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ENGLISH REPORTS

THE ENGLISH REPORTS

HOUSE OF LORDS

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THE
ENGLISH REPORTS

VOLUME III

HOUSE OF LORDS

CONTAINING

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PREFATORY NOTE

THE following decisions in Volume II. of the English Reports were considered in cases reported when it was too late to notice them in their proper places :—*Booth v. Warrington* (4 Bro. P. C. 163); considered in *In re M'Callum v. M'Callum*, (1901) 1 Ch. 154. *Bateman v. Murray* (5 Bro. P. C. 20); discussed in *Hussey v. Domville*, (1900) 1 L. R. 417. *Wilson v. Tooker* (5 Bro. P. C. 193); considered in *De Verges v. Sandeman, Clark & Co.*, 1901, 70 L. J. Ch. 47.

Each of the volumes of Dow's Appeal Cases is prefaced with a list of the Chief Judges of Courts of original jurisdiction, from which Appeals and Writs of Error lay directly to the House of Lords, during the period that the volume covers. It has been thought advisable to reproduce these lists in substance at the end of the list of Lord Chancellors which is inserted at the commencement of the present volume.

THE LORD CHANCELLORS, LORD KEEPERS, AND LORDS COMMISSIONERS OF ENGLAND

1705 to 1818.

- | | | |
|------------|---|------------------------|
| 1705-1707. | WILLIAM COWPER, Esq., afterwards LORD COWPER, Lord Keeper. | |
| 1707-1710. | WILLIAM LORD COWPER, Lord Chancellor. | |
| 1710-1713. | Sir THOMAS TREVOR, Knt., after-
wards BARON TREVOR. | } Lords Commissioners. |
| | ROBERT TRACY, Esq., | |
| | JOHN SCROPE, Esq., | |
| | Sir SIMON HARCOURT, Lord Keeper (1710). | |
| 1713-1714. | SIMON LORD HARCOURT, Lord Chancellor. | |
| 1714-1718. | WILLIAM LORD COWPER, Lord Chancellor. | |
| 1718-1725. | ROBERT TRACY, Esq., | } Lords Commissioners. |
| | Sir JOHN PRATT, Knt., | |
| | Sir JAMES MONTAGU, Knt., | |
| | THOMAS PARKER, EARL OF MACCLESFIELD, Lord Chancellor (1718). | |
| 1725-1733. | Sir JOSEPH JEKYLL, Knt., | } Lords Commissioners. |
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| | JEFFREY GILBERT, Esq., | |
| | PETER LORD KING, Lord Chancellor (1725). | |
| 1733-1736. | CHARLES LORD TALBOT, Lord Chancellor. | |
| 1736-1756. | PHILIP YORKE, LORD HARDWICKE, Lord Chancellor. | |
| 1756-1757. | Sir JOHN WILLES, Knt., | } Lords Commissioners. |
| | Sir S. S. SMYTHE, Knt., | |
| | Sir J. E. WILMOT, Knt., | |
| 1757-1766. | Sir ROBERT HENLEY, Knt., afterwards EARL OF NORTHINGTON, Lord
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| 1766-1770. | CHARLES LORD CAMDEN, Lord Chancellor. | |
| 1770-1771. | CHARLES YORKE, Esq., Lord Chancellor. | |
| | Sir RICHARD ASTON, Knt., | } Lords Commissioners. |
| | Sir S. S. SMYTHE, Knt., | |
| | Sir HENRY BATHURST, | |
| 1771-1778. | HENRY BATHURST, LORD APSLEY, afterwards EARL BATHURST, Lord
Chancellor. | |
| 1778-1783. | EDWARD LORD THURLOW, Lord Chancellor. | |
| 1783-1792. | ALEXANDER LORD LOUGHBOROUGH, | } Lords Commissioners. |
| | Sir W. H. ASHURST, Knt., | |
| | Sir BEAUMONT HOTHAM, Knt., after-
wards LORD HOTHAM, | |
| | EDWARD LORD THURLOW, Lord Chancellor (1783). | |
| 1792-1801. | Sir JAMES EYRE, Knt., | } Lords Commissioners. |
| | Sir W. H. ASHURST, Knt., | |
| | Sir JOHN WILSON, Knt., | |
| | ALEXANDER LORD LOUGHBOROUGH, afterwards EARL ROSSLYN, Lord
Chancellor (1793). | |
| 1801-1806. | JOHN LORD ELDON, Lord Chancellor. | |
| 1806-1807. | THOMAS LORD ERSKINE, Lord Chancellor. | |
| 1807- ———. | JOHN LORD ELDON, Lord Chancellor. | |

CHIEF JUDGES OF THE COURTS OF ORIGINAL JURISDICTION, FROM WHICH APPEALS AND WRITS OF ERROR LAY DIRECTLY TO THE HOUSE OF LORDS, DURING THE PERIOD COVERED BY DOW'S REPORTS

1812 to 1818.

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1807— —. LORD ELDON.

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1802-1818. EDWARD LORD ELLENBOROUGH.

LORD CHIEF BARONS OF THE COURT OF EXCHEQUER.

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1805-1831. Rt. Hon. STANDISH O'GRADY, afterwards VISCOUNT GUILLAMORE.

REPORTS of CASES upon Appeals and Writs
of Error determined in the High Court of
Parliament. By Josiah Brown, Barrister-
at-Law. Second Edition by Tomlins.
Vol. VII.

TAXES.

CASE 1.—HERBERT RANDOLPH,—*Appellant* ; WILLIAM BROCKMAN,—*Respondent*
[17th January 1706].

[The owner of a fee-farm rent issuing out of a manor, shall only pay taxes for
the rent in proportion as the manor is taxed.]

[Decree of the Court of Exchequer affirmed.]

The respondent was seised of a fee-farm rent of £260 18s. 4½d. issuing out of the manor of Aldington, in the county of Kent : and the appellant was seised in fee of the manor itself, subject to the payment of this yearly rent.

The former owners of this manor and rent respectively, had proportioned the taxes to be paid by each of them, for his distinct property, thus ; the owner of the rent, paid five-sevenths of those taxes, and the lord of the manor paid the other two-sevenths ; and this usage had constantly continued until the appellant became possessed of the manor in the year 1703.

By an act of parliament, 1 Ann. intituled, An act for granting to her Majesty a land-tax for carrying on the war against France and Spain ; it was enacted, “That all and every auditors, reeves, receivers, and their deputy and deputies, who audit or receive any fee-farm rents, or other chief rents, due to her Majesty, or the Queen Dowager, or to any person or persons claiming by any grant or purchase from or under the Crown, shall allow 4s. for every £1 of the said rents ; and proportionably for any greater or lesser sum, to the party or parties paying the same, without fee for such allowance ; upon the penalty of £20 to the parties grieved, to be recovered as aforesaid.”

At Lady-day 1704, half a year of this fee-farm rent became due, which the appellant, on the same day, tendered to the respondent, first deducting thereout the amount of the land-tax, at the rate of 4s. in the pound ; but the respondent refused to accept the money so tendered, not only because it was contrary to the former usage, but because the manor itself was taxed at a less rate.

The respondent therefore, in Trinity term 1704, filed his bill in the Exchequer against the appellant, for recovery of the half-year's rent then due, and that the defendant might continue the [2] future payments thereof ; the plaintiff offering by his bill to allow the taxes for the said rent, according to the proportion in which the manor was taxed.

On the 15th of November 1705, the cause came on to be heard, when the Court decreed that the defendant should account with the plaintiff, not only for the half year's fee-farm rent due at Lady-day 1704, but also for the rent due and in arrear to Michaelmas then last, and that an allowance should be made to the defendant for taxes of the said fee-farm rent, in proportion only, and according as the said manor and premises were taxed and assessed.

From this decree the defendant appealed, insisting (S. Harcourt, J. Jekyll) that it
H.L. III. 1 1

was directly contrary to the above clause in the act, which seemed intended, on purpose to prevent such troublesome accounts as the appellant had been put to in this cause, by ordering a certain sum of 4s. in the pound to be allowed for taxes, out of the fee-farm rents claimed under the Crown. That if the law were otherwise, it would occasion many suits and troubles, not only in this, but in many other cases of the like nature: And, that the Court ought to have decreed but one half year's rent only, upon the respondent's bill.

To this it was answered (S. Dodd) on the part of the respondent, that it was unreasonable to pay more for the taxes of the rent, than in proportion, and according to what the land itself was taxed. That the appellant himself was the person who broke the constant settled proportion of the taxes to be paid between the respective owners of the manor and the rent, and which had been so settled long prior to the respondent's purchase of the rent. That the act of parliament, 1 Ann. fo. 19, empowers the owner of the land to deduct out of the fee-farm rent in proportion only to what the land is taxed, and the subsequent clause, directing the officers of the Crown and Queen Dowager to allow 4s. in the pound was not inconsistent therewith. That the decree was made accordingly, and that this point had been before so settled by the Court in the case of Sir William Williams and Dolben. As to the objection that the Court had decreed more than one half year's rent, it was said to be agreeable to the constant course of equity, to decree any continuing payments up to the time of pronouncing the decree, otherwise the fee-farmer could never recover his rent; for if he could only have a decree for half a year's rent, and yet should be above two years in obtaining such decree, he must still be two years rent behind, in order to recover payment of half a year's rent, and so in a round for ever, unless he brought as many suits as there were half years in arrear; the consequence whereof, in such a rent as the present, was very obvious, and would enable the appellant, by the continued advantage of having the money in his hands, to defend himself at the respondent's expence. That the manor was proved in the cause to be taxed at £34 0s. 7d. per ann. and if the respondent was to allow 4s. in the pound for the fee-farm rent, which amounted to £52 3s. 8d. per ann. [3] the appellant would not only pay no taxes at all, but would actually be a gainer of £18 per ann.; which, it was conceived, the Legislature never intended.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed, and the decree therein complained of affirmed. (Jour. vol. 18. p. 197.)

TITHES.

CASE 1. ROGER CHAMBERLAINE, and Another,—*Appellants*; JOHN NEWTE,—*Respondent* [17th February 1706].

[The tithe of a horse malt-mill is a personal tithe, and the tenth part of the clear profits arising from corn ground in such mill, over and above all incidental charges, is to be paid as the tithe thereof; and the corn ground therein is to be tithed by the tenth toll-dish.]

[Decree of the Court of Exchequer reversed. See *Hall v. Machet*, 3 Anst. 915.]

1 Eq. Ca. Ab. 366. ca. 3. Viner, vol. 9. p. 39. ca. 5. 2. Eq. Ca. Ab. 731. ca. 2.
H. Wood's *Exch. Tithe Causes*, i. 482.

[In view of the fact that tithe has by the Tithe Commutation Acts been commuted into a rent-charge, the old divisions of tithes into praedial, mixed, and personal, etc. are not now of much importance.]

The respondent was rector and incumbent of the portions of Pitt and Tidcombe, in the borough and parish of Tiverton, in the county of Devon, and was entitled as such, to tithes of corn, grain, wood, and all other great tithes.

About the year 1693, the mayor and burgesses of Tiverton erected a mill for grinding malt by horses within one of the said portions, and on the 8th of May 1699,

they demised the same to the appellants for three years from Midsummer then next, at the rent of £30 per annum.

The lessees refusing to pay or compound with the respondent for any tithes in respect of the malt ground at this mill, he, in Michaelmas term 1704, exhibited his bill against them in the Court of Exchequer, praying an account and satisfaction of such tithes. The defendants by their answer insisted that no tithes were due; but the cause being heard on the 12th of April 1706, the Court decreed, that the defendants should account with and satisfy and pay unto the plaintiff, for the value of the tenth toll-dish of all corn and grain, ground at the said horse malt-mill, for the two first years in the bill mentioned, viz. from the 8th of May 1699, to the 8th of May 1701, and should also pay the costs of the suit.

From this decree the defendants appealed, insisting (C. Phipps), that if any tithe was due for such malt-mills, it could be only a personal tithe: [4] because, there was in this case no natural increase, but only a profit arising from the invention of a machine, and the labour of man and horse; and if personal, the same by law could only be a tenth of the nett profit, after deducting all charges. That if a personal tithe was due for such mills, it was only due in such places where personal tithes had been by custom paid for 40 years before the statute of Edward 6; but no such custom was proved to be for such mills in Tiverton; on the contrary, the appellants had proved, that there was another horse malt-mill, and several hand malt-mills, and many fulling mills of long standing, and yet no tithes were ever paid or demanded for the same. That the respondent had charged by his bill, that tithes for such mills were due by custom, which the appellants had denied by their answer: and yet the respondent had proved no such custom, nor the value of the tenth toll-dish, or any other toll to be taken by the appellants, but only twopence per bushel for grinding; and therefore, the decree was not warranted by the proofs and proceedings in the cause. That if the decree should be affirmed, it would sometimes happen that the tenth toll-dish, as decreed, would be the whole of the proprietor's gain, considering the expence of erecting and maintaining this mill; and in this event also, the same corn would, against all law and reason, pay tithes twice; for that all or the greatest part of such corn was grown within the same parish, and the tenth thereof was paid to the respondent in the field; and if any was ground which grew elsewhere, the same in like manner paid the tenth to the incumbent of the parish where it was grown. And lastly, this decree would introduce a new sort of tithe, and would affect great numbers of inhabitants in London and elsewhere, there being at least 100 such mills used in the city of London, and some thousands of them in other parts of the kingdom, for which tithes were never paid or demanded, but which, if this decree should be affirmed, must all pay tithes.

On the other side it was contended, (J. Cheshyre, S. Dodd) that tithes were due both by the canon and statute law, for new erected mills: by the canon law tithes were due for all mills, and by the statute of *Articuli Cleri*, chap. 5. for new erected mills, and which statute expressly provides, that no prohibition shall lie in such case. That there have from time to time, been several resolutions and decrees, for tithes of mills, and that the rest of the mills within the respondent's portions, had all along paid tithes or a composition for the same; and every modus for a mill proved tithes to be due, if they were not discharged by such modus. That the tithe in question was a predial, not a personal tithe, and the tenth toll-dish was payable for the same, and so agreed both the canon law and the custom and usage of this kingdom. And that it was not a double tithe, because it was paid by different persons, and for different purposes; in the first instance by the owner of the corn, and in the second by the owner of the mill.

After hearing counsel on this appeal it was ORDERED, that the Judges should be heard to this point, Whether the tithe [5] payable for corn ground in a horse malt mill is a personal, predial, or mixed tithe, and in what manner tithe is to be paid for corn ground in such mill, if any tithe is due for the same? And, upon due consideration of what was offered by counsel, and also upon hearing the Judges, it was ORDERED and ADJUDGED that the decree complained of should be reversed, and that the plaintiff in the Court below, John Newte (the now respondent) should recover his tithes of the said mill in the nature of a personal tithe only; that is to say, the tenth part of the clear profits arising from corn ground in the said mill, over and above all incidental charges; and to that end an account was to be taken of the profits of the said mill, and charges for the time past, within the time of the demand of the plaintiff John Newte's bill

in the exchequer, and since : and that the said tithes should so continue to be paid for the future. And it was ordered that the said Court of Exchequer should cause the said account to be taken, and what should be found due thereon paid accordingly. (Jour. vol. 18. p. 241.)

CASE 2. JOHN POLE, *Appellant*; SAMUEL GARDINER, *Respondent*
[10th March 1707].

[A modus of 12d. an acre for low meadows, and 8d. an acre for high meadows, in lieu of tithe-hay, held to be good; and the decree of the Exchequer, declaring them to be compositions and not moduses reversed.]

Viner, vol. 9. p. 18. ca. 47. 2 Eq. Ca. Ab. 734. ca. 1. H. Wood's *Exch. Tithe Causes*, i. 472. [See note to Case 1, *sup.* p. 2.]

The parish of Eckington in the county of Derby, of which the respondent and his father had been rectors for upwards of 60 years, consists of a town called Killamarsh, and of four quarters called by the names of Spinkhill, Mosbrough, Eckington, and Troway; and for time immemorial there have been paid within this parish certain yearly moduses, rates, or real compositions, in lieu of tithe-hay, viz. 12d. an acre for all low meadows, and 8d. an acre for all the high meadows (except in Troway quarter) for every year that the same were respectively mowed for hay; and for Troway quarter several small sums for every farm, amounting to about 11s.

The appellant being possessed of lands in the town of Killamarsh and in Spinkhill quarter, the respondent in Hilary term 1704, exhibited his bill against him in the Court of Exchequer, for an account and satisfaction of tithe-hay in kind; to which the defendant, by his answer, insisted upon the said antient moduses of 12d. and 8d. an acre; and that the same had been paid time out of mind, in lieu of tithe-hay, and so accepted by the plaintiff and all his predecessors, rectors of the said parish.

The cause being at issue, several witnesses were examined on both sides, and being heard on the 23d of February 1705, the [6] Court took time to consider till the 23d of June 1706, when they declared that the said payments of 12d. and 8d. an acre were no moduses, but temporary compositions; and the tithe-hay ought to be paid in kind for those lands for which the said compositions were alleged to be payable; and therefore decreed the defendant to account with, and satisfy the plaintiff for his tithe-hay, with costs.

From this decree the defendant appealed, insisting (S. Cowper, W. Jessop), that the moduses were good in law, having been inviolably observed, and being fixed and certain, and what might be permanent; that there was not any rule in law to stint or limit the value of moduses, they were all originally contracts, proceeding from compositions real, which were frequently made till the statute of 13 Eliz. which was above 350 years after the time of Richard I. That the owner of a parish might have endowed a church with more than the value of the tithes, if he had thought fit, or might have contracted for twenty times less than the value; and in this, and most other cases, an inviolable usage is the sole evidence of right, when by length of time no account of the reason or beginning of the usage can be given, and therefore it is called a prescription. That the reason given for making this decree was, that the moduses in question were too great, or near the value of the tithe in kind; for that in the time of King Richard I. which was accounted the time of memory, 12d. or 8d. might be the value of the inheritance of an acre of meadow; but according to this reasoning a farthing an acre would scarce be judged a good modus, although there were late judgments of the Court of Exchequer which confirmed 4d. an acre for marsh land in Kent, and some which allowed 6d. an acre in other places. That it was evident, both from reason and the usage in the Alienation Office, that in ancient times meadow lands were of much greater value than of late years, which was owing to the modern inventions of improving other lands to bear hay. That most parsons quarrelled with a modus of 12d. or 6d. for a farm of £20 or £30 per ann. and by the unwariness of ignorant tenants in making small alterations, got them set aside; so that within a few years past, more moduses had been broken than for many years before, while very few had been complained of, which were half or

near the value of the tithe: but if this decree stood, several hundreds of parishes would be unhinged in all their inviolable moduses and manner of tithing, and a multiplicity of suits and endless confusion would be created throughout the kingdom.

On the other side it was contended (S. Dadd), that tithe hay in kind is to be paid to every rector of common right, unless some ancient modus be payable in lieu thereof: but that the sums pretended to be moduses in this case, could only be temporary agreements or compositions, by reason of their largeness: for in ancient times, when moduses were introduced, the sums of 12d. and 8d. were of much greater value than the hay of a whole acre: that [7] there were several instances in proof in this cause, both in the time of the respondent and his predecessors, when sometimes the parishioners had refused to pay, and at other times the incumbent had refused to receive these sums of 12d. and 8d. an acre: and at all those times tithe-hay had been paid in kind. That in all the neighbouring parishes the rectors usually compounded with their parishioners for the tithe-hay, at the like rates of 12d. and 8d. an acre: and yet they had the tithe-hay paid them in kind whenever they thought fit, without any pretence that these payments were moduses. That considering so small a sum as eleven shillings was paid for the tithe-hay at Troway quarter, containing 1000 acres, and so great a sum as 12d. and 8d. for every acre of the other quarters of the parish, no other reason could be given for this difference, but that one was an ancient modus, and the other a late composition.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree should be reversed: it appearing to their Lordships that the appellant had proved the moduses insisted on by his answer, and that the respondent's bill in the Court of Exchequer should stand dismissed, but without paying any costs to the appellant, his Solicitor and Agent consenting, at the bar of the House, to waive such costs. (JOUR. vol. 18. p. 503.)

CASE 3.—JOHN TURNER,—*Appellant*; WILLIAM SMITH, and Others,—*Respondents* [31st March 1715].

[The tithes of a rectory which belonged to a dissolved abbey, are due to the grantee of the crown, and not to the incumbent as rector.]

[From the note at the end of the case, this appears to have been a frivolous appeal.]

Viner, vol. 9. p. 55. c. 14.

Before, and at the time of the dissolution of monasteries, the abbot of Coverham in the county of York, was seised in right of his abbey, of the rectory and parish church of Coverham, and of all glebe-lands, tithes, oblations, obventions, and other profits thereunto belonging; and upon the dissolution, King Hen. VIII. by virtue of the statute in that case made, became seised in right of his Crown of the said abbey and rectory, and all other the rights and possessions thereof.

Queen Elizabeth, by letters patent under the Great Seal, dated the 19th of June, in the 4th year of her reign, granted to Thomas Allen and Thomas Freeman, and their heirs, the said rectory, and all houses, buildings, barns, glebe-lands, tithes, oblations, obventions, profits, commodities, and appurtenances whatsoever thereunto belonging: excepting and reserving only to her Majesty, her heirs and successors, the advowson of the church of [8] Coverham; to hold of her said Majesty, her heirs and successors, as of her manor of East Greenwich, in the county of Kent, by fealty only, in fee soccage and not *in capite*.

Since the dissolution of this abbey, no tithes, either great or small, arising within the parish of Coverham, were ever paid to any incumbent of that parish, but were constantly accounted for to the Crown, or its farmers or lessees, until the above grant by Queen Elizabeth; and afterwards, the tithes were answered to the grantees, or those claiming under them; and such owners of the rectory, had usually paid the minister for the time being, who had officiated as curate of the parish, a stipend of £8 per ann. and which by other charitable donations was augmented to £20 per ann.

In the year 1708, the appellant was presented by Queen Anne to this rectory and vicarage, and inducted thereto accordingly; but soon afterwards, pretending to be entitled to all the tithes of the parish, he summoned the respondents and some other

of the inhabitants, before two neighbouring justices of the peace for the North-Riding of the said county of York, in order to recover certain species of small tithes; but meeting with no success or encouragement in this mode of prosecution, he brought his action at law against one John Geldart an inhabitant of the parish, for not setting out his tithes; and which action being tried at York summer assizes 1712, the Judge, on producing an authentic copy of the above grant, was fully satisfied that the plaintiff had no title to the said tithes, but that the same belonged to those claiming under that grant; and thereupon the plaintiff was non-suited.

But still persisting in his claim, he, in Michaelmas term following, exhibited his bill in the Court of Exchequer, against the respondents and others, for an account and satisfaction of their tithes: to which bill, they, by their answer, insisted upon several moduses, which they had all along paid to the owners of the said rectory; and that what tithes had become due for any other lands held by them respectively, within the said parish, had been paid and satisfied, or compounded for to the said owners or their farmers, to whom the same of right belonged.

On the hearing of this cause in Trinity term 1714, the Court ordered the plaintiff's bill to stand dismissed; but without costs, in respect of his being a pauper.

From this decree the plaintiff, however, thought proper to appeal, insisting (W. Hancock, N. Haggatt), that he was both rector and vicar of the parish of Coverham, and as such, was entitled of common right, to all the tithes, both great and small, arising within the said parish.

On the other side it was contended (C. Phipps, R. Raymond), that the appellant was only a nominal rector of the parish, and therefore had no pretence of title to the said tithes; neither had he, or any of his predecessors, ever received or enjoyed the same, nor did the appellant in his said appeal assign any error in the said decree.

[9] Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and that the dismissal of the appellant's bill therein complained of should be affirmed.* (Jour. vol. 20. p. 319.)

* By an order of the House, on the 3d of March 1697 (Jour. vol. 16. p. 224), it was ORDERED, "That no person whatsoever, do presume, as counsel, to sign any appeal, to be brought into this House for the future, unless such person hath been of counsel in the same cause in the courts below, or shall attend as counsel at the Bar of this House, when the said appeal shall come on to be heard. And, it is further ordered, that this order shall be added to the roll of standing orders, and affixed on the doors of this House, and of the Courts in Westminster-Hall."

Notice having been taken at the hearing of the above appeal (Jour. vol. 20. p. 319), that the same was signed by William Hancock and Nathaniel Haggatt, as counsel, who did not attend at the Bar to plead for the appellant, nor were they concerned in the cause in the Court of Exchequer; and the above standing order being read, it was ordered, that the Gentleman Usher of the Black Rod, his deputy or deputies, should forthwith attach the bodies of the said William Hancock and Nathaniel Haggatt, and bring them in safe custody to the Bar of the House to answer for their offence.

Accordingly, on the 23d of March 1715 (*Ibid.* p. 320), Mr. Hancock having rendered himself into the custody of Black Rod, was brought to the Bar of the House, and there, on his knees, receiving a reprimand from the Lord Chancellor for his said offence, was discharged out of custody, paying his fees.—But Mr. Haggatt having made an affidavit that he was 81 years of age and upwards, and lived at Reading in the county of Berks; that he neither signed, or consented to the signing of any such appeal, nor ever heard thereof; nor was ever any ways concerned therein, as counsel or otherwise; nor did he know the said John Turner, the appellant: On reading this affidavit, and also a certificate of James Brewer of Reading aforesaid, Doctor in physic, that he believed the said Nathaniel Haggatt to be very infirm, and incapable of travelling from the place of his abode without apparent danger of his life; it was, on Monday the 9th of April 1716 (*Ibid.* p. 323), ordered, that the said John Turner should attend the House on Wednesday then next, in order to be examined touching this matter.—But I do not find that Turner ever attended, or that any further notice was taken of this last order.†

† See St. O. No. 2, No. 5 (3); *Price v. Seeley*, 10 Cl. & F. 28; *Stacpoole v. Stacpoole*, 4 Dow, 209, 222.

CASE 4.—ROBERT AUSTEN, and Others,—*Appellants*; MATTHEW NICHOLAS,—*Respondent* [24th January 1717].

[Where the vicar is by endowment entitled to tithes of peas and beans set and planted in rows in garden-like manner, the use of a plough, instead of a spade, makes no difference.]

[A decree between other parties may be read as a precedent but not as evidence.]

[Decree of the Exchequer affirmed. See post, ca. 9.]

Viner, vol. 9, p. 22. ca. 3. vol. 12. p. 94. ca. 20. p. 120. ca. 2. 2 Eq. Ca. Ab. 734. ca. 2. H. Wood's *Exch. Tithe Causes*, ii. 10.

In 1703 the respondent was inducted into the vicarage of Shalford, and chapelry of Bramley, and thereby became entitled to all tithes, duties and profits belonging to the same.

The appellants Robert and Elizabeth Austen, were seised in fee of the impropriation, and the great tithes of corn, grain, and hay, and the other appellants were their tenants.

The respondent, as vicar, was endowed of the small tithes, and had for a long time received a composition of 3s. 4d. per acre, in lieu of the tithes of beans and peas, set and planted in rows and ranks, that had been hoed and weeded with the hand, where [10] the ground had been turned with the spade, although in the open fields; but where the beans and peas had been set in rows and ranks, and hoed and weeded with the hand, where the ground had been turned only with the plough, the tithes of such beans and pease had been gathered in kind by the impropriator or his farmers.

Until about thirty years before the commencement of this suit, the ground in the parish was usually prepared for beans, pease, and roots, with the plough and spade together; and while this method continued, the impropriator never set up any right to these tithes, so that the same was enjoyed by the vicar: but the farmers and occupiers of some small parcels of land (not considerable till about twenty years ago) having contrived a tin or iron plate, to be annexed to the plough, the use of the spade was omitted; and thereupon the impropriators, or their tenants, first set up a pretence that thereby the tithes of beans and pease became great tithes, and took the same accordingly.

In Hilary term, 10th Ann. the respondent brought his bill in the Exchequer against one Elliot, a farmer of the great tithes, for the tithes of such plough-set beans and pease; and the Court decreed him to account for the same. (See H. Wood's *Exch. Tithe Causes*, i. 523. as also Bunb. 19. 2 Eq. Ab. 734.)

The respondent soon afterwards brought another bill in the same Court against the appellants, for the small tithes arising from the glebe land, and to confirm the former decree; but, pending this suit, Elliot brought his action of trover against the respondent for taking the tithes of pease which were set in rows and ranks, and weeded and hoed upon ground turned up with the plough; and, upon the trial of that action (wherein the value of the tithes being agreed on, the only question was, Whether the tithes belonged to the impropriator or vicar?) the plaintiff obtained a verdict.

After this verdict the cause against the appellants came on to be heard on the 19th of May 1715, when the Barons having admitted their decree against Elliot to be read (though he was no party to this suit, nor were the appellants parties to that), and rejected the evidence, verdict and judgment, in the action of trover; affirmed their former decree, and ordered the appellants to account with the respondent for the said small tithes.

From this decree the appellants appealed, insisting (N. Lechmere, S. Mead) that there were in this case two contradictory determinations of the same question; the one in a Court of Equity, the other at common law: that the determination at common law ought to stand, for that every man's freehold and inheritance ought to be tried and determined at common law, or, at least, that no decree ought to have been made without a second trial. That the Court of Exchequer, by allowing the former decree to be read, as an authority in the like case, though not under the denomination of evidence, did in

effect found a decree against the appellants, on a proceeding which ought not by law any way to affect their right. That by this means all the tithes of wheat, barley, etc. [11] might be turned into small tithes, forasmuch as wheat and barley were in many places sowed in furrows after the plough, and oftentimes hoed and weeded with the hand. That the vicarage was never endowed with small tithes arising upon the glebe lands, nor had the vicar ever any possession of such tithes. That this was a new case, and would in consequence affect all the impropiators in England; for that this sort of husbandry, of planting pease in rows and ranks after the plough, and weeding and hoeing the same, was found to be a great improvement of the crop. That the vicar having a right to pease planted in gardens, where the spade only was used to turn the ground, (the same sort of husbandry being used in the open fields,) and there being an old custom in the parish to pay 3s. 4d. an acre for ground turned with the spade, and planted with any sort of roots, the vicar had accordingly received such composition of 3s. 4d. as well for pease as roots. And that it did not appear by any proof that the vicar ever collected tithes in kind of pease, planted after the spade; but that on the contrary, only 3s. 4d. an acre had all along been paid him, for all trenched ground planted, whether with pease or roots.

On the other side it was contended (S. Cowper, R. Raymond), that though vicars sometimes (for the ease of themselves and the parishioners) agreed to take a composition, yet it did not destroy the right they had to the tithes, either in kind or according to a modus; but the old right continued, to take the tithes, according to the ancient method of payment, when the time for which the composition was made, was determined. That the vicar had, for time immemorial, received the tithes of beans and pease, planted and managed in garden-like manner, as well after the plough as after the spade. That the Court of Exchequer only read the decree against Elliot, by way of precedent, and regarded it as such, as well as other cases cited out of the law books. That it was impossible the tithes of wheat, barley, etc. should ever be turned into small tithes by means of this decree; for, without a prescription, no claim could be made of such tithes by a vicar let the ground be prepared or turned, or the seed sown or set in what manner soever. That where the vicar did so prescribe, the disusing a single instrument, and still continuing the same crops and manner of husbandry, could not deprive him of that prescription; besides, the respondent claimed tithes of no other corn or grain, set in rows or ranks or otherwise sown in fields, but only of pease and beans, which plantation took its rise from the garden culture of such crops. That upon hearing the cause the appellants could not make it appear that the lands for which they insisted on an exemption of small tithes, were glebe-land; or that as such, or by any other means, they were legally discharged of tithes to the vicar; and therefore the Court decreed them to pay tithes of such lands. That this was no new case, there being precedents of the like nature in the Court of Exchequer: that without a prescription the vicar could not claim (see *Gunley v. Burt*, Bumb. 169. and post. ca. 9. of this title. See also Anstr. 319), [12] and with it he was entitled to the improvement; but if omitting an instrument in husbandry could defeat the prescription, then the right of all prescriptions was at an end.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (Jour. vol. 20. p. 583.)

CASE 5.—JOHN PRATT,—*Appellant*; WILLIAM HOPKINS, and Others,—*Respondents* [2d May 1730].

[Lands exempted from tithes, as being part of the demesnes of an ancient monastery, when inclosed by act of parliament, shall not be made liable to tithes by any general words in the act.]
[Decree of the Exchequer affirmed.]

Grounds and Rudiments of Law and Equity, p. 338. ca. 9.

The respondents were proprietors and occupiers of several parcels of land formerly part of Glastonbury commons, and commonly called or known by the several names of

Common-moor, Black-acre, and South-moor *alias* Alder-moor, and were inclosed by virtue of an act of parliament made for that purpose in the year 1721.

The appellant in the year 1719 obtained a lease from the Bishop of Bath and Wells, of the rectory and parsonage of St. John the Baptist, with the chapel of St. Bennings in Glastonbury, and other chapels therein mentioned, and of all tithes thereto belonging, for three lives; and after the inclosure of the commons, viz. in Michaelmas term 1724, he exhibited his bill in the Court of Exchequer against the respondents and others, in order to compel them to account with and make him satisfaction for the tithes arising out of the new inclosures, and particularly out of South-moor.

The appellant being well apprised of the respondents' defence, with relation to their lands in South-moor, viz. that the same were exempt from the payment of tithes, as having been part of the demesnes of the great and ancient monastery of Glastonbury, did in his bill allege that South-moor was not part of the demesnes of the said monastery; but if it was, and might, for that reason, have been exempt from tithes before the making the act for inclosing the said commons, yet the same were made liable and subject to the payment of tithes by the following clauses in that act.

"Provided always, and it is hereby declared and enacted by the authority aforesaid, "that nothing herein contained shall extend, or be construed to extend, to prejudice "any right or interest which the Lord Bishop of Bath and Wells, the im-[13]-propriator "of the rectory or parsonage of St. John Baptist, in Glastonbury aforesaid, or his "lessee, hath, have or may have to any tithes which shall belong, or may accrue to "them or either of them, out of the said new inclosures hereby to be made: and that "such impropiator, or his lessee for the time being, shall have and receive all tithes of "what kind soever, of and from the said new inclosures, as he is or shall be by law "entitled to have and receive, as rector or impropiator of the said parish, notwithstanding any modus, or pretence of a modus or composition in any other parts of the "said parish, or any exemption whatsoever. And it is hereby further enacted by the "authority aforesaid, that the said Bishop of Bath and Wells, the impropiator of the "rectory or parsonage of St. John Baptist in Glastonbury, for the time being, or his "lessee, as the said Bishop or lessee shall be respectively possessed, or entitled to the "tithes of the said new inclosures, shall, for a further augmentation and better provision "for the curate of the said parish church of St. John Baptist in Glastonbury, pay or "cause to be paid unto the curate of the said parish, and his successors for the time "being, yearly and every year, the full sum of £12 of lawful British money, out of the "tithes that shall or may arise out of the said new inclosures hereby to be made, free "from all taxes whatsoever."

To this bill the respondents put in their answers, and thereby admitted the appellant's right to tithes out of all such parts of the new inclosures as lay in Common-moor or Black-acre; but as to such parts of them as were taken out of South-moor, they insisted that the same were exempt and free from tithes; the said common called South-moor, which had heretofore been of much greater extent than what was intended to be inclosed by the act, having formerly been part of the demesnes of the aforesaid monastery, and no tithes having been paid or answered for any part thereof; and the respondents submitted to the Court, that the act, as passed, had not given the appellant any right to tithes, to which he was not before entitled by law.

In Trinity term 1726, the appellant replied to the respondents' answers, and soon after came to an agreement with them, to accept what was due for tithes arising out of Common-moor and Black-acre, together with his costs; which being stated together at £17 9s. 2d. was accordingly paid to the appellant.

After this the appellant and respondents proceeded to examine their witnesses touching the appellant's demand of tithes out of South-moor, and the depositions being duly published, the cause came on to be heard before the Barons on the 19th July 1728, and was heard in part, and by consent on both sides adjourned over to the next term; and upon a full hearing on the 14th of November following, the Barons unanimously delivered their opinions that the respondents had fully proved the exemption insisted on by answers, and that the act for inclosing the commons had given the appellant no new right to tithes out of [14] the said lands in South-moor, and therefore decreed that the appellant's bill should be dismissed with costs.

The appellant therefore appealed from the decree, contending (J. Willes, G. Eyre) that by the express words of the act the impropiator, or his lessee for the time being,

were to have and receive all tithes of what kind soever arising from the new inclosures, notwithstanding any modus or composition in any other parts of the parish, or any exemption whatsoever; and that these last words would be of no manner of use, if the inclosures in South-moor were to be exempt from the payment of tithes, it being admitted by the respondents' answer that the other two commons ought to pay tithes. That according to the act a certain quantity of the commons, containing ten acres, was to be inclosed as a better provision for the curate of the parish, but no distinction was here made as to South-moor, so that this allotment might as well be made of lands in South-moor as in either of the other commons; whereas if South moor had been exempt from the payment of tithes, and had not been intended to be subject to tithes after the inclosures were made, the curate's allotment ought to have been confined to the other two commons, which were confessedly subject to the payment of tithes. That the impropiator and his lessee were expressly obliged, as they should respectively be entitled to the tithes of the new inclosures, to pay to the curate of the parish the yearly sum of £12 free from all taxes, out of the said tithes; whence it was plain that the act never intended to make any distinction between the commons, the tithes of all the new inclosures being equally made the fund for payment of this £12 per ann. That there was an express saving in the act, that nothing therein contained should extend to prejudice the right and interest of one Mr. Strode, in respect of an inclosure of 100 acres made by him in South-moor; and this saving would have been equally extended to the residue of the moor, unless it had been intended to be subject to the payment of tithes. That though the proprietors and owners who had inclosed the commons, had greatly improved their own estates, yet it appeared from the evidence that the rectory was thereby lessened in value for want of sufficient flocks of sheep to manure the arable grounds; by which means, and by the annual payment of £12 to the curate, which the appellant had constantly paid, he must be a considerable loser if excluded from the tithes of the inclosures in South-moor; and therefore it was hoped that the decree would be reversed.

On the other side it was said, (T. Lutwyche, N. Fazakerley,) that the question concerned only the inclosures of the common called South-moor, which by the proofs in the cause appeared to be part of the demesnes of the monastery of Glastonbury, and as such exempt from the payment of tithes; that no tithes had ever been paid for this common, though at different times improvements and inclosures had been made of several parts of it; so that there was no room for the Court to doubt but that at the time of passing the act the lands in question were exempt from the payment of tithes. That the [15] first clause insisted on by the appellant was only a general saving to the Bishop and his lessee of their former rights to tithes; and as to the latter part of that clause which the appellant chiefly relied upon, acts of parliament were to have a reasonable construction, and taking the whole clause together, it appeared calculated merely to preserve the impropiator's right, notwithstanding any pretence of a modus, etc. in other parts of the parish. And it would be very extraordinary by the general words, or any exemption whatsoever at the end of this clause, to destroy a clear legal exemption when the whole drift of the clause was only to preserve such right as the Bishop, the impropiator, or his lessee then had. That there could be no reason in this case to take away an exemption in favour of an impropiator, because the act did not tend to diminish the tithes; but on the contrary, the tithes arising from the improvement of the other commons, would greatly increase the yearly value of the impropiation.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed, and the decree of dismissal therein complained of affirmed; and it was further ORDERED, that the appellant should pay to the respondents £30 for their costs in respect of the said appeal. (Jour. vol. 23. p. 559.)

CASE 6.—JOHN GIFFARD,—*Appellant* ; JOHN WEBB,—*Respondent*
[5th May 1735].

[In a suit by a rector for the tithe of lambs, the defendant insisted on a modus of 3d. for every lamb, payable on St Mark's day, or so soon after as demanded. This modus is not void in law, but the validity of it shall be determined by a jury.—Where a plaintiff claims tithes in kind, and the defendant sets up a modus; if the plaintiff declines trying the modus at law, it shall be taken against him *pro confesso*.]

[Decree of the Court of Exchequer affirmed.] [See note to Case 1, *sup.* p. 2.]

The appellant was rector of the parish of Stoke next Guildford in the county of Surrey; and the respondent was a farmer and occupier of lands in the same parish.

In Michaelmas term 1729, the appellant exhibited a bill in the Court of Exchequer against the respondent, setting forth that he was entitled to all the tithes arising in the parish, or to some recompence or satisfaction in lieu thereof: and that the respondent, from the year 1726 to the time of exhibiting the bill, had occupied great quantities of pasture land on which he kept great numbers of sheep from which he had lambs yeaned, the tithe whereof was demanded by the bill.

The respondent, by his answer, admitted the appellant to be rector, and that the respondent occupied a farm and lands in the parish, consisting of 28 acres of meadow and 240 acres of arable [16] land, but no pasture ground, except as his arable land came round in the course of husbandry to be sowed with grass seeds when sown with summer corn: he also admitted that about Michaelmas he bought a number of ewes with lamb, and had from them a great number of lambs, which he sold; but insisted that the appellant was not entitled to tithe in kind of lambs, for that there had been the following antient usage and custom approved within the parish, viz. that every occupier of lands and tenements within the said parish having a lamb or lambs yeaned within the said parish, ought, and for time out of mind had used to pay the rector of the said parish for the time being, or his lessee, for every lamb so yeaned within the said parish the sum of three-pence and no more, as a modus, and in lieu and full satisfaction of the tithe of every such lamb, and that the same was payable yearly on St. Mark's day, or so soon after as demanded; and that the same had been accepted by the rectors of the said rectory for the time being, in lieu of the tithe of lambs.

On the 14th of July 1731, the cause came on to be heard, when it was, among other things decreed, that it should be referred to a trial at law, to try the modus, as set forth and insisted on by the defendant in his answer, the then next Lent Assizes for the county of Surrey, in a feigned action; and the usual directions were given for that purpose.

This decree was made by two of the Barons only; and therefore, in order to have the opinion of the whole Court, the appellant by petition alleged, that he conceived himself aggrieved by the said decree, for that admitting the modus to be in fact as insisted on, yet that the same was void in law, and as such ought not be allowed; and to have a trial of that which in itself was void in law, would be fruitless and vain, and therefore prayed that the cause might be reheard as to the demand of tithe lambs.

This petition was argued before all the Barons on the 29th of November 1731, and they being of opinion that the said modus for tithe lambs was not a void modus in law, refused to grant a rehearing on that point, but left the appellant to try the modus at law if he thought fit.

The appellant declining to go to a trial pursuant to the said orders, it was, on the 28th of November 1732, ordered, that the appellant should shew cause, at the setting down of causes after Michaelmas term, why the modus, as insisted on, should not be taken *pro confesso*: and no cause being shewn, that order was, on the 9th of December following, made absolute. And on the 8th of February 1732, it was ordered, adjudged and decreed, that so much of the appellant's bill as related to his demand of tithe lambs in kind, should be dismissed with costs.

From these decrees, orders and proceedings, the present appeal was brought; and on behalf of the appellant it was contended, (N. Fazakerley, C. Clarke,) that the issue to try the modus ought not to have been directed before the objections to the validity

and legality of the modus were considered by the Court; because, if the objections were [17] allowed, there had been no foundation to send such issue to be tried. And on the other hand, if such issue were tried, and a verdict obtained, establishing the fact of the modus, and afterwards, on hearing the objections, the Court should be of opinion that it was not a good modus; the parties would then have been put to great charge and trouble to no purpose. It was, however, submitted, that after the issue was taken *pro confesso* against the appellant, the objections ought to have prevailed and the modus been set aside: because a custom or usage to pay a sum of money in lieu of tithes must be immemorial; but if it can be shewn by evidence, or from any thing in the nature of the payment, that it is not ancient and immemorial, then it is not a modus, but only a composition, which may bind the parson who makes it, but cannot bind the successor without his consent. It is well known, that in ancient times, and long within the time of legal memory, the price of cattle and all other commodities was so much lower than at present, that a lamb which may now be worth 2s. 6d. would not, 200 years ago, have been worth more than 6d. or in some such proportion: but in the present case, the sum of 3d. insisted on to have been anciently and immemorially paid in lieu of the tithe of every lamb (which sets the price of every lamb at 2s. 6d.) is so near the value of such tithes, even at this day, that it proves itself to be a modern composition only, and not an ancient, customary, immemorial payment or modus; and therefore ought not to bind the appellant, who had a right to his tithes in kind.

On the other side it was argued (J. Willes, J. Strange), that the modus being a matter of fact, if in any wise doubtful, was properly triable by a jury, especially as the appellant, at the hearing of the cause, refused to admit the fact of such modus: and the Court would not bar the appellant of his right to tithes until the respondent had established the fact of the modus he had insisted on in the most solemn manner, by a trial at law. As to the objection, that the modus upon the state of it was void, and ought not to be allowed, and that therefore the trial of such an issue would be vain and fruitless: the ground of that objection seemed to be, that the modus was so great, and so near the value of the tithable matters for which it was paid, that it could not be presumed to be well established as a modus or prescriptive payment, but must be a modern composition, considering the decrease of the value of money for two or three centuries past: but this objection arising upon a matter of fact, was very proper to be considered by a jury, who would enquire as to the value of lambs in the place where this controversy arose. And therefore it was hoped that the decrees and orders would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decrees and orders therein complained of affirmed. (Jour. vol. 24. p. 542.)

[18] CASE 7.—JONATHAN TYERS, —*Appellant*; PHILIP WALTON,—*Respondent*
[17th May 1753].

[The tithe of hops is to be set out by the tenth measure after they are picked; and not by the tenth hill as soon as the vines are severed from the ground.]

[Decree of the Exchequer affirmed.] [See note to Case 1, *sup.* p. 2.]

[See Knight v. Halsey, 7 Term Rep. K. B. 86. that even a custom to set out the tithe of hops by the tenth hill where the rows are unequal, leaving the binds uncut and the poles standing, cannot be supported. Semble: See the several cases cited in that report.]

Burn's *Eccles. Law*, 4to edit. vol. 2. p. 419. H. Wood's *Eccles. Tithe Causes*, ii. 483.

The respondent was rector of Mickleham in Surrey, and vicar of Dorking, an adjoining parish in the same county, and as such became entitled, among other tithes, to the tithe of all hops growing in the said parishes.

The appellant occupied some hop grounds in both or one of the said parishes, and in the year 1745, being the first year the respondent was entitled to receive tithes in the

said parishes, the appellant did not set forth such tithes, but afterwards paid the respondent twenty guineas in lieu thereof.

The appellant constantly every year afterwards, until the year 1751, set forth the tithe of his hops in the same manner as the occupiers of other hop grounds did, viz. by setting out every tenth measure, after the hops were picked from the bind or stem.

In 1751 the appellant had about ten acres of hop ground in the parish of Mickleham, and about eighteen acres and an half in the parish of Dorking, and had great quantities of hops growing thereon, and before he gathered them, caused application to be made to the respondent to accept a composition in lieu of the tithe thereof; but the appellant having previously declared that he would not at all events pay above twenty shillings an acre for such composition, the respondent refused to treat with him on that subject; and thereupon the appellant gave the respondent notice that he would not set out the tithe as he had done for several years preceding, but would set out every tenth hill in his hop ground as the tithe thereof, by severing the binds or stems from the soil, and leaving the same on the poles standing: upon which the respondent told the messenger that such method was new and contrary to law, and that he could not take his tithe in that manner: notwithstanding which the appellant soon afterwards gathered all his hops, except every tenth hill, which he left ungathered according to his notice, and refused to set out the tithe of any part of the hops which he gathered.

The respondent having never before heard of or experienced that method of setting out the tithe of hops, and apprehending he had no right to take down the appellant's hop poles, or to gather the hops left thereon, did not meddle therewith, and was in hopes the appellant would alter his sentiments, and in an [19] amicable manner pay the respondent for the tithe of the hops he had gathered that year: but instead thereof, in October following the appellant commenced an action at law against the respondent for not taking away the tithe hops so pretended to have been set out as aforesaid.

The respondent being not only injured by the appellant's not setting out his tithes, but also harassed by an action at law, was obliged to have recourse to a court of equity; and accordingly, in Michaelmas term 1751, filed his bill in the Court of Exchequer against the appellant for an account of his said hops, and to be paid for the tithe thereof.

The appellant put in his answer to this bill, and thereby admitted that in the year 1751 he had hops growing in the parishes of Mickleham and Dorking, and that he gathered upwards of six ton weight, besides what he left ungathered as aforesaid; but insisted that he did not gather his said hops without truly setting forth the tithe thereof, but on the contrary, did divide, separate, and set out the full tenth part thereof, by setting out every tenth hill upon which the hops grew, and by severing all the binds or stems upon every such tenth hill from the ground or soil, and by leaving the hops upon the binds or stems on every such tenth hill on the poles standing, and insisted that that manner of setting out the tithe was the only legal method, and that the tithe of hops ought not by law to be set out after the same are picked from the bind or stem, and denied that there was any custom in Mickleham or Dorking for setting out the tithe of hops growing there.

But the appellant having likewise by his answer suggested that the respondent's predecessor in the rectory of Mickleham did at his own costs cause to be picked from the binds or stems the tenth of the hops growing in that parish, or did satisfy the occupiers of the hop grounds for picking the same: and having likewise set forth several other matters relating to the appellant's paying for and setting out his tithe of hops in the preceding years, and his application to the respondent to take and accept of a composition for his tithe of hops in the year 1751: the respondent replied to the answer, and issue being joined, several witnesses were examined.

On the 24th of February 1753, the cause came on to be heard, when the Court was pleased to declare that the method of setting out the tithe of hops insisted on by the appellant in his answer was no good setting out of his tithe of hops; but that hops ought to be picked and gathered from the binds before they are titheable; and decreed that the appellant should come to an account with the respondent for the value of the appellant's hops growing on his said lands in the said parishes of Mickleham and Dorking, from Lady-day 1751, when gathered and picked from the binds, and that the appellant should satisfy and pay the respondent for the tithes thereof accordingly: the taking of which account was thereby referred to the deputy remembrancer of the court;

and it was further decreed that the appellant should pay to the respondent [20] his costs of the suit to that time, to be taxed by the deputy remembrancer; and that an injunction should be awarded to stay the appellant's proceedings at law, and the consideration of future costs and all further directions were reserved till after the coming in of the deputy remembrancer's report.

The appellant apprehending himself aggrieved by this decree, appealed from it; and on his behalf it was insisted (W. Murray, A. Hume Campbell, G. Hay, G. Perrott, S. Cox), that there is no positive law to regulate the manner of tithing hops, nor is it fixed by immemorial usage or custom: that the determinations of courts relating thereto have been various, and that therefore that manner of tithing seemed most just and equitable which was both least prejudicial to the owner and most beneficial to the parson or proprietor. That the manner insisted on by the respondent, by picking, and then setting out the tithe by admeasurement in baskets, was proved to be so very detrimental to the planter that it must inevitably be the ruin of the plantation of hops, the cultivation whereof is of extensive benefit to this kingdom. But the method of setting out the tithe of hops insisted on by the appellant, was undeniably proved to be fair and equitable, and not liable to any fraud whatsoever; whereas the other method was avowedly oppressive and injurious, and not productive of any benefit, or preventive of any fraud. It was therefore hoped that the decree would be reversed.

On the other side it was contended (T. Clarke, E. Sarkie), that the setting out the tithe of hops by measure, after they are picked from the bind or stem, is the fairest and most equal method, and liable to the least inconvenience; whereas the method of tithing by every tenth hill would be liable to great fraud, inasmuch as the planter would have a right to set out for tithe every tenth hill, to be computed from the place he began at; and he might every year determine before he manured his ground, where he would begin to set out the tithes, and would thereby certainly know every tenth hill through the whole plantation, and might neglect to manure or improve the same equally with the other hills, which would be unjust and unreasonable. Besides, this method of tithing would give occasion to many disputes and controversies, as the hops growing on one hill are naturally apt to intermix with the hops growing on the hills adjoining, so that it is scarce possible to sever the one from the other entire: And the owner of tithes, or his agents or servants, exercising the right of entering into the hop grounds, and pulling up the planter's poles, must frequently furnish matter for suits and vexations, which would be inconvenient both to the owner and the parishioners. That the appellant had not made the least proof that the tithe of hops were ever set out before they were picked from the bind or stem, or tithed by the tenth hill; but, on the contrary, in many instances, where the method of setting out the tithe of hops has been disputed or brought in question, it has been uniformly adjudged and determined after solemn argument, that the tithe of hops ought by law to be set out by measure after they are picked from the bind [21] or stem: and therefore it was hoped that the decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed, and the decree therein complained of affirmed. (Jour. vol. 28. p. 133.)

CASE 8. —RALPH HAWTREY,—*Appellant*; CASSANDRA DANIEL, Widow, and Others,—*Respondents* [9th May 1760].

[In what cases, and under what circumstances, a person claiming title to tithes must have his right established at law, before he can come into a court of equity for an account and satisfaction.]

[See post, cases 12 and 19 of this title.]

King Charles II. being seised in right of his crown of the reversion and inheritance of the abbey of St. Catherine, near the city of Waterford in Ireland, and among other things of the mansion place, glebe lands, and two parts of the tithes of Dungarvon, and of the whole rectories of Killbride and Killecollumbe, and two parts of the tithes of Fydown lying in the county of Kilkenny, expectant upon the determination of a term

of 51 years, granted by King James I. to Sir Lawrence Esmond, bart. by his letters patent under the broad seal of Ireland, dated the 30th of January 1670, did, by way of lease, grant, set, and to farm let, unto Sir Ellis Leighton, knt. the said abbey, rectories, tithes, and premises, to hold to the said Sir Ellis Leighton, his executors, administrators, and assigns, for 51 years, to commence in 1675, when the former lease to Sir Lawrence Esmond expired, under the yearly rent of £101 9s. 4d. payable at the times and in manner therein mentioned.

Sir Ellis Leighton, by deed poll, dated the 15th of July 1673, declared, that the said lease so granted to him was in confidence and trust only, and to the uses therein after mentioned; that is to say, to the use of himself for 21 years from the entering into possession of the said premises, under the rent of £100 per ann. for the first seven years, of £200 per ann. for the next seven years, and of £300 per ann. for the last seven years of the said time, to be paid in current and lawful money of England, in Ireland, to John then Lord Berkeley of Stratton, his executors, administrators, or assigns, over and above the rent payable to his Majesty for the same; and as to the term of years which should remain after the expiration of the said 21 years, he thereby declared it was wholly in trust for and to the only use and behoof of the said John Lord Berkeley of Stratton, his executors, administrators and assigns.

[22] King Charles II. by other letters patent under the broad seal of Ireland, dated the 17th of June 1676, duly enrolled in the Court of Chancery, for the considerations therein mentioned, granted the reversion of the said rectory and premises to one Edward Proger and his heirs, who by indentures of lease and release, dated the 21st and 22d of August 1676, in consideration of £600 conveyed the same, and all his right and interest therein, to the said John Lord Berkeley of Stratton, his heirs and assigns for ever.

Lord Berkeley soon afterwards died, leaving Christian Lady Berkeley his widow, and Charles Lord Berkeley of Stratton, his eldest son and heir at law, an infant; and by indenture dated the 13th of October 1681, between the said Christian Lady Berkeley, of the one part, and Henry Daniel of the other part, reciting the said grants and leases to Sir Lawrence Esmond and Sir Ellis Leighton, and Sir Ellis Leighton's declaration of trust; and the death of John late Lord Berkeley, having made his will, dated the 21st of January 1672, whereby he gave all his chattels, leases for years, and personal estate whatsoever, to his said wife, and appointed her sole executrix; and reciting the before mentioned grant to Henry Proger, of the reversion and inheritance of the said abbey, rectories, tithes, and premises, and his conveyance thereof to the said John Lord Berkeley and his heirs, which reversion and inheritance was descended to Charles then Lord Berkeley, son and heir of the said John Lord Berkeley, an infant; and also reciting that the said Christian Lady Berkeley, in consideration of £1400 sterling, had agreed to alien, convey and assign over to the said Henry Daniel, his executors, administrators and assigns, all the right, estate, interest, trust, use, claim and demand of the said John late Lord Berkeley, of, in and to all and singular the premises, which she did declare and undertake had come to her by the will of her said late husband; and also for the same consideration, had agreed and undertaken that the said Charles, then Lord Berkeley, should immediately after attaining the age of 21, or, in case of his death before the attaining such age, his next heir, should alien, convey and assign over to the said Henry Daniel, his heirs and assigns, all the said lands, rectories, livings, impropriate tithes and premises, with their appurtenances, in manner therein after provided and covenanted: It was witnessed, that in consideration of the said sum of £1400 paid by the said Henry Daniel, she the said Christian Lady Berkeley did grant, bargain, sell, assign and set over unto the said Henry Daniel, his executors and administrators, all the right, title, estate, interest, term of years, possession, reversion, use, trust, claim and demand, which she, as legatee or executrix of John late Lord Berkeley her husband, then had or might have in the said lands, rectories, livings, impropriate tithes and premises, with their appurtenances, and all rent and arrears of rent, due or to become due from Sir Ellis Leighton; to hold to the said Henry Daniel, his executors, administrators and assigns, during the continuance of the said lease of 51 years, granted to [23] Sir Ellis Leighton: and the said Christian Lady Berkeley thereby covenanted that her son Charles, then Lord Berkeley, when of full age, or his next heir, should convey the inheritance thereof to the said Henry Daniel and his heirs.

In pursuance of this covenant, by lease and release, dated the 23d and 24th of May

1695, between John Lord Berkeley of Stratton, and Jane Lady Berkeley of Stratton his wife, of the first part; Christian Lady Dowager Berkeley of Stratton, mother of the said John Lord Berkeley, of the second part; and Richard Daniel, gent. of the third part; reciting the last before mentioned indenture, and that the said Charles Lord Berkeley was since dead, leaving the said John Lord Berkeley, his brother and heir, whereby the inheritance and reversion of the said premises became actually vested in the said John Lord Berkeley, party thereto; and reciting the death of the said Henry Daniel, leaving the said Richard Daniel, his eldest son and heir, whereby the said Richard Daniel became entitled to the benefit of the said last-mentioned indenture; and that the said John Lord Berkeley was willing to convey and assure the inheritance and reversion of the said lands and premises unto the said Richard Daniel, his heirs and assigns, in performance of the said recited covenant; it was witnessed, that in performance of such covenant, and in consideration of 5s. the said John Lord Berkeley, by the direction of the said Christian Lady Dowager Berkeley did grant and convey the said lands, rectories, livings, impropriate tithes and premises, unto and to the use of the said Richard Daniel, and his heirs. And in order to corroborate and confirm this conveyance, and in pursuance of a covenant therein contained, the said Lord and Lady Berkeley, on the 24th of May 1695, levied a fine with proclamations, in the Court of Common Pleas in Ireland, of the said lands, rectories, impropriate tithes and premises, to the said Richard Daniel and his heirs.

By virtue of these conveyances, Henry Daniel and Richard his son entered on the premises, and Richard Daniel enjoyed the said rectory and rectorial tithes of the parish of Killecollumbe until his death, on the 30th of April 1738, having by his will devised the said lands, rectories, tithes, and premises, to the respondent Cassandra Daniel during her life, with remainder to his daughters Elizabeth Digby, since deceased, mother of the respondent John Digby, and Mary MacNaughten, since deceased, mother of the respondent Cassandra MacNaughten, and their heirs.

No claim to the rectory or tithes of Killecollumbe was set up or pretended to by any of the vicars of that parish, or any suit commenced for recovering them till 1754, when the appellant filed his bill in the court of Chancery in Ireland, against the respondent Cassandra Daniel, Simon Digby, and Elizabeth his wife, then living, John MacNaughten and Mary his wife, also then living, the respondents Sydenham Snow and Robert Snow and several other tenants of lands within the parish of Killecollumbe; charging, that by letters patent, dated the 7th of June, 26 Geo. II. [24] he was presented to the vicarage of the church of Killecollumbe, was instituted and inducted, and performed all the requisites to make him complete incumbent, and was the only incumbent having the actual cure of souls within the said parish. He then stated the grant of the said several rectories, tithes and premises to Sir Lawrence Esmond, and that King Charles I. being seised in fee, in right of his crown, of the rents reserved by that lease, and of the reversion of the said rectories by letters under his sign manual and privy signet, dated the 30th of January, in the 5th year of his reign, directed to the then chief governors of his kingdom of Ireland, reciting that King James I. by his instructions for the good and welfare of holy church in the said kingdom, did command that all such impropriate parsonages as were his inheritance, and held by lease from the crown, should for ever, as such leases expired, be thenceforth set to the several curates and ministers of all such churches who should attend the cure of souls, and from time to time be incumbents of the said parsonages, they securing to his Majesty the rents, duties, and services reserved upon such leases, which order King Charles I. had confirmed by his royal letters, dated the 8th of July 1626; that notwithstanding his said Majesty was, to his great displeasure, informed, that since the giving the said command by the said letters, sundry leases of tithes, upon the expiration of former leases or otherwise, had been again granted to laymen, in breach of his said commands; his Majesty did, by his said letters, declare his intention for him and his heirs and successors to give and grant the reversion of all such tithes, obventions, and profits, and with such reservations only as had been expressed, irrevocably to the particular churches unto which such titles did belong, and to the several incumbents which should happen to be in the said churches when such leases should determine, and to their successors for ever, giving thereby to such incumbents, on the expiration of such leases, full power to enter into possession of the said whole tithes, and charging all officers of the Exchequer to receive the same; and also requiring letters patent under the great seal to be made out, for granting the said tithes

to the use of the said incumbents and their successors for ever. Then he stated the letters patent of the 28th January 1670, granting the said rectorial tithes, glebes, and altarages, to Sir Ellis Leighton for 51 years, which did not efflux in time till the year 1726; and that King Charles II. being so seised in right of his crown of the reversion of the rectorial glebe, tithes, and altarages, of the said several parishes, did, by letters patent, dated the 7th of November 1765, grant to John then Lord Bishop of Ossory, and his successors, among other things, two-third parts of the tithes of the rectory of Dungarvon, with the mansion-house and glebe thereunto belonging; and also the said rectory of Killbride, and the said rectory of Killcolumbe, and two-third parts of the glebe tithes of the said parish of Fydown, in the county of Kilkenny, and the reversion, right and inheritance of the crown thereto, to hold to the said bishop and his successors for ever, to [25] the use of him and his successors, in trust for the several and respective incumbents of the parishes wherein the said several rectories, tithes and altarages lay and arose, and the successors of such incumbents for ever, who had or should have the actual cure of souls in the said respective parishes. And after stating, that the benefit of Sir Ellis Leighton's lease became vested in Richard Daniel, the respondent Cassandra's late husband, and that several actions at common law, and suits in the court of Exchequer in Ireland, had been commenced between Robert Watts, incumbent of the church of Fydown, and the said Richard Daniel in his lifetime, and after his decease between the said Robert Watts and the respondent Cassandra Daniel, to try the right to the two-thirds of the tithes of the said parish of Fydown; in which suit the appellant charged, that the said Robert Watts made out and substantiated his right under the said grant to the Bishop of Ossory*; and after stating, that the right of the incumbent to the tithes of the vicarage of Killcolumbe, was the same with the right of the incumbent to the vicarage of Fydown, and that the church could not be precluded by any act done by the respondent Cassandra Daniel's husband, or those under whom he derived his title, during the subsistence of the said terms for years, or pending the said suits; but that the said suits were commenced with intent to bring to a trial the title of the Bishop of Ossory and the incumbents of the said several parishes under the said letters patent, and that they should have the same effect as to all the rectories claimed by the Bishop, and the respondent Cassandra Daniel's late husband, under the said title, as it had to the said rectory of Fydown, and that the title of the appellants and his successors, incumbents of the said parish, in right of the church, should not be barred or prejudiced by any default in the trustees, the Bishops of Ossory, or the late incumbents of the said parishes: the appellant by his said bill prayed that his title might be established, and he be quieted in the enjoyment of the said rectorial tithes; or, if the court should think proper, that while the title was under consideration, the said tithes might be set annually by the proper officer, and the yearly rents payable for the same might be brought into court, for the [26] use of the person who should appear entitled, and that he might have an account.

The respondent Cassandra Daniel, and the defendants Simon Digby and Elizabeth his wife, and John MacNaughten and Mary his wife, put in their joint and several answer to this bill, stating their right to the said rectory and tithes of the parish of Killcolumbe, in the manner before mentioned; that they claimed the same under the will of the respondent Cassandra Daniel's late husband, and thereby put in issue the

* The fact was, that upon the hearing of that cause on the 4th of May 1744, the court ordered a case to be stated and sent to the Court of Common Pleas for their opinion, "Whether Michael then Bishop of Ossory, in right of his fee, and Watts as deriving under him, or the defendant Cassandra Daniel and her daughters, and the defendants Robert and Sydenham Snow, as deriving under them, were entitled to the rectorial tithes of the parish of Fydown." This case being stated and solemnly argued, the court of Common Pleas, on the 21st of April 1746, certified their opinion that two-thirds of the tithes of the said parish of Fydown (the vicarage being admitted to be endowed with the other third) were granted to the Bishop of Ossory and his successors, by the letters patent of the 7th of November 1675, and that Watts, the then incumbent of Fydown, having the actual cure of souls, was entitled, by virtue of that patent, to the said two-thirds of the tithes of the said parish. Whereupon the court of Chancery, on the 23d of June following, established this right, and decreed the defendants to account accordingly.

appellant's title, but did not set forth all their objections thereto, being advised that the appellant's right to the said tithes, if any, must be prosecuted in a court of common law, and not in equity, and that the respondents would have the benefit of all their objections, when the appellant's right came to be tried at law; they therefore insisted on the benefit of the fine levied by Lord Berkeley and his wife, and upon which the proclamations had run, and upon an act of parliament passed in Ireland in the 8th year of King George I. for the more effectually quieting and settling vexatious suits at law; and admitted the several actions and suits charged by the bill, in relation to the tithes of the parish of Killcolumbe, which were no way in issue in those suits.

The respondent Sydenham Snow, by his answer disclaimed any right to the said tithes; but Robert Snow admitted he was tenant to the respondent Cassandra Daniel, of the rectorial tithes of the parishes of Killcolumbe and Killbride, by lease granted to him thereof in 1736.

The Bishop of Ossory, by his answer, admitted that the appellant had the actual cure of souls within the said parish: that he believed the crown had granted the reversion of the rectorial tithes of that and other parishes in the bill named, to one of his predecessors, Bishop of Ossory; that he had not been willing to commence any suit at law in his name for recovery of the rectorial tithes of the said parish of Killcolumbe, believing the plaintiff had good remedy for recovering the same in his own name, but was willing to act as the court should direct.

The cause abating by the deaths of the said Elizabeth Digby, Mary MacNaughten and Edward Lord Bishop of Ossory, was duly revived against the respondents John Digby and Cassandra MacNaughten, their infant son and daughter, and heirs at law of the said Elizabeth and Mary, who, by their guardians, put in their answers, litigating the appellant's right; and the succeeding bishop answered to the same effect as his predecessor.

The appellant examined several witnesses to prove his institution and induction, performance of divine service, and having the only cure of souls within the parish, and to prove the yearly value of the tithes.

An interlocutory order was made, whereby the defendants were at liberty to read at the hearing the bill, answers, pleadings, and proofs, in the suit between Robert Watts and the respondent Cassandra Daniel, concerning the tithes of the rectory of Fydown, [27] saving just exceptions: and publication having passed, the cause came on to a hearing before the Lord Chancellor of Ireland, on the 8th of December 1758, and 25th of January 1759; on which last day his Lordship was pleased to order, that the appellant's bill should be retained for a year and a day, and that he should be at liberty to ascertain his title at law, if he should think proper; and also to make use of the name of the Bishop of Ossory as plaintiff in any action to be brought.

From this decree the appellant appealed, insisting (C. Pratt, C. Yorke) that the court ought to have established his title, and to have quieted him by perpetual injunction in the enjoyment of the tithes in question, and to have granted him the full relief prayed by his bill, or otherwise to have directed an issue, or sent a case to a court of law, as was done in the former suit instituted by Watts, in order to have determined the appellant's legal title to the said tithes. And in support of this appeal it was argued, that in all cases, as well where the interest of the crown as that of a subject is concerned, the first grant not otherwise impeached, is to take place. That the intention of the crown to grant these rectories to the church, could no more be denied than the priority of the grant. That there was no deceit upon the crown; the King had a right, and intended to grant his whole reversionary interest; and the omission of notice of the reversionary lease to Sir Ellis Leighton, by which the operation of the grant was so much longer suspended, was of no prejudice to the crown, though it was to the church; and had there been any informalities or misrecitals in the grant, they were cured by the several *non obstante* clauses. That the subsequent grantee, who founded himself solely upon the supposed invalidity of the prior patent, had neither the merit of a purchaser without notice, the prior grant being inrolled, nor of a purchaser for a valuable consideration: the consideration, if any moving from Progers to the crown, being very uncertain: but the consideration paid him by Lord Berkeley plainly appeared to be no more than £600, and Lord Berkeley's interest was again sold after his death for £1400, including the whole benefit of the 51 years' lease; and the payment of £1000 part of that purchase money to Lord Berkeley's widow and executrix, and only the remaining £400 to his heir, as plainly indicated, that the lease, rather than the reversion, was the

immediate object of the purchase. Nor had the respondents the merit of long and quiet possession : the fine of 1695 being 30 years before the title of the Bishop accrued in possession, and was levied merely to bar the dower of the young Lady Berkeley : and the right, though not the possession, had been litigated from 1726. That the appellant had originally a right to the aid of a court of equity, to compel an execution of the trust from the Bishop of Ossory : and the relief was consequential. Had the case required it, an issue might have been directed on the very right, or a case stated for the opinion of a court of law, as a means of assisting the conscience of a court of equity in making its decree, without leaving the appellant [28] generally to law : but the court of law having already determined the legal questions upon the very case stated against the same defendant, and that in a solemn manner, (though not in the same cause, or upon the same individual tithes,) and those proceedings having been read in this cause without objection to the reading them or to the opinion of the judges, the present decree did either a hard thing or a vain thing : a hard one, if the nature of the action to be brought laid the appellant under difficulties in point of form in bringing the merits of his case to an issue at law ; and a vain one, if nothing but the same question was to be determined again. That there was no matter of fact in this case, necessary to be ascertained by a jury, the whole depending on the point of law sent to the Common Pleas in Watts's cause, arising not upon doubtful facts, but upon the construction and operation of grants on record, admitted alike by both parties. That the appellant sought a speedy and final determination upon the true question of right. If the respondents prevailed, a scene of litigation would be opened, alike fruitless and without end ; unless, which must in that case be the event, the appellant should abandon the unequal contest, whereby the benefit intended by the crown to the church would be eluded, and the grant to Progers in deceit of the crown established.

On the other side it was contended (G. Perrot, A. Forrester), that the titles of both parties being merely at law, the appellant should have brought his action and tried the right there before he came into a court of equity, which could not determine it. Each party claimed under several letters patent from the crown : those of 1675 to the Bishop of Ossory, the ground of the appellant's claim, were liable to many objections, determinable only at law : as, whether the King was or was not fully apprized of his right, and so was or was not deceived in his grant ? Whether the reservation of rent by the patent did or did not pursue the King's letter, and the order of council thereon, which was the authority for passing the patent ? These and several other questions made by the respondents in opposition to the appellant's title, were cognizable at law only, upon a proper action to be brought there. That the respondents who claimed as purchasers for a valuable and large consideration under another patentee who was himself a purchaser also for a valuable consideration from the crown, were not to be deprived of any one advantage which the law would give them in support of their right : and besides the above objections to the appellant's title, they had an undisturbed possession of the premises in question for near 80 years, a fine with proclamations, and the Irish statute of 8 Geo. I. c. 4. for quieting possessions to urge in their defence ; and were a court of equity to interpose, it must, upon its own principles, do it rather for strengthening than weakening that defence. What passed in another cause, and relative to another parish, was totally immaterial : for if a proper defence was not made, or an improper direction was there given, the respondents were not at all bound [29] to submit to the like in the present suit. That the court of Chancery's intermeddling so far as to direct an issue, or send a case to a court of law, for determining the title, would have been highly improper and injurious to the respondents : as, in either instance, they might have been precluded from the benefit of several of their legal objections ; a new trial, in case they were wronged, would be their only remedy ; but in a legal proceeding they could not only rectify mistakes in fact, but in law also, by writ of error from one court to another. The appellant likewise would have the same benefit : and if there could be the least doubt of the Bishop's readiness to lend the appellant his name for the purpose of bringing an action, the court of Chancery might order it. The Bishop's being a trustee was the only pretence the appellant could invent for an equitable jurisdiction ; but even that vanished on considering that the Bishop was a trustee only of a litigated title ; and that the court, by retaining the bill, had reserved to itself the power of directing the execution of the trust, after the establishment of the title at law.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed, and the decree therein complained of affirmed. (Jour. vol. 29. p. 676.)

CASE 9.—JOSEPH SIMS,—*Appellant*; THOMAS BENNET, and Others,—*Respondents* [7th December 1762].

[Tithes are by law denominated and adjudged to be great or small according to the nature of the thing, and not from the mode of cultivation or the use to which it is applied. The tithes therefore of beans and peas, whether sown in fields or gardens, are great tithes, and do not fall under the denomination of tithes of gardens, technically called *decimæ hortorum*.]

[Decree of the Court of Chancery affirmed. See ante, case 4. of this title; and note to Case 1.]

See Bac. Abr. (Gwillim's 8vo. edit. 1798) vi. 732, 733, called *Sims v. Barnett*.

In the year 1309 the abbot and convent of Stratford Langthorn, in the county of Essex, having complained to Ralph de Baldock, then Lord Bishop of London, of great losses by inundations of their lands and other distresses, the Bishop, by an instrument of appropriation, dated the 9th of April in that year, after observing that the revenues of the said monastery were greatly reduced by the accidents and other means mentioned in the said instrument, did, for the relief of their distresses, by the advice and with the consent of his chapter, and by virtue of his pontifical authority, give, grant and appropriate to the said abbot and convent, the parish church of Eastham, to the use of the monastery for ever, saving therout a convenient portion for the support of a perpetual vicar in the same church; and therefore he ordained that the vicar should have a mansion-house, and should have and take the tithes [30] of gardens and curtilages, and all sorts of tithes, *præter decimas garbarum et feni et molendini ad ventum*; and that he should have all oblations, offerings, legacies, mortuaries, and altarages; and that he should also receive from the abbot and convent five marks sterling yearly, *de prædict. decimis garbarum*, in augmentation of his aforesaid portion; reserving the collation to the vicarage, to the Bishop and his successors.

By one of the statutes for the dissolution of monasteries made in the reign of King Henry VIII. the possessions of the abbot and convent of Stratford, and, amongst other things, the rectory of the parish church of Eastham were vested in the Crown. And by a grant of the 10th of May, 36 Henry VIII. the King, under his great seal, granted to Richard Breme, and his heirs, all that his manor of Eastham, and all his rectory and church of Eastham, with their appurtenances, lying in the county of Essex; and granted that the said Richard Breme and his heirs should hold and enjoy the same in as full and ample manner as the late abbot of Stratford, in right of the monastery, held the same before the dissolution. Under which grant, and several mesne conveyances, Dr. Wilkes, deceased, and the respondent Frances his widow, and the respondent Charles Hitch, were entitled to the said impropriate rectory.

In January 1756 the appellant was collated to the vicarage of the said parish church of Eastham, and was duly instituted, and became entitled to the several tithes within the said parish, and other imoluments with which the vicarage was endowed by the above instrument of appropriation. And in November following he filed his bill in the court of Chancery against the respondents Bennet and others, stating, that they occupied and enjoyed several lands and two messuages, and several parcels of land in the said parish of Eastham; and in the year 1756 planted and sowed in several parcels of such land, several quantities of beans and pease, and that great or considerable part thereof they from time to time, about the months of July or August 1756, gathered or caused to be gathered by the hand in the field, by plucking them from the stalk whilst they were green, and sent the same to several markets, and there sold and disposed of them; and that the beans and pease so sowed or planted, or some part thereof, was or were of such sort or kind as are always, or for the most part, gathered green for the food of man, and that all or great part thereof were planted, gathered, and sold by the

respondents for that purpose : and insisted, that he, as vicar, was entitled to the tithes thereof, and therefore prayed an account and satisfaction for the same.

The respondents put in their answers ; and the respondent Bennet said, that in the year 1756 he sowed thirteen acres, or thereabouts, with pease and beans in the open fields, in the said parish, and believed that in June, July, and August, 1756, he gathered ten acres and an half, or thereabouts, of the same, by the hand in the field, by plucking them from the stalk whilst they [31] were green, and sold them in a cart by retail, in pecks and smaller quantities, in and about the parish of Eastham, and in the streets of London, and the remainder of such pease and beans were gathered into the barn and threshed. And the respondent Johnson said, that he sowed five acres of beans and pease in the open fields in the said parish, and believed he gathered some part thereof by the hand, by plucking them from the stalk whilst green, and sold a small part thereof at Eastham, and other parts in London streets, and at market, and gathered and threshed the remainder in the barn. And both the respondents said, that all their ground in the said parish sowed with pease and beans in 1756, was, as they believed, ploughed for that purpose, and no part thereof was dug with a spade, except under or near the hedges, where the same could not be ploughed, or in such places as were too wet to be ploughed : And that the tithes of all beans and pease, whether gathered green or otherwise, having been always paid to the rector, and esteemed to belong to him, they had therefore compounded, and particularly in the year 1756, with Dr. Wilkes and his wife, as she was the impropiatrix of the rectory : and hoped they should not be again compelled to account with the appellant as vicar for those tithes, and submitted the right to the judgment of the court.

Dr. Wilkes, and the respondent Frances his wife, and the respondent Charles Hitch, by their answers, insisted on their right, as impropiators of the said rectory, viz. the respondent Frances insisted on her right thereto during her life ; and the respondent Hitch, to the reversion and inheritance thereof, after her death ; and they also insisted, that all beans and pease, whether gathered green or otherwise, belonged to the lay-impropiator of this parish, and not to the vicar, and that the same had always been paid accordingly : and Dr. Wilkes and his wife admitted that they had compounded with the respondent Bennet, and that they had accepted from him £1 5s. 6d. in lieu of the tithes of beans and pease which he set or sowed in the said parish in the year 1756 : and that they had compounded in like manner with the respondent Johnson for the sum of 17s. 6d. which was after the rate of 3s. 6d. by the acre.

Witnesses were examined on both sides : and the witnesses for the appellant proved that the respondents, Bennet and Johnson, in the summer of 1756 had pease and beans which grew on their lands and fields in the parish of Eastham, which they gathered and plucked from the stem green, and sold by the peck or bushel, to be eat green for the food of families. But there was no evidence in the cause that the vicar of Eastham had been used to take the tithes of such beans and pease. Some witnesses, however, proved that these kind of tithes were paid to the vicars of the neighbouring parishes of Low Layton and Westham.

On the 22d and 23d of February 1760 the cause was heard before the Lord Keeper Henley, when his Lordship took time to give his opinion : and on the 10th of November following [32] he was pleased to decree that the bill should stand dismissed without costs.

The appellant apprehending himself aggrieved by this decree, appealed therefrom : and on his behalf (C. Yorke, W. de Grey), it was said to be admitted by the respondents, that if the tithes of beans and pease cultivated in a garden-like manner, and gathered by the hand while green, was a small tithe, it was not included in the exception out of the vicar's endowment. Many arguments might be offered to prove it such. The quality of all tithes is to be determined at the time of severance, when the right accrues. The same thing which produces a great tithe in one state and mode of culture produces a small tithe in another. If clover is cut for hay, it is considered as a great tithe : but when suffered to grow for feed, it is considered as a small tithe. And this is also the case of tares ; when cut green they are referred to the latter class, when matured and dried before being cut, they are referred to the former. That the tithe in question was certainly not a tithe of corn or grain, and it bore two marks of a small tithe : 1st, It was in the nature of a garden tithe, being distinguished out of that description not by difference of culture, but merely by the locality of setting the pease

and beans: 2dly, It was a new and modern culture. But supposing it to be a great tithe, still the vicar was intended to be endowed with it, because it was not included in the exception out of his endowment. Beans and pease plucked from the stem by the hand whilst green, however cultivated, or wherever planted, can never be tithed under the description of *decima garbarum*. Spelman, in his glossary, interprets *garba* to be *fasciculus* either of fruits or wood; and Du Fresne calls it *spicarum manipulus*; and Matthew of Westminster says, *frumenti manipulus quem patriâ linguâ dicimus sheaf, gallice vero garbam*. But the tithe in question could not fall under the meaning of the word *garba*, being set out and taken by a measure totally different. That it was not an objection of any weight in the appellant's demand, that if tithes were paid to the vicar for beans and pease gathered green, another tithe would be claimed by the rector when the stalks ripened and were cut down, by which means a double tithe would be payable for the same thing: for this would appear otherwise when the matter was considered, not in the light of paying two tithes for one thing, but of dividing the same tithe between two different owners, according to the grant of appropriation. The vicar would have his tithe of what was actually gathered green, and the rector of what was left after it should be cut down. Nor was it an objection of any more weight, that in consequence of the appellant's reasoning the farmer would have it in his power to determine the property of tithes between the rector and the vicar, from the manner of place or culture, or time of gathering: for this was a contingency which attended this kind of right, the occupier being allowed by law to cultivate his land as he and his landlord should think proper, which makes tithes in their own nature a fluctuating and uncertain inheritance.

[33] On the other side it was contended (T. Sewell, G. Perrot), that a vicar cannot claim tithes of any kind, but by endowment or by usage, which is only evidence of an endowment; that in this case there was no evidence of usage, and therefore, if the vicar was not entitled to the tithes in question under the endowment, he was not entitled at all. That by the endowment the tithes in question were excepted out of the grant to the vicar: for the words *decimas garbarum* in the exception, have always been considered as technical terms, appropriated to and descriptive of great tithes, and to distinguish them from small tithes. And *garba* in its signification comprehends pease and beans growing in fields, as well as all other sorts of corn and grain growing in fields. So that pease and beans being in their own nature a great tithe, were in this case excepted out of the vicar's endowment under the name of *garba*.

It is however insisted, that in the present case, the pease and beans being plucked green, and sold for the food of man, they are applied to the same use as pease and beans growing in gardens, which are a small tithe; and that this tithe ought to take its denomination from the use which the thing titheable is applied to, and therefore is a small or vicaral tithe, and not within the meaning of *decima garbarum*. But all the cases relative to tithes, taken together, serve to prove that the law denominates and adjudges tithes to be great or small, according to the nature of the thing, and not from the mode of cultivation or use to which it is applied; and that therefore in this case the application of the pease and beans in question for the food of man, they not being or falling under the denomination of tithes of gardens, technically called *decime horticorum*, ought not to convert the tithes thereof into small tithes. Besides, there was no evidence to prove the appellant, or any of his predecessors vicars of the parish, to have ever been in possession of the tithes claimed by the bill; and therefore, as such right was not established by law, the Court could not decree any account thereof upon the bill.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed; and the decree therein complained of affirmed. (Jour. vol. 30. p. 304.)

[34] CASE 10. —JOHN CHOLMLEY, Esq. and Others,—*Appellants*; ATTORNEY-GENERAL, and Others,—*Respondents* [21st November 1768].

[An agreement was made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe, with some addition on account of the rector's losing certain rights of common by an inclosure; and also providing an annual stipend or pecuniary compensation in lieu of tithes. The successor declining to abide by the agreement, unless on an increase of the stipend, an amicable suit was instituted in Chancery, to which the Ordinary (but not the Patron, who was the King) was made a party, and the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the articles of agreement. This agreement was acquiesced under for 80 years (40 of which the rector against whom the decree was made remained incumbent): Held that this agreement as to the pecuniary composition was not binding, the patron not being ever a party thereto; and the composition being made only as respecting the value of the past tithes, without any regard to the future increasing value. See post, ca. 11.]

[This case is very shortly and imperfectly reported, Ambl. 510.]

[Decree of Lord Northington, C. affirmed.]

His Majesty, being in right of his Crown entitled to the advowson and right of presentation to the rectory of Burton Coggles in the county of Lincoln, the Lord Chancellor did, in November 1756, present the respondent Doctor Blair to the said rectory, who was afterwards duly instituted and inducted, and by virtue thereof became entitled to all the great and small tithes, oblations, and tenths arising from the lands within the parish, and likewise to the glebe lands annexed to the rectory.

The appellant John Cholmley was owner of all the lands within the parish except the glebe; and the other appellants, as tenants to him, had ever since the said year 1756 occupied very considerable farms.

Doctor Blair, soon after being presented to this rectory, was informed, that there was an annual sum of £96 8s. 3d. payable to him as rector, in lieu of all the tithes arising within the parish; and finding that his immediate predecessor had received such annual stipend in lieu of tithes, and not being then informed of the ground and foundation thereof, but apprehending it to be an antient and adequate modus or composition, legally established, in lieu of the tithes to which he was entitled of common right, he did, till the beginning of the year 1762, acquiesce under and receive the same: but being then apprised that it was a payment made only upon the footing of a fraudulent agreement entered into in the year 1664, between the then owners of lands within the parish, and the then rector or incumbent of the rectory, and of an amicable decree made by the Court of Chancery upon the 2nd of July 1677, in a cause in which the said owners and rector, together with the then Bishop of Lincoln, were the only parties, and that the compensation pretended to be made by such agreement, was to the greatest degree inadequate and fraudulent [35] at the time of entering into it; and that there were not the proper and necessary parties either to the agreement or decree, and consequently that the whole transaction was illegal, and by no means binding either upon the Crown as patron of the rectory, or upon the successors of the then rector: Doctor Blair therefore, in the beginning of the year 1762, applied to the appellants to have the great and small tithes set out and allotted to him in kind, or to have a suitable and adequate payment made to him in lieu of and as a compensation for such tithes; but the appellants refused to comply with his demand.

And therefore in April 1762, an information and bill in the name of the Attorney-General and Doctor Blair, was filed in the Court of Chancery against the appellants, praying, that the said decree might be declared null and void as against his Majesty and his successors, patrons of the said church, and the respondent Doctor Blair, and all future incumbents of the said rectory, and for an account of all the tithes become due to Doctor Blair since the 12th of January 1762, in respect of the lands in the

occupation of the appellants, and that Doctor Blair might receive a full satisfaction for the same.

The appellants by their answer admitted, that the advowson patronage and right of presentation to the said rectory, belonged to the Crown, and that Doctor Blair was duly presented to and instituted and inducted therein, and as rector became entitled to all the tithes within the parish payable to the rector; they also admitted the ownership and occupation of lands within the parish, and that they had taken the tithes thereof to their own use since the 12th of January 1762; but insisted, that Doctor Blair was not entitled to the tithes in kind as claimed by the bill, for that by articles of agreement, dated the 21st January 1664-5, made between Montagu Cholmley, esq. an ancestor of the appellant Cholmley and Henry Hall, esq. the then owners and proprietors of all the lands within the said town and parish of Burton Coggles of the one part, and William Ayscough, clerk, the then rector of the said rectory of the other part, reciting, amongst other things, that there was a general inclosure agreed upon, and intended to be carried into execution between the said parties, touching the fields of Burton Coggles; and that forasmuch as the said parties had agreed that a considerable part of the lordship should be still kept in tillage for the maintenance of husbandry, and had likewise agreed to better and advance as well the said rectory and yearly profits thereof and thereout arising, to a considerable yearly value, over and above what the same had been theretofore yearly worth and let for, as their own lands; and further reciting, that the glebe lands belonging to the said rectory did not consist of above 84 acres, nor had the said rectory and glebe lands, with all manner of tithes thereto belonging been let for above £100 per ann. It was therefore agreed, and the said Cholmley and Hall did thereby covenant with the said Ayscough and his successors, that he should for ever thereafter enjoy the several parcels of ground therein [36] particularly mentioned, and by him chosen in lieu of the glebe lands formerly used with the said rectory, and which several parcels of ground are therein mentioned to contain 113 acres, 1 rood and 36 perches, and to be of far greater annual value than the said 84 acres of glebe; in consideration whereof, the said Montagu Cholmley did, for himself and his heirs, covenant with the said Ayscough and his successors, incumbents of the said rectory, to pay yearly to him and them the sum of £35 13s. in satisfaction of all tithes great and small, to grow due to the said Ayscough and his successors from the said Cholmley, or any of his tenants in the said parish (except as therein after mentioned); which sum was agreed to be charged upon the lands therein mentioned, and reputed to be of the yearly value of £50, part of which said sum, namely, 8s. 3d. was thereby agreed to be paid by the said Cholmley and his heirs, to the intent that the said Ayscough and his successors should pay the tithes of a close therein mentioned, called Pickworth Pasture, to the parson or vicar of Basingthorpe, within which the same lay; and the said Henry Hall did thereby, for himself and his heirs, covenant in like manner to pay the yearly sum of £44 15s. 3d. in satisfaction of all tithes due from him or his tenants (except as therein after mentioned); and which sum of £44 15s. 3d. was agreed to be charged upon the lands therein mentioned, and reputed of the yearly value of £55, and it was further agreed that Cholmley and Hall should for ever thereafter enjoy such part of the glebe lands belonging to the said rectory, as should happen to be inclosed within any of the plots of ground then newly inclosed within the said lordship, and taken in by them respectively, without any claim to be thereto made by Ayscough or his successors, discharged from the payment of all tithes whatsoever (excepting and always reserving to Ayscough and his successors the benefit of all marriages, christenings, churchings, burials, and Easter offerings, thereafter happening within the said parish); and it was further agreed that Ayscough and his successors should for ever thereafter be discharged of all constable lays, as well for the repair of highways as otherwise, and of all duties and payments as well to the church as poor, except such poor as might thereafter fall upon the town by reason of persons inhabiting the parsonage house, or the cottage thereto belonging, which persons were at all times thereafter to be relieved by Ayscough and his successors. That in pursuance of these articles, all the lands within the parish were inclosed and enjoyed according to the articles; and particularly, that the rectors of the parish had ever since enjoyed the said 113 acres, 1 rood, and 36 perches, and that the same were then enjoyed by the respondent Blair; that the sums of money agreed to be paid by Cholmley and Hall were received, together with the rents of the said 113 acres, 1 rood, and 36 perches, by Ayscough, and after-

wards by John Adamson his successor in the rectory, in lieu of all their tithes and former glebe lands till the year 1677 : but that in that year Adamson declining to abide by the agreement, Cholmley, together with the infant daughters and [37] heirs of Hall, then deceased, exhibited their bill in the Court of Chancery, against Thomas, the then Lord Bishop of Lincoln, and against the said John Adamson, to carry the said articles of agreement into execution, and to be quieted in the possession of their lands against the claims of Adamson, otherwise than under the said articles ; and that Adamson by his answer refused to perform the agreement, unless the plaintiffs in the suit would agree to what he had proposed, and which they or their agents had promised ; viz. to add per annum to the £80 ss. 3d. that is to say, £7 1s. 10d. by Cholmley, and £8 18s. 2d. by Hall, which if they consented to and would secure the same on all the lands within the rectory, he was willing the same should be confirmed by a decree : that the said cause was heard upon the 2d of July 1677, when it was decreed that the said articles should stand ratified and confirmed, to be observed and performed by all the parties, plaintiffs, and defendants, their heirs, successors, executors, administrators, and assigns ; and it was thereby agreed, according to the offer in the said defendants' answer, that over and beside the annual sum by the articles agreed to be paid by Mr. Cholmley in lieu of tithes, the said Mr. Cholmley, his heirs and assigns, and his and their tenants, should pay the additional annual sum of £7 1s. 10d. being in all £42 15s. 2d. and that the same should be charged on all the lands of Mr. Cholmley within the parish : and that the said infant daughters and heirs of Mr. Hall, their heirs and assigns, and their tenants, should pay in like manner the additional annual sum of £8 18s. 2d. being in all £53 13s. 5d. and that the said plaintiffs and the defendant Adamson their heirs, successors, and assigns, should for ever thereafter hold and enjoy the several parcels of land allotted to them by the said articles, in lieu of their antient lands and glebe, against each other, and against all other persons claiming under them, or under the said Henry Hall deceased, according to the intent of the said articles ; and that the plaintiffs in the suit, their heirs and assigns, paying the said annual sums of £42 15s. 2d. and £53 13s. 5d. should stand discharged from the payment of all tithes, according to the said articles. They admitted, that the annual payment of £96 ss. 3d. was not an adequate compensation for the tithes in kind of the parish ; but insisted that there were 29 acres, 1 rood, and 36 perches of glebe allotted to the rector by the articles, in addition to the 84 acres of glebe before possessed by him ; and that therefore, upon the whole, the annual value of the rectory was much increased by means of the articles and decree. They also admitted that neither the patron or ordinary were parties to the agreement, and that his then Majesty, or his Attorney-General on his behalf, was not a party to the suit in which the said decree of 1677 was pronounced ; but insisted that the said articles and decree were binding on the respondent Doctor Blair and his successors ; and that in Hilary term 3 James I. Thomas Bell, the then rector, having instituted a suit in the Spiritual Court against John Nix, then a householder [38] in the said parish, for subtraction of tithes, Nix applied to the court of King's Bench, by way of prohibition, to restrain Bell from proceeding in that suit ; and that by the record of the prohibition it appeared, that certain customary payments were due to Bell as rector, in lieu of tithes in kind.

The Bishop of Lincoln by his answer said, that he had no other concern in the matters in question, than as Ordinary of the diocese, and submitted whether the decree of 1677 was binding on his Majesty, the patron of the rectory, as the then Attorney-General was no party to the said suit, and consequently had no opportunity of controverting the agreement in the said decree mentioned.

The answer of the appellants being replied to, and the cause being at issue, divers witnesses were examined as well on the part of the appellants, as of the respondent Dr. Blair. The only matter upon which both the appellants and respondents entered into proof, was to ascertain from old terriers and surveys the quantity of the glebe to which the rector was entitled before the articles of agreement, and the quantity which he now enjoyed : on the one hand, it was contended by the appellants, that the rector was, before the time of entering into the agreement, entitled only to 84 acres of glebe, and that upwards of 113 acres having been allotted to him by the articles, and of which the several rectors had been ever since in the possession, therefore the agreement was in that respect very beneficial to the rector, and consequently to the patron ; and on the other hand, it was contended by Dr. Blair, and proved from four different terriers, that

the quantity of glebe which the rector enjoyed before the time of entering into the agreement, was above 102 acres, of which 84 acres, 3 roods, and 13 perches were arable, and 17 acres, 2 roods, and 17 perches were ancient inclosure, and a small part meadow, amounting in the whole to 102 acres, 1 rood, and 30 perches, as also a right of common of two cow-gates and ten sheep-gates, annexed to an ancient cottage belonging to the rectory, which with the right of common belonging to the original glebe lands of 102 acres, were fully equal to the 113 acres of the present glebe; and it appeared, that the mistake in the agreement of mentioning the whole quantity of ancient glebe land as consisting only of 84 acres, upon which the appellants laid great stress, arose from the quantity of arable land only being 84 acres and upwards, over and above the 17 acres, 2 roods and 17 perches of ancient inclosure; for the fact seemed to stand thus, that between the year 1649 and 1662, the dates of two terriers, both being prior to the agreement of 1664, the then incumbent Mr. Ayseough made a private exchange of the 84 acres of arable land, which lay dispersed at that time in four fields, for the same quantity of land in two fields, eighty of which in one field lay contiguous to the parsonage-house, and four in another at some distance. He also made another exchange of an old close of eleven acres called Acorn Croft, being within the parish, for a [39] close called Pickworth Pasture, containing the same quantity of land, but adjoining to the other eighty acres, and lying in the parish of Basingthorpe; and as this close was chargeable with tithes to the vicar of that parish, they agreed to pay the rector of Burton Coggles, a sum of 8s. 3d. annually, as an equivalent for discharging the tithe due to the vicar of Basingthorpe: so that at the time of the inclosure and agreement in January 1664, there clearly appeared to have been only an addition made to the glebe, of about ten or eleven acres, as a compensation for the right of common, belonging to the said glebe and cottage; and it likewise appeared, that the present glebe was exactly the same as that described in the two last terriers prior to the agreement, with the addition only of eleven acres for the said rights of common.

The cause was heard before the Lord Chancellor Northington on the 15th of May 1765, and on the 17th of June following his lordship pronounced judgment thereon, and was pleased to order and decree that the information should stand dismissed as against the respondent the Bishop of Lincoln; and referred it to the master to take an account of the value of the tithes which had accrued, arisen and renewed upon the several estates in the possession of the appellants from the time of filing the information; and it was ordered, that what should be coming on the balance of the said accounts, should be paid by the appellants to the respondent Dr. Blair; and as between the respondent Dr. Blair and the appellants, his lordship did not give any costs to that time, but reserved the consideration of subsequent costs till after the master should have made his report.* (See note p. 28.)

[40] From this decree the present appeal was brought, and on behalf of the appellants it was argued (W. de Grey, J. Dunning, J. Maddocks), that by the common law the parson, patron and ordinary might alienate the possessions of the church; and though the statute 13th Eliz. to prevent the impoverishment of succeeding incumbents, has restrained this power, yet both the court of Chancery and the Exchequer have expounded that act by a maxim of the common law, that *ecclesia meliorari non deteriorari potest*; and have been of opinion, that the Legislature did not intend to prevent exchanges or bargains, by which succeeding incumbents might be benefited; for there are still remaining upon the records of both courts, many instances, both before and after the decree in question, of decrees establishing the [41] like agreements between the lay parties, their heirs, executors and administrators, and against the incumbents and their successors; none of which, before the present, were ever impeached by a subsequent decree of a court of equity; and this practice continued, until, by the frequency of parliaments, it became more convenient to have such agreements established by the Legislature. This practice cannot be accounted for, unless the great persons who sat in both courts, had upon the construction of the act of parliament been of opinion, that it was not contrary to law to establish such an agreement upon pregnant proof made that it was for the benefit of the church; and to give the statute at this time a different exposition, would not only contradict the opinions and acts of the Judges of both courts, but would in this case disturb an uninterrupted quiet enjoyment of lands and tithes for a century and upwards, and might have the like effect upon other parts of the kingdom. That the agreement in question was beneficial to the church could not be doubted,

when the incumbent and the bishop both subscribed to the propriety of it in their answers, and the respondents had not now made any proof that it was otherwise.

But however the question might be considered at law, yet in equity no agreement ought to be rescinded, without restoring the parties to their former condition ; and it ought to be rescinded in the whole, or not at all. By this decree the agreement was rescinded in part, to the prejudice of the appellant Mr. Cholmley, to the amount of 29 acres of land ; for though the decree compelled the appellants to account for their tithes in kind, it left the respondent Blair the benefit of the statute of limitations, to protect him in the possession of 29 acres more than his ancient glebe amounted to. He that would have the assistance of a court of equity, must do equity ; and therefore Dr. Blair ought not to have a decree for tithes in kind, but upon the terms of his yielding up possession of the surplus glebe lands. That an account was decreed of the tithes in specie, notwithstanding the record in the King's Bench was an evidence of some weight, that the ancient mode of tithing in the parish, before the decree of 1677, was according to the customs stated in that record ; and therefore if the record was not to be taken as decisive proof of the customs, yet it was a forcible ground for directing an inquiry touching those customs ; for if it was barely probable that all tithes were not payable in kind, it was unjust to decree it absolutely without inquiry. That the decree in this cause was directly opposite to an inrolled decree of the same court, insisted on by the appellants ; and which inrolled decree was binding and conclusive upon the persons named in it, until reversed by a superior judicature ; and the respondent Dr. Blair being a successor in the rectory, was named in that decree as a person bound by it.

On the part of the respondents it was contended (C. Yorke, A. Wedderburne), that the agreement of 1664, which was the original foundation of the appellants' claim of exemption from the payment of tithes in [42] kind, was confessedly entered into between the then owners of lands within the parish, and the then rector only ; and therefore it could not bind any future incumbent of the rectory, as neither the patron nor ordinary were parties to it. That this agreement, upon the face of it, appeared to be founded either in fraud, mistake, or collusion ; for it recited, that the glebe belonging to the rectory did not exceed 84 acres, though by the respondents' evidence it appeared that the glebe did then consist of above 102 acres, besides a very extensive and valuable right of common. The supposed allotment therefore of 113 acres was scarcely an equal exchange for the glebe and right of common enjoyed by the rector before the agreement ; and as to the agreement itself, it was void as against the respondents, either from the nature of it, as not being entered into by the proper and necessary parties ; or supposing it to be in that respect effectual, it must necessarily fail as not being a fair and *bona fide* agreement, the compensation made by it to the rector in lieu of his glebe and rectorial rights, not being just or adequate. That the decree in 1677, confirming the agreement, with the variations as to the annual sums to be paid by each of the estates in lieu of the tithes, met with the same forcible objection in respect to the want of proper parties to the suit in which it was made ; it being provided by the common law that no rights of the church should at any time be alienated without the consent of all the parties who could be in any sort interested in them, viz. the parson, patron, and ordinary. In this case the rectorial rights were all alienated and given up, and the patron whose particular right in respect to the value of the rectory was materially affected by it, was no party either to the agreement in the first instance, or to the decree by which the appellants contend that the agreement was confirmed and his rights most essentially prejudiced. But this essential defect was greatly increased in the present case, considering the patron is the King, whose rights can never be legally taken away by collusion ; and to this it might be added, that even a decree could give no strength to this illegal transaction, as it was particularly provided against by the 43rd Eliz. c. 9. s. 8. where it is declared, "That all judgments hereafter to be had for the intent, to have or enjoy any lease contrary to the said statute, or any of them, shall be deemed void in such sorts as bonds and covenants are appointed to be void, which are made for that purpose." For by the 14 Eliz. c. 11. "all bonds, contracts, promises, and covenants are declared to be of the same nature to all intents and purposes as leases, many evil disposed persons having (as it is there recited) defrauded the true meaning of the statute of the 13 Eliz. c. 20. by asserting that bonds and covenants were not in law taken to be leases."

It is however objected by the appellant, that Dr. Blair ought not to have been per-

mitted to set up this demand, after an acquiescence by the Crown as patron, and by the several rectors who had held the rectory ever since making the agreement and [43] decree; and particularly after an acquiescence by Dr. Blair himself, from the the end of the year 1756, when he was presented to the rectory, to the beginning of the year 1762, when the information was filed. Acquiescence cannot be urged as an objection to the Crown; and therefore, as the right of the Crown in quality of patron of this rectory, would be materially prejudiced if the decree of 1677 was to be considered as a bar to Dr. Blair's claim of tithes in kind, it might perhaps be unnecessary to give any answer to the acquiescence imputed to him and his several predecessors. But this objection, if admitted in its full force, would have but little weight, when it was understood, that Mr. Adamson, the rector who was party to the decree of 1677, and consequently bound by it, lived in the enjoyment of the rectory till the year 1718; Mr. Dongworth, who succeeded him, held it four years only, to 1722; and Mr. Nicholson, the next succeeding rector, enjoyed it from 1722 to 1728, only a space of six years; Dr. White Kennet held it from 1728 to 1740; and Dr. Salter from 1740 to 1756; so that Dr. Blair, who could not be considered as claiming under any of the former rectors, was answerable only for his own acquiescence, which was for a very short time, considering the difficulties he had to encounter, in obtaining a thorough knowledge of the ground of the appellants' claim of exemption against the united efforts of the whole parish, whose interest it was to prevent him from acquiring that knowledge.

Another objection was, that the agreement could not be rescinded in part if not *in toto*. It was indeed impossible to restore Dr. Blair to the possession of all those rights which were enjoyed by the rector before the agreement was entered into, and therefore it was, that the respondents by their information itself waived any relief in respect of the glebe; but the impossibility of doing the respondents complete justice could never be urged as a reason why as much justice should not be done to them as the present state of things would admit: and as that part of the agreement respecting the tithes was a totally distinct matter from what related to the glebe, the respondents might have the relief given them by the decree now appealed from, without disturbing, or in the least interfering with that part of the agreement respecting the glebe.

The last head of objection was the prohibition issued from the court of King's Bench, 3 James I. by which it was said to appear that the rector was not entitled to all manner of tithes in kind, but only to such titheable matters as are therein mentioned. But this objection would receive a full answer when it was considered that no final judgment was ever pronounced in the suit in which the prohibition issued, and consequently the writ of prohibition itself could never be set up as a bar to the rector's claim of what was due by common right: besides, the defence arising under the prohibition was inconsistent with the [44] recitals in the agreement, upon which the appellants relied as the foundation of their claims of exemption.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed. (MS. Jour. *sub anno* 1768-9, p. 131.)

[39] * The following is the substance of Lord Northington's argument on the hearing of this cause:

"This is an information brought by the Attorney General, at the relation of the rector of Burton Coggles, for an account and payment of tithes in kind. The defence set up against the claim, is first, an agreement entered into in the year 1664, between the then rector, and the owners of the lands in the parish, for accepting a yearly sum of £80 in lieu of tithes; and I am of opinion that the agreement upon the face of it is unequal, as to the consideration thereby agreed to be paid to the rector; for it appears that the agreement was entered into, in order to effectuate an inclosure of the open fields in the parish, and no consideration is given as to the future improvement of the lands by such inclosure, of which the occupiers would reap the benefit. But I am clear, that even if the agreement was equal, it would not bind the successor in the rectory, but would be void as against him. The next defence set up against the plaintiff's claim, is the decree in 1677, which appears to be made in a cause instituted by consent between the same persons as were parties to the agreement in 1664. For as to the bishop of the diocese being a party, I consider him set up as a man of straw, merely for form: and it is material to observe, that the parties themselves did not

“ consider the agreement which had been executed, as binding upon the rector ; for
 “ they considered the annuity of £80 as not being an adequate consideration for the
 “ rector’s having given up his tithe in kind, and therefore entered into a new agreement
 “ for allowing him an addition thereto of £16 18s. 3d. and on being allowed that
 “ addition, the rector by his answer consents to have the agreement established. It is
 “ true, that the decree founded on this agreement, does *in verbis* bind the successor in
 “ the rectory ; but this was a decree founded on an agreement which the court never
 “ enters into the propriety of when a bill is brought by consent of parties ; and all
 “ such decrees are drawn up by the register of the court, in the words of the agreement
 “ [40] as a matter of course. But I am of opinion that such decree cannot bind the
 “ successor. The defendants’ counsel have indeed cited cases of a similar nature, and
 “ urged the case of *Egerly v. Price*, reported in Finch’s reports, p. 18. which I have
 “ looked into, and think it a very extraordinary one, for the Judge to send for parties
 “ to attend him. I can pay no credit to that case, nor do I look upon it as any
 “ authority, but only the *dictum* of some Note-taker.

“ The decree and the agreement being laid out of the case, the next consideration
 “ is, whether a court of equity can relieve in the present case ? And I am of opinion,
 “ there is not a better rule than *equitas sequitur legem*. It is a fixed rule that the
 “ crown and church cannot be prescribed against ; the first on account of its high rank
 “ and dignity, the other on account of its imbecility : *quia fungitur vicem minoris*,
 “ *conditionem suam meliorare potest, deteriorare nequit*. At common law, although the
 “ church could alienate with consent of parson, patron and ordinary, yet it was under
 “ various restrictions ; the patron must be absolutely seised in fee simple, for if he was
 “ seised only of a fee simple conditional, or base fee, the alienation was void. In the
 “ present case, the bar set up by the defendant’s counsel amounts to a mode of aliena-
 “ tion ; and if the decree is void, as I am of opinion it is, what then is there to send to
 “ law, when the point is about the extent of a decree of this court ? And if it was sent
 “ thither, it must come back to be ultimately determined here. It has also been
 “ objected that the length of time ought in this case to bar the plaintiff ; but I think
 “ the legal rule, that no prescription can run against either the King or the church,
 “ must be adhered to ; and indeed the length of time in which this agreement was
 “ acquiesced under, is not so great as at first sight it appears to be : For Mr. Adamson
 “ who was rector in 1677, and a party to the decree, and had a right to establish the
 “ agreement during his life, did not die till the year 1718. The agreement, though
 “ contained in the same deed, yet is distinct ; one part allotting lands in lieu of the
 “ ancient glebe, the other providing an annual stipend in lieu of tithes.

“ It has been further objected by the defendant’s counsel, that the plaintiff’s bill
 “ prays to set aside the agreement, so far only as relates to the composition in lieu of
 “ tithes ; but submits that the lands allotted in lieu of ancient glebe, may continue in
 “ the estate they now are in ; which the defendants insist the plaintiff cannot do, but
 “ that the agreement must be confirmed or rescinded *in toto* ; and that the rector must
 “ give up the lands allotted to him under the agreement, which, they contend, are
 “ larger in quantity than the ancient glebe, and which additional quantity was a further
 “ consideration to the rector on the exchange. But this would be making wild work ;
 “ and the proposition was adopted by the defendants’ counsel at the bar in resentment
 “ and despair. I am clear, that the lands allotted to the rector were only in lieu of the
 “ ancient glebe, and that the difference arose from the different quality of the land.
 “ The rector having consented in the inclosure, the same was for the general benefit of
 “ the parish ; and such inclosures would be continually increasing in value, while the
 “ composition given to the rector in lieu of tithe, would be gradually diminishing in
 “ value. The composition here only respected value of the past tithes, without any
 “ regard to the future increasing value of tithes, which is allowed for in every private
 “ bill for an inclosure. If in the present case the parties had made an allowance for
 “ the future in proved value of the tithes I should not have been inclined to relieve,
 “ but left the rector to his legal remedy. I shall therefore decree,” etc. *ut supra*.

CASE 11.—HANS WINTROP MORTIMER, and Another,—*Appellants* ;
OWEN LLOYD,—*Respondent* [14th February 1777].

[A vicar may avail himself of his general title to tithes in opposition to a pecuniary composition, even though established by deed executed by Parson, Patron and Ordinary.]

[No real composition for tithes made since the stat. 13 Eliz. c. 10. is valid as against the succeeding Incumbent. See the preceding case.]

[Decree of the Court of Exchequer affirmed.]

In Michaelmas term 1773, the respondent exhibited his bill in the Court of Exchequer, as vicar of the parish of Stapenhill in the county of Derby, against the appellants, setting forth, that the respondent was and for several years had been vicar of the said vicarage, and as such entitled by endowment, prescription, or otherwise, to all tithes of hay and grass, and clover cut for hay, and to all small tithes arising within the parish, and particularly within the village, township, or hamlet of Caldwell, parcel of the said parish. That the appellants had severally been the owners and occupiers of divers farms, lands, and tenements within the said hamlet, and that from Midsummer then last they had divers titheable matters and things arising and growing on the lands so by them occupied, the tithes whereof became due, and ought to have been paid to the respondent : it was therefore prayed that the appellants might be decreed to account with the respondent for the value of the said titheable matters and things, and pay to him what should appear to be due on the taking of such account.

The appellants, by their answer to this bill, admitted that they were occupiers of certain lands within the hamlet or village of Caldwell in the parish of Stapenhill ; but insisted that the respondent was not entitled to any tithes in kind of any titheable matters arising within the said village or hamlet, either from the appellants or any other person whatsoever, owners or occupiers of any lands, tenements, or hereditaments, within the village, township, or hamlet of Caldwell, in respect of such lands, tenements, or hereditaments, or any payment in lieu or in respect thereof, other than and except that from time immemorial there had been paid by the inhabitants, proprietors and owners of lands and tenements [45] within the said village, township, or hamlet of Caldwell, to the respondent and his predecessors, vicars of the said parish for the time being, the sum of £6 on the feast of St. John the Baptist, in every year, for and as a modus and full payment and satisfaction for and in lieu of all tithes, rights, compositions, obventions, and emoluments whatsoever, due or payable to the vicar for the time being of the said parish of Stapenhill, from the inhabitants, proprietors and occupiers of lands and tenements within the said village or hamlet of Caldwell, in respect of such lands and tenements ; and the appellants contended, that such modus or ancient payment of £6 had been confirmed by immemorial custom, as well as by a certain indenture, dated the 22nd of September 1676, in the words following, viz.

“ Hæc indentura facta inter Willielmum Dominum Paget baronem de Beaudefert,
“ verum et indubitatum patronum vicariæ perpetuæ ecclesiæ parochialis de
“ Stapenhill in comitatu Derbiæ, Lichfeldiæ & Coventriæ diocesiâ & Johannem
“ Lucas, artium magistrum, vicarium perpetuum ejusdem vicariæ perpetuæ
“ ecclesiæ parochialis de Stapenhill antedictâ, ex consensu & assensu reverendi
“ in Christo patris et domini domini, Thomæ, Providentia Divinâ Lichfeldiæ
“ & Coventriæ episcopi, ex unâ parte ; Samuelem Saunders de Caldwell, in
“ comitatu & diocesiâ prædictis, armigerum, Edwardum Holland de eisdem,
“ generosum, Elizabetham Aston, viduam, Thomam Webster, Thomam Colling-
“ wood, Willielmum Cox, Georgium Thrumpton, de eisdem, yeomen, Thomam
“ Baxter, Richardum Capenhurst, Thomam Baker, de eisdem, husbandmen,
“ Thomam Jackson, de eisdem, carpenter, Thomam Corbitt, de eisdem, black-
“ smith, aliosque omnes & singulos incolas dictæ villæ de Caldwell prædictâ,
“ Ricardum Bath de Linton in comitatu Derbiæ prædictâ, et Robertum Nicklinson
“ de Swadlincote, in comitatu Staffordiæ et diocesiâ prædictâ, shoemaker, pro-
“ prietarios & occupatores quarundum terrarum infra eandem villam de Caldwell
“ prædicta jacentium, ex consimili consensu & assensu reverendi in Christo patris

" et domini domini, Thomæ Providentiâ Divinâ Lichfeldiæ et Coventræ episcopi,
 " ex altera parte ; testatur, quod tam pro bono capellæ de Caldwell infra villam
 " de Caldwell prædictâ & inhabitantium villæ prædictæ quam pro bono ecclesiæ
 " parochialis de Stapenhill prædictâ, de qua quidem ecclesiâ de Stapenhill
 " prædictâ, capella de Caldwell prædictâ membrum est, ac etiam pro et in
 " consideratione acquitantiæ & finalis concordantiæ omnium differentiarum &
 " controversiarum de et concernientium omnes & singulas decimas, oblationes,
 " obventiones, compositiones, aliaque jura & emolumenta ecclesiastica quæ-
 " cunque vicario perpetuo vicariæ perpetuæ ecclesiæ parochialis de Stapenhill
 " prædictæ, per inhabitantes, possessores & occupatores terrarum infra villam de
 " Caldwell prædictâ jacentium debitas [46] & solutas, aggregatum concordatum &
 " conclusum est, et per presentes inter partes prædictas ex consensu et assensu
 " ante dicti reverendi in Christo patris, concordatum est et conclusum, quod
 " præfatus Johannes Lucas, vicarius perpetuus vicariæ perpetuæ ecclesiæ
 " parochialis de Stapenhill prædictæ, ejusque successores, vicarii perpetui
 " ejusdem vicariæ perpetuæ, semel in qualibet mense annuatim in quolibet
 " anno imperpetuum divinas preces in capella de Caldwell prædictâ, secundum
 " formam libri communium precum leget et post lectionem earundum juxta
 " morem ecclesiæ Anglicanæ concionabitur, præfatique incolæ de Caldwell
 " prædictâ, ac proprietarii & occupatores terrarum infra eandem villam jacentium,
 " omnes et singuli eorumque hæredes, executores, administratores sive succes-
 " sores eidem Johanni Lucas, & successoribus suis, vicariis perpetuis ejusdem
 " vicariæ perpetuæ ecclesiæ parochialis de Stapenhill prædictâ, summam sex
 " librarum legalis monetæ Angliæ, in plenam contentationem satisfactionem et
 " exonerationem omnium & omnimodum decimarum jurium compositionum
 " obventionum, oblationum juriumque et emolumentorum ecclesiasticorum
 " quorumcunque infra eandem villam de Caldwell prædictâ qualitercunque
 " crescentium provenientium, renovantium aut aliquo modo contingentium
 " eidem vicario perpetuo et quovis modo debitorum aut solvi consuetorum
 " ad solum sancti Johannis Baptistæ annuatim in quolibet anno imperpetuum
 " solvent idemque Johannes Lucas, vicarius perpetuus, antedictus, ejusque
 " successores, vicarii perpetui vicariæ perpetuæ ecclesiæ parochialis de Stapenhill
 " prædictâ, eandem summam sex librarum, in plenam contentationem satisfac-
 " tionem, solutionem et exonerationem omnium et singularium decimarum,
 " jurium, compositionum, obventionum, oblationum & emolumentorum ecclesi-
 " asticorum quorumcunque prædictorum, et ut præfertur quovis modo debitorum
 " aut solvi consuetorum imperpetuum ad solum prædictum accipient et recipient.
 " In cujus rei testimonium, partes ad presentes sigilla sua eisdem mutuo ap-
 " posuerunt vicesimo secundo die mensis Septembris, anno regni domini nostri
 " Caroli secundi, Dei gratiâ, Angliæ, Scotiæ, Franciæ, et Hiberniæ, regis, fidei
 " defensoris, &c. vicesimo octavo, annoque Domini 1676. Et nos episcopus
 " antedictus, in fidem et testimonium præmissorum, sigillum nostrum episcopale
 " presentibus apposuimus."

The cause being at issue, several witnesses were examined on both sides. On the part of the respondent it was proved, that the village or hamlet of Caldwell was part of the parish of Stapenhill, and that the inhabitants of Caldwell contributed to the repairs of Stapenhill church. It was also proved, that the vicar of Stapenhill for the time being, had, as far back as the memory of witnesses went, collected and received tithes in kind for all hay, clover, [47] lamb, wool, fruits, eggs, and pigs, and other small tithes arising within the other parts of the parish, not parcel of the village of Caldwell. On the part of the appellants it was proved, that Caldwell was a chapelry in which there was a chapel of some antiquity repaired by the inhabitants of the hamlet of Caldwell. It was also proved, that the sum of £6 had been raised by a levy according to the pound rate, and paid for many years to the vicar of Stapenhill for the time being; and they likewise proved, that tithes in kind of the several articles claimed by the bill, had, not during the memory of living witnesses, been paid to the vicar of Stapenhill.

On the 11th of December 1775 the cause was heard, when there were produced and read on the part of the respondents the above indenture; an exhibit marked (C) being a terrier dated 23d of June 1665, signed by John Lucas and others, wherein

was the following entry, viz. "*Item*, pigs, geese, wool, and lamb, are paid in the parish of Stapenhill and town of Caldwell, according to the antient law, *fatus ablactatus debet esse ante quam præstetur* (to wit) when they are weanable, or of strength to live without the dam. *Item*, hay, hemp, flax, calves, colts, all manner of fruit and Easter offerings, are paid in the parish, and from all the town of Caldwell, without exception, for this vicarage antiently was endowed *omnibus minutis decimis*." Another terrier dated the 29th September 1719, wherein was the following entry:—"All manner of tithes (excepting corn only) as pigs, geese, wool, lambs, calves, colts, eggs, hay, hemp, flax, and all manner of fruit and Easter offerings, have formerly been paid in kind to the vicar of Stapenhill, by the inhabitants of Caldwell. But by an agreement made between the vicar and the said inhabitants, bearing date September 22d, 1676, by the consent of the patron and Lord Bishop, declared by their being parties to the same, the said inhabitants pay in lieu of all tithes and profits due from thence to the vicar, the sum of £6 yearly, on St. John Baptist's day, which the chapel-warden gathers and pays the day it becomes due." And three other terriers dated the 12th of July 1726, the 3d of October 1701, and the 2d of February 1705. And on behalf of the appellants, there was produced and read, a terrier dated the 23d of June 1682, wherein was contained the following entry, viz.—"*Item*, geese, wool and lambs are paid in the parish of Stapenhill, excepting Caldwell, according to the antient law, *fatus ablactatus debet esse ante quam præstetur* (to wit) when they are weanable, or of strength to live without the dam. *Item*, six pounds of monies paid from the town of Caldwell, hay, hemp, flax, calves, colts, all manner of fruit and Easter offerings are paid in the parish, excepting Caldwell, for this vicarage antiently was endowed *omnibus minutis decimis*."

On reading this written evidence and the depositions, the court decreed that it should be referred to the deputy remembrancer to take an account of what was due to the respondent from the [48] appellants respectively, for the value of the tithes demanded by the bill; and that they should pay to the respondent what upon such account should be found due to him for the value of the said respective tithes.

From this decree the appellants appealed, and on their behalf (A. Wedderburn, G. L. Newnham, J. Madocks), it was said, that terriers signed by the incumbent entitled to tithes, and by the churchwardens or inhabitants of the parish who are liable to the payment of tithes, are admitted to be read in evidence as the declarations of parties standing in opposite interests, but both interested in the manner of rendering tithes within the parish; and no terrier is perfect, or ought to be admitted in evidence, if signed by the incumbent only, or by the inhabitants only. The above terrier of 1665, which was received in evidence in this cause, appeared to be signed by John Lucas the vicar, and by four persons who were stiled churchwardens, and were to be presumed to be the churchwardens of the church of Stapenhill, which was the parish church, and not the chapelwardens of the chapelry of Caldwell. It was therefore improper to be admitted in evidence, as only one of the parties signing it was interested in the payment of tithes in Caldwell, namely, the vicar; and it was no more admissible in evidence respecting the payment of tithes in Caldwell, than a terrier signed by the vicar of Stapenhill and the inhabitants of a neighbouring parish. It was undoubted in this cause, that the vicar's right to tithes in kind within the chapelry of Caldwell, was denied 100 years ago; for by an agreement, with the concurrence of the parson, patron and ordinary, which there was no reason to suspect to have been unfair, a certain annual payment was recognised and established; not as a composition for tithes payable in kind, but as a compromise of a disputed claim. That by means of this agreement having so long subsisted, all memory and trace of any other payment was lost and obliterated; and therefore under these circumstances it was unequitable to permit the vicar to avail himself of his general title.

On the other side it was said (J. Skynner, Ll. Kenyon), that the respondent had proved his right to the several species of tithes claimed by his bill in other parts of the parish, and there was no pretence that anybody else had any title to tithes in kind; the single question was, whether the payment of £6 was a legal exemption from tithes in kind? Now there was no evidence that the payment existed before the deed of September 1676, the terriers were evidence to the contrary; and the deed did not contain any declaration of, or reference to any modus or customary payment then existing within the parish; but on the contrary, from the whole tenor and effect of this

deed, it appeared to be nothing more than an ineffectual attempt to make a real composition at a time when all the parties to it were by law disabled from so doing. The deed, therefore, instead of maintaining the pretensions of the appellants, afforded the strongest presumption that no such modus or customary payment as was now contended for, could have existed when the deed was executed; for otherwise it must be presumed, that such modus must [49] have been known to the inhabitants of the village of Caldwell, who were parties to the deed; and it was highly unreasonable to suppose that they would have omitted to take notice of such modus or customary payment, in case any such had then existed. Neither did the appellant's parole evidence amount to any proof of this pretended modus; in fact it amounted to nothing more than proof of an acquiescence under the temporary composition introduced for the first time by the deed of 1676, on the part of the several vicars of Stapenhill, since the making of that deed; but such acquiescence was not in any sort binding or conclusive upon the respondent.

After hearing counsel on this appeal it was ORDERED and ADJUDGED that the same should be dismissed and the decree therein complained of affirmed. (MS. Jour. *sub anno* 1776-7, p. 614.)

CASE 12.—THOMAS WHITEHEAD, and Others,—*Appellants*; GEORGE TRAVIS,—*Respondent* [26th January 1779].

[Where a modus is set up, but not proved by clear legal evidence, a court of equity ought not in the first instance to decree an account, but should direct an issue to try the validity of the modus.]

[To a claim by the vicar of the tithe of hay under an endowment, the defendants, the *tertenants*, set up a payment to the vicar in lieu of such tithe; viz. a modus of 1d. in lieu of tithe of hay of the lands occupied with each house in the parish. This was holden by the court of Exchequer to be a bad modus for its uncertainty: and the court thereupon decreed an account of tithes, considering the vicar's claim as acknowledged and established by the payments. But upon a writ of error the House of Lords directed an issue to try the nature of the payments. See Gwillim's *Bac. Ab.* vii. 519; *Anstr. Rep. Scac.* 309. *n.* and post, ca. 16; 19 of this title and the note there.]

See H. Wood's *Erch. Tithe Causes*, iii. 523; *Anstr. Rep. Scac.* 308, 9, in *n.*

The parish of Eastham, in the hundred of Wirhall and county of Chester, consists of a rectory impropriate and a vicarage, and comprizes several townships, and particularly the townships of Great Sutton and Little Sutton.

The respondent is, and from the year 1767 has been vicar of Eastham, and as such set up a claim to the tithe of hay arising from the tenements in the said townships of Great and Little Sutton, though he never took it in kind, nor ever received any satisfaction for it.

William Whitehead, deceased, in the year 1771, was the occupier of three several ancient tenements in the said township of Little Sutton, his own inheritance, and of two other tenements in the said township, as tenant to Thomas Whittle.

The appellant Ralph Davies was in that year occupier of four several ancient tenements in the said township of Great Sutton, [50] under a lease for years from George Bushell, the owner of the inheritance.

The appellant Elizabeth Bateman was then also occupier, as tenant at will, under Thomas Cholmondeley, esq. of a farm lately inclosed from the common of Great Sutton.

The said Thomas Cholmondeley is the impropriate rector of that part of the parish of Eastham which includes the townships of Great and Little Sutton, and is Lord of the Manor of Suttons; of which manor, rectory, and townships, the abbot and convent of the abbey of St. Werburgh in Chester were seised in fee at the dissolution of monasteries; and the same were by King Henry VIII. in the 33d year of his reign, with all tithes thereto belonging, (and other large estates in the county of Chester, the possession of the late abbot and convent,) granted to the Dean and Chapter of Chester in fee.

The Dean and Chapter, 7th Edward VI. granted all this rectory (then and anciently called the rectory of Sutton in Wirhall) and the tithes thereof, and all the estate late of the abbot and convent in the said parish and other places in the county of Chester, to Sir Richard Cotton in fee, paying to them the fee-farm rent of £603 per annum.

George, the son and heir of Sir Richard Cotton, in the 7th Eliz. alienated this rectory and the tithes thereto belonging, with the manor, rectory-house, and church of Sutton, and all the messuages and lands in the townships of Great and Little Sutton, and all the tithes thereof thereto belonging, with other premises, part of those granted to Sir Richard Cotton, to Sir Hugh Cholmondeley in fee, paying the fee-farm rent therein reserved to George Cotton, who covenanted to indemnify against the said gross fee-farm rent of £603.

This rent was surrendered by George Cotton to Queen Elizabeth, in the 22d year of her reign, with other rents reserved by Cotton, on his several alienations of the different parts of the estates which had been conveyed by the Dean and Chapter to Sir Richard Cotton; and all those several rents were immediately granted by the Queen to the Dean and Chapter in fee, and they are at this time paid to them.

The townships of Great and Little Sutton (besides the demesne lands) consist of several farm houses and lands, and of a few cottages; all of which were and continued to be the possessions of the Cholmondeley family, derivatively from the abbot, under such title as before mentioned, till by an act of Parliament passed 6 George II. the same farms and lands (being then let out on several leases for lives, as they had been by successive renewals during all memory), and the rectory of Sutton and all tithes thereto belonging (except the tithes in Little Sutton) were vested in trustees to be sold, and the reversions in fee of all such several leasehold farms were accordingly soon after sold in severalty, with their several rights and appurtenances; and particularly the reversions in fee of the several farms and lands so occupied by the said [51] William Whitehead deceased, and the appellant Ralph Davies were then purchased, with the tithe-hay arising therefrom, the same having been retained and enjoyed, with all such several farms, during all memory, by the owners and occupiers thereof; but the tithes in Little Sutton, by the said act excepted, still remain in Mr. Cholmondeley.

The family of Cholmondeley, and their lessees, during all memory prior to the said act and the alienations last mentioned, took the tithes of corn throughout both the townships of Great and Little Sutton in kind; and the occupiers of the said farms and lands, who were lessees for lives under the Cholmondeleys, uniformly, until such alienations, enjoyed (as the purchasers have since enjoyed) their several farms, and retained the tithes of hay to their own use, without any claim of tithe whatsoever in respect thereof, till the claim of hay tithe lately, and for the first time, set up by the respondent as vicar.

No vicar of Eastham ever took any tithe of hay within any part of the townships of Great and Little Sutton in kind, nor hath any satisfaction been made for the same, nor did any vicar, before the respondent, ever claim any such tithe there.

There are certain customs in the two townships of Great and Little Sutton with regard to other tithes there, which customs have been uniform and particularly well understood. From the demesne lands of Sutton, the vicars have had a certain payment made them yearly at Easter, in nature of a pension in full of their dues; and throughout the other parts of the townships the vicar hath immemorially taken in kind the tithe of pig, geese, wool, and lamb, besides Easter offerings; and four distinct yearly payments of 1d. each, have been made at Easter, by the inhabitants of each house in the same townships as moduses, under the several denominations of the sacrament 1d. garden 1d. hen 1d. and tilt 1d. and the appellants, when they put in their answer, not knowing the exact meaning of the word tilt, apprehended the tilt 1d. might be a payment in lieu of some small tithe and vicarial due, and the same was so stated in their several answers; but what they said relating thereto was conjectural, founded on a definition of the term tilt, which in the dictionaries is called a composition for tithes generally; and the appellants were not then apprised of what had been the application of the tilt 1d. in the parish, nor that one of the four pennies was a sacrament 1d. they not knowing then of the parish tithe-table, comprising the vicar's dues, by which the said four several pennies are defined and called the hen 1d. garden 1d. sacrament 1d. and tilt 1d. and the tilt 1d. is therein declared to be payable from every house.

The respondent in Trinity term 1772, exhibited his bill in the court of Exchequer against John Oxtou, John Healing, and the appellants Davies and Bateman, and William Whitehead deceased; and against others, the occupiers of lands in the adjoining townships within the said parish, therein stating his induction to the vicarage of Eastham in 1767, and that the vicarage had, for time [52] immemorial, been endowed with the tithes of all hay and small tithe arising within the said parish; and that he was entitled thereto by endowment: and that the several defendants in 1771 occupied divers separate farms and lands within the said parish, and had much hay thereon, and carried the same away, without setting out the tithes thereof for the respondent, or making him any satisfaction: and therefore, the respondent (without alleging any other right than endowment, and without any allegation of any payment having been made, to which he objected; as in lieu of tithe hay, by way of modus or otherwise, or any charge in his bill, stating any other right than endowment) prayed that the defendants might respectively account with him for the tithes of such hay, and might severally pay to him what should be found due on such account.

The said William Whitehead deceased, and the appellants Davies and Bateman, in Michaelmas term following, filed their answers, and therein admitted, that they were in 1771 occupiers of several tenements and lands in the townships of Great and Little Sutton, and that they had hay thereon in that year, and took away the same, without setting out in kind, or making any satisfaction for the tithe thereof; but they denied that the vicarage was endowed with tithe of all hay arising within the parish of Eastham, or that the respondent was entitled to the tithe of hay from the several tenements that were so occupied by them respectively in 1771, or any of them, or any satisfaction for the same by endowment or otherwise: and they severally said that such several tenements were ancient tenements, and set forth the particulars of which the same respectively consisted.

And the said William Whitehead, by a further answer, stated the right of the abbot and convent at the time of their dissolution, to the said rectory impropriate of Eastham, and the tithes thereof, and the manor and townships of Great Sutton and Little Sutton, and that the same became vested in Sir Hugh Cholmondeley; and that Charles Cholmondeley, Esq. the descendant of Sir Hugh, afterwards sold and conveyed to several persons the said several farms and lands in the said townships of Little Sutton and Great Sutton: and particularly, that the said Charles Cholmondeley had sold and conveyed unto him the said William Whitehead, such of the tenements and lands in Little Sutton which were occupied by him in 1771, called Harvey's, Hughson's, and Powell's tenements; that he believed the purchasers of the said several estates so sold, within the said townships of Little Sutton and Great Sutton, had, ever since their several purchases, held and enjoyed all the tithes of hay arising on such their estates; and he insisted that he was entitled to the tithe of hay of the said farms and lands of which he was owner and occupier in 1771, as the same all lay in the township of Little Sutton, and were purchased of Charles Cholmondeley; and believed that the said Charles Cholmondeley and his ancestors, and those under whom they claimed, and their several assigns and lessees for time immemorial, had received, taken, and enjoyed the [53] tithes of corn, grain, and hay, arising from all the tenements and lands within the townships of Little Sutton and Great Sutton, free from any claims whatsoever of the vicars of the parish of Eastham for the time being; and that the vicars of the same parish were never endowed with, and that the respondent had no claim or right by endowment or otherwise, to the tithe of hay arising from any lands or tenements in the said townships of Little Sutton and Great Sutton, and he denied that the respondent had any right to such tithe of hay.

The appellant Ralph Davies, by his further answer said, that he held the farms described by him in his first answer as tenant for years, and claimed to hold the same as tenant to his landlords, who claimed the tithe-hay thereof; and he insisted on the like enjoyment of the said hay as William Whitehead had insisted on; and said he believed that no tithe of hay had ever been taken from the same lands by any vicar, or any satisfaction made to him for the same, and denied the right of the respondent to such tithe.

And the appellant Elizabeth Bateman, by her further answer said, that she held the said farm which had been inclosed from the common of Great Sutton, as described in her former answer in the year 1771, only under Thomas Cholmondeley, the impro-

priator of the great tithes, and Lord of the Manor of Great and Little Sutton, who had let the same farm to her, free from such tithe of hay and other tithes; and that she, and the former occupiers thereof, had held and enjoyed, as tenants to Mr. Cholmondeley, all the corn and hay arising therefrom, free from any tithe; and that no vicar had made any claim thereof before filing the bill, and denied that the respondent had any right thereto.

The respondent replied to the answers, and the cause being at issue, witnesses were examined on behalf of all parties, and publication duly passed.

The cause came on to be heard before the Barons of Exchequer, when the counsel for the appellants objected for want of proper parties, none of the land owners, (save William Whitehead, a land owner as to part of the tenements in his occupation,) nor the impropiator being parties to the suit; and that the vicar's right being denied, they ought to have been defendants; but the court was pleased to over-rule such objection, and proceeded in the hearing.

The respondent's written evidence read on such hearing consisted chiefly of loose papers, and copies not verified or authenticated; no original being produced or proved to exist, and the reading of them as evidence was therefore objected to on the part of the appellants; but the objections were over-ruled by the court.

The respondent's oral evidence (which consisted of the facts being spoken to only as to the information and belief of the witnesses, and in such manner as it is apprehended would not be admissible evidence at law) was chiefly to prove that the tilt 1d. was imagined by the witnesses (but without giving any reasons) as a payment for hay, due from every farm-house having lands, to [54] the vicar, and extended to cover such lands; and the argument drawn from thence was, that it would be impracticable to collect the 1d. by reason of the lands being taken from one farm-house and added to another; and therefore that the payment of the said 1d. would be shifting, uncertain, and void as a modus; but still that it was evidence of the vicar's being entitled to the tithe hay; but such evidence was unsuspected, and a surprize upon the appellants, and ought not to have been admitted, there not being a word said about it in the bill, nor was it thereby put in issue; and therefore the appellants had no opportunity of making any defence to it, or contradicting the respondent's evidence relating to it, or of cross-examining any of the witnesses so produced as to the application of the tilt-penny.

The respondent could not, nor did prove, that he or any of his predecessors had ever taken the tithes of hay in kind.

The appellants read in evidence several exhibits, in which the title in the land owners to the lands in question derivatively from the abbot and convent was satisfactorily deduced; and by which it appeared that the tithe of hay had always been considered by the land owners and occupiers as their own private property, and constantly and immemorially retained and enjoyed by them; and they proved that neither the respondent, nor any of his predecessors, had ever taken the tithe hay, and that it was the reputation of the parish that he was not intitled thereto.

On the 18th of December 1775, the court was pleased to decree, that the defendant William Whitehead deceased, and the appellants Ralph Davies and Elizabeth Bateman should severally come to an account with the respondent for the tithe of hay demanded of them by the bill, and that they should pay unto the respondent the costs of suit to that time, so far as the same related to the said William Whitehead and the appellants, and the demand against them respectively.

The said William Whitehead died on the 4th of January 1776, before the decree was drawn up, and in Hilary term following the respondent filed his bill of revivor against the appellants, the executors of William Whitehead, and the cause was revived against them.

The appellants on discovering the tithe table of the vicar's dues, exhibited by him on the examination of witnesses, but with-held at the hearing, severally petitioned to have the cause re-heard, and that the respondent should produce the said tithe table; and on reading the deposition of Joseph Critchley and Ellen and William Currey, examined for the respondent, on the commission for the examination of witnesses as to the contents and usage of the said parish tithe table, the cause was ordered accordingly to be re-heard, and the table to be produced by the respondent on such re-hearing.

The cause was accordingly re-heard on the 1st of July 1777, when the respondent produced and read the same written and oral testimony as he had read on the original

hearing; and in addition read copies of two terriers, taken from the originals in the [55] episcopal registry at Chester, dated respectively in 1696 and 1709, but neither of which appeared to have been ever used or resorted to for collecting the vicar's dues. The appellants read in evidence, in addition to the former evidence, the said table of the vicar's dues, and depositions as to the same.

But the court was pleased to order and decree that the decretal order of the 18th of December 1775, should be affirmed.

The appellants apprehending themselves aggrieved by these several decrees, appealed therefrom; and on their behalf it was argued (A. Wedderburn, J. Dunning, J. Lloyd), that although a rector, whether lay or appropriate, is entitled to tithes of common right, and on a bill brought by him for tithes, has nothing more to prove than that he is rector; and it is incumbent on the defendant to prove an exemption or discharge, or a title to the tithes; yet the case of a vicar is totally different, and it is as clear and settled a rule that when there is a rector, *prima facie*, all the tithes in the parish belong to him; as that in order to support a bill by a vicar for tithes in kind, he must prove his right to such tithes, which must be either by shewing an actual endowment, or by prescription or usage. That the respondent in this case had not produced or proved any actual endowment of the vicarage, nor given any evidence of the receipt of any tithe-hay in kind in the townships of Great and Little Sutton by any of his predecessors; but the only evidence on which he founded his claim to the tithe of hay from the appellants' several farms was the payment of the penny called a tilt-penny, which some witnesses for the respondent said, they were informed or believed was paid for tithe-hay, but in a very vague and particular way, and without giving any reasons for such belief, or saying how or by whom they were so informed, and so as not to be admitted as legal evidence; that by such sort of oral testimony the respondent now endeavours at this day, after an immemorial enjoyment to the contrary, to apply the tilt-penny as a payment for hay, and yet in a manner not to be good as a *modus*, but still as evidence, to supply the want of endowment and enjoyment, and by such means to come at the tithe-hay in kind from the appellants' farms, though it appeared by the tithe-table, which was in the respondent's power, that the tilt-penny was from every house, and the respondent not having alleged or charged any thing in his bill relating to the tilt-penny, it was impossible for the appellants to give any answer to such evidence, or examine any witnesses to contradict it, or to cross-examine the witnesses produced by him relating thereto; and the evidence produced and read by the respondent in support of his claim, and relating to the tilt-penny, was much too loose and inconclusive for a court of equity to make a decree in favour of the respondent, a vicar, in the first instance, for payment of a tithe in kind against common right, and which neither he nor any of his predecessors had ever before taken, enjoyed, or claimed, and particularly so; as no evidence ought to have been suffered to have been read to matters which were not charged or alleged by the bill, or in issue between [56] the parties in the cause. That the claim to tithes is in its nature a legal claim, and the right to tithes a legal right; and in the case of a bill filed in a court of equity by the respondent, a vicar, for the payment of tithes in kind, and the vicar's right being denied by the defendant's answer, and evidence proving that he never had enjoyed or received the tithes demanded, and he having given no clear evidence of his right thereto, it was submitted by the appellants, that a court of equity (which has no original jurisdiction in matters of tithe, but gives relief in consequence of the account prayed) ought not, in the first instance, to have decreed in favour of the respondent, and thereby in effect established his right; but ought either to have left him to his remedy at law for the recovery of the tithe of hay, or have directed an issue to try whether the respondent, as vicar of Eastham, was or was not endowed of the said tithe of hay; upon which issue, and a *viva voce* examination of the witnesses, the question would certainly be better and more fully discussed and decided than it could be by the court of Exchequer upon the depositions, and when the most material part of the evidence was taken and received, it was impossible, as before mentioned, for the appellants to give it any answer. That besides, it was an additional objection to the decree, as to the relief given against the appellant Elizabeth Bateman, that the farm occupied by her had not been inclosed from the waste but a few years, and therefore there could be no pretence that the penny called the tilt-penny was in respect of that, and consequently no satisfaction whatsoever could be pretended to have been ever paid

in lieu of tithe hay of that farm, and the respondent had no evidence in support of his right to the tithe-hay arising thereon. That it was certain the appellants and the former occupiers, or owners of their farms, had from time immemorial, invariably taken and enjoyed the hay arising therefrom for their own use, without paying any tithe thereof; and it never was conceived by any of them that they paid any satisfaction for the same; and therefore the appellants insisted, that in favour of such long enjoyment a grant of such tithe-hay ought to be presumed by every court of justice to have been made by the person or persons capable of making the same. That as the claim to the tithe of hay in kind made by the respondent was never made by any former vicar of the parish, nor by him until several years after he became vicar thereof; and as the appellants did no more than defend what they apprehended they had a legal right to, and to preserve the ancient usage in the parish, the court ought not to have decreed them to pay the respondent the costs of the suit.

On behalf of the respondent it was urged (J. Mansfield, L. Kenyon, R. P. Arden), that the defence of appellants stood clearly falsified in every material point, the executors of the late William Whitehead, in particular, being prosecuting this appeal in direct opposition to an act of Parliament, which makes it impossible that the defence of their testator could be true. That the tilt-penny modus proved in the cause, was objected to in the court below on the ground of law, and not [57] of fact; and therefore was ripe for the judgment of the court. That no length of time can give sanction to a bad modus. That an appeal like the present, following two hearings in the court below, of ten days' continuance, and two unanimous decrees of that court, after six months' mature deliberation, in favour of the respondent, seemed not so much to bespeak the efforts of parties presuming themselves injured and seeking redress, as to betray the determined purpose of a powerful combination proved in the cause, to harass, and if possible to destroy an unsupported individual.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and it was further ORDERED, that the court of Exchequer should direct a trial to be had at the next assizes for the county of Salop, or at such other time as the said Court should think fit, upon the following issue, viz. "Whether the tilt penny paid by the occupiers of houses within the townships of "Great and Little Sutton to the vicar of the parish of Eastham has been paid and "accepted as a modus or composition, in lieu and in satisfaction of tithe-hay?" with liberty to indorse the postea with any modus which the jury should find respecting the payment of the said penny. And it was further ordered, that the respondent should be the plaintiff at law and the appellants defendants, and that all further directions should be reversed till after trial, and that the said court of Exchequer should give all proper directions for carrying this judgment into execution. (MS. Jour. *sub anno* 1779, p. 140.)*

CASE 13.—JOSEPH CULLIMORE, and Others,—*Appellants*; JOHN BOSWORTH,—*Respondent* [2d February 1779].

[Where the tithe of milk is due in kind, it must be set out by every tenth morning's meal, and every tenth evening's meal.]

[Decree of the Court of Exchequer affirmed.]

[See post, case 15 of this title; and further as to tithing milk, *Dod v. Ingleton*, Raym. 277; *Hill v. Vaux*, 1 Ld. Raym. 359; *Dodson v. Oliver*, Bunb. 73.] [See note to Case 1, 7 Bro. P. C. 3.]

H. Wood's *Exch. Tithe Causes*, iv. 24.

The respondent was rector of Tortworth in the county of Gloucester, and as such entitled to the tithes thereof, and particularly to the tithe of milk in kind.

* On the trial of the issue at the summer assizes 1779, the jury found that "the tithe penny paid to the vicar had been paid and accepted as a modus," etc. in the terms of the issue.—A new trial was moved for, but refused, and on hearing the cause on the equity reserved, the defendants (the appellants) were ordered to pay the vicar tithes of hay in kind. H. Wood, iii. 530, 531.

The appellants were occupiers of certain farms within the same rectory, and as such liable to the payment of the tithe of milk in kind to the respondent.

[58] The respondent, for some time previous and down to the latter end of July 1771, accepted a composition from the appellant Joseph Cullimore in lieu of tithe milk in kind; and on the 20th of July 1771, gave him notice in writing that the respondent should, on the 5th day of April then next, cease and discontinue to compound for his tithes on the then present terms; and that from and after that day he should expect to receive his tithes in kind as prescribed by law, unless the appellant Cullimore should consent to make the respondent such recompence for them as he should approve. The respondent's demands for the tithe of milk were thought so high by the appellant Cullimore, that he refused to compound any longer; and therefore, on the 9th of April 1772, he gave notice to the respondent in writing, that, conformable to the respondent's said notice of the 20th of July 1771, the appellant Cullimore should set out the tithe milk due to the respondent from him at his usual milking-place or places in the afternoon of the 10th day of April, the then next day, at his usual time of milking; and that the same would in like manner be continued to be set out as it became due.

The appellant Cullimore did, according to his said notice, in the afternoon of the said 10th of April 1762, set out the tithe of milk then milked from his cows, being the 10th meal, computing the same from the night of the 5th of April 1772, being the day which the respondent by his notice had fixed on for the determining of his composition, and making the meal of milk in the morning of the 6th of April the first meal; and the appellant Cullimore having in such manner set out the tithe of milk, the respondent sent for and took the same away.

On the 14th of April 1772, the respondent served the appellant Cullimore with another notice in writing, informing him, that as the last tithe meal of milk set out by him was in the evening, the respondent thought himself entitled to have the next tithe meal set out in the morning, and therefore desired that the next tithe meal of milk which might become due to him from the appellant might be set out in the morning after it became due; and from thenceforth to set out the future tithe meals of milk in an evening and in a morning alternately.

The appellant Cullimore still persisting that it was right and customary to set out the tithe of milk by every 10th meal, and not in the manner demanded by the respondent according to his last notice, he, on the 21st of April 1772, gave notice to the respondent in writing, that he should set out his tithe-milk on every fifth day in the afternoon, and that the next tithe meal of milk would be due on the 25th of April 1772, which should be then duly set out; and the appellant Cullimore did accordingly set his tithe of milk by every tenth meal, computing the same from the time aforesaid, and continued to adhere to such mode of setting it out.

The appellant Limbrick entered upon a certain farm within the rectory of Tortworth about the 5th of May 1773, the same having [59] been occupied by a tenant to whom the respondent had given the like notice for ceasing his composition as to tithes, as had been given to the appellant Cullimore; and the cows of the appellant Limbrick being brought on such lands in the evening of the same 5th of May, he immediately gave notice to the respondent that he had that evening brought his cows on the said lands in Tortworth, and should therefore set out the tithe of milk which would become due to the respondent on the 10th of May in the Floodgate-mead, and should afterwards continue to set out his tithe-milk as it should become due, at the usual milking place; and accordingly the appellant Limbrick did set out the milk milked from his cows in the afternoon of the said 10th of May, as and for the tithe due to the respondent, the meal of that evening being the tenth meal of milk milked from his cows next after they were brought into Tortworth rectory; but the respondent objecting to such mode of setting out tithe-milk, refused to take the same away.

In Trinity term 1773, the respondent filed his bill in the court of Exchequer against the appellants, and which was afterwards amended by making one John Stock a party, for an account of various tithable matters, but chiefly for tithe of milk, alleging the appellants had not accounted with him for the same; and insisting that he was entitled to, and ought to receive, the whole of the milk that was milked from the appellants' whole herd of cows on each tenth natural day, as well in the morning as in the evening, as and for the tenth or tithe of the milk for the whole nine preceding natural days; and that such was the mode in which the appellants were obliged to set out their tithes of

milk for the respondent, and which the appellants not having done or complied with, the respondent by his bill prayed that the appellants might be decreed to account with him for the single value of the tithes in the bill mentioned, and particularly for the tithe of milk during the times in the bill mentioned.

To which bill the appellants put in two joint answers, thereby setting forth, that they had duly set out the tenth meal of milk of the whole herd of their cows, milked at one time, to the time of the respondent's filing his bill; and that the same had been fairly set out for the respondent at the appellants' usual places of milking in their pails; and that the same had been constantly left there for the respondent until the next milking meal, at which time the appellants wanting the use of their pails, were obliged to throw down the milk therein neglected to be sent for by the respondent, which by law the appellants were advised he ought to have done; and the appellants said, that Tortworth was a dairy parish, and insisted that the tithe of milk could not be taken both in the morning and in the evening of the 10th natural day, because in that case calves must on that day go without milk to feed them, and there would be no whey to give the pigs, which in dairy farms was almost the only thing to give them; that a calf at ten days old would drink more milk than one cow could give, and that they were generally kept seven weeks, if not more, for the [60] butcher; and that the appellant Cullimore, who generally milked 40 cows in Tortworth, had often ten or more calves tied up feeding on the milk of his cows, in order to make them fat and saleable, and five or six calves at a time for weaning, each of which calves, before fit to sell to the butcher or turn to grazing, would drink the milk of three cows; and that if the respondent should take the tithe of all the cows on the tenth natural day, the fatting calves would lessen in bulk and value more than they would gain in the four or five following days, for that the farmer could not on the day preceding such tenth day save milk sufficient to feed his calves nor whey sufficient for his pigs, nor would the milk milked in the evening of the ninth day remain in summer sweet and wholesome till the evening of the tenth day; and that it was well known calves intended for the butcher, and fed with new milk, would not feed on skimmed milk or any other than milk newly milked from the cow, and that milk suffered to stand without being moved will have the cream rise on the top thereof, which will not afterwards incorporate together, in consequence whereof, calves intended for the butcher must go without nourishment on the tenth natural day, unless some other food as good as milk on which calves would feed could be substituted in the place thereof, which is impossible; and the appellants likewise insisted, that the legal mode of tithing milk was by setting out every tenth meal of the whole herd, and not by setting out the tenth meal of each cow, computed from the time of its first coming to the pail; and they denied that they pretended the respondent was entitled to the tenth evening's meal only and no other for his tithe, but said the respondent was entitled to the tenth meal whether it happened to be in the morning or evening; and the appellants said, they had set out on every fifth day the tenth meal of their whole respective herds.

To which said answer of the appellants, as well as to the answer of the defendant Stock, the respondent having replied, the appellants rejoined, and the cause being at issue, a great number of witnesses were examined, as well on the part of the respondent as of the appellants; and the appellants fully established by their evidence, that they had legally and according to the custom of the country fairly set out the tithe of milk, being the tenth meal of milk, as insisted by their answer to the respondent, and did in all other respects fully and sufficiently prove their case as stated and relied upon by their said answer respecting tithe-milk.

The cause came on to be heard before the Barons in the month of July 1777, when the court took time to make their decree; and afterwards, on the 17th of November 1777, the court was pleased to dismiss the respondent's bill with costs as against the defendant John Stock; and as to the claim of tithe-milk made by the respondent against the appellants, the court declared, that the respondent was intitled to the tenth morning's meal of milk and to the tenth evening's meal of milk; and the appellants not having set out the same accordingly, it was decreed, that the [61] appellants should severally account for what was due from them to the respondent for the value of every tenth morning's meal and of every tenth evening's meal of milk, milked by the appellants respectively within the said parish of Tortworth, from the time in the respondent's bill mentioned, and should pay to the respondent what should be found to be due from

them on taking such account, together with the respondent's costs of suit to be taxed.

The appellants conceiving the decree to be erroneous, so far as the same declared the respondent entitled to every tenth morning's meal and to every tenth evening's meal of milk, and ordered the appellants to account for their tithe of milk in that manner, and also to pay unto the respondent his costs, appealed from the same, and on their behalf it was urged (A. Wedderburn, J. Mansfield), the mode of setting out the tithe of milk by the tenth meal, insisted on by the appellants, has been long established and universally received : it seems to have been at first introduced from an inclination to favour the clergy, who in ancient times were supposed to be intitled only to a tenth part of every meal of milk, which at every milking they were obliged to send for and take away, and it was therefore much more convenient to have the whole of every tenth meal allotted to them, which they might receive all together at one milking without the trouble of sending more than once for their tithe. That the mode of tithing contended for by the respondent, and established by the decree, that is, by giving to the respondent the whole meal of every tenth morning and every tenth evening, was perfectly new ; instead of giving to the parson the tenth meal, it gives him the nineteenth and twentieth meals, which is not only not warranted by the cases in which the parson has been determined to be intitled to every tenth meal, but is directly contrary to them ; and it seems that the parson might with as great appearance of reason have pretended a right to the milk of the first and twentieth meals, every meal or milking being in itself, as well as in the language of the cases relative to this subject, perfectly distinct, and there being no more connection between the nineteenth and twentieth meals than between the first and twentieth. That the mode of tithing thus established by the decree was not only not warranted by any decision relating to the tithe of milk, but was also contrary to the mode of tithing which prevails with regard to all other species of tithes, and to the general rules by which this kind of property is regulated : the owner of tithes being universally intitled to the tenth part of the subject to be tithed, and nothing more, and the decree here giving to the respondent not the tenth part of the milk, but the nineteenth and twentieth parts. That this mode of tithing by the tenth morning and tenth evening's meals would subject the farmers who have large dairies to most unreasonable hardships, where the tithe of milk is thus taken in kind. Besides other inconveniences to the farmers above pointed out, their calves, which can only be supported by new milk, must every tenth day be destitute of [62] food and sustenance by such a mode of tithing, therefore a parson would acquire a power of exacting an exorbitant recompence for his tithe of milk, or where a farmer had incurred his resentment, of injuring and oppressing him by taking such tithe in kind.

On the other side it was said (J. Dunning, J. Lee), that a rector is entitled, *de jure*, to a full tenth of all milk of cows within his rectory, as well as a tenth of all other titheable matters there arising, and so the court of Exchequer declared. That a mode of setting out a fifteenth, or anything less than the full tenth for tithe, cannot be the true rule of tithing, if the rector be entitled to a full tenth. That a prescription to pay less than a tenth is a void prescription. That when the tenth meal was originally declared to be the right of the parson, it was substituted in the room of the tenth quart or tenth dish, or the tenth part of each meal, it was never meant to give him less than a full tenth of the titheable object ; it was meant to give the tenth in a more convenient and useful manner : it was therefore auxiliary to the general right of a full tenth to secure and not to destroy that right. That the setting out the tenth part of every meal, as also the setting out the tenth of each cow's milk at each milking, have been condemned as founded in inconvenience to the parson, from the great unnecessary trouble and expence it would create by those numerous and frequent tithings. Upon the same principle the attempt of the appellants to make one and the same day to be successively and perpetually the tithing-day of milk for all the farmers in this parish, where near 400 cows are milked daily, was illegal, as it would be productive of vast expence and distress in procuring a proper number of persons, horses, and utensils to be employed by the parson or lay impropiator in collecting and making it into cheese or butter ; and the expence and trouble of collecting and manufacturing it would greatly exceed the value of the tithe-milk, if it could be so collected ; and in the end would make the tithe of milk, which, if set out fair, is a valuable tithe, to be of no worth to a parson or lay impropiator, but would subject him to vexatious suits for not fetching it

away in convenient time after it was set out, though perhaps it was not in any man's power to do so. That the tenth meal and the tenth day has been and ought to be considered as expressive of one and the same idea; and that the tenth of the morning's milkings and the tenth of the evening's milkings have conjunctly been considered as the tenth meal, and so it was determined in the cause of *Dod*, vicar of Chigwell in Essex, against *Ingleton*, in the Exchequer, 31 Car. II. where the court decreed that the defendant ought to pay the whole tenth meal's milk of all his cows every tenth morning, and the whole tenth meal's milk every tenth evening, as and for tithe of milk. There have been also diverse other cases of customary tithings, where, in the general understanding of the country, the tenth meal included two successive milkings, namely, the tenth morning's and the tenth evening's milking, and this sense of the tenth meal was [63] insisted on by the farmers themselves; and all those causes arose out of the heart of dairy counties, viz. Essex, Northampton, and Buckingham; that the produce of an evening's milking as proved in the cause is, on an average throughout the year, at least one-third less than that of a morning, owing to the space of time between the morning's milking and the evening's milking being much shorter than that between the evening and the morning's milking, and to other causes, such as heat of weather, flies, and the like. An evening's milking therefore fails of being a full tenth of the milk milked from the cows at ten successive mornings and evening's milkings, and is no more than setting out a part for the whole, which is void. That the setting out the tenth milking on every fifth day in the morning alone, for the tithe, would be as much too great as an evening's meal would be too little, and would be full as prejudicial to the farmer as the other would be to the parson; and therefore neither of them alone ought to be adopted: but the setting out the tenth morning's milking as the tithe of the mornings, and the tenth evening's milking as the tithe of the evenings, avoids both objections, whether the computation begins in an evening or a morning, and at once establishes an equal general mode of tithing between farmer and parson, founded in justice and equality, the highest equity.

But to this, inconvenience is objected on the side of the appellants. No inconvenience ought to outweigh the justice of the case: the farmer ought not to be permitted to take a manifest unjust advantage to himself, by yielding one-third less than what is due on that account.—It is also objected, that if two successive milkings, viz. in a morning and an evening, are established as the tithe meal, then the farmer's calves on that day must go without new milk, and there will be no whey to give the pigs, which, in dairy farms, is what the farmer depends on. But to this it may be answered, that calves are titheable when weanable; that is, when of an age to live without the dam, on natural food, as grass or hay. The appellants say, when the calves are three weeks old in summer, and one month in winter, they can so live; consequently, till those periods, the whole milk of the cow is applied for the support of its own calf, and none set out for the tithe; hence no inconvenience or want of milk for calves results from this mode of tithing, as the whole milk of each cow is applied for the support of its own calf, until weaned and gone: at which time the cow may be said first to come to the pail, and to be titheable. That the milk of each cow is alone sufficient for raising its own calf; that as the calf advances in age it has daily less occasion for milk, being gradually more and more able to support itself by grass and hay, until it accomplishes the full weanable age to live solely on the same food with the dam. That the calves destined for tithe are always left by the appellants in a state of nature, to subsist on the milk of their proper dams only. The law of tithes, as well as of other things, should rest on principles which are fixed and certain; it is intended to be a rule [64] of conduct equally obvious to the receiver of tithe as to the payer; but if the introduction of new and artificial modes of rearing calves is to vary and alter the parson's right, originally settled on the immutable laws of nature, there will remain no settled law, no known rule of conduct for the parson, but the will and capricious practices of the farmer will constitute the law: and why not in every other species of tithe, if allowed in this? That it appeared abundantly in proof in the cause, that in dairy farms, such as the appellants', calves fall between the months of January and April yearly, and at no other times in the year, except an accidental calf; and all calves are generally gone from the cows by the month of April; so that there are nine months yearly, including the whole of the summer, the most advantageous season for making butter and cheese, when the cows are without any calves, consequently their milk is not then wanted for the support of calves. As to

pigs, it is notorious that they may be, and are supported from the preceding day's milk, as well as from whey, wash, corn, and other such food; and that they never depend on the produce of the day for subsistence, but are provided with a stock of food before hand.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree complained of affirmed (MS. Jour. *sub anno* 1779, p. 171.)

CASE 14.—HENRY HEWITT, and Others, —Appellants; ABRAHAM ADAMS,—
Respondent [19th April 1782].

[Where a composition subsists for tithes, from year to year, such year commencing at Michaelmas, a notice to determine the composition given on the 12th of September, to determine the composition at the ensuing Michaelmas is not sufficient. It is established, that in the case of farms, a tenancy from year to year cannot be determined by the landlord without six months' notice previous to the end of the year; and tithes have in this respect been repeatedly held to stand on the same footing with corporeal property. Such composition with a parishioner by way of retainer is good without deed. Hot-house and green-house plants, and all species of nursery trees are by law titheable, though not the produce of the soil of this country.]

[These were cross causes, and the decretal order of the Exchequer was reversed as to one, and confirmed as to the other.]

H. Wood's *Eccl. Tithe Causes*, iv. 159. by the name of Adams v. Waller, etc. *à contra*.

In the year 1770, James Waller, D.D. was collated and inducted into the vicarage of Kensington in the county of Middlesex, and as such vicar, he became intitled (among other things) to the whole of the small tithes, and other vicarial dues, yearly arising within the parish, or the titheable places thereof.

Soon after Dr. Waller was inducted into the said vicarage, he sent letters to several of the occupiers of garden and nursery [65] grounds in the parish, requesting them to meet him for the purpose of settling what money compositions should be paid him in lieu of the tithes in kind of such gardens and grounds; in consequence of which, meetings were had for that purpose, but no agreement having been made at any of such meetings, Dr. James Waller at Michaelmas 1771, proceeded to take the tithes in kind.

On the 2d of October 1771, the appellants Hewitt, Hutchins, Kirke, and one Williamson, and several other persons, occupiers of nursery grounds in the parish, waited upon Dr. Waller, when after some altercation, it was agreed, that they should pay him a yearly composition of 8s. 6d. per acre for the tithes of the nursery grounds in their respective occupations, which composition was infinitely below their real value. No agreement in writing was entered into, nor was it expressed what continuance such agreement should have. Dr. Waller therefore concluded that such agreement was to remain in force for one year only, and for such longer time as he and such occupiers should mutually think proper; and this composition of 8s. 6d. would probably have been accepted by Dr. Waller during the whole of his incumbency, if the other parties to the agreement had continued to observe the terms of it; but, in consequence of what is afterwards stated, he was obliged, at Michaelmas 1777, to discontinue the same.

About October 1771, a meeting was also had between Dr. Waller and Henry Hutchins, and several persons occupiers of garden grounds in Kensington, and (among others) the defendants in the original cause; at which meeting it was agreed between Hutchins and Dr. Waller, that 6s. per acre should be paid as a composition for the tithes of garden grounds, in lieu of tithes in kind. And it was then agreed, or understood, that such agreement as should be finally entered into by Hutchins with Dr. Waller, should be binding, both as to the quantum of the composition and the time during which it was to be paid, upon all the other occupiers of garden grounds; and should also be binding upon the occupiers of nursery grounds as to its duration.

At the time these agreements were entered into by the nurserymen and gardeners, it was fully understood by them and Dr. Waller, that an usage had obtained in the time of Dr. Waller's predecessors; and, as far as can be traced back by the parish books, in

settling the terms of compositions for the tithes of nursery and garden grounds, for the occupiers thereof, from to time, whenever the vicar was rated for such tithes towards the maintenance of the poor, to pay the sums so assessed upon him; and Dr. Waller agreed to give up the customary fees for burying the poor.

In consequence of this, Dr. Waller being desirous that this agreement should be permanent (although the composition of 6s. an acre was infinitely below the real yearly value of the tithes compounded for, and though the agreement was not so understood), prepared two parts of an agreement in the words and figures following, viz. "Kensington, January 17, 1772. Mem. It [66] is agreed this day between James Waller, vicar of the parish of Kensington, and Henry Hutchins of the said parish, as follows: "the said James Waller agrees to let from Michaelmas 1771, and so long as he shall "continue vicar of the said parish, all the tithes, whether rectorial, with which he is "endowed, or vicarial, to the said Henry Hutchins, of one hundred and sixteen acres "and one-half of land, which the said Henry Hutchins now occupies in the said "parish, at and under the yearly rent of thirty-four pounds and nineteen shillings, "payable quarterly, at the usual days of quarterly payments; provided that if the "present mode of cultivation shall be altered, that then this agreement shall be void; "but so long as the said land shall continue in its present state, and so long as the said "James Waller shall continue vicar of the said parish of Kensington, and Henry "Hutchins occupier of the said land, this agreement shall be binding on each party, "and shall be preparatory to a lease between the said parties. In witness whereof, "the said parties to two parts of this agreement, have interchangeably set their hands "and seals this day and year above mentioned."

The above proviso, for vacating the agreement in case the mode of cultivation should be altered, was thought reasonable, inasmuch as it might happen, that the garden grounds might be converted into nursery grounds, which is not unusual; and in that case, the rate of composition per acre agreed for with the nursery gardeners, being 8s. 6d. it is obvious that the vicar ought not to be compelled to accept the composition of 6s. per acre.

Dr. Waller signed both parts of this agreement, and gave the same to Edward Cooper, his tithe collector, desiring him to carry them to Hutchins, in order that he might sign them, which Cooper did; but Hutchins, after he had read one part over (which he improperly and clandestinely retained), told Cooper that the Doctor was too arbitrary, and that he would not sign an agreement for more than one year. In consequence of which declaration, another agreement was drawn in the words and figures following, viz. "Kensington, January 23, 1772. Mem. It is agreed this day between "James Waller, vicar of the parish of Kensington, and Henry Hutchins of the said "parish, as follows: the said James Waller agrees to let from Michaelmas 1771, to "Michaelmas-day 1772, all the tithes, whether rectorial, with which he is endowed, or "vicarial, to the said Henry Hutchins, of one hundred sixteen acres and one half of "land, which the said Henry Hutchins now occupies in the said parish, at and under "the yearly rent of thirty-four pounds and nineteen shillings, payable within thirty days "after Michaelmas next 1772. In witness whereof, the said parties to two parts of "this agreement, have interchangeably set their hands this day and year above mentioned."—The above rent is after the rate of 6s. an acre.

Two parts of this agreement having been signed by Dr. Waller, were also given to Cooper, for the purpose aforesaid; and Hutchins having fully approved thereof, and refused to execute any agree-[67]-ment for more than one year, signed both parts, one of which he retained in his own custody, and the other was returned to Dr. Waller. Hutchins afterwards paid the composition for his tithes, from Michaelmas 1771 to Michaelmas 1772, according to the terms of the agreement; and neither party, for some time, objecting to those terms, Hutchins continued to compound for his tithes upon the same terms till Michaelmas 1777; and all the other occupiers of garden ground, who had agreed to compound for their tithes at the same rate per acre, and upon the same terms as should be finally settled by Hutchins with respect to his, accordingly paid a like composition per acre, for the tithes of their respective grounds, till about August 1777.

In the month of August 1777, the nurserymen and gardeners thought proper to procure Dr. Waller to be assessed to the maintenance of the poor in respect of his tithes; and, contrary to the former usage and the faith of the agreement, insisted, that the Doctor himself should pay such rate, which obliged him to resolve either to advance

the composition, so as to reimburse himself the charge which they had used to pay, or to take the tithes in kind : and thereupon a meeting between him and the occupiers was held, when there were present the appellant Hutchins, and the said Bernard Williamson, Richard Hutchins, and Matthew Emerson, with several other persons ; at which time Dr. Waller being anxious to preserve the peace of the parish, proposed to let to any such six or more of such occupiers as he should fix upon, the whole of the tithes of that part of the parish in which the garden and nursery grounds respecting the tithes of which such controversy then subsisted, are situate, for such sum of money as it should appear by his books he had before annually received from such occupiers, upon their undertaking to pay the vicar's poor's rates in respect of such tithes, to which proposal they did not agree ; and having informed Dr. Waller, that he was at liberty to let such tithes to any other person who should take them in kind, and that they were determined to give all the trouble they could to any person who should take them, they all left him without coming to any terms.

In about three weeks after the last meeting, Benjamin Bryon and John Reubergal, two of the occupiers, applied to Dr. Waller, and offered to take the said tithes ; but did not finally agree so to do, though Bryon on the same day waited a second time upon Dr. Waller, and then agreed to take a lease of the said tithes, in manner and upon the terms after mentioned.

Dr. Waller, on the 9th of September 1777, caused to be delivered to all the appellants (except the appellant Brown) ; and on the same day caused to be delivered to one Barnard Williamson deceased, then a nurseryman in the said parish of Kensington, and in partnership with the appellant Brown, who then occupied the premises now in Brown's possession, and to several other occupiers of nursery grounds and garden grounds in the said parish, a notice in writing, signed by him, dated the 8th of September, in the words and figures following, viz. " Kensington, September 8, [68] 1777. " Please to take notice that the composition to be paid for the tithes of land in your " occupation, will determine on Michaelmas-day now next ensuing ; and that I have let " such tithes to Mr. Benjamin Bryon from that day, to whom you are hereby desired " to account for the same."

The said Benjamin Bryon also, between the 20th and 27th days of the said month of September, caused to be delivered to all the appellants (except the appellant Brown), and also to the said Barnard Williamson, and the other occupiers of nursery and garden grounds respectively, a notice addressed to them in the words and figures following, viz. " Please to take notice that I shall take the tithes in kind for the land you hold in the " parish of Kensington, in the county of Middlesex, from Michaelmas-day next ensuing " the date hereof. I am your humble servant, Benjamin Bryon. Earl's court, 10th " September 1777."

By indenture of lease of 27th September 1777, made between the said James Waller of the one part, and the said Benjamin Bryon of the other part, the said James Waller, for the considerations therein mentioned, demised unto the said Benjamin Bryon all the tithes and tenths of corn, grain, hay, wool, lamb, milk, eggs, fruits of trees, hemp, flax, and honey, and all other tithes whatsoever, and of what nature or kind soever, yearly arising, growing, increasing, or becoming due and payable within that part of the parish of Kensington which lies on the South side of the King's highway leading from Hyde-park Corner to Counter's-bridge ; and all the titheable places within such part of the said parish which belonged to the said James Waller as vicar of the said parish, to hold unto the said Benjamin Bryon, his executors, etc. from Michaelmas 1777, for six years, at the yearly rent of £280,* to be paid half-yearly as therein mentioned.

The nursery-men and gardeners having refused to set their tithes out, pursuant to the notices received, or to make Bryon an adequate compensation for the same, the respondent, in order to prevent disputes in the parish, called a meeting of the occupiers of nursery and garden grounds, with a view to settle terms of composition for their tithes, between them and Bryon, but without effect ; after which the respondent agreed with Bryon for an assignment of the lease made to him by Dr. Waller, and to pay Bryon for his interest under the same, sixty guineas a-year more than the rent reserved.

Of this agreement the respondent soon afterwards informed the occupiers, and

* This rent of £280 a-year, agreed to be given by Bryon, is more by upwards of £40 than what the Doctor had been accustomed to receive under the old composition.

desired them to meet him at a place in the parish which he mentioned to them; proposing that every occupier should retain their own tithes, upon payment of a composition, after such a rate as would make the amount of all the compositions to be paid, equal to the annual sum he had contracted to pay Bryon. [69] The respondent accordingly attended at such place to receive the occupiers and settle terms with them; but none of the occupiers came except one, who held about four acres, and with whom the respondent agreed upon a composition calculated after the rate before-mentioned.

The respondent therefore, on the 27th September 1777, delivered to each of the appellants and occupiers a notice in writing, signed by him, in the words following, viz. "Sir, Having taken your tithe of Mr. Bryon, I hereby give you notice not to move any "of your crops after Michaelmas-day next ensuing the date hereof, without giving "notice, that the same may be properly tithed; and, for your conveniency, I will "accept of notice sent for me at Mr. Bryon's house in Earl's Court, for to come and "tithe the same. I am yours, etc. Abraham Adams. 27th September 1777."

By indenture, dated 24th March 1778, made between the said Benjamin Bryon of the one part, and the respondent of the other part, the said Benjamin Bryon (after reciting the said indenture of lease) did, for the considerations therein mentioned, assign unto the respondent the said tithes, and all and singular the premises in the indenture of lease demised by the said James Waller to the said Benjamin Bryon, together with the said indenture of lease, to hold the same unto the respondent for the remainder of the said term of six years, subject to the payment of the rent, and performance of the covenants and conditions therein contained.

The appellants refusing to set out their tithes in kind, or to make a reasonable satisfaction for the same, although they never had, during the whole time they had paid their compositions, nor at any of the said meetings, or at any other time till the present suits were instituted, pretended that they were justified under any agreement in not rendering the same in kind; but, on the contrary, had uniformly insisted that the agreements respecting such compositions were to bind only so long as both parties should think proper, the respondent, in Easter term 1778, filed his original bill in the court of Exchequer against the appellants Hewitt and Hutchins, and also against James Rouse, Richard Hutchins, Anthony Shailer, Henry Hutchins, Thomas Badcock, John Reubergall, and William Combes; which bill was afterwards amended, and the appellants Brown, Kirke, Jeffries, Grimwood, and Shaw, were added parties thereto, stating, amongst other things, the agreements, lease, assignments and notices before mentioned; and that the defendants, before Michaelmas 1777, and ever since, were occupiers of certain nursery-gardens, or quantities of nursery and garden grounds, within that part of the parish of Kensington, the tithes whereof were demised to the said Benjamin Bryon, and had had, and taken therefrom, among several other species of titheable matters, divers quantities of trees, shrubs, fruits, herbs, greens, and various other kind of garden stuffs, plants, roots, flowers for sale, pines, melons, grapes, hot-house plants, and flower roots, the tithes whereof belonged to the respondent as [70] assignee as aforesaid, all which they had subtracted and with-held from him. And praying that the appellants and the other defendants respectively, might be compelled to come to a just account with the respondent for the single value of the tithes of all the titheable matters which they respectively, since 24th March 1778, had had and taken from the lands in the said parish in their respective occupations, and might pay the respondent what should appear to be due on taking such account.

In December 1778, the appellants Hewitt and Hutchins, and six others of the defendants in the bill named, by their answer admitted that the said James Waller was presented and instituted into the said vicarage and parish church; and that, as such vicar, he, or his lessee or farmer, was entitled to the tithe of corn, grain, and hay, and to all the vicarial or small tithes, yearly arising in the part of the parish before mentioned, and particularly to the tithe of wool, lamb, milk, eggs, fruit, herbs, garden stuff, plants, flowers raised for sale, hemp, flax, and honey, or a satisfaction for the same, and also admitted the notices delivered to them by the said James Waller, Benjamin Bryon, and the respondent; and that they were, during the time before mentioned, occupiers of certain nursery-ground, garden-ground, and other land within the said parish, and had had and taken divers titheable matters therefrom; and further stated, that the said James Waller having, in the year 1771, been desirous of raising the composition thentofore paid for the said tithes, to 10s. per acre, divers meetings

were had between him and the occupiers of nursery-grounds in the said parish; and particularly that on the 2d October 1771, the appellants Hewitt, Hutchins, Kirke, and one Williamson, who, together with the appellants Jeffries, Grimwood, and Shaw, were the only occupiers of nursery-grounds in the said parish, went, on behalf of themselves and the nurserymen of the said parish, to the said James Waller; and the appellant Henry Hewitt then paid the said James Waller one year's tithe, at the old rate of 6s. per acre, up to Michaelmas 1771, and that the said James Waller then gave Hewitt a bill and receipt as follows: "Mr. Hewitt's ground, all nursery; the Griffins, twelve acres, three roods, sixteen perches; new ground near Mr. Smith's house, two acres, one rood, sixteen perches; a ground where Mr. H. Hewitt's stands, two acres, twenty-seven perches; Tayler's, three acres, three roods, thirteen perches; twenty-one acres, thirty-two perches, £6 6s. Received of Mr. H. Hewitt this 2d day of October 1771, the above sum, in full of all matters that became titheable from the land in his and company's occupation in the parish of Kensington; $\frac{2\frac{1}{2}}{126}$ deducted; 6s. 0 $\frac{1}{2}$ d. overcharged for Mr. Smith's ground; agreed for 8s. 6d. per acre for every year hereafter:" and that, after some conversation between them about the composition to be paid in future, Dr Waller insisted on 10s. per acre; but that they refusing to pay the same, it was at last agreed that the composition for the tithes of all nursery-grounds in the said parish should, for the future, during the incumbency [71] of the said James Waller, be at the rate of 8s. 6d. per acre. And they further stated, that the said Samuel Hutchins, Williamson and Kirke then left the said James Waller, and Henry Hewitt staid behind, and informed the said James Waller, he thought it necessary some memorandum should be made of such agreement; whereupon the said James Waller wrote under the receipt he had given to the said Hewitt as aforesaid, as follows: "Agreed for 8s. 6d. per acre for every year hereafter:" And the said defendants insisted that Hewitt considered the same as a permanent agreement between the said James Waller and the appellants, on behalf of themselves and all other nurserymen within the parish, and that the said agreement was to continue during the incumbency of the said James Waller; and further, that Hewitt paid his composition for tithes at the rate aforesaid, up to Michaelmas 1772; and that the said James Waller gave him a bill and receipt, therein expressing that the said tithes were paid up to Michaelmas 1772, as per agreement. And the said Samuel Hutchins, by the answer further stated, that on the 16th December 1772, he paid the Doctor the composition for his tithes up to Michaelmas 1772, at which time Dr. Waller gave him a bill and receipt, wrote and signed as follows; viz. "Mr. Samuel Hutchins Dr. to the Reverend Mr. Waller on account of tithes due at Michaelmas 1772, To sixteen acres, one rood nursery ground, at 8s. 6d. per acre, as by agreement, £6 18s. 1 $\frac{1}{2}$ d. To ten acres corn land, etc. on the South side of Kensington parish, at 6s. per acre, as by agreement, £3—£9 18s. 1 $\frac{1}{2}$ d. Received this 16th day of December 1772, the above contents, by me James Waller." And that ever since the giving such receipt, he paid up to Michaelmas 1777, 8s. 6d. per acre for the nursery-ground, and therefore insisted on the same as a lease for the term of the said James Waller's incumbency, as he submitted the agreement had, by such payments, been carried into execution on his part.

December 13th, 1779, the appellants, by their answer to the respondent's amended bill, admitted that the vicar was entitled to the tithe of fruits and flowers raised for sale; but said they did not conceive that the vicar of the parish for the time being, was entitled to the tithes of pines, melons, hothouse plants, greenhouse plants, or of any plants or roots growing in hothouses, or of any exotics growing within the parish, or to the tithes of any plants or trees inoculated or grafted, or of any plants, shrubs, trees, or roots, which were purchased and planted in their nursery or garden grounds, and from thence sold out again, without having made any increase in number. And the appellants admitted, that during the time mentioned in the respondent's bill, they respectively occupied certain lands and grounds in the parish, and had had and taken divers large quantities of titheable matters therefrom. And the appellants Grimwood, Shaw, Kirke, Jeffries, and Brown, insisted on the benefit of the agreement mentioned in the answer of Hewitt and Hutchins to the respondent's original bill; and that the same had been entered into by them with the said James Waller, on [72] behalf of themselves and all other the occupiers of nursery grounds in the parish, and insisted that the said Benjamin Bryon and the respondent, before they took the lease of the

said tithes of the said James Waller, had full notice of the said agreement; and all the appellants admitted that they refused to set out the said tithes in kind. And they further insisted, that in case the said James Waller had any right to determine the said composition, the several notices mentioned to have been given for determining the same, and taking the tithes in kind, were short and insufficient notices, considering the crops, to be tithed by the respondent.

In Easter term 1778, the appellants Hewitt, Brown, and Hutchins, together with William Smith, Barnard Williamson, Anthony Shailer, J. Rouse, Rd. Hutchins, Henry Hutchins, John Reubugal, and William Combes, filed their bill in the said court of Exchequer, against the said James Waller, Benjamin Bryon, and the respondent, praying that the said James Waller might be decreed to accept the annual sum of 8s. 6d. per acre, as a composition for the tithes of nursery-grounds, and to perform the agreement so entered into by him with the plaintiffs as aforesaid, and indemnify them from the claims of Bryon and Adams, on account of such tithes, they being willing to pay what, if any thing, was due to the said James Waller, as a composition for the said tithes, at the rate aforesaid.

The said James Waller, Benjamin Bryon, and the respondent, having put in their answers to the said bill, and the cause being at issue, many witnesses were examined on both sides in each of the said causes; and on the 29th January 1782, after three days hearing, a decree was pronounced, whereby it was ordered, adjudged, and decreed, that it should be referred to Francis Ingram Esq. the deputy to his Majesty's Remembrancer of the said court, to take an account of what was due to the appellant Abraham Adams from the defendants, for all the tithes in kind demanded by the plaintiff in his said bill, in the taking of which account the deputy was to make to all parties all just allowances, and all parties were to produce before, and leave with, the said deputy remembrancer, on oath, all books, papers, and writings in their custody or power, relating thereto, and were to be examined on interrogatories as the deputy should direct; and if any special matter should arise in taking the account, the deputy was to be at liberty to state the same to the court as he should think proper; and he was to make his report herein with all convenient speed. And it was further ordered, that the defendants in the original cause should pay the plaintiff his costs of the said suit to that time; and the said original cause was to be continued in the paper of causes, to be further heard upon the coming in of the deputy remembrancer's report, until which time the consideration of the subsequent costs, and all further directions were reserved. And it was further ordered, that the cross bill should be dismissed with costs.

[73] In this decree all the parties acquiesced except the appellants, who seemed to admit what was most clearly proved in this cause by their own acts and declarations, that no agreement was made between any of them and Dr. Waller, which was or was not intended to be permanent during his incumbency, although they had severally, by their answers, claimed the benefit of such an agreement.

However the appellants thought proper to appeal from the decree, insisting (A. Macdonald, L. Kenyon) that it having been admitted that the appellants had, under some agreement, paid Dr. Waller compositions in lieu of their tithes, for every year from Michaelmas 1771 to Michaelmas 1777, inclusive; therefore, although Dr. Waller might have a right to determine the compositions, yet he could not do it without a reasonable notice to the parties. That the notices which were mentioned in the pleadings to have been given for determining such compositions, and for taking the tithes in kind, unless a new agreement was made with the Doctor's real or nominal lessee, were unreasonably too short, and therefore insufficient notices for that purpose. The notices given by the Doctor and his assignee were three in number; the first was given on the 12th of September, the second between the 20th and 27th, and the third upon the 29th of the same month. All these notices affected to put an end to the composition from the Michaelmas-day then next: the interval between the earliest notice and the day on which it was to take place, was not three weeks. It is established, that a tenancy from year to year, in the case of farms, cannot be determined by a landlord without six months notice prior to the end of the tenant's year; and it was conceived that tithes have repeatedly been held to stand, in this respect, upon the same footing with corporeal property. It seemed reasonable, that either party intending to put an end to such a composition, and to pay or require payment of tithes in kind, ought to give a longer notice of that intention, particularly so, where the notice was

given to the tenant, that he might be the better enabled to adapt the mode of his cultivation to the nature of his tenure. It could not be disputed, but that in the exercise of that discretion which every man hath a right to exercise, and every prudent man will exercise, as to the mode of agriculture most likely to be beneficial to him, it is of importance to him to know whether he is to set out his tithes in kind, or to pay a pecuniary compensation in lieu of them; and to conceal an intention to put an end to such composition (continued uninterruptedly for six years, under a supposed agreement) and thereby delude a man into a belief that it is to continue, appears to be an unreasonable and an unfair conduct on the part of the lessor, of which it is presumed a court of equity ought not to permit him to avail himself. It is a fact, that every landlord thinks himself obliged to give a much longer warning to his nursery tenant, when he means to determine his holding, than he does to the common farmer; the usage has certainly been, to give the nurseryman three years notice. If the notices were [74] insufficient the account ought not to have been directed; Dr. Waller and his lessee would then be entitled to the composition only during the litigation, and consequently the respondent's bill would have been dismissed. That the decree directed an account of hothouse and greenhouse plants; but it was conceived that these were not titheable in point of law. If they could be ascribed to any class of tithe, it must be to that of predial tithes, the definition of which is, that they arise merely and immediately from the ground. The plants in question, it is well known, are not the produce of the soil of this country. A climate and compost must be procured to keep them in a state of vegetation. They do not grow in the earth, nor derive their sustenance from thence; some of them cannot by any art be propagated in this country: and as to pine apples, one of the principal exotics that can ever produce profit to the parson by their successful increase, it was conceived they could not be deemed titheable, when it was considered that the skill and labour of several years was absolutely necessary to be bestowed upon them in order to bring them to maturity, independent of the very great expence of hothouses of the different classes, tan, fire, etc.; that they are nurtured in pots from the first moment of their existence to the final period of it: are removed from one succession house to another, as they make their slow approaches to edible perfection, which is only attainable by the skilful management of artificial heat; that they never communicate with the natural earth, and very often in their last stage to maturity, are mere rescients for a few months only in that parish where they are cut; that they are actually a commercial merchandize, are daily bought and sold in their various stages to perfection, and a great part of them actually propagated in one parish, nurtured in the succession houses of a second, and very frequently pushed into fruit, ripened, and cut in a third or fourth parish. Every argument respecting pine apples, might with equal propriety be applied to orange trees, with this additional circumstance, that the orange tree, in the first instance, costs the importer nearly half as much as he sells it for when arrived to perfection, after many years expensive cultivation, exclusive of £30 per cent. duty paid on the importation. These facts were well known and uncontrovertible. It was unnecessary to say, that if the payment of tithes for exotic plants in general (great numbers of which are annually imported to this kingdom at a very heavy expence, besides freight and duty) including pine apples, orange trees, etc. was to be added to the expence of cultivation, there must be an end to that species of horticulture. The appellants further presume that such trees and hothouse plants as actually grow in the soil, but would not grow there without artificial heat, were not the proper subject matter of tithing. And, with respect to all other species of nursery trees, which are bought in one parish, remain but a little time in a second, and purchased by a customer living in a third, and frequently undergo a greater number of removals before they are ultimately planted for use; it was conceived that [75] the respondent was not well founded in contending that they are subject to pay a full tenth of their whole value upon each removal from one parish to another.

But it might possibly be said, for it had been relied on, that there was not evidence of the cultivation of these plants; if that be so, yet surely there was enough to have induced the court to direct the proper officer to inquire into and state the nature of the culture, with the uncommonly heavy expences necessarily attending it, before they proceeded to decree the payment of tithes. The bill (*inter alia*) demanded the tithes of pines, melons, grapes, hothouse plants, etc.; the appellants resisted the demand, and

insisted they were not titheable; the decree had nevertheless directed an account generally, and payment of all the species of tithe demanded. Supposing the court could not take judicial notice of that which all mankind knows, (which is a position not to be admitted, and untrue in many instances,) yet surely private knowledge of a notorious usage might have dictated an inquiry which would have given judicial knowledge. That the decree, by directing an account generally, had declared the respondent to be entitled to every tenth exotic plant, and to every tenth pine apple and orange tree, without the least regard to the original expence of purchase, which sometimes comes to a third, and often to half the expence for which, when ripened or brought to perfection, they are sold for at market, independent of the very large expence of hothouses; an expence totally unknown in the cultivation of any of the predial tithes of this country. Therefore it was submitted, that the decree ought at least to have directed the officer, in taking the account, to have made fair allowances for the very heavy expences peculiarly attending the cultivation of exotics, and not to have decreed an account generally, which, if so taken, must do apparent injustice to the appellants.

On the other side it was said (J. Mansfield, G. Price, J. Scott), that the principles upon which notice is required by law to be given, in order to determine demises of lands or houses, or even of tithes, do not apply to cases of compositions paid for tithes, the payment of such compositions being only, in consideration of law, a mode of rendering the tithes. The true ground upon which the law requires notice to determine such demises is the presumed intention of the parties, the law inferring, from the obvious convenience of notice to the parties, that both intended that if either should be desirous to determine the relation subsisting between them, he should give the other a reasonable notice of his purpose. But the law, considering compositions for tithes as being in all cases equal in value to the tithes compounded for, or rather as tithes rendered in value, though not in specie, deems it equally convenient to the party who is to account for the tithes, to pay them in specie, as to render them in value, and cannot therefore, consistently with its own principles, infer that the parties to such a contract (to render tithes in value and not in specie) intended that notice should be necessary to determine it, unless the parties express that intention in a written [76] agreement. That the want of notice to determine compositions for tithes, is not in fact attended with the inconveniences which the law, by requiring it, meant to prevent in the case of landlords and tenants. That though it had been urged that such notice is reasonably required, inasmuch as if the party who is to account for the tithes had received it, he might have changed the mode of cultivating the land which yields the tithes, it was submitted, as an answer to such an argument, that notice admitted to be reasonable would scarcely, in any case, be received for so long time before the determination of the composition, as to enable the party receiving it to change the mode of husbandry or culture, or the nature of the produce, if he had the power of changing it, which in most cases he has not. In the present case, where the produce of nursery grounds is raised in succession, year after year, notice admitted to be reasonable would not enable the nursery gardener to change the mode of cultivating the ground. That though notice has been formerly stated to be reasonable, that the party receiving it may, if he shall think fit, suffer his lands to be wholly uncultivated, it was presumed that such an argument would not, in modern times, be offered to a court of justice; because it has been settled, by many decisions in former cases, that notice given one week, or at any time before the end of the year for which the composition was made, is notice fully sufficient in law; and in fact the appellants had sufficient notice, from what passed at some or one of the meetings, held previous to the time when the first written notice was given to them, as well as from the written notices, in fact, given of the incumbent's intention to determine these compositions. That if the notices given were not sufficient, yet the appellants having severally insisted, that these compositions could not be determined but with the incumbency of the vicar, had thereby disclaimed the only relation to the incumbent or his lessees, which could possibly entitle them to receive or require notice from either. By this adverse claim they declared, that notice was not necessary. Notice is not necessary to determine a tenancy at will, where the tenant sets up a title adverse to that of his landlord. If any of these temporary compositions had been pleaded as a *modus*, it was apprehended, upon the authority of an adjudged case, that the party pleading it, as such, could not avail himself of the want of

notice to determine it: and a plea of a permanent agreement, during incumbency, is as inconsistent with the relation which makes notice necessary, as a plea of a *modus* is. The appellants did not (and against the real truth so fully established by the evidence in these causes, they could not) consider themselves as aggrieved by so much of this decree as proceeded upon the fact, that these compositions were only temporary. As to the other point, that pines, melons, hothouse plants, greenhouse plants, and exotic plants, shrubs, trees, or roots, purchased and sold again, without having made an increase in number, or which are raised in common gardens or elsewhere, for sale in the market, were titheable in their nature and kind. It might be [77] shewn that the arguments drawn from the expence, difficulty, and artificial mode of raising these productions; and from the nature of the soil, climate, and places, in which they are produced, and urged to prove, that they are not titheable matters, or not titheable in kind, would equally serve to prove various other vegetable productions not titheable, or not titheable in kind, which have always been admitted to be so: and would tend to prove, that the same productions might be reasonably deemed titheable in some parts of the kingdom, which could not be so considered in other parts of it, which would perhaps in a great measure serve to prove, if not much qualified, that most vegetable productions are not titheable matters. That if exotics, as such, are not titheable matters in this country, the vegetable productions of which are believed not to be indigenous, except in some few instances, the land would scarcely yield any titheable matters. That if it is inconvenient that productions of this sort, raised for sale in the market, should be deemed titheable, or titheable in kind (which inconveniences in the present case the conduct of the appellants had occasioned, the incumbent having been always willing to accept a reasonable composition per acre), such inconvenience could be remedied only by an act of the legislature, and could not be removed by those who, in their judicial character and capacities, are only to declare what the law now is. But it hath been long settled, that plants, shrubs, trees, fruits, and roots, planted and raised in nurseries, and sold out again, without having made an increase, are titheable in kind; and it was reasonable that they should be so considered.

After hearing counsel on the following preliminary point, "Whether the notice given was a sufficient notice to determine a composition for tithes?" the following question was put to the Judges, viz. Whether the notice given on the 8th of September was a sufficient notice to determine a composition for tithes from year to year, such year commencing on the 29th of September? when Mr. Justice Gould delivered the unanimous opinion of the Judges present, that such notice was by no means sufficient, whereupon it was ORDERED and ADJUDGED, that the decretal order complained, so far as it related to the first mentioned cause and the present appellants should be reversed, and that the respondent's bill should be dismissed, and that the said order, so far as it related to the second mentioned cause, should be affirmed. (MS. Jour. *sub anno* 1782, p. 383.)

[78] CASE 15.—JOHN FULL, and Others,—*Appellants*; JOHN HUTCHINGS, Clerk,—*Respondent* [13th June 1782].

[The established course of setting out tithe milk is, that the entire meal of the whole herd of cows shall be set forth every tenth day, both morning and evening; and where a custom to the contrary is alleged, it must either be formally pleaded, or supported by such evidence as will be sufficient to warrant a court of equity in directing an issue to try the validity of the custom.]

[Decree of the Court of Exchequer affirmed.]

[See *ante*, case 13. of this title; and note to Case 1, 7 Bro. P. C. 3.]

H. Wood's *Exch. Tithe Causes*, iv. 155.

The respondent was presented to the rectory of Dittisham in the year 1768; in which parish it had been the custom for the rector to agree or compound annually with the several farmers and occupants for such of their great and small tithes, for which no *modus* or other payment in lieu of them had been constantly paid; and the re-

spondent, at his first coming to the rectory, pursued the same mode till the year 1773, when he refused agreeing with several of the parishioners, and insisted on having his tithes in kind; and frequent disputes happening between them as to the mode of tithing, several suits were instituted in the court of the archdeaconry of Totness, and the parishioners not being able to prove the alleged agreement between the respondent and them, the respondent obtained decrees against them in his favour.

The appellants, or such of them as could not compound with the respondent for their tithes, afterwards set out their tithes regularly, and particularly their tithe of milk, according to what they stated to be the customary mode of setting it out as immemorially used in that parish, which was to set out the tenth meal of each cow, as such cow came to the pail, in a fair and regular manner. But the respondent refused to take such tithe in that manner; and insisted, that they should set out the tenth meal of all their whole herd of cows at one and the same time; which the appellants refused to comply with.

The respondent, therefore, in Michaelmas term 1777, filed his bill in the court of Exchequer against the appellants and two other persons (who afterwards died, and were therefore never brought to the hearing); charging them with subtraction of their tithes and a variety of frauds; and demanding, as rector, an account, of all of them, of their respective lands and tithes, both great and small, within the parish, from the month of December 1768, and for payment of what should appear to be due to him on such account, though he had compounded with, and received from them an annual payment in satisfaction of their several tithes, down to the 25th of March 1774, and they had tendered the same to him to the 29th September 1775.

[79] The several defendants answered separately to this bill; and by their answers set forth accounts of their several lands and tithes, as prayed by the bill, from 1768 to 1777, and the particular compositions which they had made for such years as he had agreed with them respectively for a money payment in lieu of tithes, from 1768 to Michaelmas 1774, when he gave notice to them to set out their tithes in kind, and said they had paid or tendered to him different sums for such small tithes as they insisted were covered by moduses or payments in lieu of tithes in kind. And they all said, that they had respectively set out the tithe of milk due from them, according to the immemorial custom used in the parish, which was, by setting out the tenth meal of milk from each cow, as such cow came to the pail, of which they had constantly given notice to the respondent; but he neglecting or refusing to send for the same regularly, the milk had been kept in their pails and vessels till the next milking time, when the pails and vessels being wanted, the tithe-milk was thrown away, for want of proper vessels belonging to the respondent being left to hold the same, and not given to the dogs or pigs as mentioned in the bill, by which means the same was lost to the respondent; but as they had been advised such loss was entirely owing to the default of the respondent or his servants, they hoped they were not obliged to make any satisfaction for the same.

The respondent, on the 21st of June 1779, obtained an order for amending his bill on payment of twenty shillings costs, and in Trinity term filed his amended bill, by which he abandoned every demand for tithes except that of milk, which he charged they had not set out fairly and legally, although they had severally been required so to do: and therefore praying an account might be taken thereof, and that the appellants might be decreed severally and respectively to pay what should appear to be due to him for the single value of the tithes of such milk.

The appellants, on the 29th of October following, put in a joint answer to this amended bill, by which they said, they had set forth in their respective answers to the original bill, a just and true account of the number of milch cows from time to time by them respectively kept, and of the milk had by them respectively in each year to the time of the filing the original bill, which they prayed might be taken as part of this their answer; and denied that either of them ever neglected or refused to set out the tithe of milk fairly and legally for the respondent, as they apprehended; for they said, that the same had been constantly set out fairly and justly in the manner set forth by the appellants in their respective answers to the original bill, and which was as follows, viz. By setting out the tenth meal of the milk of each of the cows kept by the appellants, as such cows came to the pail, or first came in milk, and the tenth meal together of all such cows as happened to come in milk on the same day, which method

was agreeable to the custom immemorially used in the said parish of Dittisham, in setting out the tithes of milk as the appellants had heard and verily believed; and which [80] custom they presumed to be a very fair, just, and reasonable custom; as thereby the respondent would have the tenth meal of milk of each cow of some mornings and some evenings throughout the parish, as the cows came in milk, and thereby the appellants would also daily have milk for rearing calves, and for the use of their respective families; which would not be the case if they were to set out the whole of their milk every tenth day, or the tenth meal of each of their respective herds of cows at once; whereupon the appellants hoped, that such an immemorial custom and usage would be established, and that they would not be decreed to account for the tithes of their milk, which they had respectively fairly set out in manner aforesaid, and which the respondent might have had and taken, but for his own wilful neglect.

The cause being at issue, came on to be heard before the Barons of the court of Exchequer on the 23d of June 1780, when the court ordered and decreed, that it should be referred to the Deputy Remembrancer to take an account of what was due from the appellants for and in respect of the tithe in kind of milk, arising from their respective cows by them kept within the said parish of Dittisham, during the time demanded, by the respondent's amended bill. And also, that the appellants should pay the respondent the costs of the suit to that time, to be taxed by the said Deputy Remembrancer.

The respondent's costs were accordingly taxed at £128 3s. 4d. which sum the appellants had been obliged to pay, though the costs attending that part of the cause which related to the tithes claimed by the original bill, and which the respondent afterwards relinquished and gave up, amounted to near one-half of the bill of costs, and which ought not to have been charged or allowed to the respondent.

The appellants therefore appealed from the decree, insisting (G. Hardinge, T. Erskine) that customs of setting out all tithes have almost constantly resulted from experience of mutual advantage to the owners of the tithe and occupiers of the titheable property; and particular circumstances of extent, of situation, etc. etc. will make those customs which are upon that principle of mutual advantage reasonable in one parish, and unreasonable in another; it is therefore almost impossible for those who live at a distance from such parishes, and are not apprised accurately of these circumstances, to exercise a fair judgment upon the legality or illegality of the local custom; for which reason it appears to be necessary, in all cases where the legality of a custom is disputed in courts of equity, that an issue at law should be directed, and the fact ascertained by a verdict in the county which is the scene of dispute. With a view to this principle ecclesiastical courts have been, from the earliest periods of our law, restrained by prohibition to their proceedings, when customs or moduses are in dispute; their trials not being by juries. Such being the known practice of the common law courts in their controul over the ecclesiastical courts [81] (the practice in which and courts of equity is very similar), courts of equity should impose a similar controul upon themselves. That courts of equity have decreed against customs to pay less than a tenth part in kind as unreasonable, being only a part of the tithe, in lieu of the whole. In the present instance no such custom was averred; the appellants set out in their answers a custom of paying a tenth part; they had given evidence of such custom, and of the fact that they punctually observed it in a fair and just manner. There was no evidence to the contrary, nor any circumstances of fraud alleged on the part of the respondent; which he would not have omitted, had there been any foundation for such a charge. That the tenth part of almost every species of small tithes is due by law, *toties quoties*, as it may arise; nor can a doubt be entertained but that milk daily renewed, the tenth part of each day's produce, if not of each meal, was originally due for tithes. But mutual ease and convenience, in different parishes, have established a variety of customs in setting out the tithes of milk, and of moduses in lieu of them. In many parishes every tenth morning's meal for a certain portion of the year, and every tenth evening's meal for the remainder of it, is the custom. In others every tenth meal; in some a certain quantity of cheese, and in others a very small sum has been taken in lieu of the tithes of milk. In the present case every tenth meal of each cow is the custom, computed from the time she comes in milk, which is a determinate period from the birth of her calf; so that no fraud can be put

in practice to put all the tithe milk into an evening's meal ; but the same is duly set out mornings and evenings ; and nothing appears in the present instance but that as many meals of milk were set out in the mornings as in the evenings. That the present custom seemed to be supported by the constitution of Archbishop Winchelsea, that "the tithe of milk shall be paid from the time of its first renewing," etc. Lindwood, 199. The renewal of milk is certainly from the usual time of milking after a cow has had a calf ; and this custom was what the appellants claimed, and what they had punctually observed. It was a custom founded not only on this constitution, but on mutual convenience to the respondent and the appellants, the parish lying within very narrow limits, and the several farm houses in it lying at a distance extremely convenient for the tithe-gatherer to collect the tithe-milk from all of them. From this custom, therefore, the respondent and the appellants derived mutual benefit, each receiving a daily constant supply of so necessary an article as milk ; and it occasioned less trouble to the respondent to send round every day after his tithe milk, than for the generality of farmers to tend and milk their cows. And as to the throwing away the milk at the next milking season after setting it out where the vessels are wanted, it is a custom well known to be warranted by judicial determinations. That the present decree was supposed to be founded on the recent case of *Dr. Bosworth*, which it was contended was not in any respect [82] similar to this. In that case no particular custom was claimed or proved ; in this a custom was the subject in dispute, and had been proved. In that case many circumstances of deceit and unfair practice were evident ; in this not a circumstance of that kind appeared. In that case it was proved, that a full tenth part was not set out ; in this proof had been given that a full tenth had been set out. There was no similitude therefore between the two cases.

It is a circumstance attendant upon tithes in general, and on those of milk in particular, that they cannot be collected without some degree of inconvenience, and whoever becomes entitled to them must accept them liable to those inconveniences. It was demonstrable to those who knew the situation and extent of the parish of Dittisham, that the mode of setting out the tithes of milk which the respondent expected by every tenth day's milk, must be attended with great inconvenience, and much more than would arise from the custom which the appellants claimed ; because it was clear that every rector would become entitled, on the tenth day after his institution, to all the milk in his parish ; so that in a parish of large extent, and in which there are large dairies, and even in the parish of Dittisham, he would find much trouble in collecting all the milk on every tenth day ; his dairy should be as large as all the dairies in his parish ; it would be necessary for him to have as many pans or vessels to contain his milk as all his parishioners together : in short, on every tenth day he would be deluged with milk, and upon the intervening days he would have none. The inconvenience which would attend this mode of setting out the tithes of milk as to the appellants, by depriving them of milk for their calves, and other purposes of domestic use, was too obvious to be pointed out ; and it could be of no other advantage to the respondent to establish the mode of tithing which he demanded than to give him a power of demanding an exorbitant price for the tithe of milk, or of taking it in kind from those who had incurred or might incur his displeasure, in a manner the most inconvenient and oppressive.

As to costs, though discretionary in the court, they are never given where the party either deserts or fails in proof of the right which he himself states and claims. In the present case the respondent, by his original bill, claimed all tithes whatever arising within the said parish of Dittisham, and required an account from the appellants of the respective lands they held in the parish, and an account of the different species of tithes and satisfaction for them, from the time of his institution, though he had compounded with them, and had actually received from them regular payments in lieu and satisfaction for such tithes. The appellants were therefore obliged to put in separate answers to this bill, which, from the accounts they were to set forth, made them very long, troublesome, and expensive : and the respondent, soon after the coming in of their answer, amended his bill, and left out every claim of tithes, except as to the tithe of milk ; and on their [83] answer to the amended bill, the respondent replied to that answer alone. It was therefore apprehended, that the court ought not to have given the costs generally, but should have directed, either that the respondent should pay to the appellants the costs which he had thus unnecessarily and unjustly thrown upon

them, or should have directed the master, in taxing the costs, to confine himself to those on the amended bill alone.

On the part of the respondent it was said (Ll. Kenyon, J. Madocks, J. Lloyd), that the established course of setting out tithe-milk is, that the intire meal of the whole herd of cows should be set forth every tenth day, both the morning and the evening's meal. But the custom, as laid in the appellants' answer, was unreasonable and illegal. It would be so expensive and inconvenient for the respondent to collect the tithe-milk according to the supposed custom that it would not be worth collecting. If the custom was good in law, yet it was not so precisely and formally pleaded as was necessary and required by courts of law and equity. But if the custom was good and well pleaded, yet it was not supported by evidence; nor was there evidence sufficient given in support of it to warrant the court to direct any issue respecting it.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed, with £100 costs. (MS. Jour. *sub anno* 1782, p. 834.)

CASE 16.—BROWNLOW LORD BROWNLOW,—*Appellant*; JAMES DEVIE, Clerk,—*Respondent* [2d July 1782].

[Under what circumstances a new trial of an issue, directed to try a vicar's right to tithes, ought to be refused, especially where the greatest and most material part of the evidence is in writing, of which the court directing the issue was a proper judge, and where there is no reason to suppose that any further light can be thrown upon it by another reference to a jury.]

[Order of Lord Thurlow, C. affirmed.]

[This report was prepared by Mr. Brown previous to the work's coming into the present Editor's hands. It affords a remarkable instance of apparent contradiction between the state of the case and the judgment; arising (in this as on other occasions) from the mode of selection of the materials from the printed cases.—Some very objectionable passages have been now struck out.]

The parish of Stanground is situated partly in the county of Huntingdon, and partly in the Isle of Ely and county of Cambridge. A considerable part of it is within the great level of the fens, known by the name of the Bedford Level; and within this parish is the vill or hamlet of Farcet.

The church of Stanground was appropriated to the monastery of Thorney, one of the greater monasteries dissolved in the reign [84] of King Henry VIII. and, on the dissolution, the manor and rectory impropriate, with other possessions of the monastery, came to the Crown, and were afterwards granted by several letters patent, in the reign of Queen Elizabeth, to Sir Walter Mildmay, Knight, then Chancellor of the Exchequer, whose right and interest under these grants, at the time of his death, having descended to his grand-daughter, became vested in her son Mildmay Earl of Westmorland; and in this family they continued till 1674, when they were purchased by Sir John Brownlow Baronet, an ancestor of the appellant, and conveyed by Charles Earl of Westmorland to the use of the said Sir John Brownlow, his heirs and assigns for ever.

From the time of this purchase the estate has continued in his family without interruption; but as soon as the appellant came into possession, a large quantity of rectorial tithes were demanded by the respondent, who claimed title, as vicar of Stanground, to tithes in kind of a vast extent, and, among others, to the tithes of all the corn and grain arising from three thousand acres and upwards, of lands which he alleged to have been formerly part of a fen called Farcet Fen. The respondent was in possession of all such vicarial tithes and profits of the vicarage as had been at any time enjoyed by any of his predecessors. The tithes which he newly claimed had been constantly and uniformly enjoyed by the appellant's family from the time of their purchase in 1674, and by the Westmorland family before them; and the possession of the several suc-

cessive impropiators could be clearly traced much higher than a century, as well from records in courts of law, as from depositions of witnesses recorded in the court of Chancery.

The grounds of the respondent's claims were totally unknown to the appellant, who was advised that, as the right of the impropiator to all tithes whatsoever is founded on the common law, his title to the tithes in question was so secured by length of possession under judicial decisions, that any attempt to disturb it must be ineffectual. Some of the lands, from which tithes were now claimed by the vicar, were in the hands of the abbot and convent of Thorney at the time of their dissolution, and had, ever since, been enjoyed by the owners tithe-free, without any claim from any impropiator or vicar. From other lands, moduses in lieu of several species of tithes had been immemorially paid. The claims of the respondent must therefore affect the property of many inhabitants in so large a parish; and as tithes are due, *communi jure*, to the rector, who has not called in question any of the before-mentioned exceptions, which have been long enjoyed by the parishioners, and as a vicar has no right by the common law, the respondent ought to shew some other clear and unexceptionable title in support of new claims; but on the contrary he supported them by conjecture, and facts so obscured by antiquity, that they could neither be understood with accuracy, nor proved with any reasonable degree of certainty. And most of his new claims were inconsistent both with law and evidence.

[85] For better understanding the proceedings which had been had in support of these claims, it might be necessary to state the provisions which appear to have been made for the vicarage.

No original endowment of this vicarage was extant, but from some entries the vicarage appeared to have been endowed in 1402 of all tithes, except corn, grain and hay, wool, lamb, calves when payable in kind, and such other tithes as are comprehended by the words *garbarum cujuscunque generis*, and *bladorum*. By a subsequent endowment in 1444, it was augmented by the gift of a third part of tithe-corn *in campis de Farshed*.

No further endowment appeared; but from two obscure deeds under the hand and seal of Sir Walter Mildmay, and from an ancient yearly payment of £25, the respondent set up claims which did not appear to have been made by any of his predecessors. This annual payment has been made for a great number of years, and was supposed to have commenced in 1640, in lieu of some tithes under the first endowment; but it could give no colour or pretence to support the respondent's new claim, for reasons after more particularly mentioned.

The above-mentioned deeds bear date 24th October 1588, and 11th April 1589. The construction of them at this distance of time was difficult and uncertain; but the intention of them appeared to be, to augment the vicarage by a grant of the tithes of wool, lamb, and calf within the limits of Farcet, and to give all the tithe-corn within those limits instead of the third part of the tithe-corn of which the vicar had been endowed, with an exception of certain lands described in the deeds. A larger augmentation of the vicarage had never been claimed by any former vicar under these ancient instruments; but if the respondent was now at liberty after such a distance of time to open his extensive claims from an era of such remote antiquity, without regard to a long possession, many questions of law, as well as of fact, must arise on these ancient deeds. They bear date above 70 years before the restoration, when the case of vicarages, which could only be augmented by endowment, came under the consideration of parliament, who, by statute 17 Charles II. chap. 3, gave a power to impropiators which they had not before, to augment vicarages by a gift of tithes or a settlement in trust. If Sir Walter Mildmay had such a power in the reign of Queen Elizabeth, his grants could not operate as a legal execution of it; for though he might enable the college to take for their own benefit, yet he could not empower one corporation to take in trust for another corporation. If such a trust could be established under these grants, the difficulty of ascertaining what tithes were granted, and what were excepted, involved in it many questions of fact blended with questions of law, both as to the granted and the excepted tithes. The limits of Farcet, within which the granted tithes were confined, and the lands which were excepted, were well known at the time of the grants, but since that time the state of the country has been so changed, that neither the parochial limits at the time [86] of the grant, nor the identity of all the excepted

lands, can be ascertained by any other possible means than enjoyment; for it appears from ancient deeds, and from the declaration of the parliament, that the boundaries of lands in the Bedford Level were unknown when the act was made for settling the drainage of them, and every attempt to ascertain them from acts done since is founded in injustice, and expressly repugnant to the sense of the Legislature.

The unreasonable extent of the claims made by the vicar would be better understood by some account of the lands out of which he now claimed tithes of every denomination. Of these lands 940 acres were given by the parliament to the undertakers of the great work of draining the level, and they are now known by the name of the Adventurer's Lands. Other lands are called King's Delph, Eight Roods, Conquest Lands, New Meadow, Milby, The Pingles, and 1300 acres now known by the name of Farcet Common Fen. From the changes and alterations of these lands by drainage and other improvements, the ancient and modern state of them cannot admit of any comparison, from which any arguments can be drawn to guide any judgment on facts on which such an antiquated claim depends. Possession must be the best guide; and as there had been a long continued and adverse possession in the impropiators after several trials at law, the appellant was advised, that the following account of decisions in adverse suits, and constant possession under such decisions, could leave no room for doubt.

In the year of 1663 was made the statute of 15 Charles II. chap. 17. intitled, an act for settling the draining of the Great Level called Bedford Level; and about two years afterwards, as appeared by old depositions; viz. about 1665 the Earl of Westmorland, the impropiator, obtained a verdict in an action for tithes against the tenants of some of the improved lands within this level; in 1669 another verdict was obtained by the Earl in an action on the statute for subtraction of tithes of corn for land in the same level; and there was proof from old depositions, of collusive agreements between the vicar and the owner of those lands to defraud the Earl, the then impropiator, and to prevent the recovery in these actions. No other claim was made on the part of the vicar; but about thirteen years afterwards, whilst the then impropiator, William Brownlow Esquire, the appellant's great grandfather was in his minority; viz. in 1682 an action was brought to trial at Huntingdon, in which Emanuel College were plaintiffs, against the tenant of other lands in the same level, for subtraction of tithes of corn in the hamlet of Farcet. This action was defended by the guardians of the infant impropiator, and the plaintiffs were nonsuited. The record of this nonsuit, and of the judgment entered for the Earl on the verdict of 1669, could be produced, and it appeared from depositions and otherwise, that the nonsuit was on the merits.

[87] In 1684 depositions of old witnesses were recorded in Chancery, by which the following facts appeared. That the lands called King's Delph, Eight Roods, Milby, and New Meadow were part of the demesne lands, and had long been leased as such, that the tithes of these lands had been constantly paid to the impropiator, and that they were the lands for which the college claimed tithes of corn in the last mentioned action. That the tithes of other lands in the Bedford Level were constantly paid to the impropiator, and that the verdict in 1665 was for the tithes of some of these lands. From the time of the nonsuit in the last-mentioned action, all the tithes in the Bedford Level were constantly received by the impropiator, without any subsequent claim by the college or vicar to any of them, except the tithes of the before-mentioned 1300 acres, which after the year 1682, were improved under the act of Charles II. As to all other lands within the level, the appellant relied on constant and uninterrupted possession since the last-mentioned nonsuit in 1682, without any colour for disturbing such a possession or reviving the former suits, which have been so long silenced and buried in oblivion.

Soon after the above-mentioned 1300 acres of land were improved, several actions for tithe of corn were brought by Emanuel College against the tenants of the newly improved lands; in 1685 one of the said actions was brought to trial at Huntingdon, in which the college were nonsuited. The record of judgment on this nonsuit could likewise be produced.

From this time the claim of the vicar to tithe of corn out of any lands in the Bedford Level under the grants of Sir Walter Mildmay was finally relinquished, and no traces appeared of any further steps to assert it; but still, as the claim of the vicar to tithes out of those lands under the two endowments remained disputable, about three years after the last-mentioned action, an agreement was entered into for the sake of avoiding

further suits concerning those tithes, viz. that the vicar should make a lease of such tithes as he was entitled to, to the impropiator, who should pay £50 a-year for the same to the vicar; and accordingly, in 1688, a lease was made by Joshua Eadcliffe, the then vicar, to William Brownlow, esq. the then impropiator, of such tithes as were claimed by the vicar, the right to which was then undecided, at the yearly rent of £50. The lease was lost, but that there was such, appeared by recital in a subsequent one. And in 1691 another lease was made between Samuel Doughty, clerk, vicar of Stanground, of the one part; and William Brownlow, esq. Lord of the Manors of Stanground and Farcet, of the other part; whereby the said Samuel Doughty leased to the said William Brownlow all tithes whatsoever, due or belonging to the said Samuel Doughty as vicar, out of the fen called Farcet Fen, containing 2240 acres or thereabouts, for five years, if the said Samuel Doughty should so long continue vicar of the vicarage aforesaid, under the yearly rent of £50.

[88] The yearly rent reserved by these leases continued to be paid to the several successive vicars, without any renewal of the said lease in writing, for many years; and after sixty years and upwards from the time of the first lease, which was lost, and when nothing more was known of the origin of this agreement, but from tradition and uncertain report, the agreement was again confirmed by the renewal of the said lease; and accordingly, in 1751, by indenture between William Whitehead, clerk, vicar of Stanground, of the one part; and the Right Honourable Sir John Brownlow, baronet, Lord Viscount Tyrconnel, impropriate rector of the said parish, on the other part; the said William Whitehead leased to the said Lord Viscount Tyrconnel all tithes due or belonging to him as vicar, out of the said 2240 acres in the former lease mentioned under the said yearly rent of £50.

Though it plainly appeared from these leases, and from the nature of the case, that the old agreement was an amicable compromise of the uncertain right to such tithes as the vicar claimed in his own right out of those lands only which are specified and described in both leases, and that there was no ground to consider them as leases of any other tithes, of which a valid lease in law could only be granted by the college, whose legal title had been manifested by their being plaintiffs in the actions, yet these leases were now insisted on by the respondent as an acknowledgment of his right to all tithes whatsoever out of all the other lands not comprised in the leases, notwithstanding the judgments in the several actions, and the long possession against his predecessors. Therefore in January 1774 the respondent filed his bill in the court of Chancery against the appellant and several occupiers of the above-mentioned lands, for all tithes in kind, and prayed that his title to such tithes might be established against the appellant.

To this bill the appellant put in a plea and answer; but the plea being informal was over-ruled.

The respondent therefore amended his bill, and after stating the endowments and grants, and the leases above-mentioned, and a great number of historical facts concerning the ancient boundaries of the vill of Farcet, and of the fen called Farcet Fen, concluded with the prayer above-mentioned.

The appellant put in his answer to the amended bill, and being an entire stranger to most of the facts therein alleged, he referred to such proofs as the respondent could make of them, and submitted to the judgment of the court his title as impropiator, and whether the respondent ought to be aided in reviving dormant claims.

The cause was heard before the Lord Chancellor Thurlow on the 7th, 9th, 10th, 11th, and 13th of November 1778, and on the 5th December following; and then his Lordship was pleased to direct three issues in a feigned action to try the vicar's title under the said endowments and grants; which issues were varied on subsequent motions made by the respondent, and were divided into six, viz. 1st, Whether the respondent as vicar of the said parish [89] of Stanground cum Farcet, or the master, fellows, and scholars of Emanuel College in Cambridge, in trust for him, was or were entitled by endowment, prescription, grant, or otherwise, to all other tithes (except the tithes of corn, grain, hay, wool, lambs, and calves) growing, renewing, or accruing in, upon or out of all or any and which of the lands in the said parish, which had been in the occupation of the several defendants to the said bill respectively, at any time since Lady-day 1773? 2d, Whether the respondent, as vicar of the said parish of Stanground cum Farcet, or the said master, fellows, and scholars, in trust for him, was or were entitled by endowment, prescription, grant, or otherwise, to the tithes of wool,

lambs, and calves growing, renewing, or accruing in, upon, or out of all or any and which of the lands in the said parish, that had been in the occupation of the several defendants to the said bill respectively, at any time since Lady-day 1773? 3d, Whether the lands called King's Delph, Eight Roods, Conquest Lands, New Meadow, Milby, The Pingles, Berkeley's, or The Adventurer's Lands, and Farcet Common Fen, out of which the respondent by his bill sought tithes, lay within the vill, town, or hamlet of Farcet? 4th, Whether the respondent, as vicar of the said parish of Stanground cum Farcet, or the said master, fellows, and scholars, in trust for him, was or were entitled by endowment, prescription, grant, or otherwise, to the tithes of corn and grain growing, renewing, or accruing in, upon, or out of the lands which had been in the occupation of the defendants to the above-mentioned bill respectively, in the vill, town, or hamlet of Farcet, at any time since Lady-day 1773? 5th, Whether the respondent, as vicar of the said parish of Stanground cum Farcet was entitled by endowment, prescription, grant, or otherwise, to one-third part of the tithes of corn and grain growing, renewing, accruing in, upon, or out of the lands which had been at any time, since Lady-day 1773, in the occupation of the defendants to the said bill respectively, in the vill, town, or hamlet of Farcet? And 6th, Whether the said master, fellows, and scholars, in trust for the respondent as vicar of the said parish of Stanground cum Farcet, were entitled by endowment, prescription, grant, or otherwise, to two-third parts of the tithes of corn and grain growing, renewing, or accruing in, upon, or out of the lands which had been at any time, since Lady-day 1773, in the occupation of the defendants to the said bill respectively, in the vill, town, or hamlet of Farcet?

The said issues were tried at the summer assizes 1780, at Huntingdon, before Mr. Justice Willes; and the jury, under the directions of the judge, found the following verdict:—they found the first issue generally for the respondent. They also found the second issue for the respondent, except as to Buristed Farm. They also found the third issue for the respondent, except 60 doles of King's Delph, which they found to be within the hamlet of Stanground. They also found the fourth, fifth, and sixth issues generally for the respondent.

[90] In Michaelmas term following the appellant applied to the court of Chancery, by motion, that the said verdict should be set aside as contrary to law, and also to evidence; and that a new trial should be had of the said issues; and the matter of the said motion being argued on several days, and for the last time on 5th March 1781, stood over for judgment: and on the 28th May 1782, the Lord Chancellor was pleased to reject the said application, and refused to make an order for a new trial of the said issues on any of them: which refusal the appellant conceived to be erroneous, and that he was aggrieved thereby, and therefore appealed from the order, and hoped that a new trial would be directed, insisting (G. Hill, C. Ambler), that the verdict was contrary to the truth and justice of the case in many material parts; and, as to some of them, found under the misdirection of the Judge in matters of law: for with respect to the respondent's right to the tithe of corn, it appeared on his own shewing, by his title under the last of Sir Walter Mildmay's grants, that his right was to tithe-corn in the hamlet of Farcet, with an exception, and that too very extensive; but the jury had found his right to tithe-corn in that hamlet, without any exception whatsoever. The injustice of the verdict in this material part of the case was so apparent that the vicar now, for the first time, resorted to the extraordinary expedient of attempting to maintain that the exception ought to be expunged out of his own title deed, as being inserted by mistake of the drawer. This never was thought of till near 200 years after the date of the deed, and could not be worthy of an answer, after the admission of the exception in the words of it both by the college and the vicar, recorded in their answers in Chancery in 1685, which were read at the trial; and the only question then was, as to the quantity of lands comprized in the exception. That the jury had found that all the lands in the third issue, except 60 doles of King's Delph, lie in the hamlet of Farcet; and had found, on other issues, that the vicar was entitled to tithes of corn throughout the hamlet of Farcet; so that as the verdict now stood, the vicar was found to have a right to tithe-corn over all the lands in the third issue, except the 60 doles in the King's Delph: whereas it was not proved that all those lands are in the hamlet of Farcet; and as Stanground is the mother church, the presumption is, that lands in that parish are not within the chapelry or hamlet, unless proved so; but the Judge not only admitted modern evidence to prove lands to lie in the hamlet, which by the true construction of

the statutes 15 Charles II. chap. 17. sect. 6th and 52d. and 17 George II. chap. 37. ought not to have been admitted, but also allowed various papers not signed by any person, as evidence, though the same was opposed by the appellant's counsel. And with respect to Farcet Fen, it appeared by the recital in the last of the vicar's leases, that only part of it lies in the hamlet of Farcet; and yet the jury found the whole to lie there, and thereby rejected that part of the recital, notwithstanding other parts of that recital were ruled by the Judge to be decisive as to other matters against [91] the appellant; and it was clearly proved by the Crown Receiver's accounts, and by royal grants of Stanground Manor, and also by old depositions, that Farcet Fen was part of the demesnes of the Manor of Stanground, and yielded some profit, even before the drainage, to the Lord of that Manor, notwithstanding it was subject to rights of common; and therefore such part of it as lies in the hamlet of Farcet is within the exception in Sir Walter Mildmay's last grant; and by the common law the wastes and commons of every manor, whether they afford profits to the Lord or not, are part of his demesnes; but the judge was of a contrary opinion, and declared to the jury that Farcet Fen was not part of the demesnes, because not reserved (as he said) for the Lord's use; which was a misdirection in point of law, and also in matter of fact. And not only Farcet Fen, but such other lands in this issue, except the old Conquest Close and some of the Eight Roods, and some few other small pieces which were proved to be in the manor of Farcet, appeared by evidence of enjoyment and acts of ownership by the Lords of Stanground, and by reputation and otherwise, either to be part of the demesnes of Stanground, or else to be part of the other lands in the exception; and therefore as to all these the verdict as found, without any exception, was unjust, even supposing the right to the tithe-corn in question was now open to litigation. But the right to tithe-corn in most of the lands in the third issue had been often contested, and sometimes decided by verdict in favour of the rector, and at other times ended in nonsuit of the college; which nonsuits by old depositions and otherwise appeared to have been on the merits, without a single instance, till now, of any suit wherein the rector failed, or wherein the vicar or college, or any other opposing the rector, ever succeeded. That the rectors had ever since enjoyed the corn-tithes of these lands without any demand by the vicars; for as to part they were not included in any of the leases made by the vicars to the rectors; and as to those lands, the tithes of which were included therein, the leases were in such terms as did not extend, nor could be meant to extend, to any but such small tithes as the vicar was entitled to. And as to the payment of £25 a-year, that could not be for the corn tithes in litigation, because it was admitted to have commenced before, and to have continued during all former litigations, as well as ever since; and besides it was too low for a composition commencing any thing like so late as 1640, for all the tithes now claimed by the vicar over such extensive tracts of land; and therefore it was submitted, that the claim of the respondent, as to tithe-corn of any of those lands, was concluded and barred by former determinations, and constant enjoyment under them; but supposing the length of time not conclusive against the respondent, then by the same rule it could not be so against the appellant; consequently the validity of the grants was still open to all legal objections, and several such objections were insisted on at the trial as proper to be argued, if [92] the case was not concluded; but the Judge would not enter into any consideration about them.

That part of the parish which lies in Cambridgeshire ought to have been excepted in the verdict on all the issues; because the only written evidence on the first issue was not an original, but an entry of the substance or import of an endowment, which made it necessary, in support of the vicar's title, to prove enjoyment under it, which he did by two or three living witnesses who had collected small tithes; but all of them agreed, that no tithes of any kind whatever had been collected or demanded by, or were due to the vicar for that part of the parish which lies in Cambridgeshire; and both Sir Walter Mildmay's grants were in such terms as, by legal construction, did not extend out of the county of Huntingdon, and the construction was confined by usage; and therefore the not excepting that part of the parish which lies in Cambridgeshire out of the verdict on all the issues, was manifestly unjust, by extending the vicar's claims over large tracts of land, of which there was no enjoyment since the creation of the vicarage in any of the respondent's predecessors.

It appeared at the trial, by the testimony of living witnesses, and by the old deposi-

tions, that New Meadow is discharged from all tithes, in consideration of a tithe acre immemorially enjoyed by the rectors in lieu of the tithes thereof; and as the locality of that meadow made part of the third issue, and it was found to be in the hamlet of Farcet, therefore the same and the tithe acre ought to have been excepted in the verdict on all the issues. That the construction of the words *garbarum cujuscunq*, *generis*, and *bladorum*, *senique*, in the exception of tithes in the endowment of 1402, was misunderstood at the trial. It was then that by the legal import of the word *garbe*, tithes of wood, as well as of corn and grain, are included, unless restrained by usage, or the context; but in this case there was no instance proved of payment of tithe-wood to any vicar; and the context, so far from restraining the sense of that word, plainly shewed it was intended in the largest sense; yet, as the verdict now stood, the vicar was entitled to tithe-wood, contrary to an established principle of law, "that a vicar cannot be entitled to any particular species of tithe, otherwise than by endowment or prescription, and that all others by law belong to the rector." The respondent's bill was to establish his right as vicar, against the appellant the rector, to all tithes charged to be due to him by the bill, of which tithe-wood was one: and therefore, whether there was now any titheable wood in the parish or not, or whether the charge in the bill was true or not, Farcet Fen was anciently part of the King's forests, and known by the name of Farsheid Ferry, yet as the bill was to establish the vicar's right to all the tithes mentioned in his bill, the right to tithe-wood ought to have been excepted out of the verdict on the first issue. That the Judge neglected taking any notice of the word *bladorum* in the exception; though it was [93] at the trial submitted, from the obvious import of it, as well as from the context, to mean tithe of grass or corn depastured by cattle, or cut green and before ripe, and given to cattle: which includes agistment tithe, and also tithes of grass and of corn, vetches, tares, and other grain or pulse when cut green and given to cattle: and therefore these species of tithes ought also to have been excepted out of the verdict on the first issue. That the respondent's right to tithe-corn in any particular part of the parish depended on two facts: the one, that such part lies within the hamlet of Farcet, the other, that it is not part of the demesnes of the manor of Stanground, or of the other excepted lands. The respondent found it impossible to support this claim over the lands in the third issue, without assuming a fact which he had no right to do without proof, that the manor and hamlet of Farcet are co-extensive; but, in this case, there was not only no proof at all of it, but clear proof to the contrary, besides demonstration on the face of the respondent's own title deed, which expressly excepts demesne lands of the manor of Stanground out of the grant of tithes of lands in Farcet; this was urged to the Judge by the appellant's counsel, who requested him to take notice of it to the jury: which he did not, but suffered the evidence as to any piece of land being in the hamlet to be evidence that it was in the manor, and so on the reverse.

On the other side it was said, that there was not the least ground to impute to the learned Judge who tried the cause, any misdirection to the jury, nor the admission of any improper evidence in favour of the respondent, nor the rejection of any legal evidence on the part of the appellant. That the far greater and most material part of the evidence was in writing; of the import and effect of which the Lord Chancellor was and their Lordships were competent Judges; and upon which there was no reason to suppose that any farther light could be thrown by another reference to a jury. That the parole testimony given was almost wholly in favour of the respondent, and the cause was tried with every possible advantage to the parties and to justice, a full special jury of gentlemen having attended the trial, which employed two whole days, many of whom had taken a view of the lands out of which the tithes in question arose.

After hearing counsel on this appeal it was ORDERED and ADJUDGED that the same should be dismissed, and the decree therein complained of affirmed. (MS. Jour. *sub anno* 1782, p. 1000.)

[94] CASE 17.—DANIEL COLLINS,—*Appellant*; SIR HENRY GOUGH, and Others,—*Respondents* [16th February 1785].

[The plea of a former decree for the payment of tithes, where a modus and the lands alleged to be covered by it were imperfectly stated, so that the court could not direct an issue, is not a good bar to a bill brought for establishing the modus.]

[Decree of Lord Thurlow, C. affirmed.]

[Mews' Dig. vi. 389.]

The respondent Sir Henry Gough, in Easter term 1778, filed his bill in Chancery against the appellant, as vicar of Claverdon, and the Reverend Dr. John Warren, the Archdeacon of Worcester, as rector of Claverdon, setting forth, that in the year 1755 Sir Henry Gough, baronet, deceased, the respondent's father, became seised in fee, by purchase of the manor of Kington, and a messuage and lands thereunto belonging, called Kington Farm, or Kington Grange, or Kington Grange Farm, situate in the parish of Claverdon in the county of Warwick, except a very small part of the said farm which had been exchanged for other lands previously to such purchase. That the said Sir Henry Gough died in June 1774, leaving the respondent his eldest son and heir at law, who as such thereupon became seised in fee of the said farm (except as aforesaid), and that he had ever since been so seised thereof; that the said farm was an ancient farm, and had from time immemorial consisted of the house and several pieces or parcels of land particularly described in the bill; and that two of the pieces of land, parcel of the said farm, and in the bill also particularly described, had been, by indenture of the 10th of March 1721, conveyed by John Parker, the then owner of the farm, to Andrew Archer, in exchange for two other small pieces of land, which had ever since the exchange been held with Kington Farm. That the proprietors of Kington Farm, or their farmers thereof, from time immemorial, had been accustomed to pay, and had paid every year, on the feast-day of Saint Thomas, to the vicar of Claverdon for the time being, a modus of 13s. 4d. in lieu, full satisfaction, and discharge, and in the name and stead of all the privy or small tithes arising upon the said farm; and that no tithes in kind had at any time been paid for the farm before the year 1773, and then only upon the occasion after mentioned, nor had ever been demanded by any former vicar: but that the vicarage of Claverdon having in 1768 become vacant by the death of the Reverend William Cumming, the last incumbent, the appellant was in October 1768 presented thereto by the Reverend Dr. John Tottie, the then Archdeacon of Worcester; and that since the appellant had been so presented he had claimed to be entitled to the tithes of all titheable matters, except corn, grain, and hay, arising within the said vicarage. That accordingly, in June 1773, he had filed his bill in the court of Chancery against the late Sir Henry Gough, [95] and against the respondent Canning, his tenant, and several other persons (which suit after the death of the late Sir Henry Gough, was revived against the respondent) praying an account of all titheable matters (except corn, grain, and hay) which had been had and taken by the said several defendants since the death of the said William Cumming, and that they might be decreed to pay him the value of the tithes of all such titheable matters by them respectively had and taken, and that his right to the said tithes might be established. That the defendants had put in their answers to the said bill; and that the late Sir Henry Gough and William Canning had insisted, by their answers, that they were not bound to pay the said tithes; and had alleged, that an ancient immemorial payment or modus of 13s. 4d. per annum was paid and payable in lieu of all vicarial or small tithes arising from the lands of Sir Henry Gough, within the parish of Claverdon (except the lands which had been so taken in exchange) and for Easter offerings; and that no former occupier of the said lands had at any time paid any tithes in kind arising from the same. That the appellant having replied to the answers, issue was joined, and the cause afterwards came on to be heard on the 27th November 1777, at the Rolls, when Sir Thomas Sewell had been pleased to decree, that the respondent as personal representative of the late Sir Henry Gough, and William Canning his tenant, should account with the appellant for the tithes of the said lands, since the death of the last incumbent William Cumming. The bill then stated the foundation of the decree made by Sir Thomas Sewell at the Rolls, to be, that the respondents Sir Henry Gough and William Canning had not (and the bill charged, as the truth was, that they had not) in the answers of

either of them, distinguished or ascertained of what pieces of land the farm called Kington Farm consisted, nor set forth with certainty what lands in particular were covered by the said modus of 13s. 4d. : and also, that it was by the answer of Sir Henry Gough alleged, that all the proprietors of his lands lying within the said parish of Claverdon (except the lands before excepted) or their farmers, had, time out of mind, paid every year to the vicar of Claverdon a certain sum of 13s. 4d. in lieu of all vicarial or small tithes arising upon the said lands, and for Easter offerings ; but that it was not, by the answer either of Sir Henry Gough, or William Canning his tenant, stated or alleged that Sir Henry Gough had not lands within the parish of Claverdon, other than and besides the lands of which the farm called Kington Farm consisted, and to which farm only the said modus, as appeared by the proofs taken in the cause, extended. The bill then charged, that no tithes, or any Easter offerings, had ever been paid for the said farm called Kington Farm to any former vicar, or to the appellant, except in one instance, and that upon the following occasion, viz. that the appellant on Good Friday in the year 1773, being a short time before filing his bill, had sent his servant to Kington Farm, where the respondent Canning lived, to demand tithe eggs, and that he having been [96] then absent from home, and the appellant's servant having seen Canning's mother, and assured her that eggs and fish were excepted out of the modus payable for the farm, and that the appellant would return or pay for them, if they were not his right ; and that if the demand was not complied with, the appellant would file a bill against the respondent Canning, his mother did thereupon comply with the demand : and also except that on the 25th of May 1773, the respondent Canning, from like threats and insinuations, was prevailed upon to account with and pay the appellant a sum of money for Easter offerings, but which was the only payment ever made for Easter offerings in respect of the said farm. The bill therefore prayed that the said modus of 13s. 4d. might be established, and that the appellant might be decreed to accept the same, the respondent offering by his bill to account with him for it.

In Michaelmas term 1778, the appellant put in a plea to the respondent's bill, and thereby set forth and insisted upon the decree so pronounced at the rolls, as a bar to the respondent's proceedings ; and insisted further, that his right to tithes in kind, and the question touching the existence and merits of the modus, had been both fully in judgment in that suit ; and in January 1779 the appellant's plea came on to be argued before the Lord Chancellor Thurlow, and was over-ruled.

The appellant afterwards put in an answer to the respondent's bill, wherein he stated all the proceedings in the former suit, and the decree made therein, and insisted upon the benefit thereof, and that there was not any such modus existing, as set up and contended for by the respondent.

The defendant Warren having also put in his answer, issue was joined in the cause, and the respondent not having any evidence to produce, other than such as was produced in the former cause, he obtained an order to enable him to have that evidence read on the hearing of the cause in which the respondent was plaintiff ; and an agreement was afterwards entered into between the parties, to admit all the evidence taken in the former cause to be read at the hearing of the said cause for establishing the modus. And the cause coming on to be heard before the Lord Chancellor Thurlow, on the 17th of April 1780, and it appearing that a very small part of the farm for which the modus was payable, had been conveyed in exchange to Andrew Archer, as before mentioned, and that the same was then held by the respondents the Archers : it was ordered that the cause should stand over, with liberty for the respondent to amend his bill as he should be advised, with a view that the representatives of the said Andrew Archer might be brought before the court.

The respondent, Sir Henry Gough, accordingly amended his bill, by adding, as parties defendants thereto, the respondents the Archers, who were the co-heiresses of the late Lord Archer, who was the devisee in fee of the said Andrew Archer of that part of the farm which had been conveyed to him in exchange ; and [97] William Oakley, their tenant ; and William Canning, the respondent Sir Henry Gough's tenant ; and also Brownlow, then Lord Bishop of Worcester, the patron of the archdeaconry : and the cause came on again to be heard the 20th July 1781, when the Lord Chancellor ordered it to stand for judgment, with liberty for the appellant to apply in the meantime to have his plea re-argued ; and the appellant having accordingly applied by petition for a re-hearing of his plea, the same came on, together with the cause, to be

heard for judgment on the 6th of March 1782, when his Lordship affirmed the former order, by which the appellant's plea had been over-ruled; and it was further ordered, that the parties should proceed to trial at law at the then next summer assizes for the county of Warwick, on the following issue, viz. "Whether from time, whereof the memory of man is not to the contrary, a certain modus or sum of 13s. 4d. hath been paid yearly and every year, in lieu, full satisfaction, and discharge, and in the place and stead of all the privy and small tithes arising, renewing, and accruing upon the messuage or tenement and lands thereunto belonging, or therewith held, called or known by the name of Kington Farm, or Kington Grange, or Kington Grange Farm, situate in the parish of Claverdon in the county of Warwick, in the pleadings more particularly mentioned; and the respondent Sir Henry Gough was to be plaintiff at law, and the appellant was to be defendant; and all further directions were reserved until after the trial of the said issue: and it was referred to Mr. Montague to settle the issue, in case the parties should differ about the same."

The decree was drawn up and entered, and the appellant's solicitor having refused to accept the issue, and the appellant himself having refused to name an attorney, pursuant to the decree, to whom the issue might be delivered, the respondent was under the necessity of proceeding before the master to have the issue settled, and was obliged to move the court to enlarge the time for the trial thereof; which by order of the 19th of December last was accordingly enlarged till the then next Lent assizes. This order having been obtained, the respondent proceeded without delay to procure the issue to be settled by the master, and afterwards obtained the master's certificate, dated the 3d of February 1784, by which he certified that he had settled the issue, and annexed a copy of the issue to his certificate.

But the appellant afterwards thought proper to appeal from the decree, insisting (C. Ambler, F. C. Cust), as to the plea in bar, that the defence set up by the respondent to the former bill, brought by the appellant to establish his right to tithes in kind, was precisely the same as the case made by the respondent's present bill; namely, that the appellant's claim of tithes in kind was barred by a modus of 13s. 4d. yearly; and there was no substantial variation in the manner in which it was set out in the one and the other. If that defence had appeared to be in any respect well founded or maintainable, the court, instead of decreeing in the first cause an account [98] and payment of tithes in kind, after a very long and solemn hearing of the merits (and not for any want of form in setting out the modus, as now suggested by the respondent) would have dismissed the appellant's bill, or at least have directed an issue to try the modus at law, which the court might have done, as has been in many instances, even supposing the modus not exactly set out in the strict and accurate form of pleading. That the plea therefore was proper to prevent the court's proceeding to hear the second cause upon the same subject matter which had been before solemnly decided, and upon the very same evidence, in favour of the appellant's right to tithes in kind, between the very same parties in the former cause, and was the direct matter in question in that cause. And that decree being inrolled, and in full force, and unappealed from, further proceedings in such a case would not only be vexatious and productive of endless litigation and expence, but of dangerous consequence, and might occasion contradictory and inconsistent decrees which ought most carefully to be avoided.

As to the merits, if it should be thought right to enter into them as a new cause, and notwithstanding the plea in bar, an issue ought not to have been directed to try the validity of a modus, which appeared from the whole of the proceedings to want the essential characteristic of a modus, viz. its being founded on a composition real, antecedent to the statute of 13th of Eliz. which is the foundation of every modus subsisting at this day throughout the kingdom. The instrument in 1474, now in the archives of the church of Worcester, intitled, "A composition real of and concerning the right of receiving tithes within the parish of Claverdon," was evidence and acknowledgment under seal of the then owners of the land, under whom the respondent derived title, and of the patron and ordinary, that tithes then were, and had been accustomed to be, paid to the vicar; and from thence, and from the terriers, which appeared to be answers returned on oath to the Bishop's articles of inquiry in 1585, after the disabling statute of 13th of Eliz. it appeared that tithes in kind were due and paid subsequent to that statute. It could therefore answer no purpose to take the opinion of a jury on a question of a modus, which evidently appeared not to exist in

1585, after the disabling statutes, and must therefore be in itself so substantially bad, that it could not be made good by any trial at law; and must necessarily put the parties to very great and unnecessary expence and trouble. That the appellant's right to the vicarial tithes, as claimed by him, was admitted by the answer of Dr. Warren the rector, and confirmed by the evidence of the composition real, the terriers, the grant from the Crown in 1545, and the respondent's own title deeds; and lastly, by the decrees inrolled in 1777 and the payments of tithes ever since. And no sufficient evidence had been adduced on the part of the respondent to contradict it, or to shew that what was now set up as a modus was any thing more than personal agreements or temporary compositions, from [99] time to time, since the disabling statutes; and if there had been no such apparent objection to the modus, yet the respondent's evidence was too imperfect and defective to warrant such an issue as was directed; especially as the modus was set up as an entire modus for lands which had been since subdivided and become the property of other owners, without any notice taken in the conveyances of the parts conveyed, of their being subject to, or covered by any modus; and for those separated parts the tithes in kind had been paid to the vicar.

On the other side it was said (J. Madocks, W. Selwyn, J. C. Gough), that there was not a single instance of any tithes having been demanded from or paid by any owner or occupier of Kington Farm, at any time before the year 1773; in which year in order, as it should seem, to give some colour for the claim which was afterwards made, a few eggs and Easter offerings were obtained from the mother of Canning the tenant, in absence of her son, by means of false assurances, accompanied with menaces of a suit in case of non-compliance. This single instance of a demand and payment of tithes was on Good Friday in the year 1773, and the appellant's bill was filed in the month of June following. That if the decree of the Master of the Rolls, for an account of tithes, had been made after an issue directed to try the existence of the modus, and a verdict found against the modus, such a decree might have been conclusive, and might have settled the right in question between the parties, upon the true and real merits of the cause; but inasmuch as Sir Thomas Sewell's decree was merely for an account of tithes, in a case where the existence of the modus had never been tried, and the modus itself was imperfectly stated, and the lands alleged to be covered by the modus were not accurately set forth or described in the answer of Sir Henry Gough or his tenant, such decree for an account ought not to have the effect of binding the right, and more especially in a case where tithes in kind have never been paid within the memory of man, except in the recent instance above mentioned. And that the plea of a former decree for an account of tithes subtracted being pleaded in bar to a bill for establishing a modus, was clearly insufficient, as every plea which is set up in bar of a plaintiff's demand must be *ad idem*; and therefore in the present case it ought to have been shewn by the plea that the former cause turned upon the existence or non-existence of the modus, and that this was the *res judicata* in the former suit, in which the decree to account for tithes was made.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree complained of affirmed. (MS. Jour. *sub anno* 1785, p. 63.)

[100] CASE 18.—EDWARD WELLS CARR—*Appellant*; GEORGE HENTON, and Others,—*Respondents* [5th March 1788].

- [Where there is an old endowment of a vicarage, but the modern usage varies from it, there is ground to presume that the variance hath arisen from the act of persons competent to make it. The endowment is not therefore conclusive evidence in favour of the vicar, but his right is properly triable at law.]
 [There had been a decree for an account in a suit by the vicar's predecessor, but to which the patron was not a party, nor was the decree ever acted under.]
 [Decree of the Court of Exchequer affirmed.]

H. Wood's *Exch. Tithe Causes*, iv. 268; Anstr. 313. n.

[Mews' Dig. v. 1231.]

Dame Anne Fowke, widow of Sir Thomas Fowke deceased, (late Miss Wollaston) is rector impropriate of the parish of Lowesby, in the county of Leicester (formerly appro-

priate to the hospital of Burton Lazar in the said county); and as such entitled to all the tithes, great and small, arising, growing and renewing within the township of Lowesby, and the hamlet of Newton in the said parish: and also to the patronage of the vicarage of Lowesby, to which the rectory pays an ancient stipend of £6 13s. 4d. per annum.

The trustees of Miss Wollaston had during her minority suffered the vicarage to lapse, whereupon the present appellant got a grant of the presentation from the Crown, the bishop having also omitted to present, and by this means became vicar of Lowesby.

In Trinity term 1778, the vicar brought his bill in the Exchequer against George Henton, and several other occupiers of lands within the said township and hamlet, praying an account of small tithes subtracted by them from the time he became vicar, and in such bill the appellant charged, that the vicarage of Lowesby is a perpetual vicarage, and in the time of the reign of King John, heretofore King of England, was endowed with, and consisted in, all small tithes of the said parish, and in all oblations and obventions, as well those arising at the mother church, as those at the chapel of Newton within the said parish; and also within the glebe-lands, with the mansion-house. That in Michaelmas term, 11th Charles I. John Waybread, clerk, then vicar of the said vicarage of Lowesby, did exhibit his bill of complaint in the court of Exchequer against Sir William Henry Faunt, knight, then the owner and improprator of the rectory and church of Lowesby, and also owner and proprietor of the advowson, free disposition and right of patronage of the said vicarage; and also against Henry Skipwith, William Chamberlaine, and Ralph Tomson, then occupiers of lands within the said parish, thereby praying the aid and assistance of the court that the complainant John Waybread, might be established in the possession of the glebe-lands and tithes belonging to the vicarage, unto which the defendants [101] put in their answers. Whereupon the complainant replied; and divers witnesses being examined in the cause, the same came on to be heard on the 14th of October 1639, when the court did declare that the said vicarage was a perpetual vicarage in the time of King John, and was endowed in form following, viz. "*Consistet autem ipsa vicaria in omnibus minutis decimis ipsius parochie et omnibus oblationibus et obventionibus tam ad matricem ecclesiam quam ad capellam de Newton provenientibus et interra ecclesiasticum manso.*" It was therefore then ordered and adjudged, and absolutely decreed by the court, that the said vicarage was and should continue a perpetual vicarage, and that the said endowment in the time of King John was and is a good endowment; and that the said complainant and his successors, vicars of the said vicarage, should from thenceforth for ever thereafter have, hold, and enjoy, as well all the said small tithes of the said parish as other the premises in and by the said instrument of endowment in that behalf limited to and for the same vicarage, according to the true intent and meaning of the said endowment.

The defendants Henton, Peat, Chamberlaine, Pick, and Kirk put in their answers, and admitted that the plaintiff was vicar of Lowesby, but denied that he was endowed with all the small tithes within the parish, and did not know whether the vicarage was ever endowed with any manner of tithes, or with the mansion and glebe-lands, and grounds thereunto belonging, but admitted that the plaintiff was entitled to a certain annual pension or salary of £6 13s. 4d. for the maintenance and support of the vicar of the said parish for the time being, payable yearly by the improprator of the rectory of Lowesby.

After putting in the answers the plaintiff did not proceed in his cause; and it was thought advisable for Sir Thomas Fowke, the then improprator, to bring a cross bill; accordingly a cross bill was filed in Hilary term 1781, against the vicar, praying a discovery how he made out his right to small tithes, and that the said yearly payment of twenty nobles, or £6 13s. 4d. might be established and decreed to be in full satisfaction to the vicar for the time being, of all small tithes arising within the parish.

The vicar put in his answer, and stated his claim to small tithes as he had done by his original bill. He also replied to the answers in the original cause; put the same at issue, and several witnesses were examined by commission, who gave some weak testimony of the payment of money to a former vicar in lieu of tithes of wool and lamb; but the evidence given by the defendant's witnesses was much stronger and more satisfactory.

From both these decrees the plaintiff thought proper to appeal, and on his behalf it

was insisted (A. Onslow, J. Johnson), that the endowment, dated in the 23d year of the pontificacy of Hugh bishop of Lincoln, 1232, was alone a sufficient cause to entitle the appellant to the tithes claimed by his bill. That the decree of the court of Exchequer, 15 Car. I. 14 Oct. 1639, decreeing the vicar and his successors all small tithes for ever upon his endowment, after hearing the matter [102] between the very same parties, viz. the vicar on one side, and the impropiator and occupiers on the other side, upon the same ground and points, an endowment on one side, and a pension of £6 13s. 4d. but not in lieu of small tithes, set up from the grant of Mary and Eliz. on the other side, was valid, binding, and irreversible, as between such parties, and all others claiming under them, or in the same right. That the endowment vested a title in the vicar which could not be altered, except there had been produced against it a real composition or modus, plainly implying real composition, which there was not, but a pension, which it was insisted (as in Car. I.'s time) both by the impropiator and occupiers, was to be paid to the vicar as his only due by the impropiator only; and therefore if it was not termed pension, could not be in the nature of a modus proceeding from real composition; because, in order to be so, it must have been to be paid by the occupiers or their landlords, in their several due proportions, neither of whom were so much as pretended to have paid any thing. Besides that this pension had not only not been invariably paid as all the vicar's due, but sometimes it had not been paid at all, but a different stipend of £13 a-year, as was proved in the respondent's depositions for thirty or forty years back, and was set forth, as his due, in the act of parliament on the division of the Wollastons' estates between the two co-heiresses. And at other times the said pension, or a pension of £6 a-year, with greater or less additions to it, as the vicar and impropiator, who was always the patron, could agree before presentation, as set forth in the depositions of Car. I.'s time, wherein it was also deposed that one farm at Newton formerly paid 20s. a-year to the vicar; and by two witnesses, that they had heard that the vicar should give £10 a-year to a curate to serve Newton chapel. That in the decree of the court of wards, 34th Eliz. there is stated a temporary composition between the master and brethren of Burton hospital, and the vicar of Lowesby, for the said vicar to have a dwelling-house and close, and what is there termed a pension of £6 13s. 4d. a-year; but as it was compounded for with the vicar, it was a composition and not a pension; and not a real composition neither, not only because the bishop was no party to it, but because it was not with the occupiers; and because after this 34 Eliz. no real or perpetual composition could commence, by reason of the restraining stat. 13 Eliz. and accordingly none was set up in the suit, 36 Eliz. nor in that in Car. I.'s time, nor in the present suit. And in Car. I.'s time the grant of Queen Mary was produced to prove that the pension of £6 13s. 4d. was by endowment. That the pension set up by the respondents, if it had not destroyed itself by being contradictory, and had been capable in its nature, as pension, of destroying or varying the endowment, must, in order to have been qualified for these effects, have been proved both by exhibits and depositions invariable; whereas the direct contrary was proved, not only by the exhibits and depositions of the appellant, but also by the depositions of [103] the respondents, and by their exhibit the act of parliament on the division of the estates of Isaac Wollaston, the impropiator, between the two co-heiresses, and by that which they once made their exhibit the grant of Hen. VIII. and by the depositions on both sides in the cause in King Car. I.'s time. That by the memorial of the purport of the appropriation deed contained in the decree of the court of wards, 36 Eliz. under which deed the present impropiator claimed, it is expressed that the portion of Lowesby tithes, settled upon Burton Lazarus hospital by Hugh bishop of Lincoln, was grain and hay; and that there is a saving by endowment to Alexander Witinton, vicar, who is the very vicar named in the said endowment. That the grant of Henry VIII. under which the impropiator also claimed, confirms the endowment and appropriation deed, specifying the granting no more than the tithes *garbarum granorumque*, but adding general words *quascunque alias decimas*, the master and brethren of Burton hospital had, which comprehend the title of hay, which was specified in the appropriation deed, and the tithes of wood, which are not included in the endowment. That a terrier, dated 1700, describes the vicar as seised of all vicarial tithes, *cum toto altaragio*: and the vicarage stands in the survey of Queen Anne, at £27 5s. 11d. a-year. That a terrier, dated 1708, says, all vicarial tithes, at Newton, were then compounded for to the vicar at £27 9s. 9d. a-year. If there had been a pension or stipend of any sort, it must have been in these terriers.

That the appellant proved by his depositions, that wool and lamb, and all other small tithes at Newton, were within memory, compounded for to the vicar at about £60 a-year; and that the impropiator, at the same time, received a composition from Newton for the great tithes; and that when the impropiator has taken his tithes in kind, he has only had grain and hay. But it had not been proved by the depositions of the respondents, that the impropiator had received any small tithes within memory. That the impropiator, the 1st of George II. 1727, 9th George II. 1735, and 10th George II. 1736, filed three separate bills in the Exchequer, praying the court only for great tithes, grain, hay, and wood, and in one of them, expressly setting up his title to these great tithes, under the hospital of Burton Lazarus; and the answer to the first of these bills, (in which he pretended at first to claim all tithes, but afterwards insisted upon none but grain, hay, and wood) allows, grain, hay, and wood to be due to him, but says all the other tithes belong to the vicar. That the rectories of Feltham, Spondon, and Threkyngham, which belonged to Burton hospital, and are by the grant of Hen. VIII. sold to Lord Lysle, with Lowesby rectory, under the very same words (*decimas garbarum granorumque et quascunque alias*) have only great tithes belonging to them at this day; and the three vicars of the same receive wool and lamb and all other small tithes; and two of them receive pensions besides. And that by the endowment, the endowment tithes are for ever taken out of the rectory, for the support of the church and [104] ministry, which was conceived to be the grounds of the established rule in law, that a rector cannot prescribe against the endowment of a vicar; or in other words, even if he has taken any of the endowment tithes, he can no longer have them when the endowment is produced against him.

In Trinity term 1784, the cause was heard, when the court decreed, in the original cause, that it should be referred to a trial at law, on a feigned action to be for that purpose brought by the plaintiff on the following issue, whether the plaintiff Edward Willes Carr, as vicar of the parish of Lowesby, was entitled to the small tithes within the said parish, and the usual directions were given for settling the issue and for producing evidence, and indorsing on the postea any special matter that might arise; and all further directions and costs were reserved until after the trial. And it was ordered, that the cross-bill should be dismissed with costs to be taxed.

The plaintiff did not think fit to proceed to trial, but petitioned for a re-hearing; and accordingly on the 18th of May 1786, the cause was re-heard, and the plaintiff was permitted to read some new written evidence, namely, a private act of Parliament passed in the year 1777, intitled, "An Act for rendering valid and effectual a Partition between Taylor White, Esquire, and Sarah his Wife, and Thomas Fowke, Esquire, and Ann his Wife, of several Estates in the Counties of Huntingdon, Cambridge, and Kent, and for vesting and settling the same to the Uses and upon the Trusts contained in their respective Marriage Settlements, and for other Purposes therein mentioned;" also a terrier of the vicarage of Lowesby, dated in 1708; also some orders made by the court of Exchequer in the cause of Waybread against Fawnte, subsequent to the decree in 1639, which shewed that several of the landholders in the parish were not bound by that decree; and that the effect thereof as to others was suspended, by declaring that they should not be barred of their rights, but might try the matter at law: this, however, upon careful search does not appear to have been ever done; and the decree did not appear to have ever been carried into execution.

On the re-hearing the cause was very fully and solemnly argued and considered for several days, and the Barons were unanimously of opinion, that the decree, directing a trial at law, ought to be affirmed, which was affirmed accordingly.

On the other side it was said (R. P. Arden, G. L. Newnham, J. Topham), that supposing the old entry in the Bishop of Lincoln's register to be conclusive evidence of the actual endowment of the vicarage in King John's time, although it was unaccompanied with any usage under it, which could by no means be admitted, yet such endowment might be afterwards legally varied by the consent and act of such persons as were originally competent to consent to make and except an endowment of the vicarage. That upon the whole evidence laid before the court, and from the continued usage for such a length of time, there was sufficient ground to presume that a change had legally [105] taken place with respect to the rights of the vicar, subsequent to the date of the entry in the Bishop's register, and that the vicar was not now entitled to the small tithes in the parish of Lowesby, but to a pension issuing out of the rectory, which

was a proper question to be decided by a jury. And that the decree in 1639 had not proper parties, and was never carried into execution, and the orders made subsequent to that decree plainly shewed that the court, notwithstanding the evidence of endowment laid before them, was then of opinion that the question of right was properly triable at law.

And it was accordingly ORDERED that the said appeal should be dismissed, and the decree complained of affirmed. MS. Jour. *sub anno* 1788.—On the trial of the issue, the jury found that the plaintiff was not entitled to the small tithes, but to receive in lieu thereof £6 13s. 4d. from the impropiator. See H. Wood, iv. 275.

CASE 19.—HENRY BOLDERO BARNARD, Esq.—*Appellant*; DANIEL GARNONS, Clerk,—*Respondent* [2d July 1797].

[The right to compel an account for tithes being consequential to the legal title, and the rector having *prima facie* the title to all the tithes in turn, it seems that in questions between the rector and the vicar, a court of equity ought not to make a decree in consequence of their opinion of the vicar's title, and in derogation of that of the rector, until the title of the vicar has been established by the decision of a jury; unless such title is made out in the most clear and satisfactory manner.]

[In a suit by the vicar for agistment tithe, the original endowment did not appear; but in support of his claim to small tithes, the vicar produced an old extent or survey, as also terriers and accounts kept by former vicars. Tithe of agistment had never been paid in the parish. The court of Exchequer decreed for the vicar, without directing an issue at law to try his title; but the House of Lords reversed this decree.—See *ante*, cases 12. 16, of this title.] [7 Bro. P. C. 49, 83.]

[The question in this cause is, “Whether the rector, or the vicar of South Cave, “is entitled to the tithe of agistment of sheep and lambs, and other barren “and unprofitable cattle, within the parish of South Cave?”]

Anstr. 296; H. Wood's *Exch. Tithe Causes*, iv. 377; Gwillim's *Bac. Abr.* (8vo. edit. 1798) vii. 518–520.

The appellant Henry Boldero Barnard, in or about the year 1785, purchased the prebend and impropriate rectory of South Cave in the county of York, and by virtue thereof, became entitled (amongst other things) to all the tithes within the parish of South Cave, and the titheable places thereof, not due and payable to the vicar of the parish church of South Cave.

Amongst other tithes, the appellant claimed, as rector, the tithes of corn, hay, wool, and lamb, and also the tithe of agistment of all barren and unprofitable cattle, fed and depastured within the parish of South Cave, and the titheable places thereof; and particularly the tithe of agistment of sheep and lambs, which [106] (it was contended) was covered by immemorial payments made to the rector by way of modus, as after stated.

The title of the rector to the tithes of corn, hay, wool, and lamb, was not disputed by the vicar; but the tithes of agistment not having been usually paid in the parish, except for sheep and lambs, as after stated, great part of the parish having been till of late years unclosed, and consisting principally of extensive wolds, or sheep-walks, so that the agistment of other barren and unprofitable cattle was probably formerly of very little value; the vicar set up a claim to the tithes of agistment of all barren and unprofitable cattle, including the agistment of sheep and lambs, for which such immemorial payments had been made.

In Michaelmas term 1787, the respondent filed a bill in the court of Exchequer against the appellant, both as occupier of lands within the parish aforesaid, and the titheable places thereof, and also as rector of the said impropriate rectory, to compel payment of the tithe of agistment of sheep and lambs, and other barren and unprofitable cattle, fed and depastured upon the lands so occupied by the appellant, during the years 1786 and 1787; and by his bill admitting, that the appellant, as rector of the parish,

was entitled to the tithes of hay and corn, wool and lamb, but claiming all agistment tithe, as vicar; and alleging generally his title by endowment, or otherwise.

The appellant, by his answer to the respondent's bill, insisted that the respondent was not entitled to any agistment tithe, but that the appellant, as rector impropriate, was entitled to the tithe of agistment of sheep, and all other barren and unprofitable cattle, fed and depastured within the said parish, and the titheable places thereof; and in support of such title, the appellant stated by his answer, that for a great number of years last past, one penny for each sheep, and one halfpenny for each lamb, depastured within the said parish, and sold out after Candlemas and before the next shearing time, had been paid to the rector impropriate of the parish, and that no payment had ever been made to the vicar for the tithe of agistment of sheep, depastured within the said parish, or for any other barren or unprofitable cattle.

Issue being joined, and witnesses examined, publication passed, and the cause was set down for hearing, and was heard in Trinity term 1791.

In support of his right the respondent produced,

I. An ancient survey of the prebend of South Cave, to which this rectory was appropriated, without date, but apparently of great antiquity, intitled "Extenda Prebende de South-Cave," entered in a manuscript book found in the registry of the Dean and Chapter of York, whereby it appeared what species of tithes belonged to the prebend as rector, and what to the vicar; stating the prebend of South Cave to consist in predial and mixed tithes of the parish, and afterwards enumerating as belonging to the prebend, the predial tithes of the whole town of Cave, also the predial tithes of two carrucates of land in the town of Bromfleet, and of two carru-[107]-cates of land in the town of Faxflent (being towns within South Cave); and the tithes of hay from all the meadows within Cave and Faxflent, as well as of wool and lambs, from the feedings depastured throughout the said parish; and stating that the personal tithes, and those of flax, hemp, oblations, and mortuaries, and all small articles, belonged to the vicar. The following is a copy of this ancient survey:—

"Extenda Prebende de Southcave.

"Prebendar' de Southcave consistit in decīs pdialibus & mixtis de pochia de Cave & poch' ecclie de Wadword & medietatis ecclie de Otteley. Ad pochia de Cave ptinent villa ejusdem & villa de Brūghelflent Oxemerdiike & Faxflent in villa de Cave ptinent pbende una carucata terre cū ptinent quam hēt in dnico & decie pdiales tocus ville & scdm extēntū regiū pdece ville ptinēt quindecī carucate tre itēm decie pdiales dūar' carucat' tre in villa de Brūghelflent & duar' carucat' tre in ville de Faxflent & decia Feni omn' ptor' de Cave & Faxflent lane & agnor' in pascuis pdece pochie se depastur' except' omībz templar' & domui Sēi Leonard Ebor' ptinentibz itēm dicunt q̄ pbend' hēt in dicta pochia jūdicōm ad correcōes excessuum poch & itēm delinquenciā faciēd & eas audiend' & detmi-nand' itēm decima pdial' uni' dimid' caruc' tre jux" Wythelay ptinet pbend' quā templar' nūc occupant & in p̄senti non solvnt itēm decia cētū acr' pti que templar' de novo sūt adquisiti & in p̄senti de hiis nullam solvnt & sex acr' pti quas hospitalarii de novo occuparnt & nulla ex hiis deciam solvnt & diēe acr' pti quas prior & convētus de Warta occupant & medietatē ejusdē decie solve contūcūt & decia pti ejusdā Laur' de Faxflent quod nūc templarii occupant & nullam deciam inde solvnt Item hōies manētes apud Oxemdyke colunt octoginta & sex acr' & tres pti' p̄p̄s laboribz infra pochia pdecam & ecclia nichil inde pcipit sed templarii deciam integ'lit' recipiūt que eor' sunt svi un' acjuvant'. Item decie psonales, & lini canobii oblacōes & pncipalia decedent' & omnia minuta ptinent vicar' injuste tñ detinēt' ab eodē decia ejusdā piscar infra pochiam situate & fixe sup feodo Sēi Leonardi & layeis ad firmam dimisse. Nullos hēt tenentes apud Cave."

II. An entry in manuscript in Bibl. Cotton. Claud. B. 3. in the British Museum intitled "Registrum Cartarum Compositum Ecclesie Sancti Petri Eboraci a Tempore Hen Primi ad Tem-[108]-pora Edwardi Primi Regis Anglie;" containing a Survey or

Extenta Prebende de South Cave, which agreed almost in words, and in substance altogether with the former.

III. The most ancient existing terrier of the revenues and ecclesiastical dues belonging to the vicarage of South-Cave, dated in the year 1716: setting forth, that to this vicarage belong "all manner of tithe," (except corn and hay, wool and lamb) "and are paid as followeth, yearly, at Easter;" and then proceeding to enumerate many species of tithes, and the mode of payment, but without mentioning agistment tithe in particular. Several other terriers from the year 1716 to the year 1786, agreeing with the first, that to this vicarage belong all manner of tithes, except corn, hay, wool and lamb: but differing therefrom in the assertion "that the tithes are paid as followeth yearly at Easter," and, instead thereof, stating that "they are or ought to be paid as they severally become due, but are generally paid at Easter yearly."

IV. The accounts of Mr. Robinson, a former vicar, from the year 1759 to the year 1782, whereby it appeared that he received all tithes except corn, hay, wool, and lamb, under the denominations following, hemp, line, mill, kiln, house, hens, eggs, offerings, foals, ploughs, geese, turkies, ducks, dove-coat, chamber, cows, calves, orchards, gardens, close, rape, turnips, potatoes, clover and mustard-seeds, saintfoin, saintfoin-seeds, bees, pigs, seeds, etc. mentioning thirty instances at least of payments having been made to him for turnips, viz. thrice ten shillings, once seventeen shillings, once one pound ten shillings, twice five shillings, once six shillings, the rest from sixpence to one shilling; for rape £6 19s. 2d., £9 10s. 0d., £7 1s. 0d., £0 15s. 0d.; for rape, etc., £20; for clover, £0 10s. 6d.; for saintfoin, £1 6s. 8d.; and for saintfoin-seed, 3s.

Parol evidence was also produced in support of the respondent's right to prove, that the vicar had received all tithes arising within the parish, except corn, hay, wool, and lamb, and also except one penny for each sheep, and one half-penny for each lamb, sold out of the parish between Candlemas and the next shearing-time, received by the rector inappropriate; and that, in the idea of the parish, those payments of one penny and one halfpenny were for the tithe of wool and lamb, and not for agistment tithe. That before the inclosure of the open fields within South-Cave, which took place in the year 1785, all the lands in the parish, (except a very few closes adjoining the town), were open common fields in tillage, affording little, if any, tithe of agistment: which was a tithe then scarcely known, but which after such inclosure became of great value. That the cultivation of turnips within the parish was of modern introduction; the first growth in the old inclosures being from forty to fifty years, and in the open fields from twenty to thirty years before the suit. That the manner of compounding with the vicar for the tithe of turnips, had been by his receiving from the owners and growers of the turnips, after the rate of two [109] shillings in the pound, on the amount of money received for such turnips as happened to be sold to be eaten on the ground; and after the rate of five shillings an acre, when the turnips were pulled and taken away by the owners or growers, or eaten with their unprofitable cattle, after having been pulled.

It was observed by the respondent, that his written corresponded with his parol evidence, the result of the whole being, that all tithes within the parish belong to the vicar (except corn, hay, wool and lamb), which are payable to the rector inappropriate, or to some one claiming under him: accordingly, every new species of tithes introduced into the parish, has been received by the vicar: instances of this are to be found in turnips, potatoes, rape, saintfoin, saintfoin and other seeds, etc. etc. etc. And that the actual payment of agistment tithe, which had been entirely confined to the article of turnips, was all on one side, namely, in favour of the vicar (the respondent).

The evidence adduced for the appellant consisted first of the bill and answers in a suit by a lessee of the rectory, wherein a former vicar was a defendant, against an occupier of lands, for agistment tithe within the parish, in which no decree was made. Evidence was also given as to sums of one penny and one half-penny collected by the rector, for sheep and lambs, sold out of the parish after Candlemas and before shearing-time, without ascribing these payments to the account of agistment tithe.

It was contended that these payments were not made under that denomination, or for agistment tithe: for the more valuable tithe of agistment, arising from the other unprofitable cattle within the parish, nothing was ever rendered to the rector: the rule of the canon law and ecclesiastical constitutions (the respondent observed) for apportioning wool in different parishes, served to shew, that these payments were made for that species of tithe.

By canon 1305, *Si Ores alibi Æstate et alibi in Hieme nutriuntur, dividenda est Decima. Vid. Cod. Jud. Eccl. 692.*

By a constitution of Archbishop Winchelsea, tithes of wool shall be paid to the incumbent, in whose parish the sheep have remained constantly, from the time of shearing till Martinmas, though they be afterwards removed: and if they be removed within the said time, from parish to parish, each incumbent in whose parish they shall remain at least thirty days, shall have his proportion of the wool.—Lind. 197.

The evidence for the appellant and respondent, the latter contended was consistent; agreeing, that, (except as to the excepted articles, being corn, hay, wool, and lamb,) all the tithes within the parish belong to the vicar.

The appellant insisted, that the question to be first tried in the cause, was a mere question of title depending on facts. That by the receipt of the ancient payments of one penny for every sheep, and one halfpenny for every lamb, he, and those under whom he claimed, had been unquestionably for a great length of time, if not immemorably, in possession of the tithes of agistment of [110] sheep; and that the appellant ought not to be deprived of such possession, or his title to agistment tithe in general impeached, except by the verdict of a jury, upon the facts evidencing the title, especially under these circumstances; and that it was the constant practice of courts of equity, under such circumstances, not to make any decree affecting the title, until the title had been decided upon at law.

The court of Exchequer, notwithstanding, on the 7th of July 1791, without any previous decision on the title at law, and without directing any issue to try the disputed fact of title, under the order of the court, decreed, that it should be referred to Francis Ingram, Esq. to take an account of the title of agistment demanded by the bill.

The appellant, conceiving himself aggrieved by this decision, applied for a rehearing of the cause, and accordingly, on the 6th day of July 1793, the cause was reheard by the court of Exchequer, when the decree of the 7th of July 1791 was affirmed.

The appellant thinking himself aggrieved by these decrees, appealed to the House of Lords, praying (J. Scott, J. Mitford) that the same might be reversed, and that the respondent's bill might be dismissed, or an issue be directed to try at law the title of the respondent to the tithe of agistment, and especially his title to the tithe of agistment of sheep, and assigned the following reasons:

I. The right of a court of equity to decree an account and payment of tithes, at the suit of a person claiming such tithes, must be grounded on a clear, unquestionable, legal right to tithes in the plaintiff, or in some person in trust for him: the right to the account being merely consequential to the legal right to the tithes: the courts of equity have therefore constantly made a distinction between those cases, in which the title of the plaintiff to the tithes claimed is not generally disputed (as where it is objected only that the lands from which they are claimed are exempt, or discharged from payment of tithes; or, that the tithes claimed are not payable in kind, but are to be satisfied in some other manner, as by payment of a modus, or composition real); and those cases, in which the title to the tithes claimed is denied to the plaintiff, and a title is set up in another person. In the first description of cases, the defendant claiming the benefit of an exemption or discharge, or of a modus or real composition, acknowledges the original title of the plaintiff, as alleged by him, but qualifies that title either by an absolute discharge from payment of the tithes demanded, or by a right to satisfy that demand, otherwise than by payment of the tithes in kind.

In the second description of cases, the existence of that title to the tithes in question, which the plaintiff claims, is absolutely and totally denied; and it is objected, that the title is in some other person: and in these cases, if the person in whom the title is thus stated, has had pernaney of the tithes claimed, the bill is in effect an ejectment bill, and ought to be treated like other bills in equity, which may be termed ejectment bills. In all cases, [111] where the legal title of the plaintiff has been disputed on bills, which may be properly called ejectment bills, it has not been the ordinary practice of courts of equity to make any decree whatsoever except for the purpose of assisting the trial of the title at law, where such assistance has been necessary; and this practice has been applied in many cases by the court of Exchequer itself, to bills for tithes. In a case of *Scott v. Airey* and others, in Trinity term 1779, where a bill was filed by Dr. Scott, as rector of Simonburne, claiming tithes of corn and

hay against the defendants, several of whom were occupiers of lands within the parish, and the Aireys were owners of part of the lands, and claimed the tithe of corn and hay of their own lands, and of those occupied by the other defendants; and it appearing that the Aireys, and those under whom they claimed, had received the tithes in question, and made them the subject of settlement for above 160 years, although they could shew no original lawful title to such tithes; the court of Exchequer dismissed the bill, refusing to give the rector any relief in equity, until he had established his title to the tithes at law. In *Edwards v. Lord Vernon*, Hilary 1781, the court of Exchequer followed the authority of *Scott v. Airey*; and in *Mawbey v. Edmead*, in Hilary term 1784, Sir Joseph Mawbey claiming, as impropriate rector, tithe of lands, of which some of the defendants also claimed the tithes; it was objected that the plaintiff's title was a legal title, and that he must first demand it at law. The court of Exchequer said it was a question of title, the evidence of possession was doubtful, and a court of equity would, therefore, not make any decree till the right had been settled at law, the account prayed being merely consequential to the right; and that the proper tribunal for trial of right, if the possession was equivocal, and for construction of deeds under which parties claimed, was a court of law. And although the counsel for the plaintiff pressed to have an issue directed, in order to have the right tried at law, with the assistance of the court, the court refused it, and dismissed the bill.

These cases, which were all well considered, particularly that of *Scott v. Airey*, and were founded on more ancient authorities, as well as on the established principles of a court of equity, seem to be a full authority for dismissing the bill in the present case. For in the present case the question is a question of title, and the respondent is not in possession; he has not established his right at law; he cannot shew a clear legal right; the account prayed by his bill is merely consequential to the legal right; and therefore the trial of the legal right ought to be referred to the proper tribunal, a court of law, to which the respondent ought to have resorted before he filed his bill.

II. Supposing the situation of the respondent to entitle him to the assistance of a court of equity, notwithstanding he has not established his title at law, yet as the account prayed by the bill is, as observed by the court of Exchequer in *Mawbey v. Edmead*, merely consequential to the legal right, it is conceived that the utmost [112] he could demand was the assistance of the court, to enable him to try that right at law; and that an account ought not to have been decreed till the right had been so tried at law, and found for the respondent. And the court, under the circumstances, taking upon itself to decide upon a legal title resulting from disputed facts, seems to have confounded the distinctions hitherto established between the duties of courts of law and equity. This reasoning most strongly applies in the present case, for the respondent can have no title as vicar, but one derived out of the title of the rector. The original title, therefore, was in the rector, and must remain with him, and consequently must now be in the appellant, unless the vicar can shew a title against the rector by evidence of endowment, and by possession according to that endowment. If that is not shewn so clearly that there can be no possibility of doubt on the subject, it is conceived that the rector has a right to have the question of title discussed in a court of law, on a trial by a jury. If a modus or an exemption is set up by an owner or occupier of lands against a rector, it is considered as the established rule of courts of equity, that however clear the proof of the modus or exemption may be, and although such evidence may not be encountered by any evidence on the part of the rector, yet the rector has a right to have the question tried upon an issue before a jury, because he has a *prima facie* title, as rector, against the owner and occupier of the land.

It seems impossible to distinguish this case from that alluded to. The rector in this case having the original title, and that title remaining with him, unless taken from him by some legal means, he has a right to have tried in a court of law, and by a jury, "Whether the title has been legally taken from him or not," before a court of equity can decide that he has no title.

III. If there is any ground for the claim of a person having the original legal title, to have the question "Whether that legal title has been taken from him" decided by a trial in a court of law, before a court of equity can make a decree, founded on no question of equity, but merely consequential to a legal title, in a case in which the evidence given in the court of equity is apparently clear against him; it seems beyond a doubt that he has a right to have the question of title so tried, where the evidence in

the court of equity is so far from being apparently clearly against him, that it is conceived the weight of evidence is in his favour. In the present case the original right is with the appellant : as rector he is unquestionably entitled to the tithes in dispute, unless the respondent can shew that the vicar has been endowed with such tithes. The vicar might shew his title by producing the instrument of endowment, and shewing enjoyment conformable to that endowment ; or by producing instruments amounting to evidence of endowment, and shewing conformable possession ; or by shewing possession merely, from which an endowment might be presumed.

[113] The respondent has not produced any instrument of endowment : he has produced instruments which he alleges amount to evidence of endowment ; namely, the extent of the prebend, and the terriers ; and he insists that these amount to evidence, that the vicar was endowed with all small tithes. This assertion is principally founded on the words "*omnia minuta*," towards the close of the extent. But those words cannot, according to the rules of grammar, or consistently with their position in the instrument, be deemed applicable to tithes of any description. They follow the words "*oblaciones & principalia decedentium*," oblations and mortuaries ; and therefore clearly refer to other minute profits of the church, and not to tithes. Besides, the first part of the same instrument states generally that the prebend consists (among other things) in the predial, and mixed tithes of the parish of Cave ; and the words which apply to the vicar, state his title to consist simply of personal tithes, and tithes of flax and hemp, oblations and mortuaries, "*et omnia minuta* ;" adding, that the tithes of a fishery, (a personal tithe, Lyndwood, 195) was detained from the vicar. This extent being within time of memory, the vicar could not prescribe for small tithes against the terms of it ; and the enjoyment of the tithes in question certainly had not been with the vicar, to found a presumption of any such prescriptive right, if it could be set up. The terriers on which the vicar relies, specify the tithes which the vicar received from 1716, the date of the first terrier. This specification certainly gives to the vicar many articles of tithe to which he appears to have no title upon the extent ; and his enjoyment has been accordingly. But although it may therefore be fair to presume a subsequent endowment of those particular tithes, it is no ground for presuming an endowment of all small tithes, and in the specification in the terriers, the tithe of agistment is not comprized ; and it is clear from the very specification in the terriers, that the vicar, during all that period, was not in the receipt of the tithe of agistment. On the contrary, in 1676, Clark, as lessee of the rectory of South Cave, filed a bill in the court of Exchequer, against Sunderland and others, occupiers of lands in the manor of Bromfleet, within the parish, praying an account of the lands occupied by the defendants, and of corn, grain, and hay, grown on such lands, and of unprofitable cattle agisted there. The defendants stated a title under the dissolved monastery of St. Leonard's in York, (one of the greater monasteries,) and set up an exemption from tithes. It does not appear that this suit further proceeded ; but it is clear from it, that in 1676, the rector claimed the tithe of agistment as his general right as rector ; and that in the particular case his claim was answered, by setting up an exemption from payment of any tithes. In 1757, a bill was filed in the court of Exchequer by Wilkinson, lessee of the rectory, against Robinson, then vicar, and Newton, a principal occupier, for agistment tithe ; and Robinson, in answer to that bill, did not pretend that he or any of his predecessors had ever received agistment [114] tithe ; nay, he did not venture to swear he believed he was entitled to it ; and on the contrary said, " He did not know, nor was able to set forth, whether he was entitled to " any tithe of agistment, or that he had any right or title thereto ; but submitted the " same to the court." Yet this is the very man, who, according to the evidence of one of the witnesses in the present cause, was contriving evidence of title for the benefit of his successors, and therefore not likely to forbear setting up any claim he thought he could support. There appears, therefore, on the evidence, no ground for presuming any endowment of tithe of agistment, either from any written instrument, or from any possession ; and on the contrary, the presumption from possession is, that the vicar was not so endowed. For the payments of one penny for every sheep, and a halfpenny for every lamb, depastured within the parish, and sold out after Candlemas, and before the next shearing-time, to the rector, were proved by several witnesses to have been immemorially made to the rector ; and the fact of those payments was not disputed by the vicar. It was therefore clear that the rector was, and constantly had been in possession of the tithes of agistment of sheep and lambs under such circumstances ; as those payments,

so immemorially made, could not be good in law, but as payment for the tithe of agistment of such sheep and lambs.

This evidence, therefore, on the part of the appellant, completely negatived the vicar's claim to the tithe of agistment of sheep and lambs within the parish, by proving immemorial enjoyment in contradiction to that claim. Consequently it was impossible to establish the title of the vicar, but by production of an actual endowment, and proving such circumstances as must oust any presumption, that the title under such endowment might be subsequently varied, as by law it might. This was therefore a question, which if not decided in favour of the appellant, ought to have been tried by a jury; and accordingly in the case of Carr, vicar of Lowesby, against Henton and others, the court of Exchequer, upon the original hearing in June 1784, directed an issue to try the title of the vicar to small tithes, where it appeared by evidence that the vicar had been expressly endowed with all small tithes; but there was also evidence of subsequent payment of a pension by the rector to the vicar; and it appeared that the question upon the vicar's title had been long matter of litigation between the rector and vicar, although there had been actually an ancient decree in the 15th of Charles I. in favour of the vicar's title, founded upon the clear evidence of the endowment. This order, directing an issue, was re-heard, and the decree affirmed in the court of Exchequer, and was afterwards again affirmed on appeal by your Lordships, on the 5th day of March 1788.

IV. Upon the bill filed in the court of Exchequer by Wilkinson against Robinson and Newton, before stated, it is conceived if the cause had come to a hearing, and no other evidence had been offered than that given in the present case, the utmost the court could have done for the vicar (according to the ordinary practice) [115] would have been to direct an issue to try whether the tithe in question belonged to the rector or vicar, as the rector had a clear *prima facie* title; and certainly there would have been no pretence in that case for dismissing the bill of the lessee of the rector, who claimed under the original legal title. If therefore in 1757, such must have been the proceedings on Wilkinson's title, the subsequent transactions, so far from bettering the title of the vicar, appear to support that of the rector; that cause having been compromised by Newton with the plaintiff, and the rector having constantly continued to receive the payments of one penny for sheep, and a halfpenny for lambs; and it seems difficult to assign a reason for refusing in 1791, to try that question by a jury, which in 1757 must have been, it is presumed, tried by a jury.

V. The propriety in this case of trying the title at law is more evident, because the circumstances and situation of the parish, the alterations made by inclosures, by change in the mode of agriculture, and a variety of other circumstances, may considerably affect any presumption, which might be raised as to the title of either party; because the question between the parties is solely a question of fact, upon a matter of title, and that a legal, not an equitable title—the account prayed by the bill being merely an incident to a legal title to the tithes: because the effect of the decree is to dispossess the appellant, who is actually in possession of the tithe of agistment of sheep and lambs, and to deprive him of that which he has unquestionably purchased for a valuable consideration, namely, the penny for sheep, and a halfpenny for lambs, of which the person of whom he purchased was in possession, and to which he can sustain no title whatsoever against any occupier in the parish, if the decree of the court of Exchequer is right; notwithstanding he, and those under whom he claims, have immemorially received such payments, without any pretence whatsoever by the vicar, that such payments ought to have been made to the vicar, and not to the rector. The impropriety of refusing to permit this question to be thus tried at law, likewise appears more glaring, because if the vicar shall file his bill for payment of tithes of agistment for sheep and lambs, the occupiers will either be deprived of the benefit of payments, which they had a right to insist upon against the rector, as immemorial payments by way of modus, in lieu of agistment tithe for sheep and lambs, or they must allege the payments to have been immemorially made to the rector by mistake, and that in fact they were due to the vicar, although never received by him. The appellant also, as an occupier, is deprived of this defence, which he might, as an occupier, have insisted upon against the claim of the vicar, if the vicar had clearly been endowed with agistment tithe.

VI. The answers attempted to be given to these objections to the vicar's title were—

1st, That the payments for sheep and lambs were not payments for agistment, but

for wool : this sort of reasoning appears very [116] extraordinary. The payments were unquestionably made, because the sheep and lambs, for which they were made, did not produce wool, nor were otherwise profitable to the rector ; and that is the foundation of claim of agistment for sheep and lambs in any case. For if they had produced wool, or were otherwise profitable to the rector, there could have been no ground for claiming title of agistment, either by rector or vicar. Accordingly in a cause in the Exchequer, in Trinity term 1776, of Bennett, impropriate rector of Sutton in Lincolnshire, against Greaves the vicar, and Allenby and others, occupiers of lands ; evidence of the like immemorial payments to the vicar for sheep, viz. of three-pence a-head for all sheep which had either been sheared in the preceding year in the parish, or brought into the parish before Candlemas in any year, and were sold or removed out of the parish before the next shearing-time, was held to be evidence, that the vicar was entitled by endowment to title of agistment generally ; the court being of opinion that such payment was evidence of possession by the vicar of title of agistment of sheep and lambs. But in that case, notwithstanding such evidence, the court conceived the rector had a right to have the legal title tried at law, and directed an issue accordingly, which was found against the rector, and for the vicar ; the ancient immemorial payments for sheep, depastured and not shorn within the parish, being the principal evidence of the vicar's title to agistment title.

2dly. It was insisted that the vicar, appearing to be in possession of most of the small tithes, it ought to be presumed he was endowed with all of which the rector did not appear to be in possession.

This seems a very extraordinary mode of reasoning, and particularly when applied to a title, of which (if the payments of one penny for sheep, and one halfpenny for lambs, was for agistment) the rector was clearly partly in possession, and it seems perfectly inapplicable, and it is presumed, never has been, in fact, applied to any case in which the rector is in possession of any small tithe, as the rector, in the present case, is of wool and lamb, which he has constantly received. At the utmost, it can apply only to cases in which the rector had received nothing but great tithes, and the vicar had constantly received all the small tithes actually produced within the parish ; and upon introduction of any new article, of which the tithe is a small tithe, the vicar claimed it, and produced his receipt of all small tithes before arising in the parish, as a ground for presuming that he was endowed with all small tithes whatsoever. But even in such case, the evidence being ground for presumption, seems matter properly to be left to a jury ; more especially, as it is presumption made against a person having the common law right to the property in dispute. It is sufficiently disputable, whether the decisions of the court of Exchequer, which have held the vicar entitled to newly introduced small tithes, although the rector has received them from the time of their introduction, because the vicar had received all other small tithes, actually rendered within the parish, [117] can be maintained upon just principles : resting, as they do, upon the court's presuming a fact against a *prima facie* common law right ; but the foundation of the presumption wholly fails in cases in which the rector has actually received small tithes, because that circumstance proves that the vicar cannot have been endowed of all small tithes ; and the common law right being in favour of the rector, the vicar cannot, against that common law right, claim a species of small tithes which he never has enjoyed. If in a parish, where the rector enjoys some small tithes, the vicar should have been permitted to receive the small tithes of articles lately introduced into the parish, or small tithes, which had, for the first time, been but lately demanded in the parish, though constantly produced in it, the very same principle upon which the court of Exchequer has, in other cases, ventured to presume, as a fact, without the intervention of a jury, that a rector had received, by mistake, such small tithes, where the vicar (his endowment not appearing) has been used to receive all other small tithes, would, it is apprehended, require the court to hold that in such a case, the vicar had been permitted, by a like mistake, to receive, to the prejudice of the rector, such small tithes. It is most abundantly clear that that principle could not possibly, in such a case, support a presumption in favour of the vicar.

3dly. It was urged, that the decree for the vicar would not bind the right of the rector, and therefore it was not necessary for the court to direct an issue.

This sort of reasoning also seems extraordinary. The decree does, in effect, bind the right of the appellant ; and the court might, in like manner, annually, for ever,

make similar decrees, without directing any issue to try the fact of title, upon the allegation that no one of such decrees actually bound the right. The distinction thus set up between decrees binding the right, and decrees not binding the right, has been hitherto considered as confined to a very different case, namely, where a defendant sets up a defence by way of modus to a bill for tithes, which prayed an establishment of the right, as well as an account; and the defendant, in his answer, has made some mistake in laying the modus, so that the court could not, upon those pleadings, direct an issue. There the court, unable to direct an issue, for want of sufficient matter on the record, has made a decree for an account only, to give the defendant an opportunity of trying his title upon a future suit. But that is on a supposition that in a future suit the defendant may be able to put upon the record the modus in question, by which he might qualify the plaintiff's title so that it may be tried; whereas, in the present case, it is for the respondent to state, upon the record, his title, in derogation of the appellant's title, and to prove such title fully and clearly. For a vicar, it is conceived, is as much bound to make out his title against that of his rector by pleading and by evidence, as an occupier is to make out the exemption or qualification which he claims against the *prima facie* title of a rector or a vicar.

[118] The respondent on his part stated (F. Burton, R. Graham) the following reason for the affirmance of the decrees complained of.

I. The Extenta Prebendæ, terriers, vicar's accounts, etc. etc. independently of usage, prove that the vicar is endowed of all small tithes, and even of all other tithes within the parish, except corn, hay, wool, and lamb.

II. Wherever the usage is that certain specific tithes have been received by the rector, and the rest of the tithes in general by the vicar, all new tithes which may arise will belong to the vicar: hops, clover, madder, turnips, agistment, and other species of new crops, are instances of it. Here the usage is, that the vicar has been in receipt of all small tithes and of all tithes, other than those specifically excepted in the terriers. Consistently too with the rule of law, potatoes, turnips, rape, saintfoin, and saintfoin-seeds, seeds of different sorts, and other articles, which are new species of tithes in this parish, have been received by the vicar. The tithe of agistment itself, where it has been rendered at all, as in the case of turnips consumed by unprofitable cattle, without being first pulled, has been paid to the vicar.

To the objection, that "of common right all tithes belong to the rector; therefore the title to tithe agistment, *prima facie*, is with the rector. That the rector has also been in the actual receipt of one penny and one halfpenny, for sheep and lambs, when no tithe of wool or lamb is payable. And that the payment of those sums could not be rightfully made for any thing else than the tithe of agistment," the following answer was given:—

By endowment, or by usage, the common law-right of the rector may be qualified or abridged. In general, the great tithes belong to the rector, the small ones to the vicar, but often with the exception of lamb and wool in favour of the rector; and the natural construction of the instruments evidencing the endowment, and the import of the usage in his case, shew that such was the division in this parish. As to the payments of one penny and one halfpenny for the sheep and lambs, it never was nor is the idea of the parish, that they are in the nature of agistment tithe: no agistment tithe, though much more valuable, for other unprofitable cattle, has ever been received by the rector. The rule of the canon law and the ecclesiastical constitutions as above-mentioned, afford a clue to the origin of these payments. The testimony of the witnesses also concurs, that the payments were for wool tithe; and though they have been rendered for sheep resting in the parish fewer than thirty days, as well as more, notwithstanding the ecclesiastical constitution gave no portion of the tithe-wool in respect of less than thirty days pasturage, yet it is to be observed, that these were compositions in nature of a rate tithe on the wool shorn out of the parish, incapable of being collected in kind. To avoid frauds and disputes concerning what sheep were subject, and what exempt, an average rule is formed on the whole, whereby less is accepted for sheep, which for length [119] of keeping ought to pay more, in consideration of receiving something for those which, from speedy removal, ought not to pay any thing for tithe-wool.

To the objection stated by the respondent in the following terms:—"The written instruments are contradicted by the actual enjoyment of tithes; and the respondent's right is unsupported by written documents, or usage. According to the Extenta

"Prebendæ, predial and mixed tithes belong to the rectory, small tithes to the vicarage ; whereas the vicar has been in the constant receipt of hemp, flax, etc. etc. which are predial tithes, and the rector has been in the uninterrupted enjoyment of wool and lamb, which are small tithes." By the terriers, "to the vicarage belong all tithes" (except corn, hay, wool, and lamb), "and are mentioned to be paid in the order following, with an enumeration of several particulars. The general precedent words ought to be restrained by the latter specific ones. In the enumeration of particulars, tithe of agistment is not mentioned ; the usage has not been to receive it ; therefore it ought not to belong to the vicar."—It was answered, the written instruments are reconcilable with the modern usage. By the Extenta Prebendæ the prebend or rectory is said to consist in predial and mixed tithes, not of the predial and mixed tithes, within the parish ; and in fact at this day, it enjoys many, though not all, predial tithes : so when, lastly, all small tithes, or rather small articles, *omnia minuta*, are said to belong to the vicarage, they must be understood with an exception of those species of small tithes which are before enumerated as belonging to the rectory, and which in truth were always articles of great value. The usage perfectly concurs with this construction ; and both instrument and parol evidence shew, that the impropiator was never entitled nor ever received other species of small tithes than those which are specifically stated to have belonged to him. As to the terriers, the declaration contained in them, that to the vicarage belong all manner of tithes, except corn, hay, wool, and lamb, is expressive of the vicar's right ; the enumeration or description of particulars relates to the mode of tithing such articles as were then received by the vicar. These latter words, indicative of the temporary receipt, cannot restrain the general precedent words, disclosing the perpetual right of the vicarage.

To the last objection, that the respondent's title to agistment tithe being doubtful, and resting on facts in dispute between the parties, ought to have had the sanction of a jury in the most solemn manner, by a trial at law, before pronouncing a decree in equity to establish it. It was very shortly urged, that the rules of all courts require, that facts should be ascertained before the law is declared. References from equity proceed not of right, but of discretion, to satisfy the conscience of the court concerning doubts in facts or law. In doubts of facts an issue is directed ; doubts of law are referred to the Judges. When the conscience of the court is satisfied, both on the fact and on the law, a trial can [120] have no other object than to create expence and accumulate oppression.

But after hearing counsel it was ORDERED and ADJUDGED, that the decrees complained of be reversed ; and it is further ordered, that the court of Exchequer do direct a trial to be had at the next assizes for the county of York, upon the following issue, "Whether the vicar be entitled, by endowment or otherwise, to the tithes of agistment, within the parish of South Cave ;" and that all further directions be referred till after the trial, and that the court of Exchequer do give proper directions for carrying this judgment into execution. (MS. Jour. *sub anno* 1797.) [On the trial the jury found a verdict in favour of the respondent Garnons ; on which an account was ordered by the court of Exchequer, with the costs at law but not in equity. Wood, iv. 379.]

TOLL.

CASE 1.—THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON *Appellants* ; THE MAYOR AND BURGESSES OF THE BOROUGH OF LYNN REGIS, COMMONLY CALLED KING'S LYNN, IN THE COUNTY OF NORFOLK,—*Respondents* [2d May 1796].

[If toll be merely claimed of the individual members of a Corporation which is exempt from toll, an action can be maintained on the writ *de essendo quietum de theolonio* in the name of the Corporation.]

[This writ, *de essendo quietum*, etc. is not merely prohibitory but remedial ; on which the parties may plead to issue on a question of right. See the Lord

C. J. Eyre's opinion as to the advantages of the proceedings in ancient writs of right. Bos. & Pull. 523, 4.]

[This cause was originally tried at the bar of the court of C. P. in Easter term (May 6) 1789, when a verdict was given for the corporation of London, on both the issues joined on the defendants' pleas: viz. the first denying the custom for the citizens to be exempt from toll; and the second denying the persons named in the writ to be citizens of London; one shilling damages were given, which were remitted on the record. The judgment was, "that the citizens and all their goods should be quit of yielding toll." This judgment was reversed in the court of K. B. (Hilary term 1791) after argument, by the unanimous opinion of all the Judges of that court, given very much at length. But on the appeal to the House of Lords, Eyre, C. J. of C. P. delivered the unanimous opinion of all the Judges in favour of the action; on which the judgment of K. B. was accordingly reversed, and the original judgment of C. P. affirmed.]

[The argument of Lord C. J. Eyre included the decision of three points, namely, 1. That the writ *de essendo quietum de theolonio*, would bear a solemn action: 2. That claim of tolls was sufficient to sustain the writ: [121] 3. That the corporation of London were sufficiently interested to be plaintiffs. The reason for confining the grounds of the opinion of the Judges to these three points was, that two objections made to the form of proceedings (viz. want of attachment in the process; and the action's not being *qui tam*) were not deemed proper to be insisted upon in argument by the counsel for Lynn; and that in the opinion of the Judges, there was not room on the record to raise the great point as to the right of non-resident freemen of London, to the benefit of the London exemption. See Harg. *Law Tracts*, vol. i. Appendix No. V. *ad finem*. As to this latter point, see the reasons of the defendants in error in this case (which were drawn by Mr Hargrave) and Mr. Hargrave's argument for the Liverpool corporation in his *Law Tracts*, vol. i. p. 471-511. When the cause between London and Liverpool was tried at the bar of the Exchequer (Easter 1799), the jury, under the direction of the court, found that a freeman of London is not exempt from toll unless he be resident, inhabitant, and in scot and lot. This verdict, as far as appears, has hitherto been acquiesced in by the city of London. See 1 Bos. & Pull. 523 n.]

[See 1 H. Black. Rep. 206-216, for the original proceedings in the court of Common Pleas: 4 Term Rep. K. B. 130-146, for the proceedings on the writ of error in the King's Bench: and 1 Bos. & Pull. 512-522, for the opinion of the Judges as delivered by Eyre, C. J. in the House of Lords.]

[See *London Joint-Stock Bank v. Mayor of London*, 1875, 1 C. P. D. 11.]

This case originated from a writ *de essendo quietum de theoloneo*, that is, a writ of being quit of toll, brought in the court of Common Pleas by the corporation of London, against the corporation of King's Lynn. On which writ the corporation of London founded a declaration, the object of which appeared to be the establishing an exemption of the freemen of London, NON-RESIDENT as well as resident, from certain tolls or port duties at King's Lynn, of which the corporation of that place is the ancient proprietor.

The declaration of the corporation of London was in the words following:—

"Norfolk, to wit, The mayor and burgesses of the borough of Lynn Regis, commonly called King's Lynn in the county of Norfolk, were summoned to answer the mayor, commonalty, and citizens of the city of London, of a plea, wherefore they REQUIRE the citizens of the said city to yield toll, passage, and lastage of their goods and things within the said borough and the port thereof. And thereupon the said mayor, commonalty, and citizens of the said city, by Rowland Lickbarrow, their attorney, complain: for that whereas the city of London is, and from time whereof the memory of man is not to the contrary, hath been an ancient city: and the citizens of the said city, during all the time aforesaid, have been a body corporate and politic, in deed fact and name, by divers names of incorporation, and for divers, to wit, fifty years last past, have been a body politic and corporate, by the name of the mayor, commonalty, and citizens of the city of London: and whereas also, amongst others

"the liberties, free customs, and privileges from time immemorial used and enjoyed by the said citizens, they the said citizens, from time whereof the memory of man is not to the contrary, have been used and have been accustomed to have and enjoy, and still of right ought to have [122] and enjoy, a certain ancient liberty and privilege, that is to say, that the citizens of the said city, and all their goods, should be quit and free of and from all toll, passage, and lastage, and other customs throughout the whole kingdom of England and the ports of the Lord the King, except only his due and ancient custom and prizes of wines; all which said liberties and privileges have been confirmed by diverse acts of Parliament: and whereas our said Lord the King did, by his certain writ under the Great Seal of England, command the said mayor and burgesses, that they should permit the said citizens to be quit of yielding such toll, passage, and lastage, and other customs as aforesaid, of their goods and things in the said borough and the port thereof, or on a certain day now passed, signify to him cause wherefore they had not executed his commands to them, for the said purpose before then directed: yet the said mayor and burgesses, not regarding the said writ of our said Lord the King, have not signified to him, as by the said writ was commanded: and since the time of the aforesaid writ of our said Lord the King to them directed, to wit, on the first day of December, in the year of our Lord 1787, at the borough aforesaid, in the county aforesaid, did disquiet the said citizens on the occasion aforesaid, and did then and there REQUIRE of Osbert Denton, James Denton, Thomas Carr, Thomas Turner, and Samuel Baker, citizens of the said city, and of other citizens of the said city, toll passage and lastage, other than the custom and prizes of wines above excepted, of the goods and things of the said citizens within the said borough and the port thereof, in contempt of the said Lord the King, and to the damage of the said mayor, commonalty and citizens of £100, and therefore they bring their suit, and so forth."

To this declaration the corporation of Lynn pleaded as follows:

"And the said mayor and burgesses, by Joseph Lyon their attorney, come and say, that they the said citizens, from time whereof the memory of man is not to the contrary, have not been used and accustomed to have and enjoy and still of right ought not to have and enjoy the said ancient liberty and privilege; that is to say, that the said citizens of the said city, and all their goods, should be quit and free of and from all toll passage and lastage and other customs throughout the whole kingdom of England and the ports of the Lord the King, except only his due and ancient custom and prizes of wines, as the said mayor, commonalty and citizens have in their said declaration above alleged; and of this they put themselves upon the country, etc."—"And the said mayor and burgesses further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said Osbert Denton, James Denton, Thomas Carr, Thomas Turner, and Samuel Baker, are not citizens of the said city of London, as the said mayor, commonalty and citizens have above in their [123] declaration alleged; and of this they the said mayor and burgesses put themselves upon the country, etc."

On both of these pleas issues were joined.

The cause came on to be tried at the bar in the court of Common Pleas at Westminster, on the 6th of May 1789: and the jury found a verdict for the corporation of London on both of the issues, and gave one shilling damages, which damages the record states to have been afterwards remitted by the corporation of London to the corporation of King's Lynn: the court of Common Pleas gave judgment accordingly. The following are the forms of the verdict and judgment as stated in the record:

"The jury as to the first issue within joined, say upon their oaths that they the said citizens, from time whereof the memory of man is not to the contrary, have been used and accustomed to have and enjoy, and still of right ought to have and enjoy, the said ancient liberty and privilege, that is to say, that the said citizens of the said city, and all their goods, should be quit and free of and from all toll passage and lastage, and other customs throughout the whole kingdom of England, and the ports of the Lord the King, except only his due and ancient customs and prizes of wines as the said mayor and commonalty and citizens have in their said declaration above alleged. And as to the last issue within joined, the said jurors further say upon their oaths aforesaid, that the said Osbert Denton, James Denton, Thomas Carr, Thomas Turner, and Samuel Baker, are citizens of the said city of London, as the said mayor and commonalty and citizens have above in their declaration alleged; and they assess the

“ damages of the said mayor and commonalty and citizens to one shilling, which said
 “ damages the said mayor and commonalty and citizens now here freely remit to the
 “ said mayor and burgesses of the borough aforesaid. And because the justices here are
 “ willing to advise themselves of and upon the premises before they give judgment
 “ thereon, day is given to the parties aforesaid here until on the morrow of the Holy
 “ Trinity to hear their judgment thereon, for that the said justices here thereon are not
 “ yet, etc. At which day come here as well the said mayor and commonalty and
 “ citizens as the said mayor and burgesses by their attornies aforesaid; and because the
 “ justices here are willing further to advise themselves of and upon the premises, before
 “ they give their judgment thereon, further day is given to the parties aforesaid here,
 “ until on the morrow of All Souls, to hear their judgment thereon, for that the said
 “ justices here thereon are not yet, etc. At which day come here as well the said
 “ mayor and commonalty and citizens as the said mayor and burgesses by their attornies
 “ aforesaid; and hereupon the premises being seen, and by the justices here fully
 “ understood, it is considered that the citizens of the said city, and all their goods, be
 “ quit of yielding such toll passage, lastage, and other customs as aforesaid, of their
 “ goods and things in the said borough and port thereof. [124] And the said mayor
 “ and burgesses of the said borough in mercy, etc.”

The corporation of King's Lynn sued out a writ of error on this judgment returnable in the court of King's Bench, and assigned errors generally; to which the usual plea was pleaded, importing that there was no error either in the record or the judgment of the Common Pleas.

The case was first argued in the court of King's Bench, by Mr. Serjeant Runnington for the corporation of King's Lynn, and by Mr. Gibbs for the corporation of London.

The case was argued a second time by Mr. Serjeant Le Blanc for King's Lynn, and by Mr. Serjeant Adair for London.—On the close of this second argument, the court of King's Bench reversed the judgment of the court of Common Pleas in the words following: “ Whereupon, as well the record and proceeding aforesaid, and the judgment
 “ thereupon given, as the matters aforesaid by the mayor and burgesses aforesaid for
 “ errors assigned, being seen, and by the court of our Lord the King here fully under-
 “ stood, and mature deliberation being thereupon had, it appears to the court of our
 “ Lord the King here, that in the record and proceedings aforesaid, and also in the
 “ giving the judgment aforesaid, there is manifest error. Therefore it is considered
 “ that the judgment aforesaid, for the errors aforesaid, be reversed, annulled and
 “ entirely for nothing esteemed: and that the mayor and burgesses aforesaid be restored
 “ to all things which they have lost by reason of the said judgment, etc.”

On this judgment of reversal, the corporation of London sued out a writ of error returnable in Parliament, and assigned general errors against the judgment of reversal by the King's Bench; to which the corporation of King's Lynn pleaded generally, that there is no error in the judgment given by the court of King's Bench for the reversal of the judgment given by the court of Common Pleas; and on the part of the corporation of King's Lynn (T. Erskine, S. Le Blanc, Fr. Hargrave), the following reasons were assigned for the affirmance of the judgment of the court of King's Bench, reversing the judgment of the court of Common Pleas. (See Hargrave's *Law Tracts*, vol. i. Appendix No. V.)

I. It is submitted, that the antiquated writ *de essendo quietum de theoloneo*, to which the corporation of London has thought fit to resort, is not remedial, so as to bear the process and pleadings of a solemn action: but is simply a command from the Crown, which being disobeyed ought not to be followed with any thing beyond an attachment for the contempt. Sir Henry Finch, in his profound discourse on law, is a very pointed authority to this effect. The last chapter in that work treats of certain special writs wherein no process lieth. It begins in these words:—“ Thus far of an action, and the
 “ several parts of it, and of writs both original and judicial that begin or prosecute the
 “ action. Besides which there are certain other originals, which are, as it were, special
 “ anomalies and exceptions from the former, being not deductory to bring any matter
 “ into plea or solemn [125] action, but only commandatory or prohibitory to do or leave
 “ something undone. And therefore no process at all lieth in these writs, but only an
 “ attachment upon a contempt for not executing or obeying them.” After this introduction Sir Henry Finch enumerates various writs of this special nature; and the last but two of these instances is the writ *de essendo quietum de theoloneo*.

II. Should the writ *de essendo quietum de theoloneo* be deemed so remedial as to bear an action, it is submitted to be a point deserving of consideration, whether on the face of the record there is not an error in the process against the corporation of King's Lynn; for the record states them to have been only summoned, whereas there are precedents according to which an attachment ought to have been part of the process.

III. It is apprehended to be an invincible objection against the corporation of London, that the sort of gravamen or injury stated by them in their declaration is not actionable. They do not allege any taking of or distress for toll by the corporation of King's Lynn. The injury alleged is simply a claim or requiring of toll from the citizens of London. In other words the action is brought, not for an actual damage, nor for an actual injury, but merely for damage and injury feared. It is then an action *quia timet*. But the corporation of King's Lynn are advised, that there are only certain special cases in which an action *quia timet* is allowed by our law; and that this writ *de essendo quietum de theoloneo* is not of the number. Lord Coke in his commentary upon Littleton, thus enumerates the instances of actions *quia timet*, "Note, that there be six writs in law that may be maintained *quia timet*, before any molestation, distress, or impleading; as 1. A man may have his writ or mesne, whereof Littleton here speaks, before he be distrained. 2. A *warrantia chartæ* before he be impleaded. 3. A *monstraverunt* before any distress or vexation. 4. An *audita querela* before any execution sued. 5. A *curia claudenda* before any default of inclosure. 6. A *ne injuste veres* before any distress or molestation.—And these be called *brevia anticipantia*, writs of prevention." Hence it is plain, that the writ *de essendo quietum de theoloneo* did not occur to Lord Coke's extensive learning as one of the few anticipating writs on which an action is sustainable before actual damage received. It is observable also, that all of the few precedents hitherto explored and appealed to for the corporation of London seem to fail of serving their purpose in this respect. The first of these is the case of the 18th of Edward I. against the bailiffs of Southampton in Mr. Riley's *Placita Parliamentaria*; and in that case the abbot of Saint Edward's place, who was the complainant, expressly states, a distress upon his tenants by the bailiffs, and lays damages on that account. In the next precedent, which is the case of the King and divers citizens of Lincoln against the bailiffs of Burton, in the 22d year of the same reign, as given in Mr. Madox's *Firma Burgi*, the injury stated is the having been aggrieved and disquieted by great distresses, to the damage of the [126] citizens of Lincoln, who were joined with the King as complainants. The third and remaining precedent is a case in the King's Bench of the 2d of Edward II. in which certain tenants of the King's manor of Brimmesgrene and Norton were plaintiffs; and on a search for this case, made in consequence of its being cited from Lord Coke's *Second Institute*, the record has been found, by which it appears, that the plaintiffs alleged the making of distresses for toll and a damage thereby of twenty pounds. With these precedents, originally cited for the corporation of London, but on this point at least operating against themselves, it may be proper to connect the chapter *De Libertatibus* in the second book of Bracton. In that part of Bracton notice is taken of the remedy for those disquieted for toll in breach of their privilege of exemption granted to them by the Crown. But in the only action there stated for such an injury, both the writ and the count suppose an actual damage received by the plaintiffs; for the writ calls upon the defenders to answer *quare ceperunt theolonium*; and the count specifies a distress for the toll to the damage of the plaintiffs in a certain sum.

IV. It is also conceived to be an objection to the declaration of the corporation of London in the present case, that for the injury they have alleged they are not the proper plaintiffs. The exemption from toll under the royal grants to London is conferred in favour of the individual citizens of that place, and these are competent to defend their right of exemption without aid of the corporation. The corporation of London is not even within the benefit of the exemption; for it seems to have been admitted in the great case between Waller and Hanger, in the reign of James I. on the London exemption from prisage, that if the chamber of London should traffick, it must pay prisage; because it is in their politic capacity as a corporation, and the exemption granted enures only for the citizens in their individual and natural capacities. If then an injury has been done in the present case, it is to the particular citizens, who are named as having being disquieted by the demand of toll. But these are not so much as co-plaintiffs in the action. In point of principle it appears a strong proposition to

assert, that the corporation of London, upon whom no demand of toll is stated to have been made, and upon whom if they had traded it is apprehended the demand would be justifiable, shall yet be plaintiffs for the injury from a demand of toll upon individual citizens, who, if the demand is actionable, are capable of suing for themselves. But that the corporation of London should be plaintiffs is not merely quite unnecessary. The receiving of them as such seems to lead to two actions and two compensations for the same injury; for a recovery of damages by the corporation of London might not be a bar to an action brought by the particular citizens immediately effected by the demand of toll. Besides it is natural to ask, where are the precedents to be found of such an action by the corporation of any place for an injury to certain of its individual citizens. Here again, the three [127] precedents already referred to from Ryley's *Placita Parliamentaria*, Madox's *Firma Burgis*, and Lord Coke's *Second Institute*, will not serve the purpose; for in each of them the particular citizens (Persons, Harg. *Law Tr.*), who were aggrieved by having their right of exemption contested, were plaintiffs. Thus it seems, that the interference of the London corporation, as champions for fighting the cause of its citizens against the corporation of King's Lynn, is at the same time unnecessary, irregular, and unprecedented.

V. Further it is submitted to be a point deserving of attention, whether the suit in the present case ought not to have been *qui tam*, that is, whether the corporation of London ought not to have sued as well for the King as for themselves. Latterly, indeed, the courts appear to have been less strict, in requiring actions *qui tam*, for matters including a contempt of the King, than in ancient times. But it is to be considered, that in the present case the action is not merely laid to the contempt of the King; but actually proceeds upon a disobedience of the King's command, by a writ under the Great Seal, expressly recited in the declaration as one of the main grounds of it. It is not the case of a contempt merely virtual, but of one of the most direct and express kind. Perhaps, therefore, it may be found not to fall within the reach of those authorities, according to which a plaintiff has an election to sue, either for the Crown and himself, or for himself only.

VI. Lastly, it is with very serious anxiety submitted on the part of the corporation of King's Lynn, that the declaration of the corporation of London is essentially defective, in not stating how the five citizens, named as having been disquieted by the demand of toll, are entitled to that denomination. More particularly it is not alleged, that they are both freemen and inhabitant householders of London, or indeed inhabitants of any description. From the silence of the declaration in this respect, it may be inferred, that the citizens named are neither inhabitant householders of London, nor inhabitants in any respect; are not full and complete citizens of London; but are persons belonging to and resident in other places, and merely connected with London by having purchased its freedom: in other words are non-resident freemen. That this is the real facts of the case, will not it is presumed be disavowed on the part of the corporation of London: for, one great object of the present suit between London and King's Lynn is to have it settled, whether non-resident freemen of London are within the benefit of its charter exemptions from toll. It is not, indeed, admitted by King's Lynn, that the London exemption applies in any respect against the King's Lynn port-duties; because as London founds upon charters, some of which are ancient enough to constitute a prescriptive exemption; so on the other hand King's Lynn claims a prescriptive right of toll; and thus if the latter can be made out, the question would be, which prescription ought to prevail, that is, which shall be presumed to be most ancient. But though this is certainly a point of con-[128]-troversy between the two corporations; yet, from the general verdict, this point is clearly not open to debate on the present record; and besides this, the more immediate cause of the present contention certainly was the claim of London to shelter its non-resident freemen from payment of the King's Lynn port-duties. If the wish of the corporation of King's Lynn had prevailed, there would have been a special verdict in the present case, which would have brought forward this latter question most completely and directly upon the record. But a general verdict having been given, the corporation of King's Lynn is driven into raising the question about the non-resident freemen of London by argument and inference from the want of any allegation or mention of residence in pleadings. However, it is conceived that the corporation of London will scarce decline meeting a question so notoriously a main object of their interference by institution of the present

suit. It is hoped also, that should they endeavour to avoid this latter question, there will be found sufficient defect in their declaration to justify forcing the point into discussion; for it is submitted, that where any persons claim to be exempt from the general law of the land, they ought to be very complete, distinct, and particular, in setting forth the facts by which they qualify themselves for such exemptions; and that merely stiling the five persons, named as having been disturbed by the demand of toll, citizens, without specifying how they are so qualified, is too loose and general. On the information for a sum due for prisage to the King's farmer, in the case of Waller and Hanger, in the reign of James I. it appears from a copy of the original record, that the defendant, who claimed benefit of the London exemption from prisage as executrix of a deceased citizen, pleaded not only that her husband was a clothworker of London, and had for twenty years before his death been continually commorant and inhabiting within London, but that she the widow and executrix was a free woman of London, and commorant and inhabiting there.

An opening being thus made for the introduction of this great question, whether non-resident freemen of London are entitled to the benefit of the London exemption from tolls, it is deemed proper, on the part of the corporation of King's Lynn, to insist against such an extension of the privilege on these grounds:

1st, It is submitted, that non-residents are neither within the words, nor within the intentions of the charters of exemption. In all the London charters the grant is in favour of the *homines* and *cives* of London. But how can one be said to be a man and citizen of a place, in which he is neither housekeeper nor lodger, nor an inhabitant in any degree? The criterion of a citizen is reality, not merely a name. But a citizen without a house, without a family, without residence, is merely nominal. He wants the real qualifications. As too such a person comes not within the description of a citizen, so he is clearly not within the intent of the exemption. The privilege, as Lord Hale properly [129] remarks on prisage, is not *intuitu personæ*, but *intuitu loci*. It is local, not personal. It is intended as a favour to persons of one place, in preference to and by way of distinction from persons of other places. But to admit the inhabitants of all places equally, merely because they have purchased the freedom of the place privileged, is to destroy the distinction evidently intended; is to leave room for putting the inhabitants of all places upon the same footing; is to convert a local privilege into a personal one.—Besides, other consequences of holding the privilege to be independent of residence are monstrous. It converts a privilege of exemption into a power of exempting. It transfers the prerogative of exempting from the Crown to the corporation of London and to every other corporation of the kingdom having grants of the same privilege. Nay, it more than transfers the prerogative of exempting: for it enables the subject to produce the effect of exemption, where the Crown cannot exempt; that is, as against grantees of ancient tolls, whose grants of the tolls from the Crown are prior in date to the Crown grant of exemption from them; for the Crown cannot exempt to the prejudice of existing grants of tolls. Further, it not only deducts from the Crown the toll, which otherwise would be payable by London, and other places privileged in like manner, but enables London, and each of those places, to annihilate all ancient tolls for all persons throughout the kingdom; and so, from time to time, to render this species of revenue and property wholly unproductive both to the Crown and its grantees. Nay, what is even worse, it tends to change one toll for another; to detract the ancient toll from its real proprietor, who is generally subject to some burthen for the public benefit, such as the maintenance of a port, and to substitute in its place a toll uncompensated by any such benefit, for the city of London and other privileged places invading this species of property, namely, a sum of money for the purchase of their freedom, both in fraud of the Crown and its grantees of ancient tolls, and to the detriment of the citizens of the very place exempted. If being resident and being a householder, as well as being a freeman, are considered as part of the qualification of a citizen, all this aggregate of mischief and injustice is avoided. But declare, that being a freeman without residence in any character and of any kind is sufficient to exempt, and the whole of such mischief will immediately attach.

2. In the next place it is submitted, that all the authorities, hitherto gleaned, are pointedly against considering non-resident freemen as citizens within these charter exemptions; most, if not all of them, excluding even resident freemen, not being also householders but only inmates or lodgers.

So was it declared, against non-residents, by the King with the advice of the Lords in Parliament, in the eleventh of Henry IV. on a consideration of the London charter exempting from prisage of wines. Thomas Chaucer, who as King's butler has the receipt of the prisage duty, complained to the Lords by petition of gross [130] abuse of the London exemption from prisage. He represented, that this franchise was not granted to London and the cinque ports, "except to the end that those persons only " who dwell, and by their service become continual dwellers in those places, and their " children in the said places born, should have benefit of the said franchise." His petition next stated a gross abuse of and fraud upon this franchise by the city of London; namely, that "in the city of London it is and has been used of long time, " that every foreigner not free in the said city, who will come to the mayor, chamber- " lain, or the masters of any trade in the same city, and pay a small sum of money to " the chamber, or to the masters of any trade of the same city, shall be received into " the said freedom, as well as he who at all times is a continual dweller of the same " city, notwithstanding that he is of another town or borough, to the disinherison of " our said Lord the King, as well of the prisage which he ought to have of every such " man not free, as of all other customs and duties to our said Lord the King also from " them due." The conclusion of this petition runs thus: "May it please you to con- " sider how the estate as well of our Lord the King as of his Crown may be preserved " without destruction or prejudice, and thereupon to ordain, that due remedy may be " provided in that respect, that is to say, by praying our Lord the King and his very " wise council to send for the mayor and aldermen of London, commanding them as well " in their own persons as the masters of the different trades of the said city, to cease in " future, so to grant their freedom to any foreigner, under peril of forfeiture of the fran- " chise of the same city, and also to repeal the freedoms to such foreigners already granted " in any trade within the same city, if they have come to the said freedom in manner " aforesaid, in regard that otherwise in a short time, as well our said Lord the King, " who now is, as his heirs, who should be kings in future, will be disinherited of all " the prisage of wine throughout the whole kingdom of England, by the freedom of the " same city of London." To the petition thus forcibly concluding, the answer is as follows:—"The King will send for the mayor and aldermen of the said city; and " further has declared, by advice of the Lords in Parliament, that none hath or enjoys " such freedom in this case, if he be not a citizen, resident and dwelling within the same " city; and that all others dwelling in other cities and boroughs, or towns, etc. have " and enjoy their own franchises to them granted, saving always to our Lord the King " his inheritance in this case."—Thus emphatically speaks this famous parliamentary record; not to the city of London only, but to all other cities and places in the kingdom having like privileges of exemption from prisage and other tolls and duties payable to the Crown. All are equally told, that such privileges as well in the case of other tolls and duties as in the case of prisage, are local: that they belong to the real inhabitants and dwellers of the places on [131] which the Crown has bestowed the privilege of exemption: that selling or giving the freedom of London, or of any other place, to persons residing elsewhere, to enable their enjoyment of the same privilege, is not only an unavailing abuse of their power of admitting freemen, but perhaps a fraud upon the Crown and its grantees not altogether without dangerous consequences to those practising it: and that length of time in practising such fraud will not legalize it.

With this parliamentary declaration against non-residents, the language of the courts of Westminster Hall from the most ancient times, to which this point about exemption from tolls is traceable, appears to have uniformly accorded. To evince this, it is deemed proper to take a review of the adjudged cases.

1. The first of them is Knoll's case in the Exchequer, as long ago as the reign of Henry VI. It is cited by Calthrop, recorder of London, in his book on the customs of London, pages 34 and 35, where he explains what persons shall be discharged under the London charter of the first of Edward III. which grants that no prisage of wine shall be taken from the citizens of London. In commenting upon the distinctions and degrees of citizens, his words run thus: "The first is, he that is a citizen of London for " the bearing of offices in the city and such special intents; because he is a freeman of " the city, but not a citizen in residency and continuance in the city: for he inhabiteth " and dwelleth out of the city. And such a citizen as this is not such a citizen as shall " enjoy the benefit and privilege to be discharged of the payment of prisage, according

“to the resolution given in the Exchequer, in the case of one Knolls, Trin. 4 Hen. VI. Rot. 14, where it was ruled, that one, that was a citizen and freeman of London, but dwelt in Bristol, might not partake of the benefit of this charter, insomuch that he, by reason of his dwelling out of the city, was only a citizen to a special intent.” This same case is cited in 1 Ro. Rep. 140, 142, 148 and 149, particularly by Lord Chief Justice Coke, who refers for it to the *Communia Placita Scaccarii* of 4 Henry VI. Roll 14 or 18: and by his manner of stating the case it appears, that Knolls had a shop and servant in London, and yet was excluded because he did not himself inhabit there. Lord Chief Justice Fleming and Judge Cooke, in 3 Bulstr. 4 & 9, cite the same case.

2. The second case is the Attorney General against Henry Sacheverell and Thomas Snede, which was adjudged in the Exchequer in Easter, 44 Eliz. and began there Hill. 43 Eliz. It is cited in Calthrop's London, 35. Sir John Davis's Reports, fol. 10. 3 Bulstrode, 5. 1 Ro. Rep. 140, 142, and by Lord Hale in his treatise on ports and custome. According to all these accounts of the case, the point decided was not merely that residence was necessary to entitle a freeman of London to exemption from prisage under the word *cives* in the London charter of the 1st of Edward III. but that he must be a householder also, inhabiting as an [132] inmate being held insufficient, because inmates are not full scot and lot men. The most pointed account in print of the point in this case is by Sir John Davis, which being translated is as follows:—“The charter of London (the London charter of E. 3. exempting from prisage is meant) was allowed in the Exchequer of England 44th of Elizabeth. But the question there was, if a citizen of London, who has not a family, nor pays scot and lot, but sojourns in the house of another, shall have the benefit of the said charter. In the argument of which case, Coke, then Attorney General, put this difference of citizens; viz. that there is a citizen *nomine*, a citizen *re*, and a citizen *re et nomine*. But it was resolved, that only the citizen *re et nomine*, viz. he who is a freeman and also inhabits and pays scot and lot there, shall be free of prisage by the said charter.” But this case being important, the record itself has been searched for; and from a copy of the record the case appears to have been to this effect: Sir Edward Coke, Attorney General, informed for the Queen against Sacheverell and Snede, for taking and carrying away and converting to their own use five tons of Gascoyne wine the property of the Queen; and the defendants pleaded not guilty; upon which the case went to a jury, who found a special verdict. In this verdict the charter of the 1st of Edward III. exempting the citizens of London from prisage, is given *verbatim*. It next states, that the defendants for two years past had been freemen of London, one being free of the company of Haberdashers and the other of the company of Mercers; and that during the same time they were both abiding, lodging and resident within the city of London, but without any family or household. It also finds, that they were taxable and liable to scot and lot within London, but were never taxed or so burthened there. The verdict next states, that they had both taken the oath of a freeman of London, which is given at length, and one part of which is expressed (this word not in H.'s *Law Tracts*) to be contributory to all taxes, scot and lot, and other charges as a freeman ought. Then the verdict mentions, that the defendants on such a day imported into the port of London from foreign parts 52 tons of Gascoyne wine, and before seizure or payment of the Queen's prisage caused them to be landed and to be lodged in a cellar; and that 5 of the tons were seized by Lawrence Smith a Queen's officer for prisage, and afterwards taken from him by the defendants. It was next found, that for fifty years last past no citizen or freeman of London, inhabiting or residing in it as was done by the defendants, used to pay any prisage of wine to the Queen. But whether on the whole matter the defendants were guilty, the jury leave to the court, assessing £50 for the five tons, and £10 for costs against the defendants if the court should find them guilty. After this special verdict there appear to have been several adjournments by the court to advise upon the matter. But at length, in Trinity term, in the 44th of Elizabeth, the barons gave judgment against the defendants.—From this abridgment of the Latin record it is plain, that, according to the solemn judgment of the Exchequer in this case, a freeman of [133] London to have the benefit of the exemption from prisage must be not only resident, but also a householder. It is also apparent, that the court so construed *cives*, in the charter of Edward III. in spite of an uninterrupted usage of fifty years, found by the jury in favour of resident freemen being only inmates and lodgers. Further it is clear, that in the 44th of Elizabeth there was not so much as a

pretension to have *cives* in the London charter of exemption from prisage construed as including any freeman without residence; and that then the only point was, whether a freeman should not be a householder as well as resident. Nor is this the whole; for the record of this case shews, that the oath of a freeman of London was before the court; and that notwithstanding the engagement in that oath to contribute to taxes and submit to scot and lot, but which indeed is qualified by the very significant addition of the words as a freeman ought, the court would not dispense with the freeman's being a resident householder. Therefore this record exhibits the decision of the court in a stronger point of view against the extension of the privilege to resident freemen being only lodgers, than any account there is of the case in the printed books.

3. A third authority is the case of Sir Thomas Waller, a patentee or lessee of the crown for prisage of wine, against Francis Hanger, in the 9th of James I. It is reported in Calthrop's London, in 1 Ro. Rep. 138, in Mor. 832, and in 3 Bulstr. 1. There is also existing a manuscript report of the case, in a volume, which is written in an ancient hand, and heretofore belonged to the Yelverton library. The case is also shortly stated by Lord Hale in his treatise on ports and customs, and in Hardr. 302, and 1 Sid. 130. From a copy which has been obtained of the record, it appears that the case is entered Easter 9 Jam. in Roll 163, and that it began in the Michaelmas term preceding. It was frequently argued both at the bar and from the bench; and on account of difference of opinion amongst the Judges it seems to have at last gone off without any judgment. The general point of the case is foreign to the present purpose; for it was, whether the wines of a citizen of London, who died whilst part was at sea, and whilst other part was in the port of London, but before bulk broken, were exempt from prisage in the hands of the defendant his widow and executrix. However, all the reports of the case are full of a great variety of matter, shewing the necessity both of being resident and of being a householder, to qualify a freeman of London for exemption from prisage. Even the defendant's own pleading implied that inhabiting within London was essential to complete the title of citizenship for the purpose of their exemption; the defendant, as in a former part of these reasons has been stated, pointedly alleging the commorancy and inhabitaney of her husband, and after his death of herself, so as to shew that both were resident in as well as free of London. The Judges and counsel also appear to have been unanimous in considering actual residence as indispensable. Nor is it a little singular, that [134] though we have the arguments of two Chief Justices and five other Judges, and though on other points they differed most widely, yet there is not one of those arguments which doth not amplify upon the absolute necessity of being a resident householder of London as well as a freeman, to constitute the character of citizen for the exemption from prisage. Even Calthrop, who as recorder of London may be presumed to have been partial to its claims, in his account of this case is full to the same purpose. It would be almost endless to give the variety of phrases which the Chief Justices Fleming and Coke, and all the other Judges successively, used to prove how indispensable they deemed it to the description of *civis* that the person claiming the exemption should be a resident, nay, a householder, as well as a freeman of London. Instead of attempting so much, it may be sufficient to give Mr. Serjeant Moore's summing up the arguments of the Judges on this branch of the argument. His words, being translated from the Law French, are these: "It was resolved by all, that he who is *civis* and *liber homo* to take the benefit of this privilege, ought to be free of the city, and also an inhabitant within the city, and also to be a paterfamilias within the city. For one may be free of the city and not *civis*; as if he removes and lives elsewhere. He may be a citizen by habitation, and yet not free. He may be a citizen and free, and not a housekeeper. And in all these cases he shall not have this privilege."—Thus it is proved by this third authority, that in the reign of James I. being an inhabitant householder was so absolutely necessary to qualify a freeman of London for exemption from prisage as a citizen, that not even their own law officer and counsel would set up a pretension to the contrary. It should also be attended to, that throughout the numerous arguments in this case, there is not any thing like confining this interpretation of *civis* to the single charter of London for prisage. On the contrary, there are various ancient authorities cited to shew that the word *civis* bears the same sense, and is understood with the same restriction, in respect to other matters and privileges of London. A short extract from the manuscript report in Law French of this case of Waller and Hanger will serve as an instance; for in it

Coventry, afterwards Lord Keeper, though one of the counsel for extending the exemption to Mrs. Hanger the widow, is represented as making the following admission to the other side, "He is not a citizen of London if he is not a resiant there and taxable to scot and lot, 38 Ass. pl. 18. 45 E. III. 26. 5 Hen. VII. 10, 19, for if he is not resiant he cannot devise lands in mortmain, etc." (But see Bro. Ab. tit. Mortmaine, pl. 35, cited Bos. & Pull. 504, n.) Another instance is the following passage from Bulstrode's report of Judge Houghton's argument in Waller and Hanger. After citing one Oates's case from 38 Ass. and 45 E. III. 26, on the London custom of devising in mortmain, Judge Houghton is made to proceed thus: "And there it is said by Fincheden, that citizens ought to have such franchises, *scilicet*, those to whom such franchises did extend, *scilicet*, those [135] which were born and inheritors in the same city by way of heritage, or which are resiants, and taxable to scot and lot; and that he, which is not so, shall not be said to be a citizen." The same Judge, after adding other words to explain that a citizen of London means one who is commorant and resiant, and subject to scot and lot, and liable to supply the places and offices there eligible, says, "if he be not such a one, he shall not be said to be within the privilege of a citizen." Lord Coke also, then Chief Justice of the King's Bench, is stated by Bulstrode to have argued generally, that a citizen without residence is not, in judgment of law, a citizen. The whole passage, from this part of Lord Coke's argument, is so full of pertinent matter, that it deserves to be here stated. According to Bulstrode these were his words, "*Civis* is taken five manner of ways in our books. First *civis re et non-residentii*; and such a one is not, in judgment of law, a citizen. And this appears to be so by 35 Hen. VI. fo. 12, *præcipe* I. B. in debt, *civem Eboraci non residentem*. (See Bro. Ab. tit. Additions, pl. 13, cited Bos. & Pull. 505, n.) 36 Hen. VI. fo. 28, *civi et pannario Londini*, and he did not dwell there: this is not good; for he may be *pannarius de London*, and yet dwell at York. 4 E. IV. fo. 10, where one is *civis de London*, and dwells in another place. And if this sufficeth not *in legis estimatione*, non sufficit *in regis concessione*, if he be a resident only in name, this is not good by 24 E. III. fo. 7. 5 Hen. VII. fo. 10 and 19. If he be not a citizen and a freeman, he cannot by the custom devise his lands in mortmain. Also if he be but *inquilinus*, this will not serve his turn; but he ought to be a continuing citizen and resident, he ought to have *jus habitationis* and *jus societatis*. If in the interim he happens to be disfranchised, he shall not then have the benefit of this discharge of prisage, but he ought to be a continual citizen. And if all these do concur in him, and he continues to be *civis*, then he is every way complete, and enabled to have and enjoy the benefit of this grant of discharge. Bracton (lib. 5, tract. 5, cap. 14), fol. 411, comprehends all these in one word, *scilicet barones Londini*." Here then Lord Coke not only makes the *jus habitationis* and the *jus societatis* both equally essential for the London discharge from prisage; but partly infers it from their being so for the privileges of citizenship there.

4. A fourth authority is another case of prisage; namely, the case of Sir William Waller before the barons of the Exchequer in Michaelmas, 4 Cha. I. It is given by Lord Hale in his treatise on ports and customs, but without the name of the defendants. There is not any other report of it; and the search hitherto made for the original record has not proved successful. However Lord Hale having reported the case, puts its existence beyond a doubt. According to Lord Hale the general question was, whether the exemption of the citizens of London under the 1st of Edw. III. or otherwise, did extend to wines imported by them into Bristol, or other the out-ports? Having made this to be the great question, [136] he next states, that after several arguments the barons *uni voce* resolved three several points. The first resolution was, that by special words such as *infra civitatem vel extra* the King might have exempted the citizens of London from prisage at the out-ports. The second was, that for want of special words, and for other reasons, the exemption was confined to the port of London. The third was, that "*bona civium* must not be intended of every freeman of London;" but that the person must be, first a freeman of London, secondly an inhabitant of London, and thirdly a householder within the city. In explanation of this last part of the qualification, Lord Hale adds, that an innate is not exempt: "because such a man contributes not to scot and lot, nor is beneficial to the city; and this privilege was granted *intuitu civitatis* not *personæ*; and the grant, being in diminution of the King's revenue, shall be construed as strictly as may be, and the word *civis* be taken in as

“restrained an exposition as may be.” Thus, according to Lord Hale, the Judges were again unanimous in construing *civis* on the London exemption from prisage as meaning, not the mere freeman but a freeman being also an inhabitant-householder. Thus, too, this construction was again adopted, upon a reason, as applicable to other duties part of the antient revenues of the crown, as to the prisage-duty; namely, that the exemption granted to the citizens of London was founded upon locality. A further and auxiliary reason is indeed added to the resolution in this last case. But that reason also applies with no less force to other antient crown-duties than to prisage; for in both cases an ancient revenue of the crown is diminished.

5. The next authority applicable is a prisage case before the court of Exchequer, on the equity side, in Michaelmas, 14 Cha. II. while Lord Hale was Chief Baron. It was between Sir William Waller and Giles Travers, and is reported in Hardr. 301, but appears more fully from a copy which has been obtained of the decree. The general question in this case was the same as in Sir William Waller's case in the 4th of Cha. I. namely, whether the exemption of the citizens of London from prisage extends to the out-ports, or is confined to the port of London. When the proofs in this cause had been taken, and it came on for hearing, and the counsel had been heard, the court ordered that a case should be agreed on between the counsel on each side, and that upon this case there should be an argument. Accordingly a case was agreed upon; and it is mentioned in the decree, that Sir Peter Ball argued for the plaintiff, and Mr. Serjeant Hardress for the defendant. Of the argument of the counsel for the plaintiff Waller there is no report. But Mr. Serjeant Hardress gives his argument for extending the exemption to the out-ports very much at length; and in it great learning is exhibited. However the determination of the court was again for the patentee of the Crown, and for confining exemption to the port of London; and the Barons appear to have been unanimous; and Lord Hale, then Chief Baron, in order to put the question quite [137] at rest in future, seems to have taken great pains in framing the decree; for it not only states the case agreed on at length, but particularly enumerates the grounds upon which the court gave judgment. The general point decided in this case is foreign to the present consideration. But several things are to be collected, which it is apprehended bear upon the point of residence. First, it appears by Hardress's report, that the defendant pleaded himself to be not merely a freeman, but a citizen also. Secondly, it appears from the case stated in the decree, that the defendant made out his title of citizenship by proving, that at the time of the importation of the wines for which prisage was claimed, he was not only a freeman of London, but also was an inhabitant dwelling in the city of London, and did pay scot and lot there. Thirdly, according to Hardress's report, Mr. Baron Atkins, in his argument, repeated the doctrine of the former cases as to the necessity of being an inhabitant householder of London as well as a freeman. His words are these: “He that enjoys this privilege must be *civis* and *liber homo*, free of the city and an inhabitant within the city and a paterfamilias too. If he want “any of those qualifications, he is not entitled to this privilege as was resolved in “Hanger's case.” Fourthly, it appears from Hardress's argument, that there was strong evidence for the defendant, of non-payment of prisage by the citizens of London at the out-ports: for he says, “we have it in proof, as far as a negative can be proved, that “prisage has not been paid for citizens' goods though imported elsewhere than at the “port of London.” This becomes material for shewing, that such negative evidence, without something more, will not suffice to rule the construction of a charter of exemption, if the sense of the words is clear against the exemption claimed. Should any reference be made on the part of London, to their having given such negative evidence on the trial in the present case, it will be material to recollect, that both in this last-mentioned case of Waller and Travers, and in the case of Snede and Sacheverell before stated from the record, the exemption was in vain propped up by negative evidence in its favour; in the former, as Hardress describes it, by proving non-payment, as far as a negative is capable of being proved; and in the latter, by an absolute proof, as the record speaks, that there had been no payment for fifty years last past. Fifthly, there is a passage in the decree in this case of Waller and Travers, which shews, that both for the sake of London itself, and for the sake of the rest of the kingdom, the court thought it their duty not to encourage the least extension of the London exemption from prisage. For one of the reasons in the decree is, “that to construe their exemption “to extend unto the wine of the citizens of London, imported by way of merchandize

“to the out ports, would not only abate the trade of the city, but would be a great prejudice to the trade of wines in general throughout the kingdom; for that they should be thereby enabled to undersell other men, and engross the whole trade in the out ports, which [138] cannot be presumed to be intended.” Now the principle of the first branch of this reasoning, with a little change of words, may be brought to bear in some degree against the general exemption of non-resident freemen of London from tolls and duties; for to bring non-residents within such privilege, is to enable the corporation of London and its companies, to deprive its real and complete citizens of the exclusive benefit intended, by admitting the inhabitants of other ports and places into a participation. Thus in one point of view, even London itself is interested against extending their charter exemptions to non-residents; for the value of the exemption must diminish in proportion as the number of participants in it is increased. Even the latter branch of the reasoning of the decree is not wholly inapplicable; because, if non-resident freemen of London are to be exempt, then London, by a partial gift of its freedom to particular persons, of particular places, may discourage trade and commerce in all others, and so cause a general prejudice.

To those five cases of prisage, with the accumulation of authority and reasoning comprized in them, it is thought proper to add some extracts from the writings of Lord Hale, relative to the same subject.

In an original manuscript of Lord Hale, intitled, “Preparatory Notes touching the Rights of the Crown,” where he writes upon exemption from prisage, he thus expresses himself. “This privilege belongs in general to the city of London, by a charter of 1 E. III. to those of the cinque ports in respect of their service with 57 ships, and to the ancient members thereof; and by *Carta Mercatoria* to the Hanse merchants, upon their undertaking to answer two shillings per tun upon all wines by them imported. But here observe, 1. That no person can take the benefit of this privilege granted to London and the cinque ports, unless he be free, and also contributory to scot and lot, the grant to London being, *quod de vinis civium nulla prisae, etc.* And therefore Michaelmas 9 Jac. *inter* Waller and Hanger, where a citizen, owner of wines, died before the bulk broken, it was a great question, whether the executor should have the privilege or no.” This passage not only is expressed, so as to amount to an opinion from Lord Hale himself, that the exemption from prisage is properly construed to exclude freemen of London not being actually contributory to scot and lot; but extends the same opinion to those of the cinque ports. The grant of 1 E. III. to the cinque ports is to the barons of those ports and their heirs, which is interpreted to include all freemen of the cinque ports. But this extract from Lord Hale expressly puts them on the same footing with the citizens of London; not admitting the citizens or freemen of either place, unless they are contributory to scot and lot there as well as freemen.

In chapter 13 of the same manuscript, which is on the king's power of ordering commerce and trade, Lord Hale writes thus:—“Those that had an exemption from prisage were, 1. The [139] citizens of London paying scot and lot. 2. Merchant strangers, who by *Charta Mercatoria* were exempt from prisage paying butlerage. 3. The Barons of the cinque ports. *Inter Communia Pasch.* 7 E. III. it came in question, Whether a merchant alien, being made a freeman of Sandwich, was liable to butlerage or no. It seems by the latter opinion he was; because it was a sum due by contract of the merchants aliens in compensation of the remission of other duties, or at least that the mayor and burgesses of the port were fineable for admitting him to that liberty. But it is not adjudged here.”—Here Lord Hale again states the exemption of London from prisage, as a privilege confined to the real and complete citizens of London, to freemen contributing to scot and lot there. Something further also is brought to light by this last extract from Lord Hale's manuscript. It is that there may be such a thing as an abuse of the power of making freemen: that there may be a fraud upon the Crown and the proprietors of ancient rolls under royal grants, by making freemen merely to avoid such payment; and that not only freemen so made are excludable from the beneficial privileges aimed at, but perhaps the makers of them are in some way or other accountable for abusing their franchise; and still further, that though London and other places, having like privileges may give or barter away their freedom, so far as themselves and their own interests are concerned; yet they may not have the right of so acting at the expence of the rights and property of others. In this last remark, as to the inefficacy and irregularity of attempting to extend the privileges and

exemptions of the citizens of London to the inhabitants of other places, there is little more than repetition of the doctrine, which Lord Hale himself, once more declaring his opinion against such an abuse of franchise, has actually and pointedly expressed. The passage meant is in page 127 of the printed volume containing Lord Hale's treatise on ports and customs; for these are his words explaining the extent of the prisage exemption of the cinque ports: "It doth extend only to such as are truly members of the cinque ports, and pay scot and lot there. And therefore anciently those of the cinque ports were fined, if they did colourably admit any person to be a freeman of their ports that was in truth no inhabitant there, merely to gain the privilege, viz. *si advocare voluerint aliquem de libertate suâ esse qui non est.*"

Upon the whole of this last and grand question in the present contest between London and King's Lynn, it is submitted for the latter, that the London privilege of exemption from tolls and duties is local; that none but the real and full citizen, namely, the freeman of London, being also an inhabitant householder, or at least an inhabitant, is legally participant of such exemption; that though by being a freeman of London a man may become a citizen for certain intents, and may as such be subject to corporation offices and certain other duties and payments; yet that [140] no one can be a complete citizen, a citizen for all intents, a complete scot and lot man, a scot and lot man for parochial and other purposes as well as for corporation offices and duties, without being an inhabitant householder as well as a freeman; that if the grant of exemption should be otherwise construed, instead of being merely a grant of exemption to the citizens of London, it would also be a grant enabling the corporation and companies of London to exempt the inhabitants of every place in the kingdom; that if inhabitancy was not one part of the qualification of a citizen on these exemption charters, all the ancient tolls in the kingdom would be from time to time saleable and disposeable by London and every other place having like grants of exemption, to the disinherison of the Crown and all deriving title to such property under royal grants; that the cases and authorities in respect to exemption from prisage of wine are direct authorities, against including within the other exemption any but freemen being also inhabitant householders; the London exemption from prisage being granted for the same description of persons as the London exemption from other tolls and duties, and the reasons for excluding the mere freeman being the same in both cases; that to hold, that *civis* in the prisage charters described the full citizen of London, the freeman being also an inhabitant householder; but that the same word in the charter for the other exemption described the half citizen of London, the non-resident freeman, would be a monstrous construction without the colour either of language or of principle to sustain the distinction; that the parliamentary record of the 11th of Henry IV. excludes non-resident freemen of London, as well from the general exemption as from the prisage one, expressly representing the mischief of any other construction as the same on both exemptions; that in all the cases since there is not so much as a hint at a distinction between the prisage exemption and the general exemption in this respect, there being on the contrary a generality of language embracing both as within the same principle of construction; that, in so plain a case, any evidence of non-payment by the freemen of London without regard to inhabitancy ought now to be deemed as unavailing in the instance of other tolls and duties, as it formerly was adjudged to be in the instance of prisage; and further, that to permit London, through its freedom, to extend its privileges of exemption to the inhabitants of other places, would not only be substituting a toll to the invaders of property for toll to the real proprietors; but would even be sacrificing the privileges of London itself, that is, the privileges of its real and individual citizens, to the lucre of its corporation and trading companies.

To conclude, it is hoped on the part of King's Lynn, that the present attempt by London, to make its freedom subservient to the purpose of evading all the ancient tolls of the kingdom, will be condemned as an abuse of franchise equally unavailing and unbecoming; and that the corporation of London will be effectually [141] reminded in the language of Lord Coke while Chief Justice of the King Bench, that a citizen without residence is not a citizen in judgment of law.

For the corporation of London, plaintiffs in error, the following reasons were assigned (J. Adair, V. Gibbs) for the reversal of the judgment of the court of King's Bench, and the consequent affirmance of the original judgment of the court of Common Pleas:—

I. Because the objection made below, by the defendants in error, that the writ *de theol. essend. quiet.* is a writ merely prohibitory, on which no action can be maintained,

has no foundation. This sufficiently appears from the precedents of attachments on this writ given in the register (258 b. and the following pages), which run thus:—"Si A. fecerit, etc. tunc pone, etc. B. & C. etc." being manifestly process to bring in the defendants to answer to an action.

II. Because another objection, insisted on by the defendants in error, that the action, supposing an action to lie, ought to be by the individual citizens aggrieved, and not by the corporation of London, appears to be equally groundless. In Fitz. N. B. (519 E.) it is laid down, that "All the corporation may bring the writ by the name of their corporation, and may have an alias and attachment thereupon, if need be;" by which must be understood the process of attachment in the register, neither that book, nor Fitzherbert any where alluding to a criminal attachment on this writ.

III. Because the objection principally relied on by the defendants in error was, that this action is not maintainable where no distress has been taken; which objection the plaintiffs in error submit cannot be supported for the reasons, and upon the authorities following:—

It is evident that *De theol. essend. quiet.* and *Monstraverunt* are no more than different names for the same writ, arising from a very slight variation in the form. The register contains no such title as *Monstraverunt*; but several writs of *Monstraverunt* are inserted in the title *De essend. quiet. de theol.*; burgesses may have *Monstraverunt* (Register 259 B.); and tenants in ancient demesne may have the writ *De theol.* and all the tenants may sue as in *Monstraverunt* (Fitz. N. B. 521 B.); so that every authority as to the one is an authority as to the other.

Lord Coke (1 *Inst.* 100) says expressly, that a man may have *Monstraverunt* before distress; by which he must be understood to mean the action of *Monstraverunt*, having classed it with other writs, on all of which the remedy is by action.

The register contains several precedents of writs *De theol.* and attachments on them, which do not state a distress; and other precedents of the same writ which do.

Fitzherbert (N. B. 518), in the outset of the title, describes this writ to lie where the King's officer will demand toll. After giving the form of the writ, he goes on to state, that the party may have an alias, pluries and attachment against those who grieve [142] him. The natural meaning is, that these other writs are for a repetition of the same grievance complained of in the first; and Fitzherbert must be guilty of great inaccuracy if, to found the attachment, a new and different injury must have been committed in the mean time.

IV. Because this writ is analogous to other writs on which an action may be maintained, and judgment given on the right, without actual damage (*Co. Lit.* 100.); and such an establishment of the right seems peculiarly beneficial in a case, like the present, of an exemption from toll claimed by a large body of persons, where the particular injuries may be very numerous, and in each instance so inconsiderable, that the individuals aggrieved not choosing to incur the expence of legal proceedings, may by continued acquiescence weaken or destroy the right of the corporation; or if those who claim the toll will not distrain for it, but bring actions of *assumpsit*, to which only the general issue can be pleaded, neither the corporation nor the persons aggrieved have any means, if none are afforded by this writ, of stating their exemption on the record, and obtaining a decision which shall either establish or destroy their claim for the future.

V. Because, if the taking of a distress were necessary, this declaration does not sufficiently allege it. By the precedent in the register (258 b.) it appears that "*quietos esse permittere non curaverunt*" is a sufficient allegation in the attachment. The averment in this declaration is, that the defendants did disquiet and did require toll; and it is impossible to contend that the declaration is bad in this respect, without contending that the attachment also which stands upon the authority of the register is equally bad.

VI. Admitting that the declaration ought, in strictness of law, to have alleged a distress, the omission of it is mere form, and aided by the verdict. If a distress be necessary to support this action, the words "*quietos esse permittere non curaverunt*" in the attachment must be understood to mean disquieting by distress; and if the defendants had taken issue upon this same allegation in the declaration, the plaintiffs could not, supposing a distress necessary for the support of the action, have entitled themselves to a verdict without proving a distress. An actual distress cannot be more necessary to support this action, than an actual impleading to support a *Warrantia Chartæ*; and yet

it is laid down in Fitz. N. B. 410, 312, that in *Warrantia Charta*, if the defendant say that plaintiff was not impleaded, he thereby confesseth the warranty, and plaintiff shall have judgment to recover it. By the same rule, if the present plaintiffs have alleged a distress in their declaration, and the defendants had denied it, they would have admitted the exemption, and plaintiffs must have had judgment for the acquittal. Here the exemption is found by the jury; and how can it be contended that the not stating a distress in the declaration prevents the plaintiffs from recovering the acquittal, when, if the distress had been stated, and denied by the defendants, [143] the plaintiffs notwithstanding that denial, would be entitled to recover their acquittal?

VII. Because, whether the exemption claimed by the city of London extended to all citizens, was a matter of fact to be determined by the jury on the trial of the issues: and the exemption being found as laid, the meaning of the term citizens cannot come in question here.

After hearing counsel in this cause, the following question was put to the Judges:—"Whether the matters set forth on this record are sufficient to entitle the plaintiffs in the original action to the judgment awarded in the court of Common Pleas?"

And the Judges having considered the said question, the Lord Chief Justice of the court of Common Pleas [Eyre] delivered their unanimous opinion in the affirmative.

It was therefore ORDERED and ADJUDGED, that the judgment given in the court of King's Bench, reversing a judgment given in the court of Common Pleas, be reversed. —And it is further ORDERED and ADJUDGED, that the original judgment of the court of Common Pleas be affirmed; and that the record be remitted. (MS. Jour. *sub anno* 1796.)

APPENDIX.

Rotul. Parl. xi Hen. IV. N^o 73. No number is prefixed, but it follows No. xxxii. and is the case in the title xi H. iv. Bos. & Pull. 498, n.

As tres honours & tres sages Seignrs du cest present Parlement monstre Thomas Chaucer, chief Butiler, nre S^r Le Roy, Coment toutz Roys d'Engleterre, du temps dont memorie ne court, de leur droit heritage, & come parcell al Corone d'Engleterre, toutdys ont estee en possession du leur Prisez de Vyns en chescun Port d'Engleterre; c'est assavoir, de chescun Nief droitement arrivant deins ascune Port d'Engleterre, des Vyns de Denizeins nient franchises, fret de xx ton de Vyn ou plays, due est au Roy d'avoir de chescun tiel Nief fret de tieux Vyns ii tons, ou iiij pp de Vyn pur son droit Prise: & de chescun Nief fret de x ton, ou en outre tan q'a xx ton, i ton, ou ii pp de Vyn, come al chief Butiler nre dit S^r le Roy pur le temps esteant, ou a son Lieutenant, en ascuns des Portz d'Engleterre, pluis meillour leur semble, pur le profit nre dit S^r le Roy; desqueux Prises si tn nre S^r le Roy come toutz autres Roys ses predecesseurs ont este toutdys en possession, & loialment paiz deins toutz les Portz d'Engleterre, forq̃ seulement en le Port de Londrez & les Cynk Ports: lesqueux, si tn p nre dit S^r le Roy come p ses predecesseurs, ont [144] estee, & a present sont, ency enfranchises q̃ chun *homme si bien de la Citee de Loundrs come de les Cynk Portz, quez sont enfranchises, en yece* purront bien & franchement aler avec leur Vyns la ou leur plerra pmye tout le Roialme d'Engleterre, sanz ascune Prise en manere come devaunt est dit a nre dit S^r le Roy ent paier. *La que Franchise est suppose que per nostre dit Seigneur le Roy ne ses predecesseurs ne fuist graunte al Lieux suis ditz, forque ausyn que les gentz seulement queux* DEMURONT, & que leur service deceignent CONTINUELL DEMURANTZ, et ditz Lieux. & leur enfantz es ditz Lieux nees, devoient avoir bnfice du dit Franchys. Et ore en la Citee du Londres est, & AD ESTEE USEE DE LONG TEMS, q̃ chescun homme FOREIN nient enfranchise en la dit Citee, q̃ voet venir al Mair, Chamberleyn, ou Mestres d'ascune mestier du mesme la Cite, pur en petit somme d'argent a paier a Chaumbre ou a les Mestres d'ascune mestier du mesme la Citee, serra accepte al dit Franchis, si tn come celui q̃ ad TOUTDYS est CONTINUELL DEMURANT en

mesme la Citee, NIENT-OBSTANT Q'IL EST D'UN AUTRE VILLE OU BURGH EN ENGLETERRE; *en disheriteson de nostre dit Seigneur le Roy, si bien de ses Prises, queux il devoit avoir de chescun tiel homme nient fraunchise, come de TOUTZ AUTRES CUSTUMES ET DUTEES a nre dit Sr le Roy ency p eux duez.* Si vous please considerer, q̃ si bn l'estat nre dit Sr le Roy come de sa Corone soit garde, saunz anientisment ou prejudice: & sur ce ordiner, q̃ due remede purra estre fait ceste partie. C'est assavoir, de prier a nre dit Sr le Roy & a son tres sage Conseil, d'envoier pur les Mair & Aldermans de la Citee de Londres, eux commandantz si bien en leur Persones, come es Mesters des diverses mestiers du dit Citee, de cesser de leur Franchise ency a chescun FOREIN en avaut grauntier, sur la peril de forfaiture del Franchise du mesme la Citee. Et auxi, de leur Franchises as tieux FOREINS a present grauntiez en chescun mestier deins mesme la Citee de REPELER, s'ils ne soient devenuz a dit Fraunchise en manere come devaut est dit. Entendantz, q̃ autrement deins brief, si bn nre dit Sr le Roy q'ore est, come ses heirs queux doivent estre Roys en apres, serront disheritez de toutz leur Prises des Vyns parmy tout le Roialme d'Engleterre per la Franchises de mesme la Citee de Loundres.

Le Roy voet envoier pur les Mair & Aldermans de dite Citee. Et en outre ad DECLAREZ, p advys des Seignrs en [145] Parlement, q̃ nully n'ait ne enjoise tiele Fraunchise en ceo cas s'il ne soit Citezein RECEANT & DEMURANT DEINS MESME LA CITEE. Et que toutz autres DEMURANTZ en autres Citees, Buryghs, ou Villes eient & enjoissent leur Franchise a eux grauntée. Saurant toutditz a nostre Seigneur le Roy son enheritance en CEO CAS.

TRIAL.

JOSHUA LOMAX,—*Appellant*; RICHARD RYDER, and Another,—*Respondents*
[27th March 1721].

[The reason why in ejectments one trial does not bind the inheritance, is not from any rule or maxim of law, that one trial cannot conclude the right, for in proper actions that may be done, but from the peculiar nature of an *ejectione firmæ*, in which no judgment, as to the inheritance, can be given.]

[This is a mere collateral point: and the case itself is of little importance as a precedent. On the mode of rendering a judgment in ejection final, see *Leighton v. Leighton*, ante, vol. iv. p. 378, tit. Injunction, ca. 3.]

[Mews' Dig. v. 1518.]

Joshua Lomax, by his will, dated the 26th of December 1685, devised his estate, after payment of debts and legacies, to his two sons, Joshua, the appellant, and Thomas, the late father of the respondent Ann, and their heirs, equally to be divided between them, to hold to his said two sons respectively, for their lives; remainder to the son and sons of their respective bodies, in tail male; with other remainders over.

After the testator's death, differences arose between the brothers, touching the devised estate; but being at length compromised by a division, the appellant conveyed to his brother Thomas, such part of the estate as had been allotted to him; to hold the same, according to the limitations in the testator's will.

In June 1712, Thomas Lomax died, leaving the respondent Ann his only child; whereupon the appellant brought an ejectment to recover possession of Thomas's estate; insisting, that the same was come to him by the death of his brother without issue male.

[146] This controversy was ended by certain articles, bearing date the 29th of July 1713, between the appellant and his eldest son of the one part, and the respondent Richard Ryder, of the other: whereby it was agreed, that the appellant and his son should,

before the end of Michaelmas term then next, convey to the respondent, all their right and interest in the testator's freehold estate, except the manor of Shenley-Bury, a woodland called Madd-Grove, and such part of the Bury farm as was freehold; and that the respondent Richard should quietly surrender to the appellant, the premises so excepted.

The respondent Richard accordingly delivered possession to the appellant of the said manor of Shenley-Bury, and the woodland called Madd-Grove; but in order to adjust amicably, what was freehold and what was copyhold of the Bury farm, the respondent gave leave to the appellant and his counsel, to examine several ancient copies, and other writings in his custody concerning it; but the appellant not being satisfied with his examination, and insisting on the possession of the whole farm, brought his bill in the court of Chancery against the respondents for a specific performance of the above agreement.

On the 7th of May 1716, the cause was heard before the Lord Chancellor Cowper; when it was referred to a master, to inspect the writings relating to the lands in dispute; and to distinguish what part was freehold, and what copyhold.

Accordingly, the master by his report of the 1st of March 1716, certified, that the whole of the said Bury farm, consisting of 244 acres, was freehold.

But exceptions being taken to this report, and argued on the 3d of August 1717, the court directed an issue to be tried in the court of Common Pleas in Middlesex, by a special jury, whether any, and how much of the farm called the Bury farm, was copyhold; and if any specific or particular lands should be found to be copyhold, such lands were to be marked on the *postea*.

The issue was accordingly tried on the 17th of February 1717, when the jury found several parcels of land, particularly specified by name, amounting in the whole to 83 acres, part of the Bury farm, to be copyhold lands of the manor of Hemel-Hemstead, in the county of Hertford.

On the 20th of June 1718, the cause was heard upon the equity reserved, when the appellant thought proper to move for a new trial; but the court refused to grant one.

Whereupon the order was appealed from, and on behalf of the appellant it was urged (J. Darnall, C. Coxe), that an enfranchisement, and other new evidence, had been discovered since the trial, which would vary the case from what it was at that time; and that the appellant's inheritance being concerned, it ought not to be bound by one trial, when he was at liberty to try his right in ejectments as often as he pleased. That the appellant on the trial gave a great many instances, to induce the jury to believe, that the premises were freehold, and not copyhold lands; and [147] in truth, the weight and strength of the evidence was for him. That if he could not obtain a new trial, he would be for ever barred of his right; being restrained by the court of Chancery from bringing any action at law to assert the same: nor could the respondent be any way prejudiced by such new trial, for he would have his costs, if the appellant did not succeed. That by the common rules of equity, and the usual practice of the court of Chancery, especially in the case of an inheritance, and where the court at the hearing thought the matter so difficult as not to determine it without a jury; a second trial was very rarely, if ever, denied on paying the costs of the former trial; and as the appellant had paid the costs of the last trial, he hoped he should have a new one, and that his inheritance should not, in a court of equity, be bound by one trial.

To this it was answered on the other side, that as to the pretended enfranchisement, it was true, the appellant produced out of the office of the auditor of the duchy of Cornwall, the court-book of the manor of Hemel-Hemsted, (which had come to the Crown on the dissolution of monasteries, in the time of Henry VIII.) and in which book there was an entry of a grant, made the 4th of May, 29 Henry VIII. by Thomas Waterhouse, rector of Ashurrug, then Lord of the said manor, to Richard Mayne, of one messuage, 100 acres of land, 20 acres of pasture, and 10 acres of wood, commonly called Bury lands, to hold by the rent of 40s.: but upon perusal of this entry, the grant appeared to be only a common feoffment of lands which were freehold, and no enfranchisement at all. Nor did it relate to those lands which were found by the jury to be copyhold, as was evident from an entry in the same book of an admittance of Richard Mayne, on the 1st of October, 30 Henry VIII. to those very parcels of land which were so found by the verdict to be copyhold, to hold to him and his heirs at the will of

the Lord, according to the custom of the manor, and which was near a year and a half after the said feoffment; and a copy of which admittance was given in evidence at the trial, on the part of the respondent. As to the other new evidence, it consisted of two inquisitions *post mortem*, by which it was found, that James Mayne the father, and James Mayne the son, died seised of the aforesaid messuage and 130 acres; a special livery of the same lands to James the father, and a fine thereof by James the son; but all this evidence related to the lands, conveyed by the said feoffment. That the only use which could have been made of these several evidences, as to the present question about copyhold, would be to shew that one messuage, 100 acres of land, 20 acres of pasture, and 10 acres of wood, commonly called the Bury lands, were freehold; but this the respondent acknowledged, and the same fully appeared by several other evidences produced at the trial, on the part of the appellant; viz. two fines by William and Henry Mayne, the sons of the said Richard, and several deeds, and a presentment of the homage of the death of James Mayne; [148] in each of which, the said one messuage and 130 acres, by the same names, the same number of acres, and the same rent, were mentioned as freehold. As to the objection, that the appellant's inheritance was not to be bound by a single verdict, the instance of ejectment was not applicable to the present case, the legal right not being now in question, but an equitable one; which equitable right the appellant claimed by his bill under the aforesaid agreement, by which the freehold was to come to him, and the copyhold to the respondent; and by bringing such bill, the appellant had elected to take his remedy in equity, and not by ejectment. That the trial was directed for the information of the court, to distinguish the freehold from the copyhold, in order to decree a performance of the articles; and therefore to insist, that the present verdict, which stood unimpeached, was not sufficient to ground a decree upon, when it was designed for that end, was to say, that the trial itself was nugatory; and to appeal rather from the first direction of a trial, than the refusal of a new one. That the reason why, in ejectments, one trial does not bind the inheritance, is not from any rule or maxim of law, that one trial cannot conclude the right, for in proper actions that may be done; but from the peculiar nature of an *ejectione firme*, in which no judgment as to the inheritance can be given; but a decree of the court of Chancery, in a suit commenced by the appellant himself, might surely settle and finally determine the right, as between him and the respondents, for otherwise the appellant's bill in that court would have been vain and frivolous: and therefore it was hoped that the respondents would not be put to the expence of trying their right again, but that the appeal would be dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of affirmed. (Jour. vol. 21, p. 487.)

[149] NEW TRIAL.

[All the cases arranged under this head appear to depend so much on peculiar and private circumstances, as scarcely to afford a single precedent of importance. The general principles on which new trials are grantable have also undergone discussion in many cases in the inferior courts, subsequent to the latest of those in this work ; and the rules laid down by the Judges have not been the subject of appeal in any modern instance.]
[For practice in Supreme Court, see now R.S.C. 1883, Ord. 39.]

CASE 1.—SIMEON ASHE, and Others,—*Appellants* ; MARY ASHE, Widow,—*Respondent* [8th March 1716].

[Under what circumstances a new trial, after the trial of a second issue may be granted.]

In the year 1693, Jeremiah Ashe, then an apprentice to a wine-cooper in London, had a child by the respondent, who was a servant-maid in the same family ; this child he had christened by the name of Palatia, privately maintained her during her infancy, and when of proper age placed her out as an apprentice to a mantua-maker.

When Ashe was out of his time, he set up his trade in partnership with the appellant Bodicoate, and in a few years was reputed to be a rich man ; but he constantly lived a bachelor, and though he, for some part of the time, assisted the respondent with money to set up a public house, in order to get her livelihood, yet he never cohabited with her, or treated her as his wife ; and on account of her extravagance and ill conduct, he, for the last seven years of his life, took no notice of her, nor afforded her any kind of assistance.

On the 12th of January 1709, the said Jeremiah Ashe made his will ; and thereby gave to his said natural daughter, by the name of Palatia Goody, daughter of Mary Goody, three several legacies of £10, £20, and £20, he also gave to trustees, £200 to be laid out in the purchase of an annuity for her life, and for her sole use and benefit ; and appointed the appellants Ashe and Grout, his brother and sister, executors of his will.

In Michaelmas term 1710, the respondent exhibited her original bill in Chancery against the appellants, to have her share of the testator's personal estate, and also her widow's chamber, alleging, that she was his lawful wife. The defendants, by their answer, having positively denied this allegation, and the whole of the [150] plaintiff's demands depending on the truth of this single fact ; it was agreed by the parties, and their respective clerks in court and attornies, that, in order to avoid expence, there should be a trial at law in the court of Common Pleas upon a feigned issue, to try whether the plaintiff was the wife of the said Jeremiah Ashe, or had ever been lawfully married to him.

Accordingly an issue was prepared, and on the 22d of June 1711, it came on to be tried before the Lord Chief Justice of the court of Common Pleas at Guildhall, London ; when the jury, upon full evidence, found a verdict for the defendants, viz. that the respondent was not the wife of the said Jeremiah Ashe, or ever lawfully married to him.

Under this verdict the respondent acquiesced for some time ; but her daughter, the said Palatia Goody, dying before the said legacy of £200 was laid out in the purchase of an annuity ; she, as executrix of her said daughter, exhibited her bill against the appellants the executors, in the court of Exchequer, in order to have that legacy paid to her ; and having obtained a decree for the same, it was paid to her accordingly.

In June 1712, the respondent filed a supplemental bill in Chancery, demanding an orphanage part of the testator's estate, as executrix of her daughter ; upon the suggestion of her being his legitimate issue.

This cause was heard at the rolls on the 29th of July 1715, when, notwithstanding the former trial and verdict remained unimpeached ; his Honour was pleased to direct, that the defendants the executors should proceed to a trial at law in the court of

Common Pleas in London, on a feigned issue, to try whether the plaintiff was married to the said Jeremiah Ashe or not.

This second issue was accordingly tried before the Lord Chief Justice King, on the 6th of December following; when the substance of the evidence on the part of the executors was, that the said Jeremiah Ashe lived twelve years after the expiration of his apprenticeship in London as a single man, in great credit and reputation; and that during all that time, the respondent was in a very poor and low condition.—That when she complained of her poverty to the appellant Bodicoate, and one Mr. Jervas (who were her own witnesses) intreating them to solicit Mr. Ashe to give her something to supply her necessities, and pretending to be his wife, before God; they offered her to compel him to maintain her as his wife, if she was really married to him, and could tell them when, where, and by whom; but that she was not then able so to do, or to make out any such thing.—That Mr. Ashe dying, and there being in the register of Whitechapel, a marriage entered between one Jeremiah Perkins and Mary Smith; the respondent after his death attempted to bribe the clerk of that church to change the name of Perkins into Ashe, and that of Smith into Goody: but failing therein, she brought witnesses at this trial, to make her marriage agree with the register as it stood, and endeavoured to prove that to be the true marriage [151] between her and Jeremiah Ashe, though entered by different names; whereas the appellants produced the very Mary Smith who was then married to Jeremiah Perkins, and the original certificate of that marriage.—And that a letter was given in evidence by the respondent at the trial, and made an exhibit in the court of Chancery, as written by Mr. Ashe to her; in which the words, Dear Wife, at the beginning, and the words, Your affectionate Husband, at the end of it, appeared to be written with different ink, and of a different hand-writing from the body of the letter, and to be a mere forgery. But notwithstanding this evidence, the jury thought proper to find a verdict for the respondent.

On the 16th of March 1715, the cause was heard upon the equity reserved; when the defendants, pursuant to leave in that behalf obtained, moved for a new trial; which his Honour was pleased to deny, and decreed, that the defendants should account for the personal estate of the testator: and that the plaintiff should have her customary share thereof, together with her widow's chamber. And the defendants having appealed to the Lord Chancellor Cowper, his Lordship on the 16th of June 1716, was pleased to confirm the decree.

The defendants therefore appealed from both the decrees; insisting (J. Jekyll, F. Page), that there were no footsteps of the pretended marriage, either by publication of banns, licence, register, or certificate; but that, to supply this defect, the respondent was proved guilty of an attempt to bribe the clerk of Whitechapel, to falsify the register there; and afterwards endeavoured to prove that to be her marriage, though entered by fictitious names; the contrary of which was fully proved. That the respondent never cohabited with Jeremiah Ashe as his wife, nor ever pretended to verify her pretended marriage in his life-time; notwithstanding her poverty, and his flourishing condition. That he had, for seven years before his death, entirely discarded her; and never allowed her any subsistence. That by his will, made but a short time before his death, he had treated and provided for the respondent's daughter as an illegitimate child, and thereby disowned the pretended marriage; and the respondent, as her executrix had so far agreed thereto, as to procure a decree in the court of Exchequer for the legacy given her, by the name of Palatia Goody, daughter of Mary Goody, and had received the same accordingly. That there was no ground to direct a second trial, the first being by consent of parties, and the verdict to the satisfaction of the Judge who tried the cause; or, if a second trial was well directed, yet the second verdict ought not to receive greater credit than the first: And therefore it was hoped, that there was good cause to reverse the decree, which was founded upon a supposition of the pretended marriage; or to direct a new trial, upon the same, or such other issue as should be thought proper.

On the part of the respondent it was urged (S. Cowper, R. Raymond), that the present appeal was merely groundless, vexatious, and for delay, and according to the former practice of the appellants; for, that in a [152] suit in the Exchequer mentioned in the appeal, after they had contested the legacy of £200 given to the respondent by her daughter's will, and had made her spend as much as it was worth to get a decree for the payment of it; they appealed from that decree to the House, and afterwards withdrew the same by the respondents consent; and not only paid her the legacy, but

took a discharge for the same by her name of Mary Ashe. That as to the pretence of there being verdict against verdict, a verdict obtained extrajudicially, and, as the respondent had reason to think, by collusion, could never be a foundation for a court of justice to make any decree upon; nor could any court take notice thereof, or, in case the respondent had obtained a verdict upon the first trial, have made any decree in her favour; and therefore it would be very hard that she should be prejudiced by a verdict which she could have had no benefit of. And, that considering the oppression of the appellants, and the poverty and low condition of the respondent, it was hoped that the decrees would be affirmed with exemplary costs; or at least so far amended, as to lay the whole costs both in law and equity, and of this appeal, upon the appellants' share of the testator's estate; they being residuary legatees as well as executors, and having chosen much rather to waste the assets in law, than to do justice to the respondent thereout, by paying what was so justly due to her.

But after hearing counsel on this appeal, the question was put, "Whether the decree should be reversed?" which being resolved in the affirmative; it was ORDERED and ADJUDGED, that the said decree should be so far reversed, as that a further trial should be had in the cause on the same issue; and that such trial should be at the bar of the court of Common Pleas, some time in the then next term; and that the appellants, in order to enable the respondent to prepare for such trial, should pay, or cause to be paid to her, the sum of £60, to be deducted out of the costs, in case a verdict should be found for the respondent; and the court of Chancery was directed to proceed upon the equity reserved, after such trial had, or default of such trial; and to give such further directions as should be just, in order to the said trial.* (Jour. vol. 20. p. 424.)

[153] CASE 2.—VISCOUNTESS DOWAGER FAUCONBERG,—*Appellant*; THOMAS EVANS,—*Respondent* [11th February 1726].

[On a motion for a new trial of an issue directed by the court of Chancery, several affidavits were offered to be read in addition to the evidence given for the defendant on the trial of the issue; but the court would not permit these affidavits to be read, and the judge having certified his satisfaction with the verdict, the motion was refused. On an appeal, the House of Lords (after debate) suffered the affidavits to be read, but dismissed the appeal, and affirmed the decree.]

[Affidavits in support of evidence given on the trial of an issue directed by the court of Chancery, allowed to be read upon an appeal from the decree of that court.]

The appellant having applied to the respondent to take a house of his, which about two years before was new built, situate in New Bond Street, and having viewed the same, and agreed to take it; by articles dated the 10th of June 1723, the appellant agreed to accept a lease of the said house for seven years, from Michaelmas then next, at the rent of £160 per ann.

Afterwards the respondent, by indenture dated the 27th of September 1723,

* In pursuance of this order, a new trial was had on the 26th of June 1717, in the court of Common Pleas, by a special jury; when a verdict was found for the defendants against the marriage. (Register lib. A. 1717. p. 277.) Whereupon the plaintiff moved the court for a new trial, which being refused: she afterwards petitioned the House for a new trial, but this petition was rejected, no counsel appearing in support of it. (Jour. vol. 20. p. 660.) The defendants therefore, set down the cause upon the equity reserved, and on the 10th of May 1718, it was heard at the rolls; when counsel appearing for the defendants, but none for the plaintiff, although she was duly served with the order for setting the cause down, as by affidavit appeared; his Honour was pleased to order, that the plaintiff's bill should be dismissed, and that the books of account, papers and writings, which had been brought before the master, should be delivered back to the defendants; but in regard the plaintiff was admitted *in forma pauperis*, such dismission was to be without payment of any costs in respect thereof.

demised the said house to the appellant, together with some furniture, household stuff, pictures, and other things mentioned in a schedule annexed, for seven years, commencing from the feast-day of St. Michael the Archangel, then next ensuing, under the rent of £160 per ann. payable quarterly; and by virtue of this lease, the appellant entered and enjoyed.

The appellant afterwards, by deed under her hand and seal, dated the 23d of October 1723, agreed to pay the respondent £22 10s. per ann. for seven years, for the use of other furniture provided by him for her, and used in the same house. And having soon after occasion for more furniture for the house, the appellant, by another deed under her hand and seal, dated the 12th of November 1723, agreed to pay to the respondent £17 10s. per ann. for seven years, for other furniture which was also provided by the respondent, and used in the said house by the appellant.

But in Hilary term 1724, the appellant exhibited her bill in the court of Chancery against the respondent, praying, that she might be discharged from the said articles, lease, and agreements, and that the lease and counterpart thereof might be delivered up and cancelled; under pretence that the house was not substantially built, and that it was hazardous for the appellant to live therein in windy weather.

To this bill the respondent put in his answer, and insisted, that the house was strong and substantially built; and that the articles, agreements, and counterpart of the lease, were fairly and deliberately entered into without any manner of fraud or imposition whatsoever.

[154] The cause being at issue, divers master builders, bricklayers, and carpenters were examined as witnesses on the part of the respondent, who proved that the house was substantially built, and with good and sound materials; and on the 29th of June 1725, the cause was heard before the Master of the Rolls, when his Honour was about to dismiss the bill: but at the request of the appellant, was pleased to order that the parties should proceed to a trial at law, the sittings after the then next term, in the court of King's Bench, on this issue, viz. Whether the house in question was built in a substantial manner, fit for a tenant to live in: and the jury, who were to try the issue, were directed to have a view; and after the trial had, either party was at liberty to resort back to the court, on the equity reserved.

Accordingly, on the 3d of December following, the issue was tried before the Lord Chief Justice Raymond; when the jury, after a long examination of many witnesses, brought in their verdict for the defendant, that the said house was built in a substantial manner, fit for a tenant to live in.

The appellant afterwards applied to the Lord Chancellor for a new trial, who directed her to move the court of King's Bench for such trial; which was accordingly done in Hilary term 1725, but the court refused to grant any new trial, being satisfied with the verdict.

On the 21st of February following, the cause came on to be heard upon the equity reserved, before the Master of the Rolls; who, upon debate of the matter by counsel on each side, and hearing the order read, which was made upon the former hearing, and also the *postea* or verdict; was pleased to order, that the appellant's bill should stand absolutely dismissed with costs, both at law and in the court of Chancery.

The appellant being dissatisfied with this decree, preferred her petition and appeal to the Lord Chancellor King; and the cause being reheard before his Lordship on the 30th of April 1726, he was pleased to dismiss the petition of appeal, and to affirm the decree.

The appellant therefore appealed from both decrees, contending (P. Yorke, N. Fazakerley), that it appeared by the proofs in the cause, before the first hearing, that the respondent had very much imposed upon the appellant, in assuring her, that the house was substantially and completely built and finished; whereas it was so slightly and unskilfully built, that it was not likely to stand to the end of the appellant's lease, nor could she dwell therein without the hazard of her life, as well as the lives of the rest of her family; and therefore no issue ought to have been directed, but the appellant ought to have been relieved on the hearing, by having the lease and counterpart delivered up, and decreeing the respondent to pay her costs. But if it had been necessary for the information of the court, to have directed such an issue, yet inasmuch as the strength of the evidence given upon the trial of it, touching the dangerous state and condition of the house, was on the appel-[155]-lant's side, besides

the additional affidavits offered by her counsel on the motions for a new trial, and the great reason to believe that the jury were influenced: the appellant ought not to be concluded by the verdict, but a new trial should have been directed by a special jury: and before such new trial had, the appellant's bill ought not to have been dismissed.

(On the other side it was said (C. Talbot, T. Lutwyche), that the court of Chancery has constantly used, and has an undoubted right to direct an issue at law, to inform the conscience of that court in matters of fact, which from the evidence before them, appear doubtful: that in this case the evidence before the hearing was very strong in favour of the respondent: and that the issue was directed at the earnest intreaty of the appellant's counsel, and was the only thing which prevented his Honour the Master of the Rolls from dismissing the bill. That the issue had been accordingly tried, and found for the respondent to the satisfaction of the Lord Chief Justice who tried it: and upon whose report of that trial, the court of King's Bench thought proper to refuse a new trial: and as to the allegation that the jury were influenced, it was denied by every one of them, upon oath. It was therefore hoped, that the decree and proceedings of the court of Chancery would appear to be founded in justice and equity, and consequently be affirmed; and the appeal dismissed with costs.

At the hearing of this appeal, it was proposed on the part of the appellant, to read certain affidavits of persons skilled in building, touching the house in question, which were offered to the Master of the Rolls, on applying for leave to move for a new trial: but this being objected to on the part of the respondent, the counsel were directed to withdraw: and after debate, the question was put, "Whether the said affidavits should be read," and resolved in the affirmative. The affidavits were accordingly read, and after hearing counsel on both sides, it was ORDERED and ADJUDGED, that the appeal should be dismissed; and the decree and affirmance thereof therein complained of, affirmed. (Jour. vol. 23. p. 34.)

[156] CASE 3.—JOHN FLOYER,—*Appellant*; RICHARD JOHNSON,—*Respondent*
[16th February 1726].

[A new trial was granted upon reading some letters of the defendant, wherein he had put a greater value upon the premises in question, than what had been found by the jury upon the former trial; although these letters were in the plaintiff's power previous to the former trial, and might have been then produced if he had thought fit.]

Viner, vol. 21. p. 488. note to ca. 5.

The appellant, by contract in writing dated the 30th of September 1720, agreed to purchase of the respondent two leasehold estates in the county of Surrey, at sixteen years purchase, being beneficial leases for 21 years, usually renewed every seven years: and one of the leases being held under the hospital at Croydon, was to be renewed by the respondent, and made up a term of 19 years at least.

After executing this contract, the appellant made several offers and proposals to the respondent, by letter and otherwise, in order to settle and adjust the annual value of the premises, which was to be the measure of the purchase, amicably between themselves, and wherein the appellant would have yielded almost to any terms to prevent a suit: but the respondent knowing the appellant had little or no experience in country affairs, and hoping by that means to make an advantage, always declined closing with any proposals the appellant made, and was still adding, or insisting on something more, with design to work up the appellant to give an exorbitant price for the premises.

In this manner near two years were spent, and the appellant finding no hopes of an accommodation, he in Hilary term 1722, filed his bill in the court of Exchequer against the respondent, for a specific performance of the contract at 16 years purchase, according to the real annual value of the premises. The respondent by his answer insisted, that he and the appellant had come to an agreement together, to settle and adjust the value of the premises at £180 per ann. and therefore relied upon it, that

the purchase ought to be made and computed according to that valuation: and further insisted, that having at the appellant's request renewed the hospital lease for 21 years, whereas by the contract he was obliged to renew only for 19, he had paid £16 extraordinary in his fine on that account, which the appellant ought to allow.

In Michaelmas term 1723, the respondent thought proper to file his cross bill against the appellant, to oblige him to go on with his purchase at 16 years value, after the rate of £180 per ann. upon the appellant's supposed agreement to estimate the premises at that rate: and likewise demanded an allowance [157] of £16 for the appellant's share of the fine, for the two years extraordinary in the hospital lease; suggesting, that the appellant promised and agreed to pay the same.

The appellant by his answer to this cross bill, denied he ever agreed to value, or accept the premises at £180 per ann. or at any other certain rate whatsoever; but admitted, he had made several overtures and proposals to the respondent about settling the annual value of the premises amicably between themselves, but which the respondent would never close or agree with: and as to the demand of £16 for his share of the fine for renewing the hospital lease, the appellant denied he ever agreed to pay any certain sum; but admitted he did agree to allow a proportion of the fine for the two additional years, which he was ready and submitted to pay.

On the 8th of June 1724, both causes were heard; when it was ordered and decreed, that the contract of the 30th of September 1720, for the purchase of the premises at 16 years value, should be performed; and in regard it did not appear to the court that the annual value of the premises was ever settled or agreed betwixt the parties, it was ordered, that it should be referred to the Deputy Remembrancer, to consider and adjust the annual value of the premises; and according to that rate, discounting all proper allowances, to compute and ascertain what the *quantum* of the purchase money did amount to, and to compute interest thereon, after the rate of £5 per cent. per ann. from Lady-day 1721, the time when the contract ought to have been performed, discounting what should appear to have been paid in part, or on account of the said purchase; and to see what proportion of the fine the appellant ought to pay and allow, for renewing the hospital lease, which was to be added to the purchase money. And the Deputy was also to take an account of the rents and profits of the premises made or received by the respondent, or which, without his wilful default, might have been made or received by him from Lady-day 1721, which were to be allowed the appellant out of his purchase money; and the consideration of costs, and all further directions, were reserved until after the deputy should make his report.

Pursuant to this decree, the Deputy made his report, by consent of parties, dated the 29th of April 1725, and therein stated the proofs on both sides, as to the annual value of the premises; but certified that by reason of the contrariety in the evidence, he had not been able to settle the value, and therefore had not proceeded to take the accounts directed by the decree.

On the 3d of May following, the causes were heard upon the special matter of this report; when the court directed an issue to be tried at the next assizes for the county of Surrey, to try what was the yearly value of the premises in question, at Lady-day 1721, when the contract for the purchase should have been performed: and it was further ordered, that the sheriff should return a good jury, who were to have a view; and that after the [158] trial, the causes should come on again for the final directions of the court.

Accordingly this issue was tried before Mr. Justice Dormer, and ten of the jury had been upon the view; and after a long examination of witnesses, the jury found a verdict to the satisfaction of the Judge, that the yearly value of the premises in question, at Lady-day 1721, was £130 per ann.

On the 8th of December 1725, the causes came on upon the equity reserved, when the respondent moved for a new trial; and upon reading some passages in the original bill, and in the appellant's answer to the cross bill, and two letters written by the appellant to the respondent, from whence it appeared, that the appellant himself had estimated the premises at a greater yearly value than was found by the jury; the court was pleased to order, that a new trial of the issue should be had, upon the respondent's paying the costs of the former trial, to be taxed by the Deputy; and that the former verdict should stand, but should not be given in evidence upon the new trial.

But from this order the appellant appealed, because it was not founded upon any

certificate of the Judge who tried the issue, nor upon any affidavit or suggestion of any corruption or misbehaviour either in the jury, or the appellant or his agents. And it was contended (P. Yorke, P. Ward), that the expressions in the appellant's bill, answer and letters, upon which only it appeared that the new trial was directed, were no evidence in law, to prove or ascertain the annual value of the premises in question; or if they were, yet they were such evidence as arose long before the trial was had, and such as being always in the respondent's own power, he might have produced at the trial, if he had thought fit. That if a trial so fairly and impartially had, and which was admitted to be well and properly directed, was not to determine the question between the parties, as to the yearly value of the premises, it was scarce possible to conceive what trial should: and for the court to enter into the consideration of the *quantum* of such yearly value, after they had directed it to be tried by a jury, and it had been tried accordingly, was in effect, to set aside their own direction and decree, or at least to make it vain and nugatory. And that the setting aside a trial at law so solemnly had, without consulting the Judge who presided at such trial, and without the least charge or imputation of partiality or corruption in the jury or parties, would tend very much to weaken and overturn that excellent part of the common law, trials by juries, and to create endless expence and vexation to suitors. It was therefore hoped, that the said order of the 8th of December 1725, would be reversed and discharged: and inasmuch as the causes then stood for the final directions of the court upon the equity reserved, that their Lordships would be pleased to make such order and decree, as the court of Exchequer ought then to have made: namely, to order that the Deputy Remembrancer should compute the purchase money to [159] be paid by the appellant, according to the annual value of the premises, as found by the last verdict, and carry on the account of interest and profits, pursuant to the decree of the 8th of June 1724. That upon the appellant's payment or tender of the purchase money, as it should be settled by the Deputy, the respondent should execute an assignment of the leases and premises in question to the appellant, or to whom he should direct, with the approbation of the Deputy, and at such time and place as he should appoint. That the respondent should procure all proper parties to join therein, and should forthwith bring before and leave with the Deputy, the original leases, and all other deeds and writings relating to the premises. That the respondent's cross bill should be dismissed with costs, and that the appellant should have his costs, both at law and in equity, to be taxed by the Deputy, and allowed and deducted to him out of his purchase money.

On the other side it was insisted (T. Lutwyche, C. Talbot), that from the appellant's bill, answer and letters, and all the proceedings in the causes, it manifestly appeared that the yearly value of the lands, at £130 as found by the jury, could not be the full and real value; and therefore a new trial was properly directed. That in case the value of the lands should remain fixed at £130 per ann. which it would be without a new trial, the appellant would become a purchaser of those lands for £1080 in 1720, when lands sold very high, which cost the respondent with the appellant's privy, £1600 in the year 1716, when lands sold much cheaper, and which likewise cost him £110 for a renewal fine, and several considerable sums in improvements. It was therefore hoped, that the order would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the said order as prohibited the former verdict being given in evidence at the new trial, should be reversed: and it was ORDERED and declared, that the appellant should be at liberty to give the former verdict in evidence at the new trial: and it was further ORDERED, that a view of the premises in question should be had, as directed at the former trial. (Jour. vol. 23. p. 39.)

[160] CASE 4.—ALICE LUCAS, Widow, and Another,—*Appellants*; FRANCIS LUCAS, and Others,—*Respondents* [17th February 1756].

[As to trials at bar in civil cases, see *Dixon v. Farrer*, 1886, 18 Q. B. D. 54; *Anderson v. Gorrie*, 1894, 10 L. R. 383.]

[In what case a new trial may be granted, after a trial at bar; but it must be on payment of the costs of the last trial.]

Matthew Lucas esq. deceased, was in his life-time seised and possessed of the town and lands of Rathdaniel, and other lands in the counties of Carlow and Wicklow, for the remainders of several leases for lives, of the yearly value of £174 per ann. over and above the reserved rents, and also possessed of a personal estate of the value of £2000, and having no legitimate issue, but seven natural children, viz. three sons, John Lucas, the respondents Francis Lucas and Charles Lucas, and four daughters, Catherine the wife of Richard Williams, Judith, Caroline and Mary, for whom he had the most tender regard and affection, having constantly bred them up, and educated them in his own house and family, from the times of their respective births, till it was proper to place them out at public schools; and having one brother William Lucas, esq. the appellant Alice's late husband, who was his heir apparent, and five sisters, viz. Mary Baker, Sarah Jackson, Elizabeth Hayes, and Judith Higginbotham, widows, and Ann Grogan wife of Edward Grogan, and as he always intended his fortune for his natural children, when he renewed two of the said leases, he took the same for the lives of the said John, Francis, and Charles Lucas, his three natural sons, notwithstanding one of the lessors who was well acquainted with, and had a friendship for William Lucas the brother, very much pressed the said Matthew Lucas to insert his said brother's name in the lease, as one of the three lives, but he refused; declaring, that he thought his brother already provided for sufficiently.

In September 1750, Matthew Lucas was taken ill of a cold, which turned to a fever, attended with an inflammation on the lungs, and being minded to make his will, and settle all his worldly affairs, he gave instructions to one Mr. John Sexton, who had been bred an attorney, and was accustomed to do business for him, in drawing leases and other deeds, to prepare his will. And accordingly Mr. Sexton prepared the draught of a will, agreeable to such instructions, and delivered the same to Mr. Lucas, who thereupon ordered his daughter Catherine to make a fair copy of it, as she wrote a more legible hand than Sexton, which she accordingly did, and delivered such fair copy to the said Matthew Lucas, who read over the same, and afterwards duly executed the said will, in the evening of the 16th of September 1750, which was on a Sunday, at which time, as well as [161] at the time of his giving such instructions for preparing his will to Sexton as aforesaid, the testator was of sound mind, memory, and understanding; and which will he duly executed by signing, sealing, and publishing the same, as and for his last will and testament, in the presence of Garrett Fitzgerald, the apothecary who attended him in his illness, William Fenellon yeoman, and the said John Sexton, who all subscribed their names as witnesses in the presence of the testator, and of each other.

By this will the testator devised his said freehold leases to his eldest son John Lucas, with limitations over to his other natural children, and gave several pecuniary legacies to all his other natural children, under a proviso, that if any, or either of them, should intermarry with a papist or papists, the person so marrying should have one shilling only; and after giving to his sister Higginbotham £20, and to his sister Ann Grogan £20, he gave to his brother Captain Lucas, and his sisters Jackson, Baker, and Hayes, but five shillings a-piece, and made his son John Lucas residuary legatee, with a limitation over to his other natural children; and he appointed Colonel Joshua Paul, the respondent Byrne, and his son John Lucas, when at full age, executors of his will. But the testator directed, that all the children, except Judith, should live together at his dwelling-house at Rathdaniel, and be maintained out of the profits of his fortune by his executors, until otherwise provided for according to the will.

The testator being apprehensive of danger to his children, from the resentment and violence which he thought his brother might exert after his death, and being extremely anxious that his will should be effectual, and his effects secured and disposed of so as to answer the purposes thereby intended, he directed the respondent Byrne to carry his

ready money, bonds and notes to Dublin, to be lodged there for safe custody, and to lay the will before counsel: and to prevent mistakes, he made his daughter Catherine write a particular account of the money, bonds and notes so sent. The respondent Byrne went immediately to Dublin for that purpose; and during that time, the testator executed three different leases, dated the 17th of September 1750, by one of which he demised to the respondent Byrne, the mansion-house, and middle part of Rathdaniel, containing 150 acres, at 14s. an acre; by another, he demised to him that part of Rathdaniel called Ballyhurst, at 11s. an acre; and by the third, he demised to him another part called Rahendaw, containing 170 acres, at 10s. an acre. These leases were for the term of seven years, to commence from the 25th of March then last, at the expiration of which, the eldest son John would, if he lived, attain his age of 21. And the intent of granting them was, that if the testator died, the value and income of the said estates might be fixed and ascertained during the minority of his son, in order that the same should be applied in keeping the children together at the mansion-house, until his son arrived at his full age; but that in case the testator should recover from that indisposition, the said [162] leases should be surrendered; and so he informed the respondent Byrne, who promised to deliver up the same accordingly.

The testator died some time in the night of the 18th, or early in the morning of the 19th of September 1750, and immediately after the removal of his corpse out of the house, the said William Lucas, with a number of armed men, forcibly took possession of the house, and turned the respondent Byrne and the children out of it, and left about twenty people in it to keep possession for him. He also took possession of the stock that was upon the ground, and sold a great part thereof, and though he had heard that his brother had made a will, and had actually seen a copy of it, and knew that the testator at his death had goods in several dioceses to found a prerogative jurisdiction, and had actually caused a caveat to be entered in the prerogative court against proving any will or granting any administration till he was heard; yet in order to give a colour to his possessing and disposing of the effects of the deceased, he applied to the consistorial court of the diocese of Leighlin, in which diocese his brother died, upon a suggestion that he died intestate, and by that means obtained administration.

The respondent Byrne propounded his will in the prerogative court, and caused citations to issue against the said William Lucas the brother, and the five sisters of the deceased, in order to prove and establish the will. To this citation William Lucas appeared by his proctor, and alleged, among other things, that Matthew Lucas was of insane mind, memory, and understanding, at the time of making his will.

Issue being joined and witnesses examined, this cause came on to be heard in the prerogative court, on the 8th of March 1750, when a definitive sentence was pronounced in favour of the will, and the burthen of the execution thereof, with administration of the goods, rights, credits, and chattels of the said Matthew Lucas, was granted to Colonel Joshua Paul and the respondent Byrne, two of the executors, saving the right of the other executor to prove the will, when he should be capable by law of so doing.

William Lucas appeared so fully convinced of the justice of this sentence, that he delivered up to the respondent Byrne peaceable possession of the several farms he had entered upon, returned the stock and cattle which he had not disposed of, and paid some of the money which he had received for that part of the stock which he had sold.

The respondent Byrne entered upon the management of the estate, for the benefit of the children, and Colonel Paul, though of a great age, declared he would act whenever it should become necessary, and in the mean time directed his agent Mr. George Warren to keep an account of the rents of the farms, and to inspect and inform him of the conduct of the respondent Byrne, in the management of the estate.

John, the eldest son of the testator, died soon after; and the respondent Francis Lucas, the second son, on the 18th of Sep-[163]-tember 1751, filed his bill in the court of Exchequer in Ireland, by the respondent Byrne his next friend, to perpetuate the testimony of the witnesses to the will; upon which the three subscribing witnesses were examined, and William Fenellon, one of the witnesses, being cross examined on the part of the said William Lucas, the defendant in that cause, deposed, that the testator appeared not to be in his senses at the time of the execution of the will, although, upon his examination in the prerogative court, he had sworn that the testator was in his senses at the time of the execution of it.

On the 17th of June 1752, William Lucas exhibited his bill in the said court of

Exchequer, against the respondents Francis and Charles Lucas, Catherine Lucas, and Caroline and Mary Lucas, the surviving five natural children of Matthew Lucas, (Judith being then dead,) and against the respondents Byrne and Richard Mulligan, in order to set aside the will, as to the freehold leases, and to be decreed the profits of the said leasehold lands, and for an account and other purposes therein mentioned.

To this bill the respondent Byrne put in his answer on the 3d of November 1752, and Francis and Charles Lucas, and Catherine Lucas, by their guardian, and the said Richard Mulligan, put in their answers on the 9th of the same month, whereby they severally insisted on the validity of the will, and denied the suggestions of the bill. But Caroline and Mary, the two other children, by their answers admitted, that Matthew Lucas was insane at the time of making the will. However, they both died before issue joined, and therefore no further notice was taken of them in the cause.

William Lucas the plaintiff, replied to the answers of all the other defendants, and the cause being at issue, witnesses were examined on both sides, and an order was obtained by the respondent Francis, to read the depositions in the cause for perpetuating testimony, saving just exceptions, and the like order was obtained by William Lucas, for reading the cross examination of William Fenellon.

On the 13th of May 1754, the cause was heard, when it being agreed on both sides, that there was a contrariety of evidence concerning the sanity of the testator, and that the same was proper to be tried, and that the proofs on each side should be entered as read; the court directed, that the two following issues should be tried in feigned actions, at the then next summer assizes to be held for the county of Carlow, where the said Matthew Lucas lived and died, and where the greatest part of his estate lay, viz. Whether the will bearing date the 16th day of September 1750, in the pleadings mentioned, was at any time, and when, duly executed by the said Matthew Lucas; and if so, whether the said Matthew Lucas was of sound and disposing mind, memory, and understanding, at the time of executing the said will, or not. And whether the leases in the pleadings mentioned, and alleged to have been made by the said Matthew Lucas, to the respondent [164] Henry Byrne, bearing date the 17th day of September 1750, or any or either and which of them, was or were duly executed by the said Matthew Lucas; and if so, whether the said Matthew Lucas was, at the time of the execution thereof, of sound and disposing mind, memory, and understanding, or not.

The respondents being apprehensive they could not have an impartial trial in the county of Carlow, where the plaintiff's connections and interests were very great, moved the court, on the 28th of June 1754, upon affidavits, setting forth the value of the lands, the alliance and interest of the said William Lucas in the said county, and that he had frequently served on the grand jury there, in order to make an interest among the gentlemen of the county, so that an impartial trial could not be expected there; and that there were several material witnesses, not yet examined in the cause, who lived in Dublin, and could not be prevailed on to go to Carlow; that the issues might be tried at the bar of the court some day in the next Michaelmas term, by a jury of some indifferent county, and not by any jury of the county of Carlow. William Lucas at the same time moved, that the rents and profits of the lands might be brought into court, or that a receiver might be appointed; and he opposed the motion made on behalf of the respondents, on an affidavit made by himself, wherein he denied having any influence, though he had many relations in the county of Carlow, and urged his apprehensions concerning the circumstances of the respondent Byrne, and of his intentions to quit the kingdom, in case the issues were found against him. In answer to which affidavit, the respondent Byrne swore that he was in good circumstances, independent of any of the effects of the testator Matthew Lucas, and that he had no intention to leave the kingdom. But the court refused to make any order upon either of the motions.

The issues were accordingly tried at the assizes held for the county of Carlow, in August 1754, before Mr. Justice Marshall. The trial of the first issue, on which Sexton and Fitzgerald, two of the subscribing witnesses to the will, and many other witnesses were examined on the behalf of the respondents, and also several witnesses on behalf of the plaintiff, lasted above seventeen hours. But Mr. Justice Marshall quitting the court before the jury gave in their verdict, and leaving John Smyth, esq. one of the justices of assize in court to receive the verdict, the jury returned their verdict to Mr. Smyth, "That they found, that the said Matthew Lucas did duly make and execute his

"last will, bearing date the 16th day of September 1750, in the pleadings mentioned : "but that the said Matthew Lucas was not of sound mind, memory, and understanding, "at the time of executing the said will." But the counsel and agent for the plaintiff not being satisfied with the wording of this verdict, drew up another, which the jury found and returned to the said John Smyth, in the words following, viz. "We find "that the will bearing date the 16th day of September 1750, in the [165] pleadings "mentioned, was not at any time duly executed by Matthew Lucas, deceased, in the "pleadings also mentioned. And we also find that the said Matthew Lucas was not of "sound and disposing mind, memory, and understanding, at the time of executing the "said will." The second issue was tried the next day before Mr. Justice Marshall, when the jury found the following verdict, viz. "We find that the leases in the pleadings "mentioned, and alleged to have been made by Matthew Lucas in the pleadings men- "tioned, to the defendant Henry Byrne in the pleadings also mentioned, were duly "executed by the said Matthew Lucas ; but we find, that the said Matthew Lucas was "not at the time of the execution of the said leases respectively, or of any of them, of "sound and disposing mind, memory, and understanding." The Judge signed certificates of these verdicts, on the 8th of November 1754, and the same were delivered into court on the 9th, and upon the 11th the plaintiff obtained two several orders for confirming *nisi* the judges said certificates.

On the 26th of the same month, the respondents Francis and Charles Lucas, and Byrne, applied by counsel to shew cause against confirming the certificates, and at the same time moved to set aside the verdict, and for new trials on the said issues at the bar of the court, by juries of another county. This motion was founded upon an affidavit of the respondent Byrne, wherein he pointed out several inconsistencies in the evidence produced on the part of the plaintiff, and more particularly as to one Margaret Ennis, the plaintiff's principal witness. She was the mother of Caroline and Mary, two of the daughters of Matthew Lucas, and attended him in his last illness ; she was also made a party to the plaintiff's bill as guardian to her daughters, and by the answer which she put in for her daughters, she admitted the charge of insanity of the testator at the time of executing the will and leases ; but her children dying before issue was joined in the cause, she was no longer regarded as a party to the suit, and was produced on both trials at Carlow as a witness for the plaintiff, and cross-examined by the respondents. It was alleged by the respondents, that she had told Mr. George Warren, that she had heard a conversation between the deceased and his sister Higginbotham, some hours before his death, in which he told his sister, that he had made his will, and left her a legacy in it ; and further, that she declared to Warren, that Mr. Matthew Lucas was in his senses at the execution of his will, and of the leases ; but being cross-examined at the trial of the first issue, she denied every thing of this conversation. Mr. Warren being afterwards examined for the respondents, swore positively to it ; and upon the trial of the second issue, Margaret Ennis, in her cross-examination, acknowledged the conversation between the testator and his sister. This matter, together with many other material circumstances in the trial, was set forth in an affidavit of the respon-[166]-dent Byrne, which was confirmed by the affidavit of Mr. John Clark, who attended likewise at the trial.

The plaintiff opposed the motion for a new trial, and to support his opposition, filed also an affidavit to contradict the respondent Byrne's ; but the Honourable Richard Mountney, Esq. one of the barons of the court of Exchequer, having declared that he had spoke with Mr. Justice Marshall concerning his opinion of the verdicts, and asked him whether he thought, from what passed on the trials, there ought to be new trials granted, and that Mr. Justice Marshall had declared it to him as his opinion, from what passed on the trials, that new trials ought to be granted, and had informed him, that the said Margaret Ennis had on the said trials sworn to the effect above mentioned ; the court on the 2d of December 1754, allowed the cause shewn by the respondents against confirming the verdicts, and granted new trials of the former issues to be had on different days, in the next ensuing Hilary term, at the bar of the court, by two separate juries of the county of Carlow, to be struck by the chief remembrancer, or his deputy ; and they refused to give the plaintiff the costs of the former trials, and directed, that the plaintiff and the respondents should be at equal expence in the trial of the issues at bar.

The first issue accordingly came on to be tried at the bar of the court of Exchequer,

on the 28th of January 1755, by a jury of the county of Carlow, when it was fully proved, that Matthew Lucas had, for several years before his death, a dislike and aversion to the plaintiff: that he had, a considerable time before his death, a settled and deliberate intention to leave his fortune to his natural children, and no part thereof to the plaintiff, and that he had always educated and supported his natural children in such a way as shewed the utmost paternal regard for them. But though the execution of the will and leases, and the sanity of the testator at the time of executing the same, was sufficiently proved, and though no one denied the testator's having lucid intervals during his illness, except Margaret Ennis, who on this trial was so sanguine as to contradict what she had admitted in her cross examination on the trial of the second issue at the assizes of Carlow, yet the jury, after a trial of twelve hours, found the following verdict; viz. "We find the will in the pleadings mentioned, was duly executed on the 16th day of September 1750, by Matthew Lucas, but that the said Matthew Lucas "was not of sound and disposing mind, memory and understanding, at the time of "executing the said will."

The next day the respondents gave notice to the plaintiff of a motion intended to be made for setting aside the said verdict, and for a new trial of the said issue at the bar of the court, in the next ensuing term, by a jury of an indifferent county, and not by a jury of the county of Carlow. The court was accordingly moved, and the motion was supported by the former affidavits, and by an affidavit made upon this occasion by the respondent [167] Byrne, and opposed by the plaintiff with another affidavit. And the matter being debated on the 31st of January, and 1st of February 1755, the court who knew all that passed on the trial, and were dissatisfied with the verdict, were pleased to order, that a new trial of the first issue should be granted, the verdict on the said first issue being contrary to the weight of evidence, and that the said first issue should be tried by a jury of the county of Dublin at the bar of that court, on the second law day in the next Easter term; and that the second issue directed in the cause should be tried by a separate jury of the county of Dublin, at the bar of that court, on the third law day in the said term, under the terms of the former order, that is, at the equal expence of both parties, and without giving the plaintiff costs of the former trials.

From this order the plaintiff William Lucas appealed, but dying soon afterwards, the appeal was duly revived in the names of the present appellants; on whose behalf it was said (W. Murray, W. Noel), that upon the first trial of both the issues before Mr. Justice Marshall, the juries found a verdict in affirmance of the title of the heir at law; that the question was a single matter of fact, of which the juries were the proper judges, and that Mr. Justice Marshall declared he had no fault to find with the verdict. That upon the new trial of the same issue relating to the execution, the verdict was also against the will; and the court before whom that issue was tried, did not say that the verdict was against evidence, but only that it was against the weight of the evidence. The weight of evidence, where witnesses are examined on both sides, depends in a great measure upon the credit of the witnesses, of which the jury, and not the court, are the only judges: and the jury being the proper judges of the credit of witnesses, is a capital reason why issues are directed in cases where there is a contrariety of evidence by living witnesses. That the county should not have been changed; or if changed, it should have been to the county of Wicklow, where some of the lands lay, and which was adjacent to the county of Carlow, or to some other adjacent county, where the juries might have knowledge of the witnesses and of their credit; and not to the county of Dublin, where neither the witnesses or their credit were known. That if any of the appellants' witnesses should die before new trials could be had, they might thereby suffer irreparable loss, after two trials already had in their favour. That as the question was sanity or insanity, which was a plain single fact, and as trials at bar are expensive to the parties; the issues should not have been ordered to be tried at bar. And, that the court having granted a third trial, should at least have given the appellants the costs of the former trials.

On the other side it was contended (C. Pratt, K. Evans), that the late William Lucas's title, if any, being merely as heir at law, his proper and natural remedy to set aside the testator's will and leases was at law; and the directing of issues was either a matter of mere [168] indulgence to him, or to satisfy the conscience of the court, as to the due execution of the will and leases respectively; and therefore the court had a right to direct those issues to be tried upon such terms as to them seemed just and

reasonable ; especially in respect to Lucas, for whose benefit alone the same was directed to be tried. That the verdicts found on the trials of the issues at *nisi prius* in the county of Carlow, being certified by the judge to have been both given contrary to evidence, and the verdict afterwards given upon the trial of one of those issues at bar, appearing to the court before whom it was tried to have been likewise given contrary to the weight of evidence, the court was bound to order a new trial even for the benefit of Lucas : since the court could neither establish the verdict so given against evidence, or make any decree thereon as prayed by his bill : and as it must and did appear to the court, that the verdicts found upon all the trials so contrary to the weight of the evidence, must have arisen from a partiality and prejudice in the minds of the freeholders of the county of Carlow : the court was under a necessity for the ends of justice, which could only be attained by a fair and impartial trial, to order the issues to be tried by a jury of some other county which was more indifferent : and therefore the court did right in directing such new trial to be had by a jury of the county of Dublin, which would be equally impartial with any other jury, and would be attended with the least expence to the parties. That as such issues were directed to be tried for the information and satisfaction of the conscience of the court, and rather for the benefit of William Lucas, and as the respondents were no way to blame, it was but right and reasonable that such new trial should be at the joint and equal expence of both parties ; and Lucas could have no ground to complain of the order on that account, since he might have proceeded at law if he had thought proper ; and he had the less reason to complain, since he submitted to the same terms when the first trials at bar were ordered.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be affirmed, with the following variation, viz. " That the " respondents do pay the appellants their costs of the last trial in this cause, to be " taxed by the deputy remembrancer of the said court, before any new trial be had ; " and that the said court do appoint such time for the new trial of the first issue in " this cause, and also for the trying of the second issue, as shall be proper : " And it was further ORDERED, that the said court of Exchequer should give the proper directions for carrying this judgment into execution, and all such further directions as should be just. (Jour. vol. 28. p. 477.)

[169] CASE 5.—GEORGE EARL OF POMFRET, *et Ux.*—*Appellants* ; THOMAS SMITH Esq. and Others,—*Respondents* [5th March 1771].

[Under what circumstances a new trial (at Bar) is proper to be directed after the trial of an issue.] [See note to preceding case.]

Philip, Duke of Wharton, being seised in fee of divers manors, lands and hereditaments, in the counties of Bucks, York, Westmoreland and Cumberland, did by three several deeds of lease and release, dated the 19th and 20th of March 1721, convey the same to the Honourable Alexander Denton, Esq. Thomas Gibson, John Jacob, and Robert Jacomb, in trust to sell the same, or any part, for the payment of his debts, and other purposes therein mentioned : and a bill in Chancery being brought by the creditors of the Duke, for carrying these trusts into execution, it was on the 19th of August 1723, decreed, that the trust estates should be sold before the Master, and the money arising therefrom applied in discharge of the Duke's debts.

The Duke afterwards going abroad, and being outlawed, and attainted of high treason, and dying under such outlawry and attainder, his estates became forfeited to the crown ; and by letters patent, dated the 24th of April 1733, the same were granted by the crown to, and vested in the same and other trustees, upon trust to sell the whole or any part thereof, for the payment of the Duke's debts, and to apply the surplus to the use of Lady Jane Coke, and Lady Lucy Morris, his two sisters, and coheirs ; which said Lady Morris some time afterwards died intestate, and without issue, leaving Lady Jane Coke, her sister, surviving, who thereby became entitled to the whole surplus of the trust estates.

In the year 1738, the several manors or lordships of Healaugh Old Land, Healaugh New Land, and Muker, otherwise Mewcair, and divers messuages, farms, lands, and

hereditaments, part of the trust estate, in Swaledale, in the county of York, were sold before the master, under the decree, to the respondent Thomas Smith, for £10,500, and were conveyed to him accordingly, by the following description, and under an express exception and reservation contained in the conveyance in the following words; viz.

"All those the manors or lordships of Healaugh, otherwise Healey, commonly called Healaugh Old Land, and Healaugh New Land, and all that the manor or lordship of Mewcair, otherwise Muker, or by whatsoever other name or names, the said manor or manors, now are or have been heretofore called or known; all which said manors, or lordships, are situate, [170] lying and being in or near Swaledale in the county of York, with all the lands, tenements, and hereditaments thereunto belonging, or to or with the same commonly used, occupied or enjoyed, or accepted, reputed, or taken, as part, parcel or member thereof, or of any part thereof; saving and reserving out of the said manor, to the said Alexander Denton, and Thomas Gibson, their heirs and assigns, as hereinafter is saved and reserved: and all that messuage, tenement, and farm, called Crackpott Hall, with the lands and grounds thereunto belonging, or therewith used; and also a small piece or parcel of land or ground, called Spring end Close, now or late in the tenure or occupation of Simon Harker, his assigns, or under-tenants; all which manors, messuages, mills, lands, tenements, hereditaments, and premises, are situate, lying, and being within the towns, parishes, villages, hamlets, precincts, and territories of Healaugh, Healey, Mewcair, Muker, Crackpott, Eastonsdale, Westonsdale, Ruth, Satterton, Harkaside, and Swaledale, in the said county of York, some or one of them; and are, or are meant or intended to be the same manors, messuages, mills, farms, lands, tenements, and hereditaments, mentioned in the particular or schedule annexed to the said master's report; saving and reserving to the said Alexander Denton and Thomas Gibson, their heirs and assigns, all and singular the mines, veins, and parcels of lead, copper, and potters' ore, and iron, which now are, or at any time hereafter may be discovered or found, lying, being, arising or growing, in or upon all and every the commons and wastes of the aforesaid manors; with full and free liberty, power, privilege, and authority, with miners, agents, workmen, and labourers, to search for, dig, work, sink, make shafts, and use all other ways and means from time to time, for finding, discovering, and working of any such mines of lead, copper, and potters' ore and iron, and to make drifts, addits, levels, and all other things necessary for the finding, raising, obtaining, and getting the same; and also to dress and cleanse the said ore from rubbish and stone, and to erect any engine or engines upon the premises, and to turn or divert any water or waters, for the making water courses or dams, as shall be useful for the working of such engines, or for any other use or advantage of the said works and mines, or for the cleansing of the said ore; and also free liberty of ingress, egress, and regress, into, and out of, and to make, have and use all convenient ways and passages, within all and every or any part of the premises mentioned or intended to be hereby sold or conveyed, to and from the said mines or works, with men, oxen, horses, and carts, and by and with all other ways and means, instruments and carriages, as well for bringing of timber, iron, corn, coals, minerals, and all other necessities, to and for the use of the miners, labourers, and workmen there, to build and erect upon any part of the said wastes, convenient houses or cottages, for the habitation of [171] agents, workmen, or miners, whilst they shall be employed in and about the working such mines, and raising and cleansing the said ore and minerals; and also to build and erect on the said wastes, or any part thereof, convenient bingsteads, smith's forges, mills, furnaces, engines, and storehouses, hovels, and buildings, for dressing, bucking, cleansing, running down, and smelting, refining, and for putting up, preserving, and keeping the said ore; and also liberty to cut, dig, and raise, and take in and upon the said wastes and waste grounds, or any part thereof, so much stone and clods, as shall be necessary and needful, for making and repairing such cottages, buildings, and works; and also full and free liberty, power and authority to dig for, cut, raise, dry, take, and carry away all such peat, turf, and turbarry, from time to time, and upon and from the said moors, mosses, wastes, and commons, as the said Alexander Denton and Thomas Gibson, their heirs and assigns, their servants, smelters, or workmen, shall have occasion for, and use as well in the smelting, running, and making the said ore, minerals, and metals, into lead; as for the use, benefit, and convenience of the miners, workmen, washers, lewers, and others,

“employed in and about the said mines; and also, saving and except all and every lease or leases, granted and demised, or agreed for, of any mines, or liberties for searching for, discovering, and working the same, in any part of the premises, or ordered by the high court of Chancery, to be made to the governor and company of the mine adventurers of England, and all the interest, profits, and advantages, thereby arising and accruing.”

From the time of the sale of the trust estates, Lady Jane Coke, under the reservations in the said conveyances, constantly had and enjoyed all mines of lead ore which were found within the commons and waste lands, belonging to the trust estate; and the receiver, who before the sale of the estates was appointed receiver of the rents of the lands, as well as the profits of the mines, was continued receiver of the profits of the mines, they being subject to the payment of a rent charge to the Duchess of Wharton; and the profits of the mines, during Lady Jane Coke's lifetime, produced a very considerable revenue, which was applied by the receiver in payment of the Duchess of Wharton's annuity, and the residue to Lady Jane Coke.

In January 1760, Lady Jane Coke died, having made her will dated the 22d of December 1757, whereby she devised all her estates and effects, both real and personal, unto the appellant, the Countess of Pomfret, her heirs, executors, administrators, and assigns, to and for her and their own use and benefit.

In May 1764, the appellants intermarried, whereby the Earl became entitled to the said trust estate.

Amongst the lands conveyed to the respondent Smith, was the farm, called Crackpott-hall farm, which adjoined upon a large waste, several miles in extent, part of the wastes of the [172] manor of Healaugh; this farm was let at the rent of £20 a-year, and consisted of several parcels of inclosed land; the outermost piece, next the waste, being called by the name of Crackpott-hall pasture, fenced from the waste with a stone wall; the ground in question consisted of 200 acres of land, or thereabouts, lying on the outside of the wall of Crackpott-hall pasture, which the respondent Smith insisted was parcel of Crackpott-hall farm, and called Crackpott-hall out pasture, and which the appellants insisted was parcel of the waste of the manor, and called the Hall Moor, the name of Moor being a common appellation given in that country to wastes and commons.

One Metcalfe and his partners, having discovered some signs of lead ore in the ground in dispute, they obtained from the respondents, or some of them (the respondents Hartley and Parke claiming under the respondent Smith) ten meares of ground, which were set out for them to work in; and in May 1767, Metcalfe and partners began to work within the ten meares, about 60 yards from the wall of Crackpott-hall pasture, and there discovered a rich vein of ore, and began to work the same to great profit.

In the month of February 1768, Jeremiah Hutchinson, the then receiver of the trust estate, claimed the mine in question, for the use of the appellants; and Metcalfe and his partners refusing to deliver up the same, in the month of May following the appellants exhibited their bill in the court of Chancery, against the respondent Smith and the other respondents, claiming the right to the said mine, as being found upon the waste lands within the said manor of Healaugh; and prayed, that the defendants might be decreed to deliver up the said lead mine, and the ore got, and that the appellants might be quieted in the possession of the said mine, and that the defendants might be restrained by injunction from working the said mine, and that they might account for the ore they had got, after deducting all reasonable charges; and that a receiver might be appointed to work the said mine, and receive the profits thereof pending the suit.

To this bill the defendants put in their answers, and thereby admitted the right of the appellant to the lead mines in the commons and waste grounds of the said manor of Healaugh, but insisted, that the grounds on which the lead mine in question was sunk, was called Crackpott out pasture, and time out of mind was part of the tenement called Crackpott-hall farm, and had been used as such by the occupiers of the said farm; and that the owners and occupiers of the said farm, had time out of mind exercised every act of ownership thereon, without interruption.

On the 5th of June 1769, PAnson and Metcalfe, the agents of the appellants, who insisted that the place was part of the waste, entered on the ground in

dispute, and sunk for lead ore therein, west of the place where the respondents were working. And soon afterwards, the respondents filed a cross bill against the appellants and the said P'Anson and Metcalfe; praying that they [173] might be directed to return the possession of the said mines to the respondent Smith and his lessees, and that they might be quieted in the possession thereof; and that the appellants and the said P'Anson and Metcalfe might be restrained from working the said mines opened by them: and on the 4th of July 1769, an injunction was granted upon filing the bill, to restrain the said P'Anson and Metcalfe, and their servants from working the mines.

On the 17th of October following the appellants, and the said P'Anson and Metcalfe, put in their answers to the cross bill; insisting, that the ground where both parties were working, was part of the wastes of the manor: and upon coming in of these answers, the respondent Smith and his lessees, moved to have the injunction extended to the appellants, and on the 2d of December 1769, the following order was made in the cross cause, viz.

"Upon the plaintiffs undertaking to bring such action as they shall be advised, in
 "order to try the question of right between the parties, and to proceed to trial thereon,
 "at the next summer assizes, to be holden for the county of York, his Lordship doth
 "order, that an injunction be awarded to restrain the plaintiffs and defendants, their
 "servants, workmen, and agents, from opening or working any mines within the parcel
 "of land now in dispute, beyond those ten bounds and meares, that have been set out
 "by the plaintiffs, to their under lessees; but the plaintiffs, and their under lessees,
 "are to be at liberty to continue their working within the said ten meares or bounds,
 "they paying from time to time, such duty or shares, as are reserved from the under
 "lessees to the lessors, to be ascertained by affidavit, into the Bank, with the privity of
 "the accountant general of this court, to be placed at the credit of this cause: and it is
 "further ordered, that the same, when so paid, be from time to time laid out in the
 "purchase of Bank £3 per cent. annuities, in the name and with the privity of the
 "said accountant general, in trust in this cause, and he is to declare the trust thereof
 "accordingly, subject to the further order of this court: but in default of the plaintiffs,
 "or their under lessees, paying into the Bank as aforesaid, the said shares or duties,
 "any of the parties are to be at liberty to apply to this court for an injunction against
 "the plaintiffs, or their under lessees; and in default of the plaintiffs bringing such
 "action, and proceeding to trial thereon by the time aforesaid, the defendants are to be
 "at liberty to apply the court to dissolve the injunction before directed to be awarded;
 "and his Lordship doth reserve the consideration of all further directions, until after
 "the trial shall be had, and any of the parties are to be at liberty to apply to the court,
 "as there shall be occasion."

An action of trover was accordingly brought by the respondents against the appellant the Earl of Pomfret, and John Metcalfe, in order to try the right to the ground and mine in question; and [174] a special jury was appointed, and a rule for view granted, in Trinity term 1770. And at the summer assizes following, the cause was tried; when many witnesses were examined on both sides, who gave material evidence for each of the parties, and part thereof (particularly as to the name, and whether there had been an inclosure of the 200 acres in question) was contradictory; and during the course of the trial, the respondents' counsel offered in evidence the following leases, viz. one lease dated in the year 1742, whereby the respondent Smith demised to Leonard Hartley and Ralph Parke, and Thomas Parke, all the mines and veins of lead under several farms therein mentioned, and amongst others a farm described as follows; all that farm "called Crackpott-hall farm, with the lands and grounds thereto belonging, "in the occupation of George Metcalfe, except a place called Swinner Gill, and the "large out pasture adjoining, or near thereto." Another lease dated in the year 1743, whereby the respondent Smith demised to the same lessees, all the mines and veins of lead in and under lands described as follows:—"In all and every or any of the large "out pasture commonly called or known by the name of the Crackpott out-pasture, "bounded on the east by Swinninghill Beck, being a part and parcel of a certain farm "called Crackpott-hall farm, situate, lying and being within the manor of Healaugh." And two other subsequent leases of the like purport. Whereupon it was objected by the appellant's counsel, that none of the said leases ought to be admitted in evidence against the appellant, the Earl of Pomfret, neither he, or any person under whom he claimed, being party thereto; but the judge who tried the cause over-

ruled the objection, and the leases were all read to the jury, and a verdict was given for the respondents.

The appellants, being dissatisfied with the verdict, moved the court of Chancery, on the 15th of November 1770, for a new trial; and likewise moved, that the honourable Mr. Justice Aston, then Lord Commissioner Aston, who tried the cause, would please to make his report of the evidence given at the trial.

Accordingly, on the 23d of November, the judge stated to the court, the evidence given on both sides at the trial, and, amongst other things, stated that the four leases were read in evidence to the jury, and that he had over-ruled the objections made to the admissibility thereof; and upon the whole the judge declared, that he was satisfied with the verdict, and should have been satisfied had it been the other way; for although he thought the evidence in favour of the respondents at the trial greatly preponderated, yet the view of the place in question was in his opinion so very material, that the jury were thereby the best judges of the credit to be given to the several witnesses, who had been examined on both sides; whereupon, and after the matter had been debated by counsel, the Lords Commissioners were pleased to order, that the appellants should take nothing by their motion.

[175] Afterwards, on the 4th of December 1770, the respondent Smith obtained an order in the cross cause, that so much of the order of the 2d of December 1769, as awarded an injunction, and the injunction thereon issued against the plaintiffs in that cause, to restrain them, their servants, workmen and agents from opening or working any mines within the parcel of land in dispute, beyond those ten bounds and meares, that had been set out by the plaintiffs to their under lessees, might be dissolved and discharged; and that so much of the said order as awarded an injunction, and the injunction issued thereon against the defendants in that cause, to restrain them, their servants, workmen and agents, from opening or working any mine within the same parcel of land, might be continued; and that such injunction might be extended and enlarged, not only to restrain them from opening or working any mines there, but also from taking and carrying away any lead ore, off or from the said premises; and also that such part of the said order, and the injunction issued thereon, as directed the duty or shares, reserved from the under lessees to their lessors, arising out of the said ten meares or bounds, that had been set out as aforesaid, to be paid into the bank, might be absolutely discharged; and that the plaintiffs might be at full liberty to receive such duties and shares from their under lessees, as at the time of making the order were, and since that time had, and for the time to come should become due and payable to them respectively.

From this last order, and also because the court refused the motion for a new trial, the present appeal was brought; and on behalf of the appellants it was said, (J. Dunning, J. Madocks,) that the opinion of the learned Judge who tried the cause made it evident, that the proof given on each side was such as was difficult to decide upon; and therefore the question whether the four leases mentioned in his report ought to have been received in evidence, became the more material, it being highly probable, that the admitting those leases to be read as evidence, determined the jury. For the lease of 1743, describing the place by the name of Crackpott out-pasture, parcel of Crackpott-hall farm, might be thought decisive of the question, if it were evidence of the fact. Whereas those leases ought not to have been read in evidence against the appellants, for they were private transactions between the respondents, to which Lady Jane Coke, or any person under whom she claimed, was neither party or privy; and if a lease containing such a description was admissible evidence against a person neither party or privy to it, no man's property would be safe. But it was said by the respondents, that the leases were read, not for the sake of the description, but to shew that in 1743 the respondent Smith exercised an act of ownership in granting such leases: this however could not be a reason for reading the lease of 1742, because that lease was confined to the farm only, and no part of it applied to the place in question, but the words of the exception; that lease therefore did not prove that Smith demised the [176] lands in question, but that he excepted them by a description injurious to the appellant's right. And as to the lease of 1743, if the lessees entered and worked for ore in the demised premises, the fact that they so entered as tenants to the respondent Smith, was proof of his exercising an act of ownership at the time of such entry without reading the lease; and therefore the reading it served only to inveigle

the jury, by the description of the premises contained in it. That by the order of the 2d of December 1769, both parties were restrained from working upon the vein of ore in question, save the miners, who were working in the ten meares first set out; and they were at liberty to continue to work, paying their duty for the ore into the bank, for the benefit of the party who should eventually be entitled. And the consequences of refusing a new trial, had been the giving the respondents the liberty of working at large, enabling them to receive the duty, and continuing the appellants restrained by the injunction, which consequences would prove fatal to the appellants, if the verdict was not well founded. It was therefore hoped, that the said two orders would be set aside, and that the appellants would have a new trial at the bar of the court of King's Bench.

On behalf of the respondents it was said, (A. Wedderburn, R. Perryn,) that if a new trial was not to be granted of course, and that it was not, there were many authorities to prove, the appellants' application was groundless; the conduct of the jury and of the judge being equally unimpeached, and no material objection proposed against the verdict. That the cause was tried by a most respectable special jury of gentlemen in the county of York, who all of them had a view of the place in question; all the witnesses were examined; and the verdict, after a trial of 25 hours, was entirely to the satisfaction of the judge who tried the cause; no trial therefore could be more satisfactory to the court, and for that reason ought to be conclusive to the parties. And as to the order of the 4th of December 1770, it was a necessary consequence of the verdict.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the two orders of the 23d of November and 4th of December 1770, should be reversed; and it was ORDERED, that the order of the 2d of December 1769, so far as related to the injunctions thereby awarded, and to the paying the duty or shares, etc. reserved, into the Bank, should be revived; and that the appellants should be at liberty to bring such action as they should be advised, in order to try the question of right between the parties, at the bar of the court of Common Pleas, by a special jury for the county of York, at such time as that court should appoint. And it was further ORDERED, that the court of Chancery should give all necessary and proper directions, for carrying this judgment into execution; and that any of the parties should be at liberty to apply to that court, as there should be occasion. (MS. Jour. *sub anno* 1770-1, p. 371.) (See vol. iv. p. 700. tit. Issue, ca. 14.)

[177] CASE 6.—JOHN DICKENSON and WALTER BLAKE,—*Appellants*;
PATRICK BLAKE,—*Respondent* [11th May 1772].

[Mews' Dig. xi. 510, 527. See *Wells v. Cooper*, 1874, 30 L. T. 721;
Anderson v. Titmas, 1877, 36 L. T. 711.]

[The mistake of a juror's name in the panel, or the discovery of new witnesses to impeach the testimony of a witness examined on the former trial, are not circumstances sufficient to induce the court to grant a new trial.]

[Even an objection to the competency of witnesses, discovered after a trial, is not a sufficient ground of itself for granting a new trial. 1 Term Rep. K. B. 717.]

On the 22d of May 1754, Anthony Blake, deceased, the father of the respondent, executed to the appellant Walter Blake his bond and warrant of attorney, to confess judgment thereon, in the penalty of £2547, conditioned for the payment of £1273 10s. sterling, on the 22d of August then next; and in Trinity term 1754, judgment was entered up thereon, in the court of Common Pleas in Ireland.

Anthony Blake, at the time he gave this bond and judgment, was in possession of a valuable freehold estate in Ireland, whereof he was tenant in tail, and of which he proposed to levy a fine and suffer a recovery, to enable him by mortgage or sale to raise money to discharge, as well the debt so secured to the appellant, as several other considerable demands, and he accordingly wrote to his attorney, Mr. John Concannon, pressing him to expedite the fine and recovery: and the same were shortly afterwards perfected; but he was yet under great difficulty, not being able to raise money by mortgage, or to meet with a purchaser for any part of his estate.

After the money secured by the bond and judgment became due, the appellant Blake wrote many letters to Anthony Blake, pressing payment of all or part at least of the debt. Whereupon he wrote a letter to the appellant, apologizing for his inability to pay any part of the debt, on account of his not being able to raise any money by mortgage or sale of his lands.

The appellant Blake and Anthony, having been for some years very intimate, and their intimacy still subsisting, Anthony requested the appellant to use his best endeavours to procure a purchaser for part of his estate at least, to enable him to discharge the debt due to the appellant; and it being necessary for the appellant Blake to be furnished with a rent-roll of the estate, and Anthony Blake's authority and proposals, to enable him to treat for the sale of it; Anthony for this purpose, on the 22d of March 1759, wrote and sent a letter to the appellant upon the subject, and enclosed therein the rent-roll: but the appellant Blake being unable to accomplish a sale, and being at this time very much in want of money, he on the 22d of April 1759, for [178] a full and valuable consideration, assigned over to the appellant Dickenson, the said judgment obtained against Anthony Blake, and the money due thereon. And on the 25th of that month, Anthony Blake died intestate; whereupon his real estates descended to Valentine, his eldest son and heir.

In Trinity term 1759, the appellant Dickenson sued out a *scire facias* against the heir and terre-tenants of Anthony Blake, to shew cause why the said judgment should not be revived; and the writ was served on the several tenants of the estates, to which Robert Bodkin, and some others of the tenants, pleaded the statute of the 11th of Queen Anne, made in Ireland to prevent excessive and deceitful gaming: whereby (*inter alia*) it is enacted, "That from and after the 1st of November 1711, all notes, bills, bonds, judgments, or other securities or conveyances whatsoever, given, granted, drawn, entered into, or executed by any person whatsoever, where the whole or any part of the consideration of such conveyances or securities, shall be for any money or other valuable thing whatsoever, won by gaming at cards, dice, tables, tennis, bowls, or other games whatsoever, or by betting on the sides or hands of such as shall game at any of the games aforesaid, shall be utterly void, frustrated, and of none effect."

In Hilary term 1760, Valentine Blake, by his next friend (he being under age) filed his bill in the Court of Exchequer in Ireland, against the appellants and others: charging, that his said father Anthony Blake was drawn in by the appellant Blake, to play or game at cards or dice, or both, at the races of Loughrea, in the county of Galway, in August 1773; and that the appellant Blake won from the said Anthony, £45 10s. and £91, and that Anthony on the 1st of September 1753, gave two promissory notes to the appellant Blake, for the money so won. That on the 1st of November 1753, Anthony was again prevailed upon to play or game for money at cards or dice, or both, with the appellant Blake, at a coffee house in Galway, when the said appellant won from Anthony £1137, for which he gave to the appellant his two promissory notes, one for £157 10s. and the other for £997 15s. That afterwards, Anthony at the Eagle tavern in Dublin, in the year 1754, executed the said bond and warrant of attorney, to confess a judgment to the appellant Blake, who caused the said judgment to be entered thereon; and that there was no consideration for the said bond and judgment, except the said promissory notes passed for the said gaming debts. And further charging, that the appellant Blake assigned the said judgment to the appellant Dickenson, without his previous knowledge, and without consideration; and which assignment was so made, with intent to elude the said act of Parliament for preventing gaming. Therefore the bill prayed, that the appellant Dickenson might be restrained by injunction, from proceeding at law on the *scire facias*, until the hearing of the cause; and that the said judgment and assignment thereof might be set aside, and the said bond delivered up to be cancelled; and that the appellant Dickenson, and all [179] persons claiming under him, might be enjoined by the perpetual injunction of the court, from suing or molesting the said Valentine Blake, or his estate, for recovery of the said judgment debt.

On the 26th of October 1760, Valentine Blake died, whereupon the respondent by his next friend, he being then an infant, on the 27th of November following, filed his bill of revivor, as brother and heir at law of Valentine; which bill was afterwards amended: and the respondent having attained 21, he then proceeded in the cause in his own name, under the usual order for that purpose.

To these bills the appellants put in their answers, and exceptions being taken

thereto, further answers were put in. The appellant Dickenson, by his answer swore, that he was a stranger to the consideration given by the appellant Blake to Anthony Blake, for the said bond and warrant to confess judgment; and that he was a purchaser of the said judgment entered up thereon, for the full value, without any fraud or notice, and he set out the consideration given for the same. The appellant Blake, by his answer, admitted he had frequently gamed with Anthony Blake, but positively swore he gave the full value in money, for the promissory notes mentioned in the bill, for £45 10s. and £91. And that all their gaming notes had been delivered up, and the accounts of their gaming transactions settled at a tavern, called the Eagle, in the town of Galway in February or March 1754. And there being a balance of about £4 11s. due to Anthony from the appellant Blake, the same was paid by him to Anthony; and that the said gaming accounts being so settled, the notes that passed between them for the sums won at play, were delivered up on both sides, and cancelled. He further swore, that Anthony prevailed upon him to advance and lend him considerable sums of money, and to pay money for his use, for which Anthony used to give his promissory notes; and that in 1754, when Anthony came to Dublin for the purpose of levying a fine, and suffering a recovery of his estates, to enable him to pay his debts, the appellant and Anthony, on the 22d of May 1754, met at the Eagle tavern in Dublin, and an account having previously been settled between them, the bond and warrant of attorney in the bill mentioned were executed. And he positively swore, that the consideration of the said bond was composed of money he had lent and paid to and for Anthony Blake at several times, and about £15 he lent him at that very time; and that no part of the consideration thereof, was money won at play, or gaming of any sort.

Issue being joined, and the great question in the cause being, Whether the whole or any part of the consideration of the said bond, bearing date the 22d of May 1754, given by Anthony Blake to the appellant Walter Blake, upon which the said judgment was entered up, was for money won at gaming; the parties entered into proofs, and examined witnesses in support and contradiction of this question of fact. The respondent insisted, that the appellant was not in circumstances to lend or advance such a sum of money to Anthony, as was secured by the bond; but [180] he wholly failed in proof on this point, and instead of supporting this allegation, it was clearly proved, by several witnesses produced on the part of the appellants, that the appellant Blake in 1753 and 1754, was a man in very good circumstances. That he had shortly previous to this time, been married to his then wife, with whom he had got a fortune of £2000 in money, besides a jointure she became entitled to upon the death of her former husband. That he had also about that time sold a farm or two of his own, and a large stock of cattle he had upon the farms, so that he was in money to lend a sum much exceeding the sum secured by the said Anthony Blake's bond; and besides this, several persons intimately acquainted with him, deposed to his being esteemed a man of fortune. The respondent also insisted, and proved by one witness, that in the year 1753, Anthony and the appellant Blake played at cards together a whole night at the house of John French, at Loughrea, in the race week; and the respondent also proved by two witnesses, that they played at dice at Lynch's coffee house in Galway, in 1753, when the appellant won money of Anthony; the last two witnesses spoke positively to about 100 guineas, and to their information and belief to about £1000, and said they saw some of the money won, paid; and according to their information and belief, Anthony gave his note to the appellant Blake for the money won at play; and for which, as they were informed and believed, Anthony afterwards gave his bond to the appellant Blake: and Francis Blake, a witness well inclined to serve the respondent's purposes, deposed to a conversation he had with Anthony Blake, when he was in prison about a year before his death, when Anthony declared, that the debt due to the appellant Blake was contracted by gaming. Marcus Blake deposed, that he being in company with Anthony and the appellant Blake, at the Eagle tavern in Dublin, was asked to witness a bond from Anthony to the said appellant, which he refused, as he had heard that Anthony had lost at play to the appellant a large sum, and therefore deponent did not choose to witness any writing between them, lest he should at any time be called upon to give evidence thereof, they being both his friends; but said he had heard and believed, that a bond was executed by Anthony; for that Anthony, on the day after he executed the said bond and warrant of attorney, told deponent of it; and deponent heard, that the bond was given for money which the appellant had won sometime before of Anthony at gaming; the said

Anthony having so informed the deponent. Robert Bodkin, a defendant in the cause, and one of the terre-tenants of the estate of Anthony Blake, being also examined on the part of the respondent, deposed, that he was a creditor of Anthony Blake's, and had a conversation with Magdalen, the widow of Anthony, on the day of his burial, when she declared she would dispute the appellant Blake's judgment, as it was given for a gaming debt. That on the next day he called on the appellant Blake, and introduced a discourse relative to the said Magdalen and her son's affairs, and mentioned the said judgment or bond debt, which she said was gaming money, and declared she would litigate it; whereupon the appellant Blake made answer, that the bond was not all gaming money, for that he gave Anthony Blake good gold out of his pocket. That deponent afterwards went to Magdalen, and acquainted her with what the appellant had said, and told her it would be a pity the appellant should not be paid what money he paid out of his pocket to Anthony. The respondent likewise examined Miles Burke, who deposed, that he was very intimate with Anthony Blake to the day of his death, and was much with him in July 1758, when he was confined in Galway gaol. That Anthony told the deponent, that he owed a gaming debt of £1100 or £1200 to the appellant Blake. That in 1759, the appellant Blake often visited Anthony; and when he was upon one of such visits he desired the deponent to withdraw, for he had business with Anthony; whereupon deponent left the chamber, and went to an adjoining closet, which was divided from the chamber by a thin partition of boards; and Anthony Blake's wife having desired the deponent to watch the appellant Blake narrowly, whenever he came to Anthony, in order to discover what business he had with him, the deponent therefore when he withdrew to the closet, listened attentively, and plainly heard the discourse between them, which was as follows, viz. the appellant said, "Mr. Blake, is it not time you should put me in some posture of payment of the money you owe me, which is a debt of honour, and which I won fairly from you?" Whereupon Anthony, in some passion, answered, "that it was ungenerous to press him in his confinement for money, which you know is not in my power to pay." And said further, "I have done every act in my power to secure your debt, for I have passed a bond and warrant to you for the debt, and levied fines, and opened my estate, to make it liable to your debt, and other judgments which are against me." And the appellant further said to Anthony, that he had promised the appellant to go to Dublin sometime before, to sell the lands of Cregmore, part of his estate, for payment of the appellant's debt: whereupon Anthony declared, that he could not go to Dublin, as he promised, for want of money, and that he could not prevail on his wife to levy a fine on the said lands: and thereupon the appellant said, if he applied to him he would get money to answer the expences to go to Dublin on the occasion; and that he had a Dublin man, or a county of Mayo man, ready to treat about the purchase of the said lands. And the deponent further deposed, that during the said conversation, the appellant Blake told Anthony, that his greatest uneasiness about the debt was, for fear any thing might happen to Anthony, by which the deponent believed he meant Anthony's death, that, in such case, Anthony's children, or friends might dispute the debt with the appellant, or his representatives, as it was a gaming debt. The respondent only examined two other witnesses, worthy of the least attention, viz. Patrick Darcy and James Barnwell: the first of whom spoke [182] of a conversation he had with the appellant Blake, after Anthony Blake's death, relative to a judgment bond, or demand he had against Anthony's estate; when he advised the appellant to accept all the money he really lent Anthony, and to give up that part which was lost at gaming; but the deponent believed the appellant refused to do this: and said, that from the conversation which passed between the deponent and the appellant, the deponent really believed a great part of the appellant's demand against the estate of Anthony, was on account of money lost at gaming; and he assigned as a cause for this belief, informations from several persons, that Anthony and the appellant often gamed together, and lost several sums to each other; but never was present when they gamed. The other witness, James Barnwell, was one of the attesting witnesses to the execution of the bond and warrant of attorney for confessing the judgment in question; and he deposed, that they were executed at the Eagle tavern in Dublin, and that Anthony Blake, the deponent, and a waiter at the tavern, were the only persons in the room to the best of his recollection: and he and the waiter were witnesses to the execution thereof: that previous to the execution Marcus Blake, a woollen draper in Dublin, the said Anthony Blake, the appellant

Blake, and the deponent were in company together for several hours in the said tavern, and when it became so late in the night, that Marcus Blake went home, Anthony and the appellant had a conversation together about an account, but deponent could not recollect what they said; and thereupon the appellant took out of his pocket, and handed the said bond and warrant of attorney to Anthony, who looked it over for some time, and either he or the appellant rang the bell, or called the waiter to bring a pen and ink; which being done, deponent was about going, but was either by the appellant or Anthony desired to stay; and he saw the said bond and warrant of attorney executed by Anthony, and he and the waiter witnessed it. That the appellant gave to Anthony, some money and bank notes, and some other papers, but to what they amounted, or the contents of the papers he could not depose. That no account was then settled between the appellant and Anthony, save as aforesaid; and the bond and warrant of attorney were ready drawn and filled up, when produced to Anthony by the appellant, and the penalty or condition never mentioned, or the consideration. That they were executed by candle-light, late at night, or very early in the morning, in regard Anthony Blake, Marcus Blake, the appellant Blake, and the deponent sat several hours together, and it was clear day-light when they parted. And he believed, that whatever account was between the appellant and Anthony, it was settled by them before they met in company with the deponent.

The appellants controverted this evidence, not only by proving very fully that the appellant was in circumstances to lend a sum of money, exceeding the sum secured by the said bond, but by examining many witnesses who proved declarations made by An-[183]-thony Blake, of the appellant Blake having promised to lend him £1200 or £1300: of his being under great obligations to the appellant Blake, for his supplying him with money in his greatest want; of his resolution, on that account, to give the appellant a preference in payment of his debt to all his other creditors; of his having levied a fine and recovery of his estates, to enable him to raise money to fulfil such his intentions, by paying the appellant; and of his denying that the money he stood indebted to the appellant was a gaming debt, but a real debt for money lent.

On the 24th of January 1770, the cause came on to be heard before the Barons of the said court of Exchequer, and the same being continued for several days, on the 27th of June 1770, the Barons pronounced an order, directing a trial at law, at the then next Galway assizes, upon the following issue, viz. whether the whole or any part of the consideration of the bond, upon which the judgment in the pleadings mentioned was entered, was for money won at gaming? And it was ordered, that the sheriff of the said county of Galway should return a grand panel of the freeholders of the said county to the chief remembrancer of the said court or his deputy, who was thereout to name forty-eight, and each party was at liberty to strike out twelve, and the remaining 24 were to be the jury for the trial of the said issue.

The appellants intended to have immediately appealed against this order; but the house not sitting before Galway assizes, they were obliged to appear on the trial of the said issue, which came on the 31st of August 1770; when a verdict was found in favour of the respondent.

The appellants upon the trial objected to the examination of Robert Bodkin, who was offered as a witness on the part of the respondent, because he was one of the terre-tenants of the estate of the said Anthony Blake, who pleaded the said statute of the 11th of Queen Anne; but the judge over-ruled the objection, and allowed him to be examined as a competent witness, and he accordingly gave evidence to the effect before stated. Different parts of the appellant Blake's answers to the bill in the Exchequer, were allowed to be read on the part of the respondent, upon which the appellants' counsel read other parts thereof which made for him: notwithstanding which, the judge who tried the cause, in summing up the evidence to the jury, was pleased to inform them, that no part of the answers was any sort of evidence for the appellants.

The appellants conceiving themselves greatly aggrieved by this trial and verdict, and having subsequent thereto discovered very material evidence, of which they were totally ignorant before and at the time of the trial, they therefore moved the court of Exchequer for a new trial; upon which occasion affidavits were laid before the court on both sides.

[184] The appellant Blake by his affidavit deposed, that John Smith by the name of Smyth Pendergast of Gort, esq. was one of the 24 jurors named in the panel re-

turned for the said trial : and he believed that the said John Smith of Gort was the person intended by the name of Smyth Pendergast in the panel ; and when the name of Smyth Pendergast was called on the trial, and the judge was acquainted with the misnomer, he would not permit the said John Smith, who was present, to be called, though desired by the appellants' counsel ; and thereupon the appellants' counsel challenged the array of the panel on account of the said misnomer ; and that therefore the deponent was advised and believed, the said issue did not receive a trial pursuant to the directions and meaning of the order. That Neptune Lynch was examined on the trial on the part of the respondent : who deposed to his being present at a conversation on the last day of Trinity term 1754, between the appellant Blake and the said Anthony Blake, relative to a promise the said appellant had made to supply Anthony with some money : on which occasion, Anthony having got very warm, mentioned the said appellant's having got a bond from him for a gambling debt, and that he afterwards suffered a recovery to lay his estate open to the payment of it ; and that the deponent thereupon answered, " You have done only what you ought, and there is no merit in you to sign a " bond and suffer a recovery for money fairly won : " and the appellant positively swore, that no such conversation ever passed ; and that no part of the consideration of the said bond was for money won at gaming, but all for money lent. That the said Neptune Lynch was not before examined in this cause : and that the deponent since the said trial accidentally discovered two credible witnesses, who had disclosed to the deponent's agent, such declarations of the said Neptune Lynch's, relative to the matters in contest, made by him antecedent to the trial, and such other circumstances relative to the evidence given by him on the trial, as the deponent was advised by his counsel, would either totally destroy, or at least strongly impeach, his credit with any jury. That several parts of the appellants' answers in the cause being read on the trial, other parts thereof were by the direction of the respondent's counsel also to read ; but the judge in summing up the evidence, and giving his directions to the jury informed them, that none of the said answers was any sort of evidence on the deponent's part, or to that effect ; although the deponent's counsel insisted on the contrary, as the respondent's counsel had read part thereof. And that no evidence was laid before the jury, that could induce them to believe, that £15 15s. or any particular sum was lent by the deponent to the respondent, save in the deponent's said answers.

The appellants also read on this motion the affidavit of Gustavus Warner, an attorney who attended the trial, and who deposed, that on the trial the appellants' counsel objected to the examination of Robert Bodkin as a witness, because he was one of the terre-tenants of the said Anthony Blake's lands, who pleaded the said [185] statute of the 11th of Queen Anne to prevent gaming, to the *scire facias* ; and that therefore he would have been liable to costs, if such plea was not supported ; yet the judge received his evidence. That Marcus Blake was produced on the trial on the respondent's part, who deposed, that in May 1754, he was in company at the Eagle Tavern in Dublin, with the said Anthony Blake, the appellant Blake, and James Barnwell, from about seven o'clock one evening, until late in the evening of the next day, playing at cards, and he being fatigued was going home, when the said Anthony, or the appellant, requested him to stay, and witness a bond which the said Anthony Blake said he was to give the appellant ; and which the said Marcus deposed he refused to do, as he believed it to be for a gaming debt, and they were both his friends, and he would not choose to be called upon as an evidence. And the said Marcus further deposed, that he told the appellant, that he might get Mr. Barnwell and the waiter, or the man of the house, to witness the said bond. And further, that he (Marcus) inquired of the said Anthony Blake, in the said appellant's hearing, whether he intended to pass a bond for his late Galway adventure, meaning (as the said Marcus explained himself) for a large sum which he had heard the said Anthony had lost at gaming, at Lynch's coffee-house in Galway to the appellant Blake ; and that Anthony answered in the affirmative, in the appellant's hearing, who did not contradict Anthony's assertion, and that thereupon the said Marcus retired, as he alleged, or to that effect. And the said Gustavus Warner further deposed, that Miles Burke was examined on the trial, on behalf of the respondent : and the judge in summing up, having mentioned that the said Miles Burke's evidence was very doubtful in his opinion, and the trial having lasted from ten in the morning till six or seven in the evening, the judge desired to know from the jury, if they thought they would take up more than half an hour in considering of their

verdict, signifying to them his intention of retiring from court for about that time, when John Morgan, one of the jury, answered, that they would not be above ten minutes: that the jury having made a motion as if to retire to the jury room, they instantly returned to their former place in the jury box, and some or one of them declared, they were ready to deliver in their verdict; whereupon Sir John O'Flaherty, the foreman pronounced the following verdict, as the verdict of the jury:—"We find, that some "part of the consideration of the said bond, in the issue mentioned, was for money won "at gaming." Whereupon the said John Morgan called out—"We find that £15 15s. "of the said bond was for money lent by the defendant Walter to the said Anthony "Blake, and the residue of the money won at gaming." That one of the appellant Blake's counsel, having mentioned that he heard Mr. Morgan give the said latter verdict, but not the foreman; the judge thereupon asked the foreman what was the verdict of the jury, when the foreman repeated the words so spoken by Morgan, and delivered them as the verdict of the jury. And [186] that from the time the judge had finished his charge to the jury, none of the jury retired to the corner of the jury box, or consulted or spoke in the least together, that the deponent could observe, until the said last mentioned verdict was delivered by the foreman, although deponent was, during the whole time, very attentive to what the jury said and did; and therefore he believed, neither the foreman, or Morgan, ever consulted with their fellow jurors before they spoke, or delivered the verdict aforesaid. And the appellant, on the said motion for a new trial, also read the affidavit of Patrick O'Brien, an attorney, who attended the trial; whereby he deposed to the same effect as Gustavus Warner.

The respondent, to oppose the new trial being granted, read, on the motion, an affidavit made by himself, denying that the counsel for the appellants offered to waive any objection on account of the mistake in the jury panel, in the name of John Smith Pendergast; on the contrary, that the respondent's counsel made this offer, on the appellants' counsel challenging the array. And deposing, that several parts of the appellant Blake's answers were read on both sides: that the cause was tried by a jury of gentlemen of fortune and good characters. That Robert Bodkin, on his being produced by the respondent, swore that he did not give any directions to file any plea to the said *scire facias*, issued to revive the judgment. That the deponent believed the appellant Blake, long before the trial, knew that Neptune Lynch would be examined on the deponent's part on the said trial; for deponent was present several months before the trial, when the said Neptune Lynch informed Patrick O'Brien, the appellants' attorney, that he could not avoid disclosing what he knew relative to the said bond, if called upon; and desired Mr. O'Brien to tell the appellant Blake so. That Neptune Lynch was a man of good character, and a justice of the peace, and deponent did not believe the appellant Blake had, or could get any witness to impeach the testimony given by Mr. Lynch on the trial. That the judge, who tried the cause, did not give any particular charge to the jury to find for either side: and he believed every disinterested person present was convinced that the jury brought in a just verdict. That the judge did not inform the jury that none of the answers read on the trial was any sort of evidence for the appellants; but declared, the jury were the best judges what credit they would give to the said answers, and to the witnesses examined; and that the jury were not precluded by the reading of the said answers, from judging thereof, and of the evidence given on both sides. He also swore that the jury did consult before they gave in their verdict; and that he verily believed the application for a new trial was calculated only to delay hearing the cause in the court of Exchequer, and to worry the deponent with expence; for he had been informed and believed, that the appellant Walter Blake had often declared, both before and since the trial, that he never would desist putting the deponent to expence and trouble, while he was worth a shilling, or to that effect.

[187] The Barons, after hearing these affidavits, and the certificate of the judge who tried the cause read, made an order, refusing the motion for a new trial, with costs.

And on the 7th of December 1770, the cause came on to be heard, upon the judge's certificate of the verdict and merits; when the court was pleased to decree the respondent a perpetual injunction; and the appellants to cause satisfaction to be acknowledged on the record of the judgment in the pleadings mentioned, and to pay the respondent his costs.

From both the decrees and the order refusing a new trial, the present appeal was brought; and on behalf of the appellants it was insisted (J. Burland, R. Perryn), that the bill ought to have been dismissed at the hearing; as the question between the parties was a fact only triable at law, and which might and ought to have been tried under the plea to the *scire facias*, to revive the judgment; and consequently there could be no just ground or necessity for a court of equity to interpose, by directing any issue between the parties. But supposing the court had jurisdiction, and did right in directing such issue, yet no trial had been yet had pursuant to the meaning of the order of the 27th of June 1770, the sheriff having returned 23 freeholders of the county of Galway, instead of 24: there being no such person as Smyth Pendergast, one of the jurors named in the panel. If however the jury had been properly impanelled, and were competent to try the cause, they might properly have founded their verdict upon the evidence of Robert Bodkin, who was one of the tenants of the estates of Anthony Blake, and had pleaded the statute of 11th Anne; and therefore ought not to have been permitted to be examined as a witness on behalf of the respondent, nor ought his testimony to have been received, as he was an interested witness. That the respondent's case did not appear to be varied from what it was at the hearing in the court of Exchequer, by any additional proof upon the trial, except by the evidence of Neptune Lynch; who not having before been examined as a witness in the cause, the producing him upon the trial of the issue was a surprise upon the appellants, and they could not therefore be prepared to invalidate his testimony; but since the trial, they had made material discoveries to impeach his evidence. That the judge, who tried the cause, misdirected the jury, in declaring that no part of the appellants' answers was any evidence for them, contrary to the established rule of evidence: nothing being more known or certain, or more consonant to reason, than if a person will have recourse to his adversary's answer, he must take his whole testimony together, and shall not be permitted to garble it, and read particular parts; but the whole answer is to be read, if required, and is evidence at law. That the verdict obtained under these circumstances, was contrary to evidence; the bond in question being *prima facie* evidence, on the appellants' part, of the loan of the principal money thereby secured, or of a valuable consideration for the same; and this evidence was supported by positive proof of declarations by Anthony Blake the obligor, that the whole consi-[188]-deration of the bond was for money lent; whereas the evidence on the part of the respondent was presumptive only, arising from conversations had at least twelve years before the time of giving evidence of them, and contradicted by the positive oath of the appellant Blake in his answer; who swore to have lent Anthony the whole money for which the bond was given, and contrary also to the repeated declarations of Anthony himself. That if the above reasons, taken simply, were not a sufficient foundation for granting a new trial; yet being taken altogether, there could not be any just ground to refuse it, and bind the appellants in a case of this nature, and where the demand was so considerable, by one verdict; and especially in the case of a purchaser, as the appellant Dickenson was, for a full and valuable consideration, without any notice whatever that any part of the consideration of the bond and judgment was for a gaming debt; and where the appellant Blake had in his answer positively sworn to the lending of the whole money thereby secured. It was therefore hoped, that the decrees and order would be reversed, and the respondent's bill dismissed with costs; or at least that a new trial would be granted in any county of Ireland, except the counties of Galway and Roscommon, where the respondent had powerful interest and connections.

On the other side it was contended (A. Wedderburn, A. Forrester), that the appellants having themselves obeyed, and concurred in carrying into execution the order of the 27th of June 1770, by proceeding to a trial of the issue thereby directed, were for ever concluded from complaining thereof, and that order was now become final. That all their objections in support of the motion for a new trial, were fully answered by the respondent's affidavit; and the several facts by them alleged, were clearly proved to be but so many misrepresentations of what passed at the trial; and if the supposed discovery of two witnesses who could discredit Lynch's evidence, was once admitted as a reason for granting a new trial, it would be opening a door to every kind of perjury, by giving parties an opportunity of making a new case *ex post facto*. That the appellants' prayer of a new trial in any county in Ireland except Galway and Roscommon, where the respondent was said to have powerful influence, was calculated only to blind and mislead: the evasive and unsatisfactory accounts of the transaction in question

given in the appellants' own answers, and which must have appeared to the jury, went much further in procuring the respondent a verdict than all his supposed influence, and would have had the same effect wherever the issue had been tried. The judge who tried it, was satisfied with the verdict, and the cause had been finally heard upon the certificate. It was high time therefore for the respondent to be at peace.

Accordingly, after hearing counsel on this appeal it was ORDERED and ADJUDGED, that the same should be dismissed, and the decrees and order therein complained of affirmed. (MS. Jour. *sub anno* 1772, p. 687.)

[189] CASE 7.—ANN SALTER,—*Appellant*; FRANCIS HITE, and Others,—*Respondents* [31st January 1775].

[Courts of equity may direct New Trials in suspicious cases, and especially where fraud or forgery is imputed to a will.]

[Where there were two trials upon the validity of a will and the verdicts opposite, yet an order of the court of Chancery for a New Trial (at Bar) was, upon the circumstances of the evidence, reversed.]

Michael Salter Ashe, the validity of whose will was the subject of the present contest, was for the greatest part of his life in necessitous circumstances as an apothecary at Crediton in Devonshire, under his original name of Michael Salter. In this situation it appears he had at times been assisted by the respondent Hite, who was an attorney.

About the year 1763, one Henry Ashe, a relation of Salter's, died, upon whose death he came into possession of an estate of about £300 a-year, and assumed the surname of Ashe. After this he employed Hite as his attorney in collecting rents, etc.

On the 14th of August 1767, Michael Salter Ashe died, without issue, leaving the appellant, his only sister, his heir at law, and Hannah Salter Ashe, his widow.

About three months after Mr. Ashe's death, Hite the respondent sent to Mrs. Ashe the widow to come to his house, and there produced to her a parcel in a cover, on the outside of which was written, "This will not to be opened till three months after the death of Mr. Salter Ashe."—The will appeared to be attested by three subscribing witnesses, Mr. Paull (a reputable attorney at Exeter, by whom it was suggested that it had been drawn and prepared for execution); Josias Salter, a brother in law of the deceased; and Elizabeth Caunter, a woman residing at Crediton: these were all dead at the time of the testator's decease.

By this will the testator, in the first place, provided for his wife in these words, viz. "I give unto my beloved wife Hannah Salter Ashe, one annuity or yearly rent charge of £80, to be issuable and payable quarterly, out of all that my manor, and all those my messuages, bartons, farms, lands, tenements, hereditaments, and premises, with their appurtenances, situate in the parish of Sowton, otherwise Clist Fomison, in the said county; which said annuity I compute and declare to be more than the third part of the clear net produce and income of all my said lands and estates; and which I hereby intend, will, and declare, shall be in full satisfaction of all her dower and thirds which she may hereafter claim to have after my decease, out of my said manor, lands, and estates aforesaid, or other my lands and estates whereof I shall die seised; and which said annuity I [190] will and declare to be a sufficient maintenance for her; and more so, that I had no portion or fortune with her."—The testator then proceeded to give to his wife, and to his sister Ann Salter, the appellant, all his household goods and furniture equally between them, on condition that his wife should, within six months after his death, execute a release of her dower to his trustees after named: but in case she refused so to do, then the testator revoked that bequest, and gave his said household goods and furniture to his trustees and executors, in order that they might sell the same, and apply the money arising therefrom towards payment of his debts, legacies, and funeral expences. The testator then made provision for his other relations, by giving them annuities for life, chargeable upon his real estates; namely, to his cousin William Salter (one of the respondents), an annuity of £50, immediately,

another annuity of £40, after the death of the testator's wife, and upon the contingency of his sister, Ann Salter's being then living; to Mary the daughter of the said William Salter, an annuity of £20, to commence after the death of her father; to his cousin Margaret Salter, (another of the respondents,) an annuity of £20, immediately; and to his cousin Elizabeth Williams, a legacy of £20. And after giving several small legacies to his acquaintance and servants, the testator gave to the respondent Francis Hite a legacy of £350, in the following words, viz. "Also I give to Francis Hite of Crediton aforesaid, gentleman, the sum of £350 of lawful money of Great Britain, who hath been a particular friend unto me for many years past, and from whom I have had and received many valuable assistances during the time of my adversity, and before my present estate and fortune descended unto me by the death of Henry Ashe, esq. and since, I do acknowledge and declare his true and just performance of the transactions of my affairs, for which no ample compensation hath been made him. And I give unto the said Francis Hite the said £350 over and beyond the monies he hath already received of me: and which said sum I do hereby will and declare is by me meant and intended to be in full of all his demands on me, or my estate and effects, for his transactions as aforesaid."—The testator then proceeded to dispose of his real estates: and after devising a part of them to John Partridge the younger (another of the respondents), for a term of 200 years, as an auxiliary fund to his personal estate for the payment of his debts, legacies, and funeral expences: he gave the whole of such real estates to John Partridge the elder, and Samuel Mare (two of the respondents), to the use of his sister Ann Salter the appellant, for her natural life; remainder to the first and other sons of her body successively in tail male; remainder to the respondent Hannah Salter Ashe, the testator's wife, for her natural life; and after her decease to remain to her issue in tail, in such manner as he had limited the same to his said sister Ann Salter, with remainder to Margaret Salter (another respondent), in the same manner; and for default of such issue, then the testator [191] devised all his said estates to Jane Ramsay (another respondent), daughter of the respondent Francis Hite (by her then name and description of Jane Byrdall, of Crediton aforesaid, widow of John Byrdall, late of St. Mary Church, in the same county, surgeon, deceased), and to the heirs of her body; with remainder to the said Jane Byrdall, her heirs and assigns for ever. Then followed a proviso, whereby the testator declared his will to be, that his trustees after payment of the said several annuities, should receive and take all the overplus, rents, and profits of his estates, and pay the same into the hands of his said sister Ann Salter, she being but of a moderate understanding, at four equal quarterly payments; and that the same should not be paid to any other person or persons who might claim the same by virtue of any bargain, sale, or assignment from her, nor into the hands of any person or persons whom she might happen to marry, but only into her own hands during her life, whether she should be sole or covert: and so as that such husband might not have any thing to do therewith. The testator then gave the residue of his personal estate to the respondents John Partridge the elder, and John Partridge the younger, to be by them disposed of and applied towards the payment of his debts, legacies, and funeral expences, and appointed them executors of his will.

On the 13th of January 1768, the respondents Francis Hite and Jane Ramsay (by her then name of Jane Byrdall), exhibited their bill in the court of Chancery against the appellant, as the testator's heir at law, and also against the other respondents, praying, that the testator's will might be established, and the several trusts thereof performed and carried into execution.

But before any of the defendants had answered this bill, viz. on the 18th of April 1768, the appellant filed her cross bill against the respondents, praying, that an issue at law might be directed to try the validity of the will.

These causes being at issue, and several witnesses having been examined on both sides, came on to be heard on the 9th of July 1770, before the Master of the Rolls, when his honour was pleased to order, that the parties should proceed to a trial at law, at the then next Lent assizes to be holden for the county of Devon, on the following issue, *devisavit vel non?* and the consideration of costs, and all further directions, were reserved until after such trial should be had.

This issue was accordingly tried at the Lent assizes for Devonshire 1771, and after a hearing of 14 hours, a verdict was given in favour of the will.

On the ground of the contrariety of the evidence given, the appellant in Easter term

1771, applied to the court of Chancery for a new trial; which the Lord Chancellor (Bathurst), after much argument, on the 9th of July, refused.

Hereupon the heir at law appealed to the Lords, who, on the 1st of March 1773, ordered that the parties should proceed to another trial upon the same issue, the appellant paying the respondent the costs of the former trial.

[192] In consequence of this order of the House of Lords, the issue was again tried at the summer assizes for the County of Devon, in the year 1773, before Mr. Baron Adams and a special jury; when, after a trial of near 18 hours, the jury brought in a verdict against the will.

[193] The respondents apprehending the second verdict to be contrary to the weight of evidence, applied on the 20th of Ja-[194]nuary 1774, by motion to the court of Chancery, for a new trial of the former issue; and upon full debate of the matter, [195] the Lord Chancellor was pleased to order another trial, at the then next Lent assizes for the county of Devon.

[196] And upon a second application by the respondents for a variation of this last order, by having the issue tried at the bar of [197] the court of King's Bench, by a jury of the county of Middlesex, his Lordship was pleased, on the 8th of February following, to [198] direct the issue to be tried accordingly, by a jury of the county of Devon, upon the respondents consenting to take *nisi prius* costs, in case a verdict should be found in favour of the will.

[199] From both these orders the present appeal was brought; and on the appellant's behalf it was said (J. Mansfield, J. Dunning), that the balance of evidence [200] clearly preponderated in her favour. That the clear and positive proof that Elizabeth Caunter was at Crediton, during the fair [201] week, and that Josias Salter was not present at the Turk's Head on the day of the supposed execution of the will; the negative [202] proof, that Matthew Andrew Paull never made the will; the several declarations of Elizabeth Caunter; the internal evidence of the will itself, and the indorsement on the cover; all concurred in demonstrating this proposition, that the pretended will was never executed by Michael Salter Ashe, nor drawn by Matthew Andrew Paull, nor attested by any of the persons whose names were set thereto as subscribing witnesses. That the only ground on which it was contended the will ought to be established was, that otherwise several witnesses produced by the respondent Ramsay, must be guilty of perjury; but it was on the other hand equally clear, that if the will was to be established, several witnesses produced by the appellant must be deemed guilty of perjury; as it was impossible on any supposition, to reconcile their testimony to the case insisted upon, and attempted to be proved by the respondents. That the positive testimony of the witnesses being thus contradictory, no criterion remained by which the cause could be rationally determined, but the circumstances of the case; and these most wonderfully concurred to disprove the pretended will, and indeed rendered it impossible to believe this will to be genuine, without believing facts to have existed in the present case which never before existed in any human transaction. That the only reason urged for granting a new trial was, that as there were now two opposite verdicts, one in favour of the will, [203] the other against it, there was no foundation for the court of Chancery to decree either for or against the will. But to this it might be answered, that the verdicts were founded on different facts. The book of accounts kept by Paull was not produced on the first trial, and the non-production of it was urged with weight to the jury, on the behalf of the respondents; but on the second trial this book was produced. The *alibi* of Josias Salter was not positively proved on the first trial, but on the second it was proved with the greatest clearness and precision. The two verdicts were therefore in effect not contradictory, being the result of different evidence; and the jury who gave the first would probably have given the second, if they had heard the subsequent evidence. Besides, when the two verdicts were compared, the last must derive weight from the very circumstance of its being the last. When after one trial parties proceed to a second, the cause is better understood; the parties are fully acquainted with the merits of their own case, and of that of their adversary; and are better prepared to support the one, and combat the other. In this case too, the second verdict had an advantage from being given by a full special jury, whereas the first was the verdict of a common jury, with the assistance of only three special jurors. That the last verdict was in itself perfectly satisfactory; no objection could be made to it; and it concurred with and confirmed those suspicions, which their

Lordships entertained when they ordered a second trial. Those suspicions induced their Lordships to think, that the first verdict was not satisfactory, and that the cause ought to undergo a second examination by a jury. And as upon such second examination a jury had given a verdict contrary to the former: to determine that the second verdict was not a satisfactory decision of the question, was in effect to say, that the question could never be satisfactorily decided.

On the part of the respondents it was contended (E. Thurlow, W. Davy, J. Brown, F. Buller), that all issues of this kind are directed to inform and satisfy the conscience of the court by which they are directed; and where, as in the present case, two different verdicts are found upon the same evidence, it is almost of course to grant a third trial: for otherwise, it is scarcely possible for the conscience of the court to be satisfied: and when two verdicts are contradictory, one does not merit more credit than the other. That the weight of evidence on both trials, and particularly on the last, being in favour of the will, the second verdict must, in that respect, be considered as contrary to evidence; which has always been held a good ground for granting another trial. That the facts in this case being both numerous and complicated, it seemed highly expedient, for the quiet and satisfaction of the contending parties, that they should again be examined into, and finally discussed, in the most solemn manner that the constitution of this kingdom will permit. And though the great expence attending this mode of discussion formed the appellant's only solid objection to it, yet the force of that objection was obviated by the respondents having [204] consented to take only *nisi prius* costs in case another verdict should be found in their favour.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the orders therein complained of should be reversed. (MS. Jour. *sub anno* 1774-5, p. 138.)

[192] The following is a statement of the evidence on both sides, with observations thereon, from the appellant's printed case.

The Respondents' Proofs.

It being admitted that the appellant was heir at law to the deceased, the counsel for the respondents insisted, and called witnesses to prove, that the will in question was prepared and attested by Mr. Paull, and was executed at the house of John Vicars, who then kept the Turk's Head inn at Exeter, and was afterwards delivered to Susannah Franks, the housekeeper of Francis Hite, by the supposed testator himself, with directions, in case of his death, to deliver the same into the hands of John Partridge; and that accordingly, Susannah Franks, in the latter end of the month of August, wherein Michael Salter Ashe died, or about the beginning of the next month, delivered the pretended will to John Partridge, from whom Francis Hite received it.

The respondents then attempted to prove the execution of the will, and in order to mark the time so strongly, that it was impossible for the witnesses to be mistaken in this particular, they attempted to prove, that it was executed on one of the days whereon a great fair was held, called Lammas fair, in the city of Exeter, in the year 1766, which began on Tuesday the 5th, and ended on Thursday the 7th of August. By these circumstances, all the witnesses affect to ascertain the date of this transaction: and John Melhuish, by a circumstance mentioned in his evidence, fixed it to be on the 8th of August.

George Coryndon, Samuel Sweeting, and John Geare, Gentlemen, and Richard Wootton, writer, deposed to their knowledge of Mr. Paull, and of his hand writing, that they believed the name of Paull indorsed on the will, from similitude, to be his writing. Sweeting deposed, that Paull was a man of accuracy and precision in business; and Coryndon and Wootton on their cross examination, said he was an exact man, and that they apprehended would, if he had observed the interlineation, have taken notice of it in the attestation; and all of them deposed to their belief, that the will, interlineation, and indorsement on the cover, were of the same hand writing; that it was not Paull's; that they were all acquainted with the hands writing of the attornies and writers in Exeter; but that they knew not, nor had ever seen the hand writing of the will. Wootton deposed, that he frequently wrote for Paull, and that the spelling in the will was not Paull's manner of spelling, for that he spelt in the modern fashion.

Several others were called, and proved, by similitude, the hands writing of the

testator, and of Josias Salter and Elizabeth Caunter, the other two persons whose names are set as witnesses to the pretended will.

John Vicars, Mary his wife, Margaret Caser their servant, and John Melhuish writing clerk to Francis Hite, deposed, that on the 6th or 7th of August 1766, being Lammas fair days, Michael Salter Ashe, Josias Salter, Matthew Andrew Paull and Elizabeth Caunter, were at the house of Vicars, at the Turk's Head inn, at Exeter.

The said John Vicars (who being since accused of having committed the crime of forgery, hath destroyed himself) particularly deposed, that Michael Salter Ashe the testator, and Josias Salter, came to his house together about 11 or 12 o'clock in the forenoon, asked for a room and went away; [193] came again in the afternoon, about two or three o'clock with Mr. Paull, and the witness shewed them into the dining-room, took out a table for them to do business on, and saw Paull take a paper parcel out of his pocket, out of which he took a parchment, and threw it on the table; then the witness went down stairs and met Elizabeth Caunter, who after being informed that Michael Salter Ashe and Josias were above stairs, went into the dining-room: That in a few minutes afterwards the bell rang, and he went up, and on opening the door, heard Paull reading a parchment, which from some words that he heard, he understood to be the will, but could not remember the words; and afterwards, going into the room again, saw Paull writing on the parchment; then went down stairs; and being called up again, was ordered to bring a candle, which he carried up lighted, and left it. Mr. Paull soon after went away, and Mrs. Caunter followed him: That the witness then went up, and drank negus with the supposed testator and Josias Salter; that the parcel was then on the table. Josias said, "Here is the thing which I have been so long uneasy about, and wishing to have done. There is Doctor Salter's will: Now every thing is settled to my mind, I shall die contented." Michael Salter Ashe then expressed himself to Josias, who was his wife's brother, as follows: "Now I have made my will, I don't know what I shall do with it. I dare not carry it home; my wife will be so uneasy, she will kill me." To which Josias replied, "You know you have friends enough that will keep it for you; there is Mr. Partridge, my master Mr. Hite, or Mr. Mare, where it will be as safe as in your own custody." That it was enclosed in a white cover, sealed with a large broad seal; then Josias took it up, and they went away; and they were in the house in the whole, about one hour and a half: That no other persons were in the room, besides the supposed testator and the three witnesses, and they desired the witness not to admit any other person.

Mary Vicars, the wife of the last witness, deposed, that she saw Elizabeth Caunter at the Turk's Head, in the time of Lammas fair, and saw her go up stairs to the dining-room; and seeing her so go up, asked Melhuish who she was, and was told by him, that it was Elizabeth Caunter. That on that day or the next, she asked her husband what the company in that room had been doing; who told her that he imagined they had been about Doctor Salter's will.

Margaret Caser, a servant, deposed, but very incorrectly as to the time, and all other circumstances, that Elizabeth Caunter was at the Turk's Head during the same fair.

John Melhuish, Hite's writer, deposed, that he saw, during the said Lammas fair, the said Paull, Michael Salter Ashe, Josias Salter, and Elizabeth Caunter, come down stairs from a room at the Turk's Head: that he asked Josias Salter what they had been about; who said, that they had been executing the Doctor's (meaning the said Michael Salter Ashe's) will: and he fixed the day on which this happened, to be the 8th day of August, by the circumstance of his then having come to the Turk's Head, from a house in Southgate street, where he had been to settle a cause, in which one Jasper had been arrested, and was then discharged. In this cause the warrant for arresting Jasper appeared to be granted on the 7th, and by the positive evidence of Philip Sarell, the bailiff who made the arrest, Jasper was discharged on the 8th.

Mary Cookesley deposed, that she remembered her sister-in-law, Elizabeth Caunter's coming to her in August 1766, at Mr. Gibbs's in Exeter, where she then lived as servant, about one o'clock; stayed a few minutes; said she would return and drink tea, and that she was then going to Mr. Paull's. Elizabeth Caunter afterwards returned in the afternoon about [194] five o'clock, and said she had been on business about Doctor Salter's will; drank two glasses of wine; was in a bad state of health, pale and yellow, and her face bloated: dressed in mourning, walked very poorly, and said she came on

a double horse, but did not tell who rode before her, nor where her horse was, nor of her having been at the Turk's Head: That Gibbs's house was distant from Paull's about 400 yards, and Paull's house from Vicars's house about 800 yards, and it was the same distance from Vicars's house to Gibbs's. This witness on the former trial did not recollect, nor has any other ever said, how Elizabeth Caunter was conveyed, or supposed to be conveyed to Exeter.

Peter Cann, a barber in Crediton, deposed, that the latter end of July 1766 Josias Salter and the Doctor (meaning the said Michael Salter Ashe) came together into his shop, and that they first talked softly together in a corner of his shop, then Josias said aloud, "Doctor let us go to Exeter, Mr. Paull will be ready for us before we come:" The Doctor went off; Josias tarried, and witness asked him, "If the Doctor was going to settle his will?" to which Josias answered, "The Doctor shall make a will, for if he should die without a will, what will Mrs. Ann (meaning the appellant) do? the family will be in confusion, she is not qualified."

Samuel Mare (serge-weaver) deposed, that Josias Salter served Hite: That there was great intimacy between Josias and the supposed testator: That in June or July the Doctor came to the witness's house, and said he desired to speak with him, and told him that Josias was going to be tapped, and would not live long, and asked the witness "if he would give him leave to make use of his name as a trustee in his will, with another friend?" to which he consented: And further deposed, that in about a week, 10 days, or a fortnight afterwards, he met Mr. Ashe in the street, who addressing himself to the witness said, "I've done that, now I am easy:" That the witness apprehended he meant his will; and the supposed testator further added, "If I do not take care of the estate, they (meaning the family) will spend it all." And this witness, on his cross examination, said that he told Hite of the conversation between him and the supposed testator, in a day or two afterwards.

Robert Stribbling, Thomas Lee. These witnesses deposed, that they heard Doctor Salter make use of expressions of regard and friendship for Hite.

Elizabeth Saunders deposed, that in the year 1766 she was a boarder at Mr. Brake's, in Crediton, where Mrs. Caunter also lived, and attended the wine cellar, and was a kind of housekeeper, and was a little addicted to drinking: That she was confined to her bed about the 20th of August, and was before that time in an ill state of health, but was not, as she believed, confined to the house; that she never saw her go on horse-back. And on her cross examination said, she was very little in company with Elizabeth Caunter; did not mind a great deal about her, and being frequently out from morning till night, did not see Elizabeth Caunter for whole days together, and therefore had no particular recollection of her illness, before the 20th of August; and said, that Elizabeth Hole waited on Mrs. Caunter, and she and the other persons and servants about her must know more of her than the witness.

Alice Morris deposed, that Mrs. Caunter was at her house in Lammas fair 1766, about 12 o'clock: was much swelled and very ill; said she had business at the Turk's Head, and bought two or three pair of stockings, and left them on the stall, went away and returned again soon after for them: That it was the year after her husband's death, who died in 1765, and about a month before Mrs. Caunter's death: That she lived next door to the Turk's Head, but never heard of any dispute about Doctor Salter's [195] will, or Mrs. Caunter's being at Exeter in Lammas fair 1766, till about eight weeks ago, when Vicars's hostler, and Hite's man, Melhuish, were standing on the outside of her shop talking about Mrs. Caunter: and then the witness said, "she was there, and bought goods of her;" but there was no entry in the books of the witness of any goods sold to Elizabeth Caunter, nor could she mention any circumstance connected with her transaction with Elizabeth Caunter, by which she could remember to have seen her at that particular time: That Hite had been at her house within a week, and had been there often within four months.

Susannah Franks, who was Hite's housekeeper, and died before the first trial, said in her deposition upon the commission, that Mr. Ashe, in August or September 1766, came to Mr. Hite's house, and he not being at home, Mr. Ashe delivered her a paper parcel, containing (as he informed her) his will, and desired her to take care of it, and not let it come to his wife's knowledge, because, if it should, he should live a more uneasy life with her than he did already; and desired her to keep the parcel, and if he should die, to deliver it to Mr. Partridge, the first opportunity after his death; that she took

care of it; and Mr. Ashe dying in August 1767, she delivered it to Mr. Partridge about the latter end of that month.

John Partridge, the elder, deposed, that in August 1767 Susannah Franks delivered him the paper parcel sealed up, at Mr. Hite's house, with a request not to open it till called for: and in a few weeks after, he received a letter from Mr. Hite, desiring the witness to deliver it him, and thereupon he sent his son with it to Hite, sealed up in the same manner he received it.

John Partridge, junior, deposed, that he received the parcel from his father sealed up; and that he carried it to Mr. Hite at Crediton, where it was opened in the presence of the widow.

The former verdict for the will was produced and admitted.

The Appellant's Proofs.

William Webber deposed, that he lived with Matthew Andrew Paull, whom the respondents suppose to be the drawer of the will, for a year and a half next before and home to his death in April 1767, and wrote for him during all the time, and that he verily believes Paull did not prepare, or cause to be prepared, the will then produced and shewn him, and assigned as reasons for his belief, that Paull used to impart to him all his business; that he never communicated to him aught of the will then produced, and was thoroughly convinced and persuaded, that a will of the length with the instrument then produced, could never have gone through Paull's office, without this witness's knowledge; that since Paull's death he had made strict search among his papers, and could not find any instructions, draft, or other traces of Mr. Ashe's will; that Paull kept instructions for and drafts of all wills prepared by him, tied up in separate bundles; that Paull himself and this witness generally transacted the business, unless they were much pressed, and he used at such times to employ Mr. Wootton, Mr. Bale, or Mr. Bisgood, writers in Exeter, to engross deeds and other instruments. This witness, on perusing the instrument produced as the last will and testament of Michael Salter Ashe, declared, that the body of the instrument was not of the hand-writing of either of the said writers employed by Paull, and that he did not know of whose hand-writing it was, and never saw writing like it; that Paull never spelt in the manner the will is spelt: that he had examined Mr. Paull's books of account of business done, which in his judgment were accurate: that Paull in his cash-book [196] entered all monies received and paid, and kept a book in which he made memorandums of business to be done; that he found in that book an entry by Mr. Paull to attend a survey for Mr. Holman, at the Half Moon in Exeter, on the 7th of August; and then produced the survey terms, which were of the witness's hand-writing, and the biddings were in Paull's hand-writing, and that the survey was held at 3 o'clock in the afternoon.

Paull's books were then produced, and confirmed the evidence given by this witness.

The appellants then produced, to prove the alibi of Josias Salter, Philip Sarell a bailiff, who produced a warrant from the sheriff of Exeter, dated the 7th of August 1766, against one Jasper, at the suit of the respondent Hite; and deposed, that he arrested Jasper the day the warrant bore date, and that he continued under arrest till the next day, when he was discharged.

On the part of the appellant, the strongest and most positive evidence was given, to prove the impossibility of Josias Salter's being at the Turk's Head on the 7th or 8th of August 1766, whereon the will is supposed to be executed, being then in the last stage of a dropsy, and tapped on the 8th; and that he was in a bed-room at the Barnstaple inn, from 11 in the morning of Thursday the 7th, till he was carried to Sowton on Saturday the 9th.

Josias Rogers, gardener, deposed to his long and intimate acquaintance for 30 years with Josias Salter, Mr. Ashe and Mrs. Ashe. That in August 1766, on Thursday, in the Lammas fair week, soon after 12 o'clock at noon, he received a message from them by his wife, to attend them at the Barnstaple inn in Exeter. That he accordingly went there, and found them all together in a lodging-room; that they told him they came that morning from Crediton; that the witness dined and continued with them in the same room from the time he came, till night, and helped Josias Salter to bed, who was so very weak and ill of a dropsy, that he could hardly go over the room, and that Dr. Ashe, the supposed testator, or his wife, was not out of the witness's sight a quarter of

an hour from the time he came there, to the time of his going away at night : that he saw Josias Salter the next day, just after he had been tapped, as he believes about 11 o'clock in the morning, tarried with him all that day, and laid with him that night, and the next morning helped him into the post-chaise which conveyed him to Sowton.

Elizabeth, wife of the said Josias Rogers, deposed, that on the 7th of August 1766, the year in which Josias Salter died, she about 11 o'clock in the morning, received a message from Mr. Ashe, desiring her to come to the Barnstaple inn to him : that she immediately went, and there found Mr. Ashe and his wife and Josias Salter together : tarried with them about an hour, and then went home to send her husband to them, at his return from his work, which was about noon : that he immediately went, and tarried with them all that day, as she believed : that Josias Salter was very much swelled, and so weak, that he could not without great difficulty walk over the room : That she went to them a second time, that afternoon, between 2 and 3 o'clock, and found them and her husband all together, and tarried with them about an hour : and further deposed, that she was present the next day when Josias was tapped by Mr. Symonds, and that she assisted in the operation.

John Symonds, surgeon, deposed, that on Friday morning the 8th of August 1766, he received a message from Mr. Ashe, requesting his attendance at the Barnstaple inn, to tap Josias Salter for a dropsy : that he went there, and found him in a bed-room with Mr. and Mrs. Ashe, and he thinks Elizabeth Rogers was there : and that he then tapped the said [197] Josias, whose constitution was much impaired : that he was very weak, full of water, and could not walk far or well, and could not, in his opinion, walk from thence to the Turk's Head.

The strongest and most positive evidence was given to prove, that Elizabeth Caunter, from the 31st of July 1766, the date of the will, and in fact from the 4th of July to her death, which happened the 21st of September following, was never out of Crediton, which is distant from Exeter eight miles. It is incontestably proved, that she laboured under a dropsy, and a complication of disorders, from the middle of July, which increased on her until her death. And if the evidence of the respondent's witnesses deserved credit, she was in Exeter from 12 o'clock till candle-light of Friday, the 8th of August, and consequently must have set out from Crediton early in the morning, and returned to Crediton late at night, and rode 16 miles on horseback, and walked about a principal part of the city of Exeter whilst she was there.

Elizabeth Hole, servant at Mr. Brake's in Crediton in the year 1766, deposed, that Mrs. Caunter was housekeeper to Mr. Brake : and that the latter end of July, and particularly that week in which the Lammas fair was held at Exeter, Mrs. Caunter was extremely ill : that on Monday the 4th of August she asked Mrs. Caunter leave to go to Lammas fair, who said, " If I am so ill to-morrow as I am to-day, I shall not be able " to let you go." That the witness said, " I will get Martha Buckingham in my " stead ;" to this Mrs. Caunter consented, and Martha Buckingham came there that evening, before the witness left the house : that in the evening she went to Exeter, and returned home again the next day, Tuesday in the evening, and found Mrs. Caunter at home very ill : that she attended her the whole of the two following days, Wednesday and Thursday the 6th and 7th : that she did not go out of doors, and on Thursday the 7th, she could not do any thing without the witness's assistance : that she always attended her, and during the whole of the residue of that week was not absent from her half an hour at any one time.

Martha Buckingham deposed, that she was hired to attend Mrs. Caunter in Lammas fair week, in the room of Elizabeth Hole : that she was with her before Elizabeth Hole set out for the fair, and was not absent from her at all till her return on the Tuesday, and that she saw Mrs. Caunter every day of that week, mornings and evenings ; and that she was so very weak that she could not go the length of the court, (meaning the assize hall,) without sitting down.

Ann Penrose, who lived in the same house with Mrs. Caunter in the year 1766, deposed, that in Lammas fair week Elizabeth Hole went to Exeter : that the witness was with Elizabeth Caunter the whole of that week : that she walked lame and feeble, had a dropsy and weakness of breath : that every person must observe it in her walking : that she could not in her opinion have gone to Exeter, and could not go there without the witness's knowledge ; and that Elizabeth Hole, Charity Ford, Martha Buckingham, and Elizabeth Damerell were generally with her.

Charity Ford deposed, that in the year 1766 she was apprentice to Mr. Brake in the shop, and lived there six years; that Elizabeth Caunter was not at Exeter after the 4th day of July in the year 1766; and that she fixed on that day, from her bringing home some things for Miss Brake; and that she could have known if Mrs. Caunter had been, after this time, absent for more than three or four hours. That she was first taken ill about the 8th of July, and the last time taken ill about the 21st of August, and from that time confined to her bed till her death. That she was bled in the beginning of August 1766, and the whole of Lammas fair week was very [198] ill and confined to the house. That she was never absent from Elizabeth Caunter for more than an hour or two. That she remembered Elizabeth Hole's going to the Lammas fair at Exeter, and Martha Buckingham supplying her place: And further deposed, that Mrs. Ashe paid a visit to Mrs. Caunter about a month before her death, and on her leaving the room, Mrs. Caunter said, "I wish Michael Salter would make a will, for the sake of poor Hannah," meaning his wife. Mrs. Damerell said, "do you think there is a will?" Mrs. Caunter said, "I am very certain there is no will, and I wish he would make one for poor Hannah's sake; if not, there will be the duce of a spudder."

Elizabeth Damerell deposed, that in the year 1766 she lived in Crediton with her mother; that she was very intimate with Mrs. Caunter, who died the 21st of September in that year; that from the 20th of July she visited her every day several times, and was never absent more than four or five hours in any one day till her death. That she could not have gone to Exeter without her knowledge; that she was very ill and weak, and bled by her apothecary Mr. Hewgoe, the 2d of August; that her disorder afterwards increased upon her, and she could not walk without holding by somewhat to support herself. And the witness deposed, she was frequently whole days with her; and that Mrs. Caunter in her last illness, when Mrs. Ashe had been to visit her, soon after Mrs. Ashe's quitting the room, said, "I wish Mr. Salter would be persuaded to make a will, for the sake of poor Hannah." That the witness asked her if he had not made a will; to which she replied, "No, and I fear he never will; if so, there will be the duce and all of a spudder."

Elizabeth Pain deposed, that Mrs. Caunter made the same declaration to her in her last illness, respecting Mr. Salter's not having made a will, as the other two witnesses, Ford and Damerell; but said, that she did not remember that Damerell and Ford were present.

John Hewgoe, apothecary, deposed that in July and August 1766 Elizabeth Caunter was very infirm, feeble and dropsical, that he bled her in bed on Saturday the 2d of August; that she kept her room Sunday and Monday the 3rd and 4th of August, and that on the 5th she came down stairs, but was so very weak, that she tottered as she walked over the room. That he did not see her after, for three or four days. That he thought she could not travel on horseback, but she might walk a little way in the street; and not more than half a quarter of a mile, and that she was confined by illness to her bed till her death on the 21st of September. This witness refreshed his memory by having recourse to his day-book.

Several of the witnesses proved that Michael Salter Ashe and his wife lived together with great harmony and affection.

Observations on the positive Testimony.

By the evidence thus given on the behalf of the appellant, every part of the respondent's story, insisted upon in support of the will, is contradicted. It is shewn to be in the highest degree improbable, or rather impossible, that the will should have been drawn by Mr. Paull, or engrossed or executed under his directions. The will is long and particular; a draft of it must have been made before it was copied for execution. Neither his papers or his accounts discover any trace of it. It is not copied by any person ever employed by him, or known in the country where he lived. His clerk, whom he entrusted in all his business, never heard of it.

[199] The execution of the will at the time fixed is disproved by the fullest and clearest testimony. Josias Salter is positively proved, by the evidence of Josias Rogers and his wife, not to have moved from the Barnstaple inn, to which he came to be tapped for his dropsy, either on the 7th or 8th of August; on the latter of which days the supposed execution of the will is fixed by John Melhuish. Elizabeth Caunter is proved by various witnesses not to have been at Exeter during the week in which the

Lammas fair was held. The infirmities and sickness under which she then laboured enable the witnesses to speak with the greatest accuracy and certainty.

If therefore the cause was to be decided by the positive testimony only given on each side, without attending to the circumstances of the case, it is at least equally strong on the part of the appellant: and a jury might very satisfactorily decide upon it, that the will was not executed by the supposed testator. But when in addition to this testimony, the circumstances are considered, they leave no room to doubt that the will is a forgery.

Observations on the Will, and the Indorsement on its Cover.

The indorsement on its cover, by which it is directed, that the pretended will shall not be opened till three months after the supposed testator's death, affords abundant matter for observation. It is not to be reconciled with the expedition required by the supposed testator, for the payment of his debts, legacies and funeral expences. It is absolutely inconsistent with the directions given for his burial.

Supposing this to be the true and genuine will of Michael Salter Ashe, no reason can be assigned for making this indorsement: Supposing it to be false and forged, it may be easily accounted for. It was necessary for the framer of the will to furnish some plausible excuse for the delay in not producing it immediately after the decease of Mr. Ashe: and he was induced to insert the clauses in the will, which were inconsistent with the indorsement on the cover, in order to give an air of probability to the will itself. This diversity of intention naturally produced the inconsistency which evidences the fraud. It cannot be presumed that Mr. Ashe directed the indorsement; nor is it less absurd, or less inconsistent with the course of business, to suppose that Paull should direct the person who ingrossed the will to indorse the cover. It is admitted that the engrosser of the will was not present at the supposed execution of it; and the respondents affect to trace the will from the Turk's Head into the hands of the respondent Hite, who produced it to Hannah Salter Ashe: and still they have not attempted to point out the time when the indorsement was made; neither is it pretended to have been written by any person connected with the supposed testator, or by Mr. Paull, who is by the respondents supposed to have made the will, or by any person whose hand-writing was ever before seen; though it is indisputably the same with the hand-writing of the will, which is very remarkable, and wrote by some old person; and if Paull had prepared the will, some traces of it would have been found in his office, and known to his clerk: and the writer must have been discovered if the transaction had been genuine. It is also very extraordinary, that Paull should read over the will, and immediately inclose it in a cover, with an indorsement so very inconsistent with the directions contained in the will itself, and that the testator and the other two witnesses should none of them discover it, for if Vicars be credited, they were all present at the reading and executing of the will, and Paull himself sealed it.

[200] A very long interlineation appears in the will, of which no notice is taken in the attestation. This is very singular: it is still more so when it is considered that the will appears to be attested by Mr. Paull, an attorney of great accuracy, who would not have omitted to remark such an interlineation.

The extreme hardship and severity with which the widow of the supposed testator is treated in this will, is foreign to his known character, and to the current of his affections. It was proved at the trial that he lived with his wife in the most perfect harmony for a great number of years, from his marriage till his death, and had experienced during that time great vicissitudes of fortune, being sometimes involved in extreme poverty, and at other times in good circumstances.

The annuities are merely colourable, and inserted with a view of giving a plausible appearance to the will, and of preventing the annuitants from countenancing the appellant, in disputing the validity of the pretended will.

The intails in the will are artfully drawn, so as to secure, at all events, the remainder in fee to the respondent Jane Ramsey; for, at the death of Mr. Ashe, the appellant Ann Salter was upwards of 46 years of age, and to prevent even a possibility of issue to inherit, there is a very artful clause inserted in the will, that the person marrying her should not have any benefit from the estates: the trustees being directed, in that event, to manage the estates, receive the profits, and pay them into her own hands. The next in remainder is William Salter, lately dead, who was a married man,

then aged 51 years, and had issue only one daughter, aged 23 years, who cannot take under the will, the limitation in tail being only to his sons.

The wife of William Salter being then upwards of 50 years of age, there was no probability of her ever having any heirs male to inherit. If the limitations to William Salter had not been carefully varied from the antecedent and subsequent limitations, which extend to the issue female, an estate tail would have vested in the daughter of William Salter, who, as soon as she came into possession of the premises, might have suffered a recovery, and have barred the subsequent limitation to the respondent Jane Ramsey. The widow of Mr. Ashe was then upwards of 51 years of age, and Margaret Salter was upwards of 56 years of age, and unmarried; so that the remainder in fee is well secured to the respondent Jane Ramsey, there being scarce a possibility that any antecedent estate tail will vest in the issue of the former devisees. The interest of the respondent Jane Ramsey at first view appears to be precarious and of small value; but on examining the probable duration of the prior limitations, the expectancy is certain and of considerable present value; besides, it is unaccountable why Mr. Ashe should omit the name of Josias Salter, in the limitation of the estate, when he hath inserted all the others who stood in the same relation to him.

It is not in proof, that the supposed testator had any affection or esteem whatsoever for the respondent Jane Ramsey; but the expressions of kindness contained in the pretended will, and the proof adduced on the part of the respondents, are applied to the affection and esteem which it is contended Mr. Ashe entertained for Francis Hite. The daughter, who was utterly unknown to Mr. Ashe, is the apparent object of his bounty; though this devise is not contended to have been made with an intent to aggrandize the family of the Hites, but merely to pay a debt of friendship. It must therefore remain the subject of conjecture, why the name of Jane Ramsey, rather than of Francis Hite, should grace this will as the devisee of the real estate. It must be admitted, that Francis [201] Hite shewed some marks of friendship, and offered some small relief to Mr. Ashe in his poverty and distress; foreseeing probably the event which happened, that the estate in question would soon fall to him by the expiration of some antecedent limitations. He was accordingly employed by Mr. Ashe, as his attorney and agent, on the acquisition of his fortune, to receive his rents and manage his affairs. Anxious care is taken in the pretended will, that Hite shall never be called to an account for monies received by him as bailiff or steward, to whatever amount that might be, at the time of the testator's decease.

The death of the three attesting witnesses in the life of the supposed testator, within a year after the execution of the pretended will, is extraordinary. But it is still more extraordinary and more unaccountable, that Paull, a sensible, judicious and accurate attorney, much conversant in business, should permit two persons, then in a dying condition, to attest the will of a man in good health, and that for the purpose they should be brought from Crediton, the distance of eight miles, when in the populous city of Exeter witnesses might have been had in abundance to this transaction.

If secrecy from Mrs. Ashe was the motive, the time of execution, as well as the choice of witnesses, was very extraordinary; for Mrs. Ashe comes with the testator and her brother to Exeter, and the will is said to be attested by Mrs. Caunter an intimate friend, and Josias Salter a brother of Mrs. Ashe, the latter of whom must know he should be totally destitute of the necessaries of life if he survived Mr. Ashe; and the choice was also the most unfortunate, because Caunter and Josias Salter are supposed studiously and anxiously to declare the business in which they had been employed to every person they happened to meet.

The weakness and the infirmities of both Elizabeth Caunter and Josias Salter, at the time fixed for the execution of the will were such, that it was absolutely impossible for either of them to have walked about the streets of Exeter in the manner described by the respondents' witnesses; but it is probable some of them might see Elizabeth Caunter at Exeter on the 4th of July, which was certainly the last time of her being there.

Some additional testimony was adduced by both parties at the last trial, which merits observation. It was much insisted on by the counsel for the appellant at the former trial, and at your Lordships' bar, that it was impossible for Elizabeth Caunter, weak and infirm as she was, to be conveyed from Crediton to Exeter without a carriage, and without a companion; and that although Michael Salter Ashe died within a year

after the date of the supposed will, the authenticity of which was immediately questioned, no evidence had been given of any carriage that was hired for that purpose, or of the person by whom she was attended, nor any conjecture formed of the manner in which she came.

Mary Cookesley, a witness examined at the former trial, for the first time deposed, that Elizabeth Caunter declared to her, that she came to Exeter on horseback, but who attended her, where the horse was hired, or where it was put up at Exeter, is still a secret, and must ever remain so, unless the memory of this or of some other witness should hereafter be so much improved as to recollect these circumstances. This witness could give no reason for her new additional recollection, which had never occurred to her on her former examinations at the first trial. And upon the commission from the court of Chancery, two new witnesses were examined on the part of the respondents, namely, Elizabeth Saunders, whose evidence was too slight and insufficient to merit any attention, when opposed to the clear and concurrent testimony of the other witnesses, who were the constant companions of Elizabeth Caunter in her last illness: And Alice [202] Morris, whose evidence is owing entirely, according to her own account, to her overhearing, most providentially, a conversation between Hite's writer and the ostler at the Turk's Head: but it is utterly incredible, that this witness living at Exeter, next door to the Turk's Head, the supposed scene of action, which was kept by Vicars and his family, should never have heard of this transaction until within two months before the last trial; and then, at the distance of eight years, should perfectly recollect the time of seeing Elizabeth Caunter, without circumstances which might naturally refresh her memory. It is to be remarked, that Elizabeth Caunter is admitted by all parties to have been at Exeter on the 4th day of July in the same year, which might possibly lead this woman into some mistake, concerning her being at Exeter in the summer of that year.

On the part of the appellant, the *alibi* of Josias Salter was not clearly proved at the former trial. It was a fact well known to the parties in the cause, that Josias Salter came to Exeter on the 7th of August 1766, in order to be tapped for the dropsy: But it was not till the first trial that the respondents absolutely fixed the time of the pretended execution of the supposed will, when John Melhuish, the clerk of the respondent Hite, in order to give credit to his story, affected to ascertain the time precisely, by his assisting at an arrest made at Exeter, by the order of his master. This clue led to a discovery of the evidence which has clearly established the *alibi* of Josias Salter. The books of Matthew Andrew Paull were produced for the purpose of shewing that he made no entries therein of any money received for the business supposed to have been done by him relating to the will in question. The result of this new evidence has clearly added great strength to the case of the appellant, and it is material to be attended to, as it distinguishes the cases on which the two verdicts have been given in this cause, and renders them in effect reconcileable to each other; and if they could not be considered as reconcileable, would afford a very good reason for preferring the latter.

[204] CASE 8. —CHARLES CHAPLIN,—*Appellant*; JOHN BREE,—*Respondent*
[8th March 1775].

[Where the Judge expresses himself dissatisfied with the verdict, it is a good ground for directing a new trial.] [See *Webster v. Friedeburg*, 1886, 17 Q. B. D. 736.]

[Q. How far tithes are due on a sinecure?]

See H. Wood's *Exch. Tithe Causes*, iii. 409–415, where it appears that the bill was in Nov. 1775 dismissed by consent without costs.

Sir John Brownlow, bart. died seised, amongst others, of an estate at Rysolm and at Grange de Lyngs, in the county of Lincoln. After his death, his widow, Dame Alice Brownlow, was in possession of this estate till the year 1714: when, in consequence of an act of Parliament for vesting all the real estates of Sir John Brownlow in trustees, to be sold for the purposes therein mentioned, the estates at Rysolm and Grange de

Lyngs were conveyed to the then Sir John Brownlow, bart. afterwards Lord Viscount Tyrconnel, of whom, in the year 1721, the same were purchased by Thomas Chaplin, esq. the appellant's father.

At the time of this purchase Mr. Chaplin was particularly careful to ascertain the out-goings from the estates, which were by agreement to be allowed for, by a drawback from the purchase money, according to the price which he had given; and after an examination of the several deeds, accounts and vouchers then in Lord Tyrconnel's possession, an account of the actual out-goings was made out, and a drawback out of the purchase money was repaid according to the agreement. In this account of the annual outgoings were contained the following articles; viz. To the rector of Rysolm, £15, procurations and synodals, 10s. 1½d.

From the year 1721 these outgoings were regularly and uniformly paid by the appellant's father, and after his death by the appellant, till the year 1767; when the respondent, soon after his institution to the rectory, claimed tithes in kind instead of the said yearly payments.

Though the respondent is called a rector, yet there has not been in Rysolm any church or place of public worship, or any parsonage house, any resident minister, or any divine service within time of memory, if ever. The rectory (if it be properly so called) is an absolute sinecure; and it never was contended, that tithes in any kind, or any other payments in lieu of tithes, but the above mentioned yearly payments, were ever received or demanded by any of the respondent's predecessors.

[205] By the statute of Queen Anne, for discharging small livings from their first fruits and tenths, the bishops of every diocese are required to inform themselves, as well by oath as by all other lawful ways and means, of the improved yearly value of every benefice under £50, and it is expressly enacted, that the certificate of the bishop shall ascertain the clear yearly value of the benefice. Under the directions of this statute, Rysolm was certified by the Bishop to be of the clear yearly value of £15. It was afterwards augmented by Queen Anne's bounty, and the respondent, from the time of his institution, received the benefit of such augmentation. The Bishop had certified the value of the living into the first fruits office, but seven years before Lord Tyrconnel purchased the estate; which had been long enjoyed by his ancestors. The respondent had therefore every opportunity of knowing the value of the living; and as the certified value corresponded with the customary payment to the rector, no purchaser in the situation of the appellant's father could require a greater security. When he made the purchase, intelligence was sent to the patrons of the living, that improvements of the estate were talked of, and that if tithes in kind could be had, the advowson would be valuable. This intelligence was in the respondent's custody; and the constant acquiescence in the ancient payment ever since, notwithstanding the improvements, was strong evidence that the certified value was unalterable. On the faith and credit of the value of the living, so ascertained by parliamentary authority, and confirmed by certain and uniform payments, improvements of the estate were made. On the same faith and credit, the appellant entered into covenants in his marriage settlement; and many purchasers for a valuable consideration would be substantially prejudiced, if the value, at this distance of time, was to be altered, and the remedy was to be traced back against the heirs at law of Sir John Brownlow, who died in the last century.

Notwithstanding these circumstances, the respondent, in Hilary term 1769, exhibited his bill in the court of Exchequer, against the appellant, setting forth, that on the 2d of December 1766, he was instituted and inducted into the rectory of Rysolm, and thereby became entitled to all manner of tithes, oblations, obventions, and other ecclesiastical dues whatsoever, within the said parish, and the titheable places thereof: that the appellant was owner and occupier of all the lands within the parish, to the amount of 2000 acres and upwards, and that the said lands were of the yearly value of £700. And the bill prayed an account of the value of the titheable matters in the years 1767 and 1768, and payment of what should appear to be due on taking the account.

The bill was afterwards amended; but contained no allegation that tithes in kind had been ever paid or demanded: nor was the circumstance of the augmentation of the living by Queen Anne's bounty disclosed by the bill, although it appeared from the respondent's allegations that tithes in kind would increase [206] the value of this living beyond the value of any of the livings which were intended by the Parliament to have the benefit of such augmentation.

The appellant, by his answer, admitted, that he was the sole owner and occupier of all the lands in Rysolm : and said, that he was also the sole owner and occupier of another tract of land adjoining to Rysolm, called Grange de Lyngs : but that the lands in Rysolm contained only 671 acres, or thereabouts : and that the lands called Grange de Lyngs contained 759 acres, or thereabouts. He insisted, that the said tract of land, Lyngs, or any part thereof, was not in the parish of Rysolm : and submitted to the court, that if it was within the parish, it was exempt from tithes, and was parcel of a dissolved monastery, and belonged to a religious order. As to the lands within the parish, the appellant insisted, that some ancient, lawful and valid composition real was made before the reign of Queen Elizabeth, by and between the parson, patron and ordinary of the parish : by virtue whereof a certain ancient payment of £15 10s. 1½d. to wit, £15 in money, was made payable half-yearly, at Lady-day and Michaelmas, in each year, to the rector of the said parish for the time being, and 10s. 1½d. residue of the said £15 10s. 1½d. was to be paid to the archdeacon of Stowe, within the diocese of Lincoln, for procurations and synodals yearly, and which had been paid from ancient time before the reign of Queen Elizabeth : to wit, from the time of making such real composition, by the owner for the time being, of all the lands within the parish (except Grange de Lyngs) in lieu and full satisfaction of all tithes whatsoever, offerings, oblations, obventions, and other ecclesiastical dues, possessions and rights whatsoever, yearly arising, renewing, increasing or payable, upon or from all lands within the said parish, or the titheable places thereof, or belonging to the said rectory : and which said ancient payment of £15 had been constantly and regularly paid, for a long series of years to Michaelmas 1766, to the rectors of the parish for the time being, or to some other person for their use, and by them, together with the payment of the said 10s. 1½d. in manner aforesaid received, taken and accepted, during the time aforesaid, in full satisfaction, and in lieu of all tithes whatsoever, offerings, obventions, oblations and other ecclesiastical dues, possessions and rights, yearly arising, renewing or payable, within the said parish of Rysolm, exclusive of Grange de Lyngs aforesaid, and the titheable places thereof, or belonging to the said rectory. And the appellant submitted to the judgment of the court, that the said annual payment was an effectual bar against any demand of tithes in kind : and believed it was so understood at the time of his father's treaty for the purchase of the said estate : and that neither the respondent or any of his predecessors, in the memory of any person living, had ever performed any religious duty within the said parish.

[207] The respondent replied to the answer, and divers witnesses having been examined, and their depositions duly published, the cause came on to be heard before the Lord Chief Baron, Mr. Baron Adams, and Mr. Baron Perrott, on the 12th and 14th of December 1772, when the court was pleased to observe, that the question, Whether Grange de Lyngs was in the parish of Rysolm or not ? was a question of fact proper for the determination of a jury on an issue at law : which was not objected to by the counsel on either side. And as to the question concerning the composition real, it was objected by the respondent's counsel, that the appellant ought not to be admitted to give any other proof of it, than the production of the instrument under the hand and seal of the bishop and the other parties : but this objection being over-ruled, a variety of evidence was produced on the part of the appellant, and an office copy from the first fruits office of the bishop's certificate, and some old accounts of Lady Brownlow's steward, before the time of the said certificate, and several vouchers to the said accounts, which were casually preserved in the mansion-house at Belton, and receipts for money paid to several successive rectors, and for synodals and procurations, and a receipt for the outgoings which had been repaid by Lord Tyrconnel out of the purchase money, and the depositions of several witnesses, were read on behalf of the appellant. But the respondent's case was rested on objections to the rankness of the composition real insisted on by the appellant, and the insufficiency of the evidence in support of it. After arguments at the bar, the question concerning the composition was thought proper for the determination of a jury on another issue at law : one of the barons, however, declared his inclination at first to dismiss the respondent's bill on this part of the case, but he afterwards acquiesced in abiding the event of an issue at law, to which the former part of the case had been referred : And it having been declared by the court, that the Lent assizes would be inconvenient for the trial of the issues ; it was thereupon decreed, that it should be referred to a trial at law, to be had upon the two following

issues; viz. first, "Whether the lands called Grange de Lyngs were in the parish of "Rysolm!" Secondly, "Whether such ancient, lawful and valid composition real, was "made before the reign of Queen Elizabeth?" These issues were directed to be tried at the then next summer assizes for the county of Lincoln, by a special jury; and the consideration of costs, and all other directions, were reserved till such trial should be had.

The two issues being settled conformable to the decree, no further steps were taken till the 15th of July 1773, when the court had almost finished their last sittings before the long vacation; and then the respondent having applied by motion, that certain exhibits might be produced by the appellant, the court made an order, that all deeds, books, papers, and writings relative to the matters in question, in the custody or power of either party, [208] should be forthwith produced on oath before the Deputy Remembrancer, with liberty to take copies respectively. And after this order, the respondent gave notice of trial at the ensuing assizes. But on the 17th of the same month the court varied the order, by directing the deeds, books, papers, and writings to be produced at Lincoln on or before the 14th of August, being the first day of the assizes.

On the 19th of the same July the respondent countermanded the notice of trial which he had given two days before, and did not proceed to try the issues.

On the first day of Michaelmas term 1773 the respondent applied to the court, by motion, to discharge that part of the order of the 17th of July which related to the production of deeds, etc. at Lincoln, and that they should be produced on oath, and left with the Deputy Remembrancer, on or before the first day of Hilary term, for inspection, and with liberty to take copies; and that the time for trying the issues might be enlarged to the then next Lent assizes. And the same day the appellant moved, that the issues might be taken *pro confesso* against the respondent, he not having proceeded to trial as directed by the decree.

On the 16th of November the two motions were heard together, when the court made an order for the production of all deeds, books, papers, and writings before the Deputy Remembrancer, according to the respondent's application, and enlarged the time for the respondents to proceed to the trial at law till the then next Lent assizes.

Many variations were afterwards made in the order for production of papers and writings, and the respondent having left with the Deputy Remembrancer ten large folio manuscript books of account, belonging to the master and fellows of Baliol college in Oxford, (upon whose presentation the respondent had been instituted to the said sinecure), which books it was impossible for the appellant or his agents to peruse within the time allowed by the order for the inspection; therefore, on the 4th of February following, the appellant applied to the court, by motion, that the time for trial of the issues might be enlarged to the following summer assizes, which at the time of the decree was judged the most convenient season of the year for such trial, and that the respondent might point out such parts of the said manuscript folio books as he intended to give in evidence, or otherwise that the time for inspection might be enlarged to the first day of the then next Easter term; but the court denied the motion, and ordered that the appellant should pay the costs of the application.

The appellant having no intention to evade the trial of the issues, but trusting that when they were tried the questions would be at rest, acquiesced in the several orders which the court had made on the respondent's application, notwithstanding the unexpected denial of the last motion, with costs.

[209] On the 25th of March 1774, the issues came on to be tried before Mr. Justice Blackstone and a special jury of the county of Lincoln; and after some time spent on the trial of the first issue, it was proposed by the judge, and agreed to by the counsel on both sides, that the first issue should be tried on that day, and that the trial of the second issue should be deferred to the day following. The trial lasted many hours on each day, and the jury, after withdrawing and taking time to consider of their verdict, found for the appellants on each of the issues.

On the first day of Easter term 1774, the respondent moved the court for a new trial of both the issues; and on the last day of the term, the report of Mr. Justice Blackstone having been read, (in which he stated the evidence on both sides, without giving any opinion on the verdict upon the first issue, but expressed himself in a manner which imported his disapprobation of the verdict of the second issue) the court ordered, that a new trial should be had of the issues directed by the decree, at the next assizes

for the county of Lincoln, by a special jury of the said county, on payment of costs to be taxed.

From this order Mr. Chaplin appealed, and he afterwards applied, by motion to the court of Exchequer, for a copy of Mr. Justice Blackstone's report; but the court did not think proper to comply with such application.

In support of this appeal, it was said (G. Hill, F. C. Cust, E. Willes), that the ancient and invariable payment of a certain sum of money in lieu of tithes, which was proved in the cause without contradiction, and without any proof, tradition, or even allegation, that tithes in kind were ever paid or demanded in former times, was so strong an objection to the respondent's claim, that on his refusal to proceed to trial, at the time expressly directed by the decree, the issues might have been taken *pro confesso* against him. He had every indulgence which could reasonably be expected; and after a fair and impartial trial, he ought to have acquiesced in the verdict. A further litigation at law might answer the purpose of vexation and expence, but could not be desired from motives of justice. A new trial of either of these issues could not be supported on any of the grounds upon which courts of equity have ever granted new trials: for there was no imputation on the characters of the jurors; nor any charge of partiality against any of them; it had not been contended, that the verdict was against law, or founded on facts which were contradicted, or that any new evidence had been discovered, or could be expected.

But the only objection to the verdict, and the sole ground for setting it aside, was, that it was contrary to the opinion of the Judge who tried the cause, and who appeared, by his report, to have been dissatisfied with it.

To this objection it was answered, I. That it could not affect the verdict on the first issue, with which the Judge did not express any dissatisfaction; and as to the second issue, the objection was immaterial from two considerations. 1st, From the nature [210] of the question before the jury. 2d, From the decree in the cause. The question did not depend on various and contradictory evidence, but on facts neither contradicted by witnesses, or denied by either of the parties. The inference and presumption from these facts was the only question before the jury, and they were the only proper judges of it. And if in such a case, the opinion of a judge differing from a jury, is a ground for a new trial, there must be a failure of justice; for the order for a new trial amounts to a declaration of the court, that the former jury drew a wrong conclusion from the facts before them, which is, in other words, a direction to the new jury what verdict they must find on the same facts. The evidence before the judge at the assizes, had been previously considered at the hearing of the cause, by competent judges of every question within the province of a judge: they directed the issue, for the purpose of taking the sense of a jury; but this direction would have been nugatory, if the sense of a jury was to be over-ruled by the opinion of a judge. And on this ground of objection, the order for a new trial was inconsistent with the decree. But II. There was not in fact any ground for the judge's dissatisfaction with the verdict, on either of the issues. As to the first issue, the respondent undertook to prove, that the lands called Grange de Lyngs were in the parish of Rysolm; but he did not offer any of the legal proof, usually required of such a fact. He gave no evidence of perambulation, payment of parochial rates, or service of parochial offices. The whole of his evidence, which was left by the judge to the consideration of the jury, rested on a single deed: and if a description in a deed is conclusive evidence of the extent of a parish, which cannot be admitted, the whole arose from conjecture, that a parcel of land described in the deed, by the name of Lyngs, within the parish of Rysolm, must necessarily mean Grange de Lyngs; though, in the same deed, Grange de Lyngs is, *eo nomine*, distinguished from Lyngs in Rysolm, and is not mentioned in any part of the deed to be in the parish of Rysolm. The jury were so desirous of doing justice, that they withdrew with the deed at their own request, though their inspection of it was strongly opposed by the respondent's counsel; and if no evidence had been given on the part of the appellant, there would be no ground to contend that a different verdict ought to have been found. As to the second issue, it was clearly proved, that the yearly payments in lieu of tithes, had been invariably made for a great length of time; and nothing was in question, but the conclusion from this fact. It cannot admit of a doubt, that every *modus* supposes a real composition, though the original instrument is not extant; and the presumption of the jury, that such an instrument existed, though lost or destroyed by length of time, was

warranted by many great and respectable authorities. This presumption was not destroyed by contrary proof, but only opposed by arguments, that the composition might probably be of a later date than the disabling statutes; in support of which [211] arguments, a supposed rankness in the composition was much relied on; though the value of the estate in former times was not proved, but estimated by conjecture only. A distinction was however taken between the plea of a modus and a real composition; but it has been held, that there is no necessity, either in law or equity, to use the word modus, it being a term not necessary in pleading.

The construction which the learned Judge who tried the cause, put upon the second issue, created much perplexity at the trial. The appellant by his answer had insisted, that the tract of land, called Grange de Lyngs, was not in the parish of Rysolm; and this point was the object of the first issue: and he also thereby insisted, that if Grange de Lyngs was within the parish, it was exempt from tithes, for the reasons therein mentioned; and therefore he laid the composition real in lieu of tithes, etc. for all lands in the parish of Rysolm, except Grange de Lyngs. This provisional exception was necessary in answer to the bill; but standing in the second issue, as directed by the court after the verdict on the first issue had severed Grange de Lyngs from the parish, the learned judge adhered to the mere letter without attending to the true meaning of the issue; and considered the exception of Grange de Lyngs in the second issue as inconsistent with the verdict on the first issue, and consequently rendering it impossible, in his opinion, for the jury to find a verdict for the appellant in the strict terms of the second issue. But it was submitted, that the exception in the second issue, being provisional, or conditional only, if the jury had found that Grange de Lyngs was within the parish, the true meaning was no more than this, that the jury at all events should not consider Grange de Lyngs, whether in the parish or not, as covered by the composition; the word except being in this, as in some other instances, synonymous with the words not including: and therefore this objection, being founded on a grammatical nicety, and contrary to the merits of the case, was not a sufficient ground for a new trial of that issue. But if the House should be of a contrary opinion, the appellant hoped, that the second issue should, in that case, be varied in such a manner as to leave the question indisputably open for a second trial upon the merits, free from the objection taken by the learned judge to the form of the second issue as it now stood. And it was also hoped, that as this objection went only to the second issue, the verdict on the first issue would remain.

On the other side it was insisted (R. Perryn, G. L. Newnham), that the verdict on the first issue was given contrary to evidence, the grant of the 30th of September, 30 Henry VIII. being conclusive evidence to prove, that the lands called Grange de Lyngs, were at that time in the parish of Rysolm; and no evidence was offered on the part of the appellant, to shew that they had been at any subsequent time separated. That the verdict upon the second issue was wholly unsupported by any evidence produced by the appellant; the mere proof of payment from the reign of Queen Anne, and the value of [212] the living at that time not being sufficient evidence of a real composition made before the reign of Queen Elizabeth, or of an uniform payment during that long period; and if there had been any weight in such evidence, it was entirely destroyed by the respondent's evidence, which proved, that in the 26th of Henry VIII. the reputed value of the living was only £4 per ann. That soon after the year 1599, the value of the living was returned by four neighbouring clergymen to the Bishop to be only £10 per ann. That in 1601 the state of the living appeared from a terrier to be very different from that contended for by the appellant; and not consisting of a bare annuity of £15 a-year, clear of procurations and synodals, as alleged in this issue. That the verdict on both the issues was contrary to the opinion of the learned Judge who tried the cause, as appeared by his report: and under these circumstances the inheritance of the church ought not to be bound by a single verdict. That the cause originated in the Exchequer, and the issues were directed for the information, and to satisfy the conscience of that court; but the conscience of the court still remained unsatisfied, and therefore all the Barons had been unanimously of opinion, upon solemn argument and full consideration, that a new trial ought to be granted.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the order complained of as directed a new trial of the first issue should be reversed; and that so much of the said order as directed a new trial upon the second

issue should be affirmed. And it was further ORDERED, that the court of Exchequer should give all proper directions for carrying this judgment into execution. (MS. Jour. *sub anno* 1774-5, p. 333.)

[213] TRUST AND TRUSTEES.

CASE 1.—FRANCIS ANNESLEY,—*Plaintiff*; HENRY DIXON,—*Defendant*
(in Error) [10th March 1706].

[A. as the guardian of B. an infant, made a claim to certain lands before the trustees of the Irish forfeitures, which being allowed, he entered on the lands. Part of these lands being out upon lease, A. procured a derivative lease thereof to himself; but it was held to be in trust for the infant.

[This point does not appear very clearly in the statement of the case as here given. —The judgments of the courts of B. R. in Ireland and England were affirmed.]

On the trial of an ejectment brought by the defendant against the plaintiff, in the court of Queen's Bench in Ireland, for divers messuages in Tippenham, in the county of Kildare: the jury found the defendant Annesley not guilty, as to ten acres, parcel of the said premises in the declaration mentioned; and as to the residue, they found a special verdict, stating the following facts:

That before, and at the time of the accession of the late King James II. to the crown, Robert Dixon, the lessor of the plaintiff, was seised of the lands mentioned in the declaration, except those ten acres, in his demesne as of fee; and that King James II. at the time of his accession to the throne, or any other person to his use, or in trust for him, was not seised, possessed of, or interested in any of those lands.

That, by the act of resumption, 11th and 12th William III. cap. 2, intituled, "An act for granting an aid to his Majesty, by sale "of the forfeited and other estates and "interests in Ireland, and by a land-tax in England, for the several purposes therein "mentioned:" it was *inter alia*, enacted, "That all the honours, manors, lands, etc. "whereof the late King James II. or any in trust for him, or to his use, was seised or "possessed of, or interested in, at the time of his accession to the crown of England, "should be, and were vested in the trustees named in the said act, their heirs, executors "and administrators respectively, from and after the second day of November, 1699, "according to the several estates and interests which the said late King, or any in trust "for him, had in any of the premises, at the time of his accession to the crown of "England: to the end, that the same might be sold, disposed of and [214] applied "by the said trustees, to and for the purposes in the said act mentioned. And, that no "person having any estate, right, title, or interest, in law or equity, into or out of any "of the said forfeited or forfeitable estates or interests, or any other the estates or "premises, before the 13th of February 1688, might be in any respect whatsoever "prejudiced; it was further enacted, that all persons, etc. having any estate, right, "title, etc. in law or equity, into, out of, or upon any honours, manors, lands, "etc. therein before vested in the said trustees, before the said 13th of February "1688, by reason of any settlement, etc. or incumbrance affecting the said estate, "should, on or before the 10th day of August 1700, enter all their respect- "ive claims and demands thereunto: And in default thereof every such estate, "right, title and incumbrance, were declared to be void; and the estate or "estates, so as aforesaid liable thereunto, or charged therewith, should from "thenceforth be freed and discharged from the same; and such claims were to be "transcribed, by order of the said trustees, and entered in books as a perpetual memo- "rial thereof. And the said trustees, or any seven or more of them, were thereby "impowered, according to their best discretion, to hear, determine and judge every such "claim, at any time after the entry thereof, and before the 25th of March 1701; and "if such claim should not be allowed by the said trustees, the claimant, his heirs, "executors, administrators and assigns, should be for ever barred and without remedy:

"And the said trustees, or any seven or more of them, might in such cases, dispose of such writings, deeds or evidences, in such manner as to them should seem meet." And it was further enacted, "That the said trustees, or any seven or more of them, should be a court of record; and every judgment, determination or decree of theirs, should be entered of record in books of parchment, and should be obeyed by all persons concerned therein respectively; and should be final, and should conclude and bind all and every person or persons, their heirs, executors, administrators and assigns; notwithstanding any disability in respect of coverture, infancy, non-sanity of memory, or other matter or thing whatsoever; and all infants, feme covert, idiots, persons of non-sane memory, or beyond the seas, corporations, and all other persons, bodies natural and politic, their heirs and successors, and their respective interests, should be bound and concluded by such judgment, determination and decree, according to the tenor and purport thereof, any law, statute or custom, or other matter or thing, to the contrary notwithstanding. And after the time for entering such claims, the said trustees, or any seven or more of them, were enabled and required, at any time before the 25th of March 1702, to sell all the estates and interests thereby vested in them as aforesaid, or any parcel thereof, and such sale was to be by cant or auction; and the said trustees were to execute an indenture of [215] bargain and sale to the buyer, and such indenture should be immediately entered and transcribed in books to be provided by the trustees for that purpose, and should then be delivered to the purchaser, who was to cause such indenture to be inrolled in the Chancery of Ireland, within six months after the date thereof. And the persons making such purchase, and having such conveyance and assurance as aforesaid, were adjudged in actual seisin and possession of such parts and parcels of the premises, as should be so purchased and conveyed; and should hold the same for such estate or interest therein as should be conveyed by the said trustees, discharged from all arrears of rents, and all demands of the King, his heirs and successors, and of the trustees, their heirs, executors, administrators and assigns, and of every other person whatsoever; except such claims and demands as should be allowed by the trustees, in the determination of such claims as aforesaid; and also freed and discharged from any breaches of trust, which might be pretended to have been committed by the said trustees, in not strictly pursuing the powers and directions given by the said act."

That Robert Dixon, the lessor of the plaintiff, made a claim before the trustees, and therein stated his title by letters patent of the 30th of March, 15 Car. I. made in pursuance of a commission of grace for remedy of defective titles; whereby all the lands, then in possession of Sir Robert Dixon or his tenants, containing by estimation two-thirds of the lands of Tippenham, or thereabouts, and reputed 130 acres of arable, and 30 acres of pasture, were granted to Sir Robert and his heirs, who entered and was seised to the time of his death; and then Sir William Dixon, his son and heir, entered and was seised, till he was dispossessed in the time of the civil wars; but, upon his plea in the Exchequer of Ireland, he was, in the year 1661, restored, and quietly held and enjoyed the said lands. That one Robert Sherlock was seised in fee of five houses and 30 acres of land in Tippenham, being about one-half of the remaining third, and mortgaged the same to Robert Moore in fee: And one Pierce Fitzgerald was seised in fee of the other moiety of that third part, being one-sixth of the whole. That a moiety of the lands was seised and sequestered as the lands of Fitzgerald, tho' he was in fact, only proprietor of a sixth part; and that Robert Moore, being adjudged an innocent papist, had a decree for his mortgaged lands, and was put in possession thereof by order of the commissioners, and thereby became seised in fee. That the said Robert Moore and James Sherlock, the son and heir of the said Robert Sherlock, by deed of feoffment, dated the 5th of May 1664, and by fine, in consideration of £120 conveyed their said lands to Sir William Dixon, whereby he was seised of the said mortgaged lands; and he was also seised in fee of his two-third parts as aforesaid, and died; whereupon the same descended to Sir Richard Dixon, who entered and enjoyed till he died, in [216] June or July 1684, and by his death the lands descended to the claimant, then under the age of ten years; who, by Francis Annesley his guardian (the now plaintiff in error) entered on the same and was seised. The claim then stated, that all that part of the town and lands of Tippenham, which formerly belonged to Pierce Fitzgerald, was by letters patent conveyed to the Duke of York and his heirs; and that Sir William

Talbot, the Duke's commissioner, took upon him in 1680, to demise for 31 years to one Quin, the half of Tippenham, containing, as was alleged, 209 acres, at the yearly rent of 2s. 6d. for every acre. That Quin, in 1695, demised this moiety for 17 years to the said Francis Annesley, at the yearly rent of 3s. 8d. per acre; and under colour of such demise, the said Francis Annesley possessed himself of that part which was conveyed by Moore and Sherlock. That the fee-simple of the premises which belonged to the Duke of York was vested in the trustees; but without making any claim thereof, the claimant averred his title to the two-thirds of which he was in possession, under the patents before stated, and also to the moiety of the other third, conveyed by Moore and Sherlock, and then possessed by Mr. Annesley, under colour of the lease from Quin; and he claimed the benefit of that lease as a trust for him, being taken by his guardian. That the trustees, by their decree and adjudication of the 5th of September 1700, thought fit to adjudge, that the claimant should enjoy one moiety of the lands of Tippenham, to him and his heirs; and that his claim as to any other or further part of the said lands, should be disallowed and dismissed.

The jury further found, that the trustees in consideration of £184 6s. 7½d. paid by the said Francis Annesley, and of the further sum of £100 allowed to him by order of the trustees, for service in making out their title to the said lands of Tippenham, by their indenture of bargain and sale, dated the 7th of June 1703, did bargain and sell to the said Francis Annesley and his heirs, all that the moiety of the town and lands of Tippenham, containing by estimation 161 acres, with their appurtenances, all which said premises, the deed says, were late parcel of the estate of the late King James II. at the time of his accession to the crown of England, and now are in the possession of the said Francis Annesley, and his under-tenants. Then they found that Annesley being in possession, Dixon entered upon him, and made the lease set forth in the declaration, and that Annesley re-entered and ejected the lessee; and conclude generally, if, upon the whole matter, the court shall judge he is guilty of the trespass and ejectment of the residue of the lands, beyond the said ten acres, they find him so; and if they shall adjudge him not guilty, they find him not guilty.

On arguing this verdict in the court of Queen's Bench in Ireland, judgment was given for the lessor of the plaintiff; and, after three solemn arguments upon the writ of error in the court of Queen's Bench in England, the judgment was affirmed by [217] the Lord Chief Justice Holt, and the Justices Powell and Gould (who delivered their opinions *seriatim*), contrary to the opinion of Mr. Justice Powis.

But to reverse both these judgments, a writ of error was brought in Parliament; and on behalf of the plaintiff in error it was contended (R. Donkin), that if the trustees under the act of Parliament had not a power to declare, adjudge, and determine what was forfeited and vested in them, and what not, the clause obliging persons to enter their claims before them, would be not only useless, but vexatious: and if the decree and sale of the trustees should not be an incontrovertible title to the protestant purchasers, then must such purchasers, upon any trial, prove the estate and title at law of the forfeiting persons: but which it was impossible for them to do, because the forfeiting persons having withdrawn, with all their deeds and evidences, the protestant purchaser was totally naked and destitute of any defence, save only the decree and sale of the trustees. That if it had been imagined, that the trustees' decree was not final and conclusive, very few, if any, would have become purchasers; and consequently, the public debt, which was the consideration of the act, would have remained unsatisfied. That it would be the greatest hardship imaginable, upon all those who had debentures, to have no fund but this for the payment of them; and to be in a manner compellable to buy these forfeited estates therewith, and yet liable to be evicted from them. That many of the army and others, who had purchased these estates with the hazard of their lives and loss of their limbs, and had greatly improved them, and made settlements of them on their families, were not able to prove any other title than the decree and sale of the trustees; and therefore, if that should not be sufficient, they were liable to be evicted and turned out of all. That the only objection of weight against this power being in the trustees, was, that they might have sold all the innocent persons' estates in Ireland: but it might as well be said, that the Judges in Westminster-Hall and a jury had too great power, and might wrongfully determine every cause that came before them: which was not to be presumed, and was an objection against all judicatures. That the trustees had the approbation of both Houses of Parliament, and were upon

their oaths, and took all imaginable care in their determinations; so that out of near 4000 titles, which they had determined, not above four or five persons, thought themselves aggrieved. And, that the defendant Dixon having had his claim fairly and fully heard before the trustees, and the same having been determined and decreed against him; it was hoped, that the judgments would be reversed.

On the other side it was insisted (J. Jekyll, St. J. Broderick), that the determination of the trustees, as to the lands in question, was *coram non jure*, nothing being subject to their judgment or disposition, but what was vested in them; and nothing was vested in them to be disposed of, or intended to be so, but the estates of forfeiting [218] persons, and the private estate of the late King James. That this was not pretended to be a forfeited estate, nor was it ever part of King James's private estate; and therefore, if the act should receive the construction contended for by the plaintiff, so as to give the trustees any power over this estate, it would at the same time have put it in their power to dispose of every estate in the kingdom of Ireland.

After hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given in the court of Queen's Bench in Ireland, and the affirmance thereof in the court of Queen's Bench in England, should be affirmed; to the end, that execution might be thereupon had, as if no writ of error had been brought in the court of Queen's Bench in England, or into the House. (Jour. vol. 18. p. 279.)

CASE 2.—CHARLES MACARTY,—*Appellant*; JOHN BAYLY,—*Respondent*
[1st April 1707].

[The determination of the trustees of the Irish forfeitures is binding and conclusive to all parties, and no appeal lies from it.]

[A private case of little interest or importance.]

Charles Oge Macarty was, before the year 1641, seised in fee of the lands in question, among others; and by a limitation in his marriage-settlement, made in 1625, these lands, on failure of issue male of his body, were to come to Charles Macarty, the appellant's father.

By the act of settlement made in Ireland, in the year 1662, the said lands, together with several other forfeited estates in the barony of Muskry, in that kingdom, were vested in King Charles II.; and by a clause in the act of explanation, made in 1665, the same were to be set out and granted to Charles James Macarty, then Lord Muskry, an infant, in tail male; with remainder in tail male to Donogh, then Earl of Clancarty, Lord Muskry's grandfather; with a remainder over to the Earl's right heirs. And it was by that act expressly provided, "That the said Earl Donogh, or Hellen, then Countess of Clancarty, if she survived the said Earl, should, by way of lease, or rent-charge for years, or otherwise, as to him or her should seem meet, afford such relief out of the premises, to the former proprietors, as he or she should find did best merit the same; and what he or she should do therein, was by the said act made good and valid in law."

Soon afterwards, both the Earl and Lord Muskry died; and thereupon Callaghan, the second son of Earl Donogh, became Earl of Clancarty.

[219] In 1674, Charles Oge Macarty died without issue, leaving David Barry his nephew and heir at law; who soon afterwards prevailed upon Earl Callaghan to grant him a lease, dated the 11th of January 1674, of the lands in question, for 99 years; but in this lease there was a proviso or condition, that if it should afterwards appear, that any other person, by virtue of any deed of intail, or otherwise, ought to have or be entitled to the inheritance of the said premises, after the death of the said Charles Oge, without issue male of his body, had there been no forfeiture of the same, then the said lease should be void.

In the year 1675, Charles Macarty, the appellant's father, exhibited his bill in the court of Chancery in Ireland, against Earl Callaghan, and the said David Barry, praying that the Earl might be decreed to make him a lease of the said premises; but the Lord Chancellor, thinking he had no power to make such a decree, dismissed the bill.

In 1677, pursuant to an order of the King and Council in England, and another

order of the Lord Lieutenant and Council in Ireland, founded on a report of Sir John Temple, then Solicitor General in Ireland: the said Countess Hellen (who having survived Earl Donogh, was alone authorised by the said act of explanation, to make leases of the premises to meriting persons, and to judge and determine who were such), together with Countess Elizabeth, the mother and guardian of the then Earl of Clancarty, by deed, reciting the proviso in the act, the settlement of 1625, that the said Charles Macarty was a meriting person, and that the lands in question ought to have come to him by the said settlement; did in pursuance of the said act and orders, demise the said lands (among others) to the said Charles Macarty, for a term of 99 years.

For some time after the granting of this lease, the possession of the lands was disputed; the said David Barry sometimes receiving the rents, and at other times, the said Charles Macarty: but, in the year 1686, Macarty obtained quiet possession, and so continued till the year 1692, when he was forcibly evicted by the respondent, under colour of his having got an assignment of Barry's lease.

The inheritance of the premises becoming afterwards vested in the trustees, for the sale of the Irish forfeitures, by reason of the Earl of Clancarty's attainder; the said Charles Macarty claimed the benefit of his said lease before the said trustees, and obtained a decree accordingly: the respondent's counter-claim of the benefit of Barry's lease, being at the same time dismissed, on full hearing.

In consequence of this decree, Macarty brought his ejectment and obtained a verdict and judgment: whereupon, the respondent exhibited his bill in the court of Chancery in Ireland, to be relieved against this verdict.

Pending this suit, the said Charles Macarty died, having made his will, and thereof appointed the appellant his son, executor: [220] and the cause having been duly revived against him, came on to be heard in December 1705: when the Chancellor, assisted by the Lord Chief Justice Doyne and Mr. Justice Upton was pleased to decree a perpetual injunction, to stop all proceedings at law upon the said judgment in ejectment, or otherwise, on the defendant's title.

From this decree the defendant appealed: insisting (S. Dodd), that the determination of the trustees, was binding and conclusive to all parties: the matter being undeniably subject to their jurisdiction, and no appeal lay from them to the Chancellor. That his Lordship could not examine, alter, or controul, what Countess Hellen had done, she being, in that particular, solely intrusted by the Parliament; and he might as well assume a power to repeal the act, as establish Barry's term, and set aside Macarty's lease. But, supposing that Barry's lease had been of any validity, yet, it was totally defeated and avoided by the condition thereunto annexed.

On the other side it was argued (St. J. Broderick, R. Turner), that if the lease granted to Macarty had been made to Charles Oge himself, as it ought to have been, there could have been no colour for the dispute. That the restriction, or proviso, in Earl Callaghan's lease, ought to be deemed void, because he had no power by the act to make any; for it was his and Countess Hellen's own fault that the lease was not made to Charles Oge, who lived eight years after the act of explanation passed; and for the same reason the lease made by Countess Hellen in 1677, to the appellant's father, ought not to stand. That the dismissal of the respondent's claim, by the trustees, ought not to prejudice him: because their power was only to determine incumbrances on the forfeited estates, but not to whom such incumbrances, if controverted, should belong.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, "that the decree therein complained of should be reversed;" and that the respondent's bill in the court of Chancery in Ireland should stand dismissed out of that court. (Jour. vol. 18. p. 307.)

[221] CASE 3.—HENRY GORGES and ROB. GORGES his Son,—*Appellants*;
CHARLES PYE,—*Respondent* [27th March 1712].

[Mews' Dig. xiv. 914, 1572.]

[Trustees in a will, to support contingent remainders, join with the tenant for life in a conveyance, whereby the contingent remainders are destroyed before they come *in esse*; this is a plain breach of trust, and whoever claims under such conveyance, having notice of the trust, shall be liable to make good the estates.]

[Decree of Lord Keeper Harcourt, affirmed.]

[This point was more precisely determined in the case of *Mansell v. Mansell*, 2 P. Wms. 678; in which it was expressly and solemnly decreed by Lord Chancellor King (assisted by Lord Chief Justice Raymond, and Lord Chief Baron Reynolds) that trustees appointed for supporting contingent remainders are guilty of a breach of trust in joining to destroy them; and that it makes no difference whether the settlement by which the trustees are appointed be voluntary, or for a valuable consideration; or by will only. With respect to the remedy in such case, it was declared, that if the persons claiming under the breach of trust have notice of it, then they are subject to the same trust: as also if the conveyance by the trustees be voluntary, or without a valuable consideration; but if it be for a valuable consideration and without notice, the purchaser shall hold the land discharged, and the trustees must buy and settle other land to the same uses.—But it seems that a distant contingent remainder-man has no right to call trustees to an account for such breach of trust, during the life of tenant for life. *Else v. Osborn*, 1 P. Wms. 387, 8.]

[In certain cases however, as for payment of debts, and some few other instances, a court of equity will exercise its discretion by directing trustees to join in destroying contingent remainders; but this is done with great caution, and it is unsafe in any case for a trustee so to do without the directions of a court of equity. See *Busset v. Clapham*, 1 P. Wms. 357, and Mr. Cox's note there; as also on the case of *Mansell v. Mansell* above cited.]

1 Wms. 128. 2 Salk. 680. Preced. in Chan. 308. 1 Eq. Ca. Ab. 384. E. ca. 1.
Viner, vol. 21. p. 528. ca. 2.

Sir Walter Pye being seised of several manors and lands in Herefordshire, by deed dated the 6th of March 1638, made a voluntary settlement of the manors of Kilpec, Orop, and other estates of about £1200 per ann. to the use of himself for life; remainder to the heirs of his body; remainder to his own right heirs: but subject to a proviso, that he might by any writing, or by his will, charge the estate so settled, with the payment of his debts; and in default thereof, that then the use and trust of all the said estates, should be to trustees, for 21 years after his death: upon trust for the payment of his debts, out of the rents and profits during that term.

Sir Walter had two sons, namely, Walter and Robert; and having afterwards occasion to borrow money, he, in the years 1640, 1649, 1652, 1653, and 1654, levied several fines, and made several mortgages, of different parts of his estate; and, by virtue thereof, became seised in fee, or of the equity of redemption, of the premises comprised in those fines and mortgages.

On the 23d of October 1659, Sir Walter Pye made his will, and thereby devised all the manors, lands, tenements, and here-[222]-ditaments, whereof he, or any in trust for him, or for his use, stood seised (except Kingston farm, which he devised to his son Robert, in fee,) to Walter, his eldest son, for 99 years, if he should so long live; remainder to trustees, to preserve the contingent remainders: remainder to the first and other sons of Walter, successively in tail male; remainder to other trustees, for a term of 99 years, for raising £2000 for the portions of Walter's daughters; remainder to his said son Robert, for 99 years, if he should so long live; remainder to trustees, to preserve the contingent remainders: remainder to the first and other sons of Robert, successively in tail male; remainder to other trustees for a term of 80 years, for raising

a like sum of £2000 for the portions of Robert's daughters: remainder to John Pye, the testator's brother, and grandfather of the respondent, for 99 years, if he should so long live; remainder to trustees, to preserve the contingent remainders; remainder to his first and other sons, successively in tail male: with other remainders over. And in this will was contained a power for the testator's son Walter, to make a jointure upon a wife, not exceeding £300 per ann.; and for his other son Robert, after the death of Walter, without issue male, to make a jointure upon a wife, not exceeding £500 per ann.; and a declaration, that the estate so devised, should be liable to the mortgages and debts of the testator.

The testator soon afterwards died, leaving Dame Mary his widow, to whom, in 1656, he had made a jointure of £350 per ann.; and the estate was also subject to some mortgages, and other debts of his: whereupon Walter the son, entered on all the estates, not in jointure to Dame Mary, and enjoyed the same for some time.

In November 1667, a treaty of marriage was set on foot, between Robert Pye, and Mary, the daughter of Sir Edmund Bray: and, in order to enable Robert to make a settlement on that marriage, the several mortgages in fee, made by Sir Walter, were paid off by Robert, to the amount of £2000: and thereupon the premises comprised in those mortgages, were conveyed to trustees and their heirs, to the use of the said Robert and Mary, for their lives successively; with remainder to the first and other sons of that marriage, in tail male: with remainder in fee to Robert, and his heirs. And in these conveyances both Walter and Robert joined, and the will of Sir Walter was therein particularly recited.

Besides these deeds, Walter, and the trustees named in his father's will, as well those for preserving contingent remainders, as those for raising portions for Walter's daughters, conveyed their interest during the life of Walter, and also the term for raising the portions, to new trustees; and a fine was afterwards levied by Walter and the new trustees, whereby the estate of Walter and his issue, was intended to be barred and extinguished.

Notwithstanding these conveyances, Robert, by a deed poll, dated the 1st of July 1668, settled a jointure upon the said Mary, [223] his intended wife, in pursuance of the power contained in Sir Walter's will: but doubts afterwards arising, whether this jointure would be good, as Walter, his elder brother, was still living; Robert, by another deed of the 14th of the same month, reciting the said several conveyances and deed poll; and the doubts respecting the validity of the jointure, assigned a church lease to trustees, as a security to indemnify Mary, against her being evicted of any part of the premises, so settled upon her in jointure.

By this marriage, Robert had issue only one daughter: who, together with her mother, died in a few years afterwards.

In 1675, Robert married Meliora, the sister of Sir James Drax; and, upon this second marriage, although his brother Walter was still living, he made the same settlement upon her, and her issue by him, as he had made on his first marriage; with the like notices and recitals of Sir Walter's will.

By this marriage Robert had issue only one daughter, named Elizabeth, who was afterwards the wife of the appellant Henry, and mother of the appellant Robert; and, on the 30th of January 1680, he died: whereupon Meliora, his widow, entered on the estate.

On the 24th of March 1690, Walter, the brother, died without issue; and the estates of him and his brother Robert, under Sir Walter's will, being spent for want of issue male, the title of John Pye, Sir Walter's brother, accrued; who, together with Edward his son, the respondent's father, and John Scudamore, the surviving trustee for preserving contingent remainders, in Trinity term 1691, exhibited their bill in the court of Chancery, against Meliora and Elizabeth, the widow and daughter of Robert Pye, and the trustees for raising the £2000 portion, under Sir Walter's will; offering to pay the debts of Sir Walter, if any remained unpaid; and to secure the payment of Elizabeth's portion, when it should become due; and therefore praying a conveyance of the mortgage and trust estates, and an account of the rents and profits thereof.

On the 27th of January 1695, this cause was heard before the Lord Chancellor Somers: when the counsel on both sides admitting it to be a matter of intricacy and difficulty a reference was made to the Master, to state the case upon the evidence: but the parties never thought proper to proceed upon this reference.

John Pye, and Edward his son, and Meliora the widow of Robert, being all dead, the respondent, in Easter term, 1708, filed his bill of revivor against the appellants Henry and Elizabeth his wife, and the trustees; and the suit again abating, by the death of Elizabeth, was revived against the other appellant Robert, as her son and heir.

On the 6th of November 1710, the cause was heard by the Lord Keeper Harcourt; when the court declared, "that as to the lands comprised in the deed of 1656, the uses of that deed were not revoked by the will; and, that what [224] lands were comprised in the deed of March 1638, and not included in the several fines levied in 1640, 1649, 1652, 1653, and 1654, or any of them, they likewise did not pass by the will. But as to such lands as were comprised within any of the said fines, and of which Sir Walter, or any in trust for him, or for his use was seised in fee-simple at the time of his death, or of which he was entitled to the equity of redemption, those lands, and the equity of redemption did pass by Sir Walter's will, and that the plaintiff was well entitled to the equity of redemption thereof, on discharging the incumbrances, and to have an account of the rents and profits, from the time of Sir Walter's death; and that the rents and profits of the lands, comprised in the deed of March 1638, were liable to the payment of the debts of Sir Walter, during the term of 21 years, from his death;" and decreed the same accordingly. And it was referred to the Master, to take an account of the debts and incumbrances at the time of Sir Walter's death, and what part thereof had been paid by Robert or Walter his sons; also what remained unsatisfied at the time of the death of Walter, and had been since paid, either by Meliora, the widow of Robert, or by the defendant Henry; in order that it might appear, what part of the debts and incumbrances had been paid and satisfied, by and out of the rents and profits of the estate subject thereto. And the Master was also to take an account of the rents and profits of the devised estate, received by Robert and Walter Pye during their respective lives; and what should appear to have been received by them, or either of them, was to be applied in keeping down the interest of the mortgages, and other incumbrances, during their respective lives, so far as such rents and profits would extend. The Master was likewise to take an account of the rents and profits of the lands, comprised in the deed of March 1638, which, for 21 years after Sir Walter's death, had been received by the said Robert and Walter, or either of them; and those rents and profits were to be applied in discharge of Sir Walter's debts, according to that deed. An account was also to be taken, of the whole rents and profits of the lands which passed by the will, and had been received by Meliora, or the defendant Henry; and what should appear to have been so received, was to be applied in sinking the interest, and then the principal of such of Sir Walter's debts, as remained unsatisfied at the death of Walter his son, and to which the defendant Henry was any way entitled; and, after satisfaction of these debts, then to be applied in payment of the £2000 portion of Elizabeth, the defendant Henry's late wife, with interest for the same, from the time of their marriage.

From this decree, the defendants Henry and his son Robert, appealed; insisting (E. Northey, R. Raymond), that it was impossible to take a regular account of the rents and profits of the premises, and of the payment of debts and incumbrances, for a period of above 50 years, which had elapsed since Sir Walter Pye's death; and after the death of [225] so many persons who were in possession, and had paid those debts and incumbrances. That though the rents and profits so to be accounted for, were only to be applied in keeping down the interest of the incumbrances, and not in sinking the principal; yet, when it was considered, that the annuities and other annual payments out of the estate, and the interest of the debts charged thereon, did, for nine years after Sir Walter's death, exceed the yearly value of the estate, by at least £300 per ann.; and for the next eleven years, by £150 per ann. the case was not at all altered, but the account must be taken of the whole profits, and of the debts. That no account ought to be taken of the rents and profits of the lands, settled upon Meliora in jointure; for, Walter Pye having extinguished his estate for life, and with the concurrence of his trustees, by deeds and fine, barred himself and his issue, of all estate and interest in the premises, his power to make a jointure upon a wife ceased; and Robert's estate and power to make a jointure arose. That he accordingly made such jointure on Meliora, by mature advice, and for a valuable consideration, and she enjoyed the same till her death; and therefore it was hoped, that the appellants ought not to account for the profits thereof. That though Sir Walter Pye did, by his will, make provision for the

payment of his debts; yet, by the same will, he created a power in his son Walter to make a jointure, of any part of the estate, not exceeding £300 per ann.; and a like power in Robert to make a jointure, not exceeding £500 per ann.; and it could not be thought, that he intended to subject that jointure to the incumbrances, for then it would have been of no value, nor would any woman of fortune have married either Walter or Robert, on making such a jointure: and in case money had not been raised by wives' portions, the debts would have swallowed up the estate. And as Sir Walter had, by his will charged the estate with the payment of his debts, the term of 21 years, created by the deed of March 1638, did not, according to the true meaning and construction of that deed, arise; and therefore, the decree ought not to have directed any account of the rents and profits of the lands comprised in that term.

On the other side it was argued (T. Powys, S. Cowper), that what was done in 1667, upon Robert's marriage with Mary, appeared to be done, with full notice of Sir Walter's will: it being recited in most of the conveyances which were then executed, and the counsel concerned being conscious, that the title which Walter or Robert could make under that will, was not to be relied upon: did therefore, at the same time, direct a conveyance to be taken from the mortgagees, and made that also a settlement upon Mary, and her issue. But being also sensible, that the title under the mortgages was a redeemable estate; Robert soon afterwards, under colour of the power in Sir Walter's will, appointed his said wife a jointure; and, at the same time made a collateral security, in case she should be evicted of the jointure-lands, by [226] the death of Walter and Robert, without issue male. That the trustees in the will named, for preserving the contingent remainders, and the trustees for raising portions for the daughters of Walter, only conveyed to the new trustees, the estate and interest which they had during the life of Walter, and in the term of years for raising his daughters' portions; and it was Walter and the new trustees only, that afterwards levied the fine: and therefore, the estates in the old trustees, for preserving the contingent remainders during the lives of Robert and John, and to their respective issue male was not transferred or destroyed: so that what these old trustees did, was intended to bar Walter and his issue only, and not to bar or extinguish any of the estates limited to Robert or John, or their issue male: and consequently, could not operate against the respondent, who claimed as issue male under John. Besides, when this conveyance was made, Robert and John, who were successively tenants for 99 years, if they so long lived; and Edward, the son of John, who was tenant in tail, were all alive: but did no act to bar their estates, and therefore could not be barred by any act done by Walter, or his trustees. And all these conveyances being made with full notice of Sir Walter's will, and most of them containing express recitals of it; the trustees for Walter must have appeared to be trustees also, for preserving the other estates in remainder to John and his issue male, so that there was no ground to complain of the relief given to the respondent by the present decree.

As to what was done upon the marriage of Robert with Meliora, in 1675, that was also done with the like notice of Sir Walter's will: under the former conveyances from Walter and the mortgagees, and in the same manner as the former jointure: and it was observable, that notwithstanding all these transactions, the appellant Henry, in right of his late wife, actually claimed the provision made by Sir Walter's will, for her portion of £2000. The appellants therefore, being sensible that their title was not sufficient, attempted to support it by alleging, that they, and those under whom they claimed, had been in possession for 50 years; whereas, for 30 of those years, viz. from the death of Sir Walter, to the death of Walter the son, the possession had gone under Sir Walter's will, as of right it ought to go; and Walter dying in 1690, the title of John, the respondent's grandfather, then accrued, and not before: who in Trinity term 1691, brought his bill to redeem and establish his right. As to the pretended impossibility of accounting for the profits, from Sir Walter's death; it was answered, that Sir Walter having, by his will, declared his estate liable to his mortgages and debts, all who claim under that will, must take the estate, subject to that incumbrance: the decree therefore was very favourable, in not directing the whole profits, which were far beyond the interest, to be accounted for during the lives of Walter and Robert, but only so far as to keep down the interest: whereby the whole burthen of the principal was thrown upon the [227] respondent's inheritance, so that the appellants had no reason to complain of the decree in this respect. And much less, respecting the account of the profits received by

Meliora: for it was very plain, that Robert had no power to make a jointure in the lifetime of his brother Walter: nor could Walter transfer or give any power to Robert which was not given him by Sir Walter's will. That Meliora and her counsel were so sensible of this, that she took another conveyance from Robert: under the title of the mortgages which were conveyed to him, and under that title only did she hold the land which she claimed as a jointure. As therefore Meliora came into possession under a mortgage-title, nothing could be more just, or was more constantly the rule of a court of equity, than that she must be considered as a mortgagee in possession; and that the profits of the estate ought to be applied towards satisfaction of the debts due on those mortgages, under which she was in the actual receipt of the profits.

Accordingly, after hearing counsel on this appeal it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed; and that the appellant Henry should pay the respondent £40 for his costs. (Jour. vol. 19. p. 408.)

CASE 4.—CHARLES O'HARA,—*Appellant*; TULLY O'NEILL,—*Respondent*
[13th February 1717].

[Mews' Dig. xiv. 324, 429. Commented on in *Forster v. Hale*, 1896, 3 Ves. 713; and see *In re De Nicols*, [1900] 2 Ch. 410.]

[A. agrees for a beneficial lease of 41 years, B. advances money towards paying the fine, etc. and the lease is taken in B.'s name, without any declaration of trust; held that B. was a trustee for A. and, upon being paid the money he advanced, with interest, should assign the lease to A. account with him for the profits, and pay him his costs: held also, that the trust being proved by letters of B.'s own hand-writing, this case was not within the statute of frauds and perjuries.]

Viner, vol. 21. p. 497. note to ca. 6. 2 Eq. Ca. Ab. 745. ca. 9.

In the year 1709, the respondent treated with the Right Honourable Francis, Lord Conway, for a lease of certain lands in the county of Leitrim in Ireland, and at length his Lordship agreed to grant the respondent a lease thereof, for a term of 41 years, in consideration of a fine of 1000 guineas, and a yearly rent of £200.

During the continuance of this treaty, the appellant greatly encouraged the respondent to conclude the bargain: offering by letters under his hand, to raise the money for the fine and lend it to the respondent for a year or two at interest, provided the lease was taken in his (the appellant's) name: But the appellant, through some disappointments, failing in making good such offer, the respondent was under the necessity of declining the bargain; he, however, entered into another agree-[228]-ment with Lord Conway's agent, and which his Lordship afterwards confirmed, for a lease of the said premises for three years, to commence from the 25th of March 1712, under the yearly rent of £300; and, by virtue of this agreement, the respondent entered, and demised the premises to under-tenants, whereby he gained a clear profit of about £150 per ann. over and above the reserved rent.

In September 1712, the appellant came over to England, as well to transact some business for the appellant, as to renew the former treaty with Lord Conway for a long term in the premises; and during his residence here for those purposes, the appellant, in several letters, expressed himself greatly obliged to the respondent: and intimated, that having received a sum of £2000 he would readily lend it to him, in order that he might be thereby enabled to proceed in the said treaty, and obtain a beneficial lease in the premises.

The respondent, being thus assisted and encouraged, renewed the treaty with vigour: and the Lord Conway being well disposed to do him a kindness, did in May 1713, agree that in consideration of a fine of 2000 guineas, he would demise the premises to the respondent for a term of 41 years, under the yearly rent of £100; and it was also agreed, that £600 part of the fine, should be paid down upon the execution of the lease: £500 other part, on the 10th of August then next ensuing: and the residue thereof on the 10th of December following.

In consequence of this agreement, a lease was prepared and engrossed, with a blank left for the name of such person as the respondent should think fit to nominate as his trustee: and the appellant being then in London, the respondent acquainted him with what had been done, and proposed taking the lease in his name by way of security for the re-payment of the fine which he was to advance.

This proposal was readily agreed to by the appellant: but it being discovered that Lord Conway had no power to grant leases in reversion, or by way of future interest; the respondent, in order to enable his Lordship to execute the said agreement, surrendered the former lease for three years; and thereupon the appellant's name being, with the respondent's consent, inserted in the new lease, Lord Conway executed the same on the 20th of June 1713, and the appellant then paid him £600 as the first payment of the fine: but his Lordship thought proper to keep the lease in his own hands, by way of security for the payment of the residue of the fine, the appellant being a total stranger to him.

In January following, the respondent was informed, that the appellant was about to depart suddenly from London: and that he had given out in several companies, that if the respondent failed in paying him the money before his departure, the bargain would be wholly his own, and the respondent would be excluded from any benefit or advantage, which he might otherwise be entitled [229] to. The respondent therefore, to guard against any consequence of this kind, did on the 8th of January 1713, give the appellant notice, that on the next day, he (the respondent) intended to pay, or tender to him, such sum or sums of money, as had been paid by him to the Lord Conway, on the respondent's behalf, respecting the said fine: and accordingly the respondent, together with one Robert Finlay, a merchant in London, attended at the time and place appointed with £3000 in order to make the said tender: but the appellant industriously kept out of the way, and soon afterwards returned to Ireland.

Matters remained in this state for some months: but, on the 6th of August 1714, the respondent exhibited his bill in the court of Chancery in Ireland against the appellant: stating the whole transaction, and that he was ready to satisfy the appellant, whatever he had paid to Lord Conway, on account of the fine: and therefore prayed, that the defendant might be decreed to assign all his estate and interest in the lease to the plaintiff.

The defendant, by his answer to this bill, admitted the lease for 41 years; that the same was granted on the foundation of the agreement between Lord Conway and the plaintiff; that he was a perfect stranger to Lord Conway, until the time of executing this lease: and that in order to enable his Lordship to execute the same, the plaintiff, at his (the defendant's) instance, surrendered the former lease for three years: but he, at the same time insisted, that as the supposed trust between the plaintiff and him, was not manifested by any writing, the same was void by the statute made in Ireland, 9th William III. intitled, "An Act to prevent Frauds and Perjuries."

On the 20th of February 1716, this cause was heard: when the Lord Chancellor declared, that there appearing a trust sufficiently proved by letters of the defendant's hand-writing, and subscribed by him, besides the implied trust which might arise or result to the plaintiff from the surrender of his lease for three years, this lease was clearly out of the statute, made for the prevention of frauds and perjuries: and therefore it was decreed that the said lease for 41 years was taken by the defendant in trust for the plaintiff: that the defendant should account with him for the full value of the said demised premises: and, that upon payment of what should appear due of the said fine, with interest for the same, the defendant should convey or assign the said term to the plaintiff, and also pay him his costs.

And, on the 22nd of the same month, it was further ordered, that the plaintiff should join with the defendant and George Warburton, esq. one of the Masters of the said Court, in demising the premises for one year, to the best bidder or bidders: and that the reserved rent should be made payable to the plaintiff, subject to the future order of the court.—Accordingly the premises were demised for the best rent that could be had: the former occupiers thereof, having only held the same as tenants at sufferance, from year to year.

[230] From this decree and subsequent order, the defendant appealed: and, on his behalf it was alleged (N. Lechmere, S. Cowper), that soon after the respondent had filed his bill, one Mac Cornick filed a bill of discovery, grounded upon the statutes made for

preventing the growth of popery ; and that since the above decree Mac Cornick had exhibited a supplemental bill against the appellant : insisting on the decree as evidence, and claiming the benefit of those statutes, and of the said lease : and therefore it was conceived, that this alone was sufficient evidence, that the appellant could not be so weak as to pay down near £2500 for a lease of the premises in question, in trust for the respondent, without so much as any security, or even a covenant from any person for the repayment of the money ; and when it appeared, on the respondent's own shewing, that he was not in a capacity either to raise, or repay the money, but by the security of a lease, which the appellant knew would be forfeited by the acts of Parliament ; and that he would thereby be not only deprived of the estate, but of his money also.

On the other side it was insisted (R. Raymond, S. Mead), that the decree and order appealed from were well founded, and agreeable to the rules of equity and natural justice ; and therefore it was hoped, that the same would be affirmed, and the appeal dismissed with costs, for so plain a violation of trust.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the first clause in the decree, which declares, "that the lease therein mentioned was taken in "trust for the plaintiff Tully O'Neill," should be affirmed : and it was further ORDERED, that the second clause in the said decree should be affirmed, with the following alteration at the close thereof, viz. after the words ["and that he do account with the plaintiff for the"] leave out the words ["full value of the said land"] ; and instead thereof, insert ["rents and profits of the said lands, in manner aforesaid"] : and it was further ORDERED and ADJUDGED, that the last clause in the said decree should be varied, and stand in the words following, viz. "That, upon the plaintiff's, his executors or assigns, "paying unto the defendant, his executors or assigns, what shall appear to remain due "of such principal-money, as he paid to the Lord Conway, with the interest thereof ; "that thereupon the defendant is hereby decreed, to assign over and deliver up the said "lease to the plaintiff, his executors, administrators, or assigns, by good and sufficient "conveyances in the law, free from all acts and incumbrances of the defendant's ; the "plaintiff giving sufficient security, to be approved of by the Master of the said court of "Chancery, to indemnify the defendant, his executors, administrators, and assigns, from all "damages he may any way incur, by reason of the covenants in, or his acceptance of the "said lease ; and if the plaintiff shall not pay to the defendant what shall so appear to "remain due to the defendant upon the account to be taken as aforesaid, within six "months after the Master's report confirmed ; the defendant at the same time giving "up and [231] assigning the said lease, free from the acts and incumbrances of the said "Charles O'Hara, as aforesaid ; then the plaintiff's bill is from thenceforth to stand "absolutely dismissed with costs : and the better to enable the said Master to state and "settle the account, he is to be armed with a commission to examine witnesses touching "the said account, in which the Master is to make all just allowances ; and that the "plaintiff have his costs of suit in the said court ; which costs, when taxed, to be deducted "out of the money which shall be found due to the defendant on the account aforesaid." And it was also ORDERED and ADJUDGED that the said order of the said court of Chancery, of the 22d of February 1716, should be affirmed. (Jour. vol. 20. p. 606.)

This judgment was, on the 25th of June following, received and made an order of the said court of Chancery ; and the appellant several times afterwards moved the court for the benefit of the said affirmed order of the 22d of February 1716, by having the rents paid to him, but the court refused the same. [These proceedings were made the subject of a separate case by Mr. Brown ; but do not appear to contain any point of general law which might have rendered the total omission of them of any importance.]

The appellant was afterwards served with a summons to attend the Master on the account, but being at that time confined in prison, he could not attend, and therefore sent in his charge ; and three several commissions for examination of witnesses on the account were granted, two of them to be executed at different places in Ireland, and the third at London ; and both parties having joined, those in Ireland were executed, but before the return of the commission to London, the Master proceeded on the account *ex parte* ; though solicited by the appellant's agents to desist till the further proofs could be laid before him.

Accordingly, on the 19th of February 1718, the Master made his report *ex parte*, and therein charged the appellant with several sums with which he ought not to have been charged ; and omitted to give him credit for several sums, even for money paid

for quit-rent of the lands, and for which the appellant had receipts; and he reported only £2009 18s. 6¾d. due to the appellant for principal and interest of the fine of 2000 guineas and 40 broad pieces of gold paid by him to the Lord Conway.

On the 26th of the same month the report was confirmed; but the respondent, in order to gain more time than the six months limited by their Lordships for payment of the money, after the report should be confirmed; moved again, on the 18th of April 1719, for a confirmation of the report, unless the appellant should lodge exceptions in two days.

The appellant accordingly took six several exceptions to the said report: first, for that the Master had not taken notice of the appellant's charge laid before him, or that there had been a commission to London to prove the same; or that the appellant's agent had insisted that the said commission was not returned, and desired the Master would defer his report till the return thereof. The second exception was, for that the Master had charged the appellant with the whole rents, though a great part thereof remained in arrear; and the third, fourth, fifth and sixth excep-[232]-tions were, for that the Master had not given the appellant the proper allowance for the said fine and other money paid the Lord Conway in England, and paid and expended by the appellant in England, on account of the said lease; the Master having computed by the difference in guineas only, though exchange was then above £12 per cent.; nor had the Master made any allowance for money paid by the appellant for the quit-rent of the lands, nor for the money expended by him in defence of several suits concerning the said lands, and in raising the said fine: All which sums were given in the appellant's charge, and were to be allowed him by their Lordships' said order.

On the 8th of May 1719, the cause was heard on the said report and exceptions; when, though the appellant's counsel prayed that the account might be referred back to the Master, that so the appellant might have an opportunity of laying his proofs before him, yet the Chancellor was pleased to over-rule all the appellant's exceptions, and to confirm the report; and ordered, that the register should compute the interest of the principal money to the said 8th of May 1719, which amounted to £31 12s. 6d. and being added to the said balance of £2009 18s. 6¾d. reported due, made £2041 11s. 0¾d. out of which the costs of the suit were to be deducted. And it was further ordered, that the appellant should assign over and deliver the said lease to the respondent, his executors, administrators or assigns, or to Brinsley Butler, Esq. by sufficient conveyances in the law, free from all acts and incumbrances of the appellant; the respondent at the same time giving the appellant sufficient security, to be approved of by the Master, for his indemnity on account of the said lease; and should also then pay to the appellant the said sum of £2041 11s. 0¾d. first deducting the costs of the suit. And it was also ordered, that the respondent should, within six months, accept of the said assignment, and pay the appellant the said £2041 11s. 0¾d. deducting the said costs; or in default thereof, the respondent's bill should thenceforth stand absolutely dismissed with costs.

The appellant being still in confinement, was, on the 22d of August following, served with a copy of a writ of execution of this decree; and at the same time the respondent tendered an engrossed parchment writing, importing an assignment of the said lease to Brinsley Butler, and also shewed the respondent some bags of money, which he said was the consideration money mentioned in the said writing, and offered to pay the same, if the appellant would then execute the deed; but the appellant not having previously read or seen the said deed, or any draft or copy thereof, nor he, nor any person on his behalf, having been advised with in preparing and settling the same or any draft thereof, as in such case is usual; and the appellant observing, that several improper covenants on his part were inserted therein, and also that no allowance was made for the interest of the money decreed due to the appellant from the 8th of May 1719, to [233] which time the said interest had been computed, being 127 days; as also, that £221 16s. had been deducted out of the said money on account of costs, though the appellant was not served with any bill of costs; he, for these reasons, refused to execute the deed, and insisted, that the respondent ought to indemnify him from all damages on account of the said lease, which he had not done; but the respondent refusing to pay the money unless the appellant would execute the deed, went away abruptly; and he, or any person on his behalf, never afterwards paid or tendered one farthing of the money, though he then was, and for about three years

before had been in the possession of the lands, and enjoying the full benefit of the lease.

On the 27th of the same month of August, the Lord Chancellor ordered that an attachment should issue against the appellant, and that the interest of his money should cease from the time of the tender, unless cause shewn in ten days : Accordingly the appellant, on the 17th of September following, shewed for cause the irregularity of the tender ; but his Lordship was pleased to order that an attachment should issue against the appellant, unless he should execute to the respondent an assignment of the lease in ten days without further motion. And on the 8th of October 1719, this last order was made absolute, and the appellant was accordingly charged with an attachment ; and it was then also ordered, that the interest of his money should from thenceforth cease.

The appellant afterwards finding that several lands, not belonging to Lord Conway, but the estates of other persons, were inserted in the deed of assignment so tendered to him, moved the court on the 24th of February 1720, to set aside the said several orders of the 27th of August, the 17th of September, and the 8th of October 1719 ; but this motion, though supported by several affidavits, was refused, and all the said former orders were affirmed.

The appellant, on the 14th of December 1723, moved the court again to discharge the said orders, and also the attachment, that so he might at least have his liberty ; but his Lordship still denied the appellant any relief, and also refused to suffer the aforesaid affidavits, and several other proofs and papers then offered by the appellant's counsel, to be read.

And, therefore, from the Master's report and the confirmation of it, and also from the several subsequent orders and proceedings, the present appeal was brought ; and on behalf of the appellant it was insisted (C. Wearg, C. Talbot), that the court, on several applications, had constantly refused him the benefit of the order of the 22d of February 1716, which had been affirmed on the former appeal ; and that the Master had not by his report, made the appellant all the allowances which he was justly entitled to, but had proceeded on the account irregularly, without giving the appellant any opportunity of proving the several articles of his charge ; that the pretended tender was only conditional, if the appellant would [234] execute the assignment to the said Brinsley Butler, which neither he, or any person on his behalf, had ever before seen or read ; and which also imported to be an assignment of lands belonging to other persons, and not to Lord Conway ; nor was there any increase made in the consideration money of that deed, for the interest of the appellant's money from the decree of the 8th of May 1719, to the time of the said tender, as there ought to have been ; and the deed moreover contained several very unfair and improper covenants on the part of the appellant. That the respondent did not at the time of the tender, or at any other time, offer to the appellant any sufficient security for his indemnification in respect of the lease ; nor had he since tendered to the appellant one penny of his money, or given him an opportunity of executing a proper assignment of the lease : although the respondent was in the full enjoyment of the lands, and in possession of the money also, for which, by the order of the 8th of October 1719, he was to pay no interest ; while the appellant was deprived of his liberty, by being confined upon the attachment.

On the other side it was said (P. Yorke, T. Lutwyche), that the respondent had done all that he was obliged to do, in compliance with the order made on the former appeal, and to enforce the execution thereof ; having, for that purpose, raised £2000, for which he still paid interest. And as it appeared, that the appellant had never offered to execute an assignment of any kind, or taken any one step towards complying with the said order ; it was hoped, that the several orders complained of would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the Master's report and the order of the 26th of February 1718, confirming the same, should be confirmed ; save and except that the Master should review his report, in relation to the value of the exchange of the purchase money paid by the appellant to the Lord Conway, and see whether he had allowed the appellant the full value of the exchange, as it stood at the time of the said payment, and if he had not so done, to do it ; and that he should also review the taxation of costs to the respondent, and allow what was reasonable and just : and it was further ORDERED and ADJUDGED, that

all the orders and decrees of the said court of Chancery, subsequent to the said order of the 26th of February 1718, should be set aside and reversed, and particularly the order for an attachment against the appellant; and the said court was forthwith to cause him to be discharged from his commitment on the said attachment, without payment of any fees; and it was further ORDERED, that the said court of Chancery should direct the Master to approve of the draft of an assignment, to be made by the appellant to the respondent, pursuant to the order and judgment of the House on the former appeal: and also to approve of the security, to be given by the respondent to the appellant for his indemnity; and after the approbation of such assignment and security by the said court, to appoint a place [235] and time, not exceeding three months, for the executing such assignment and giving such security; and the Master was to carry on the interest due to the appellant from the time to which it was last computed, home to the time of executing such assignment; and out of the principal money and interest that should be so computed due to the appellant, the costs decreed to the respondent were to be deducted: and that on the respondent's payment to the appellant, of what should be so due to him, after such deduction, and giving such security for indemnity as aforesaid, the appellant was to execute the said assignment to the respondent; and that the said court of Chancery should give such proper directions, in pursuance of this judgment, as should be just. (Jour. vol. 22. p. 506, 17th April 1725.)

CASE 5.—THE MAYOR, BAILIFFS and COMMONALTY of the CITY of COVENTRY,—*Appellants*; ATTORNEY-GENERAL, —*Respondent* [11th March 1720].

[Mews' Dig. iii. 259. Followed in *A.-G. v. Brazen Nose College*, 1834, 2 Cl. & F. 30.]

[A corporation who were trustees of a freehold estate for the benefit of a charity, misapplying the increased revenues, and grossly misbehaving themselves in the execution of their trust, and being unable to pay the sums due from them in consequence of their misapplication and misbehaviour; These circumstances afford sufficient reason for the court of Chancery to direct the trust estate to be conveyed to persons, more able and willing to execute the trust faithfully, for the benefit of the poor.]

[Decree of Lord Keeper Harcourt affirmed.]

[For the principles on which Court of Equity act, in increasing charities as the fund applicable to them increases, see the case of Thetford School, 8 Rep. 130. 1 Eq. Ab. 100. c. 7. *Arnold v. Attorney-General*, Show. P. C. 22. ATTORNEY-GENERAL *v.* JOHNSON, Ambl. 190; —*v.* SPARKS, Ambl. 201; —*v.* HABERDASHERS' COMPANY & TONNA, 4 Bro. C. C. 103. 2 Ves. jun. 1; —*v.* WINCHELSEA (Earl), 3 Bro. C. R. 373; —*v.* MINSHULL, 4 Ves. jun. 11. From all which cases it appears, that where the charity must have borne the loss if the value of the thing devised had decreased, it shall enjoy the benefit of any increase; That the court will even extend the bounty beyond the number of objects specified by the testator, provided they are of the same description; or will increase the bounty limited to specific objects.]

Sir Thomas White, 34 Hen. VIII. intending to relieve and preserve the commonwealth of the city of Coventry, then in great ruin and decay, paid to the Mayor and his brethren, £1400, wherewith they purchased lands, which were then of the clear yearly value of £70. And on the 6th of July, 5 Edw. VI. they covenanted with the Company of Merchant Taylors of London, that immediately after Sir Thomas White's death, they would yearly dispose of, and pay the rents and profits of these lands, in manner following; viz. £24 per ann. to twelve poor men, inhabitants of Coventry, in free alms, for ever; £40 per ann. in free loan, to young freemen of Coventry, of good name, [236] fame, and thrift; to be lent out for nine years, and then to be put out again to other such young men of Coventry; and so from nine years to nine years, for ever; and the other £6 to be paid yearly, 20s. to the Merchant Taylors, 6s. 8d. a-piece to the Mayor, Recorder, and ten Aldermen of Coventry, to see the charity performed, and 20s. to the Town Clerk, for making the entries thereof: this to continue in Coventry for forty-one years; and afterwards the £40 to circulate yearly between Coventry, Northampton, Leicester, Nottingham, and Warwick, for ever.

This £70 per ann. continued to be disposed of in the above manner, for about 150 years; but some differences arising among the Aldermen of Coventry, about sharing the surplus of the charity estate, the other four towns became, by this accident, informed, that the estate was greatly increased in value; whereupon, in Hilary term 1695, an information was filed in the court of Chancery, by the Attorney-General, at the relation of the Merchant-Taylors Company, and on behalf of the inhabitants of the said four towns, against the Mayor and Corporation of Coventry; for an account and distribution of the surplus profits, in augmentation of the charities.

On the 13th of December 1700, this cause was heard before the Lord Keeper Wright, assisted by the Lord Chief Justice Holt, Mr. Justice Powell, and Mr. Justice Blencowe; when the court were of opinion, that the corporation of Coventry, were entitled to the surplus rent of the lands in question, and therefore ordered the information to stand dismissed. (2 Vern. 397.)

But on an appeal to the House of Peers from this decree, their Lordships, on the 19th of February 1702, ordered, that the said decree of dismissal should be reversed; and that the court of Chancery should proceed to give the plaintiffs such relief on the information, as should be just: the House declaring it to be their opinion, that the increase of the value of the lands in question, ought to be applied towards the augmentation of the several charities and appointments. (Jour. vol. 17. p. 298.)

In consequence of this determination, the court of Chancery, on the 12th of June 1703, decreed, that the full improved value of the estate, should be applied according to the order of the House of Peers; and referred it to a Master to ascertain such yearly value, and reserved further directions till after the report.

The Master by a report, dated the 9th of July 1705, certified the yearly value of the lands to be £612 12s. 2d. clear of all deductions; and that the defendants had received £750 for fines, on granting leases: but it being discovered, that the estate was of greater value, and an offer being made to the court, to make it so appear on the peril of costs; an order was made that the Master should review his report. And accordingly the Master, by another report, dated the 9th of July 1709, certified the lands to be of the clear yearly value of £988 13s. 10d.

[237] On the 14th of October following, the cause came on to be heard for further directions upon the Master's report; when it was decreed, that the Corporation should account for what they had received out of the charity lands, from the time of the order made by the House of Peers; and as they appeared to have misbehaved themselves, they were to have no costs from the time of that order; and a receiver was appointed, and the corporation were enjoined from receiving any of the profits of the estate for the future.

This account having been taken, the Master by his report, dated the 13th of December 1710, certified the sum of £2241 1s. 3d. to be due from the Corporation after all deductions.

But pending these proceedings, the defendants, by fraud and undue practices, drew the four other Corporations into a private agreement at Lutterworth; whereby, under the pretence of costs, though none were either decreed, or reserved, they agreed to pay the four Corporations and the Merchant-Taylors Company £825, and instead of applying the full increased profits of the estates, in augmentation of the charity they agreed to pay out of it only £60 per ann. to the Corporation of Coventry, and the other Corporations. And in order to execute this agreement, the defendants demised all the charity lands to the Merchant-Taylors Company, and the other four Corporations, for twenty thousand and one years, and accepted a re-demise thereof, for twenty thousand years, under the particular rent of £60 per ann. to the four other Corporations, but which was much less than their proportions of the charity.

Upon the discovery of this transaction, and that the defendants had made contracts for leases of the charity lands to their own members, sons, and friends, for long terms of years, on large fines, and at small reserved rents; the court of Chancery recommended it to the Attorney-General to bring another information on behalf of the inhabitants as paupers, against the five Corporations, and such as had signed the agreement, in order to enforce the former decree.

Accordingly, in Michaelmas term 1709, a second information was exhibited, praying to have the agreement set aside, and the trust-estate transferred to new trustees.

And upon the hearing of this cause before the Lord Keeper Harcourt, on the

27th of February 1710, the court declared, that the Lutterworth agreement was a very vile and corrupt agreement, and entered into with an intent to evade the order of the House of Peers: and that the defendants had not complied with that order, as appeared by their own accounts: it was therefore decreed, that the said agreement, and the deeds of demise and re-demise, should be set aside; and that the trust-estate should be re-assigned, so as to put the defendants and the other Corporations, in *statu quo*.—And the former cause coming on at the same time to be heard, on the Master's report of the 13th of December 1710, the defendants were ordered to bring the [238] £2241 1s. 3d. before the Master, in three months; and in the mean time, the consideration of transferring and settling the trusts, was suspended.

After the expiration of five months, viz. on the 17th of July 1711, the cause came on again, when the court enlarged the time for three months longer; but declared, that if the defendants did not in that time, bring the money before the Master, it would be reasonable and proper that the trust should be transferred; as well on account of their disability, which would then manifestly appear, as for their misbehaviour in the premises.

The defendants repeatedly applying for further time for payment of this money, the court thought proper to direct the Master to approve of new trustees, to be nominated by all the Corporations; which he having done, and the defendants still neglecting to pay the money, the cause came on to be finally heard on the 4th of March 1711, when the court approved of the several persons nominated by the Master's report, to be trustees for the management of the charity in question; and decreed, that the defendants, the Mayor, Bailiffs, and Commonalty of the city of Coventry, should convey and assign all the right, title, and interest, whatsoever, in the estate and charities in question, unto the said new trustees, their heirs and assigns, in trust for the several purposes to be therein mentioned; and that they the said trustees should act therein, as the said defendants were by the said deed of appointment to have done: and it was further ordered, that the said new trustees should be at liberty to fill up any vacancy which should happen to be in their number, as they should think fit: but whenever the number of such new trustees, should by death, or removal, be reduced to twenty-one persons, then it was ordered, that such remaining twenty-one persons, should be obliged to fill up the number to thirty-one: but such succeeding trustees, were to be persons living within the city, or county of the city of Coventry, or within three miles of the same. And the said trust being so transferred as aforesaid, it was further ordered, that the several six shillings and eight pences, payable yearly to the Mayor, Recorder, and ten Aldermen, and the twenty shillings to the Steward, or Town Clerk, as the same then were, or should be augmented, should be applied in payment of the charges, which the said new trustees should be at in the management of the said trust; and if there should be any surplus thereof, above what should be sufficient to defray such charges, it was to go and be applied to increase the fund of the charity, distributable in the said city of Coventry.

Pursuant to this decree the trust-estate was assigned; but the defendants neglecting to pay the money reported due from them, sequestration issued against their estate, goods, and chattels; and after lying under this sequestration for about seven years, they at length raised money enough to satisfy the demand, and then, but not before, appealed from the decree.

[239] And on their behalf it was said (P. Yorke, S. Cowper), that they were divested of their freehold and inheritance, though they had done no act to forfeit the same, or any thing contrary to the order of the House of Peers; which order they apprehended, was never meant to take their inheritance from them, or to alter the trusts, as originally settled by the deed of the 6th July, 5 Edw. VI. whereby proper inspectors were appointed, to see the charity duly applied. That although when the decree was made, they were not able to perform it, whereby the £2241 1s. 3d. became in arrear; yet the execution of the decree was sufficiently provided for by the sequestration, without taking away the appellants' freehold, or removing the trust out of their hands. That an error in judgment upon so nice a point, as to have occasioned even the court of Chancery, assisted by Judges, to err, ought not to be construed a breach of trust in the appellants. That although they were unable to pay the duty decreed immediately, yet their estate sequestered was an ample security to have discharged it, in far less time than the sequestrators held it; and having lost several thousand pounds by means of

the sequestration, their inability ought not to extinguish the original trust. That the design of Sir Thomas White, which was to prefer the commonwealth of the city of Coventry, was, by this decree, turned to the hurt, and weakening of the magistrates' authority there: whilst the four other Corporations had their interests strengthened, by being still left in the trust of disposing the loan-money in their towns for whom Sir Thomas White expressed no such particular regard as for Coventry, and who could not be thought less blameable than Coventry, in making the said agreement. It was therefore hoped, that the decree would be reversed, and the appellants restored to the freehold and trust of the said estate.

To all this it was answered (R. Raymond, C. Talbot), on the other side, that what the appellants called their freehold and inheritance, and which they had indeed made use of as their own, was a bare legal estate, vested in them as trustees for the charity; and it was most evident from all their transactions, that they and their predecessors had, in many instances, misapplied the charity money, and most grossly abused the trust reposed in them. That their vile and corrupt agreement at Lutterworth, to elude the order of the House of Peers, and their inability, or wilful refusal to pay the £2241 1s. 3d. which they had received out of the charity estate after that order; were sufficient reasons to induce the court of Chancery, to direct the estate to be conveyed to persons more able and more willing to execute the trust faithfully, for the benefit of the poor; and who, for just reasons, might be removed or punished, as that court should see cause. That the inability of the appellants to perform the decree, did not seem to be a good reason for continuing them in the execution of the trust; and though a sequestration was a proper method of carrying the decree into execution, with respect to the arrears, yet it could by [240] no means enforce a faithful performance of the trust for the future. That whatever name the appellants' misapplication of the charity money, prior to the order of the House of Peers, might deserve; their misapplication of the £2241 1s. 3d. received since that order, was certainly a wilful and obstinate breach of trust, and not merely an error in judgment; and therefore ought to aggravate, instead of being used as a reason to extenuate their offence. That the sequestered estates, were so far from being an effectual security, for raising the duty decreed, that during all the time the appellants lay under it, there was only about £300 raised by it; nor would the profits have raised the whole in many years, if the appellants had not sold or mortgaged some of their estates for that purpose. And if the sequestrators, who are officers of the court of Chancery, had not properly discharged their trust, the court would upon complaint have punished them; but that their misbehaviour, if any, could not be laid to the charge of the respondents, or be urged as a reason to reverse the decree, which was made before the sequestration issued.

After having heard counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be affirmed; without prejudice to the appellants applying to the court of Chancery, according to the course of that court, for a reconveyance of the trust-estate, as that court should think just.* (Jour. vol. 21. p. 468.)

*It appeared that this noble charity was so greatly increased, that instead of the £24 a-year to the poor inhabitants of Coventry, they at this time received above £300 a-year; and instead of the £40 a-year loan-money, paid to the five corporations successively, they received in their turns near £500, and that the other charities were augmented in proportion.

[241] CASE 6.—SIBILLA BLAKE, and Another,—*Appellants*; ROBERT BLAKE,—*Respondent* [5th August 1721].

[Mews' Dig. i. 369; xii. 881; xiv. 430, 900.]

[A. by marriage articles covenanted, that all the lands which he should afterwards purchase in the parish of K. should be to the uses of the articles. He purchased lands in K. and took a conveyance in fee in the name of his youngest son, but there was no declaration of trust. Held, that the son was a trustee for his eldest brother, who was entitled to these lands by virtue of the covenant.]

[Decree of the Irish Chancery affirmed.]

[The principle as above stated is undoubtedly recognised by courts of equity. See *Treatise of Equity*,¹ Book 2. c. 5. § 1. But the point does not appear to have been litigated in the present case, the decision of which resulted from its own peculiar circumstances.]

[See post, ca. 12.]

Robert Blake Esq. the respondent's grandfather, being seised in fee of the town and lands of Ballintober, and several other lands in the counties of Galway and Mayo in Ireland, did, on the 1st of March 1681, upon the marriage of his eldest son Richard Blake, the respondent's father, with Mary Magdalen Martin, daughter of Oliver Martin Esq. convey the said premises to the use of himself for life, remainder to the said Richard Blake his son for life, remainder to the first and every other son of the said Richard Blake on the body of the said Mary, in tail male successively, with other remainders over: And part of the said estate was thereby agreed to be charged with the payment of certain debts, portions and incumbrances. For which purpose a term of 99 years in such part was created; and power was thereby reserved to the said Richard Blake, to sell the said lands of Ballintober; but the money arising by such sale was to be laid out in the purchase of other lands, to be settled to the same uses: And it was thereby further agreed, that if the said Robert Blake or Richard Blake should purchase the lands of Cloongawnagh, in the barony of Killmaine, in the county of Mayo, they should also be settled to the same uses.

In 1692 the said Mary died, leaving issue by the said Richard Blake the respondent, their eldest son and five younger children, all minors: Soon afterwards Robert Blake also died; whereupon the respondent's father Richard entered on the whole estate, and converted the rents and profits thereof to his own use, without any regard to the said term of 99 years, raised for discharging the portions and incumbrances: And he also sold the lands of Ballintober for £1000, whereof £300 was by him laid out in the purchase of the lands of Cloongawnagh and Glanskehy; but he did not lay out the residue thereof in the purchase of lands, as he was obliged to do by the settlement.

Upon a treaty of marriage between the said Richard Blake and Elizabeth Dillon in November 1700, it was agreed, in consideration [242] of £800 to be paid as her marriage-portion, that the said Richard Blake should settle £150 per ann. for her jointure; and that he should add £1100 to the said £800, for completing the sum of £1900, which was to be placed out at interest, the yearly produce whereof was to be received by the said Richard Blake during his life, and after his decease the said £1900 was to go to the issue of that marriage. This marriage afterwards took effect, and there was issue of it six children, of whom the appellants were the survivors.

But before the solemnization of this second marriage, the said Richard Blake being made sensible of the injury done to the respondent by not applying the profits of the trust-lands, comprised in the said term of 99 years, in discharge of the portions and incumbrances, according to the agreement made on his first marriage, did, by indentures of lease and release, dated the 20th and 21st of December 1700, convey part of the said settled estate to the said Oliver Martin and others upon trust, by and out of the profits thereof to pay all the debts and portions mentioned in the schedule annexed to the settlement of 1681: And the said Richard Blake did thereby covenant, that all such lands as he should purchase in the parish of Kilrickill, should go and be to such

uses as the premises before mentioned were limited by the said settlement of 1681 ; and these deeds were, for safe custody, deposited with Andrew Blake, the said Richard Blake's brother.

The lands of Clonmain, situate in the said parish of Kilrickill, containing 203 acres, were afterwards purchased by the said Richard Blake, who, at the time of such purchase, declared the same should go with the rest of his estate, according to the limitations of the said settlement of 1681.

On the 20th of August 1702, the said Richard Blake demised part of the lands comprised in the said settlement of March 1681, to certain trustees, for the term of eleven years, to raise the £1900 provided by the agreement made on his second marriage, for his children by the said Elizabeth, and the sum of £900 part thereof, was raised and placed out at interest by the said trustees accordingly.

The said Elizabeth, the appellant's mother, often applied to the said Andrew Blake for a sight of the lease and release made in December 1700, and he, being at length prevailed upon to deliver her the said deeds for her perusal, she immediately tore and cancelled them, declaring that they should never prejudice her or her children.

After this transaction, the said Richard Blake applied the rents and profits of all the said trust-lands to his own use ; whereupon the respondent, being then an infant, did, by his *prochein amy*, the said Oliver Martin, exhibit his bill in the court of Chancery in Ireland against the said Richard Blake, Elizabeth his wife and others, for an account of the said trust-lands, and to compel the said Richard Blake to apply the rents and profits thereof, by him received, in payment of the incumbrances affecting the said [243] estate, according to the said settlements ; and to lay out the money raised by the sale of Ballintober in the purchase of other lands, and to execute a new deed to the same effect with the deed cancelled by the said Elizabeth : And this cause being brought to a hearing, it appeared that the said Richard had received more out of the trust-lands than was sufficient to pay the said incumbrances ; and therefore it was decreed that he should forthwith pay off all the debts and incumbrances affecting the said estate, and should likewise execute a deed to the same effect with the deed cancelled by the said Elizabeth, and make good the money raised by the sale of the lands of Ballintober. In pursuance whereof, the said Richard Blake re-executed deeds of lease and release, but did not perform the other parts of this decree.

By an act of parliament made in Ireland, 2 Ann, for preventing the further growth of popery, provision was made for the maintenance of the protestant children of popish parents : and it was thereby enacted, that in case the son and heir of a popish parent should become a protestant, such popish parent should from thenceforth be only tenant for life of all his real estate, and the reversion in fee should be vested in such eldest son, being a protestant.

The respondent, having conformed himself to the church of Ireland, as by law established, filed his bill in the court of Chancery in Ireland, in the year 1710, against the said Richard Blake, for a maintenance ; and to have an execution of the trusts of the deed of December 1700. But pending this suit, all matters in controversy between the said Richard Blake and the respondent, were referred to his Grace William, Lord Archbishop of Dublin ; who made his award in writing, dated the 6th of July 1711, and thereby ordered, that the said Richard Blake and the respondent, should demise the farm of Ballycussin, and other lands therein mentioned, commonly called the trust-lands, and comprised in the said term of 99 years, (except a certain part, which was to be enjoyed by the said Richard, during his life) to the said Lord Archbishop and other trustees, for the term of 999 years ; upon trust, to raise, in the first place the sum of £1000, being the sum, in the said award mentioned to be behind and unpaid, of the £1900 provided for the children of the said Richard, by the said Elizabeth, the interest and produce of which £1000 was to go to such children, during the life of the said Richard ; and also to raise for the said children, the further sum of £2000, as an addition to their portions ; and to pay several debts contracted by the said Richard Blake, amounting in the whole to £3000 and upwards ; and ordered, that the respondent should join with the said Richard Blake, in a conveyance of lands to the said Elizabeth, of the yearly value of £200 for her jointure ; and also, that the respondent and the said Richard Blake, should join in a conveyance of his the said Richard's interest in Clonmain, (which, by mistake, in that part of the award, was called Clonagh, and in another part Clongannagh,) in the county of Galway, [244] to certain trustees, to the use of William Vincent Blake, the

then eldest son of the said Richard, by the said Elizabeth, for his life ; remainder to the first and every other son of the said William Vincent, in tail male successively ; remainder to the second and all other sons of the said Richard, by the said Elizabeth, in tail male ; remainder to the respondent for life, with other remainders over : and by the said award, £120 per ann. only, was to be allowed for the respondent's maintenance, until the said debts and portions should be raised and paid.

Though the respondent found himself much aggrieved by this award, in regard his estate was thereby made liable to £50 per ann. more than was provided for the said Elizabeth, by her marriage-agreement ; and to the payment of £3000 to the younger children of the said Richard, by the said Elizabeth : and chargeable also with £3000 debts of the said Richard, which the estate was not made subject to before ; and though the respondent thought it a great hardship, that he should be obliged to join in an immediate settlement on the issue male by the second venter, of the lands of Clonmain, the reversion of which he was entitled to after his father's death, as well by the deed of December 1700, as by the said act of Parliament ; yet in order to put an end to all differences in the family, the respondent did acquiesce in the said award ; and, pursuant thereto, the said Richard Blake and the respondent, by indenture dated the 1st of June 1713, demised the said trust-lands to the said Lord Archbishop of Dublin and other trustees, for the term of 999 years, upon the several trusts in the said award mentioned ; and by an indorsement on the said lease, it appeared, that the same was delivered by the said Richard Blake and the respondent, to Francis Geoghegan, esq. as an escrow, until the said lands of Clonmain should be conveyed, according to the directions of the said award.

Accordingly, the said Richard Blake and the respondent, settled certain lands on the said Elizabeth for a jointure : and by deeds of lease and release, dated the 11th and 12th of May 1713, conveyed 122 acres in Clonmain, viz. 81 acres purchased from Dorothy Wall, and 41 acres bought of Thomas Geoghegan, to Richard Malone and Robert Mason, esqs. and their heirs, to the use of the said William Vincent Blake, for life ; remainder to his first and every other son in tail male ; remainder to Constantine Blake, second son of the said Richard, by the said Elizabeth, in tail male ; remainder to the third, and all and every other son and sons of the said Richard, on the body of the said Elizabeth, in tail male ; remainder to the respondent for life ; remainder to Richard Blake, jun. the respondent's eldest son, for life ; remainder to the first and every other son of the said Richard Blake, jun. And after the execution of this settlement, the 999 years' lease was delivered to the said Archbishop of Dublin, by the consent of all parties.

The said Archbishop afterwards, as Guardian of the said William Vincent Blake, demised the said 122 acres in Clonmain [245] to one Michael Lally, for a term of years, if he the said William Vincent Blake should so long live.

In 1718, the said William Vincent Blake, and also the said Constantine Blake, died without issue : and there being no issue male of the said Richard, on the body of the said Elizabeth living, the respondent became entitled to the possession of the said 122 acres in Clonmain, for his life, by virtue of the remainder limited to him in the said last mentioned settlement ; and he also became entitled to 81 acres, residue of those lands, by virtue of the deed of 1700, and the true intent and meaning of the award.

In February 1718, the respondent exhibited his bill in the court of Chancery in Ireland, against the said Richard Blake and Elizabeth his wife, the appellants their daughters, the said Michael Lally and others ; stating, *inter alia*, that in regard the said Richard was, by the award, to convey all his interest in Clonmain, to the uses therein mentioned, it was a fraud in him not to convey the 81 acres in Clonmain, part of those lands, which he had purchased from Honora Burk, as well as the other 122 acres, to the said Richard Malone and Robert Mason, to the uses of the said last mentioned settlement : and therefore the bill prayed, that the said Richard Blake might be obliged to convey the said lands of Cloongawnagh and Glanskehy, to the same uses as the said Robert Blake's estate was limited by the settlement of December 1681 ; and also to convey the 81 acres in Clonmain, purchased of the said Honora Burk, according to the covenant contained in the deed of December 1700, and the direction of the said award.

The said Richard Blake and Elizabeth his wife put in an answer to this bill ; and the said Richard said, that he purchased 122 acres, part of the said lands of Clonmain,

from Dorothy Wall and Thomas Geoghegan, and agreed with the said Honora Burk, for the purchase of her equity of redemption in the said 81 acres, and that he paid down part of the purchase money, and at that time intended to settle the same to the uses of the deeds made in 1681; and believed, that the lands of Clonmain were the lands intended to be settled on the said William Vincent Blake and the respondent, by the award; in regard he the said Richard had no lands in the county of Galway, or elsewhere, called by the name of Clomagh, or Clomgannagh, and he submitted to settle the said lands of Cloongawnagh and Glanskehy, to the same uses with those in the settlement of 1681.

On the 9th of July 1720, the cause was heard before the Lord Chancellor; when it was ordered, that the respondent should recover the equity of redemption of 162 acres, part of the lands of Clonmain, mortgaged by Walter Wall to Fergus Maddin, and bought by the said Richard Blake from Dorothy Wall and Honora Burk; and it was referred to a Master, to ascertain what was due on account of the said mortgage, and all parties were to have just allowances; and upon the respon-[246]-dent's paying what should appear to be due, an injunction was to issue for putting him in possession. And it was further ordered, that the respondent should recover the 41 acres, which the said Richard Blake bought from the said Thomas Geoghegan; and an injunction was awarded, to put him in possession thereof. And it was ordered, that the defendants should account with the respondent, for the profits of the said lands of Clonmain, from the death of the said William Vincent Blake; and, that the said Richard should settle the said lands of Glanskehy and Cloongawnagh on the respondent, as the rest of the said Richard Blake's estate was settled, by the deeds made in the year 1681; but no costs were given on either side. And the cause being re-heard on the 11th of November following, upon the appellants' petition; the Lord Chancellor declared, that every act done by the said Richard Blake, in prejudice of his eldest son the respondent, was fraudulent, and that the respondent ought to be relieved against the same; and therefore the former decree was affirmed.

From this decree and the affirmance thereof, the present appeal was brought; and on behalf of the appellants it was insisted, (R. Raymond, C. Phipps), that the lands of Cloongawnagh, and not Clonmain, were the lands intended by the award to be settled on the issue male of the second marriage, with remainder to the respondent; and that this was evident, both from the award itself, and from the deed of trust executed by the respondent and his father, in pursuance thereof: for the award, by way of reference to the lands first thereby directed to be settled, called them three several times, the lands of Clomgannagh, which sounds much nearer Cloongawnagh than Clonmain; and those two denominations being the only parts of Richard Blake's estate, which were not expressly allotted by the award for some other purpose, the deed of trust having charged the lands of Clonmain, as part of the £1900 to be laid out for the use of the children of the second marriage; explained why they were not subjected to any of the directions of the award, and that Cloongawnagh were the lands thereby directed to be settled. That the lands of Clonmain, being put in account to the children, as part of the £1900 secured to them by the marriage-articles, ought to be subject to the same trust as the £1900 was, and no other; as it no way appeared in the cause, that this money was otherwise made up; on the contrary, Richard Blake in his answer, said he believed, that the said £1900 was not made up, exclusive of the lands of Clonmain, and that they were put in account to the children, as part thereof, with the knowledge, and by the consent of the respondent, though he now pretended, that those words were put into the deed by mere mistake; to rectify which, it was supposed, that the deed of settlement of those lands, was contrived to bear date prior to that wherein they were charged as part of the £1900, though not executed till a year after. That Honora Burk expressly conveyed her part of the said lands of Clonmain, being 81 acres, to Richard Thomas Blake and his heirs, to the use of him and his heirs; and there being no trust declared [247] in writing, there could not arise any by operation of law to Richard the father, it being impossible to distinguish trust-money in the pocket of a trustee, from his own; and he having money in his hands at the time of the purchase, to be laid out for the use and benefit of the said Richard Thomas Blake, the presumption that this purchase was made with the trust-money, would have been very strong, even if the lands of Clonmain had not, by the trust-deed, been expressly charged to that account. That the respondent, by his

bill, claimed the said lands of Clonmain, under the fraudulent deeds of the 21st of December 1700, and the 12th of May 1713: the first of which was directed by the award to be null and void, and since revoked, and must be so taken to be, from the respondent's own shewing: for, if the lands of Clonmain were the lands intended to be settled, as he alleged, it was plain there was no regard had to the covenant in that deed, that such lands as should be purchased by Richard Blake, in the parish of Kilrickill, should go according to the settlement of 1681; and yet so inconsistent was the respondent with himself, that at the same time he contended that those were the lands intended to be settled by the award, he claimed them by virtue of this covenant: and as to the deed of the 12th of May 1713, it being inconsistent both with the award, and the recital in the deed of trust, and also destructive of the marriage-articles, by depriving the children of so great a part of the provision thereby intended for them; the same ought not to be in any manner binding or conclusive to the appellants, who were infants, and no way parties or privy to it.

On the other side it was said (T. Lutwyche, S. Mead), that it appeared by the award, and the deeds executed in pursuance thereof, that the lands of Clonmain were intended to be settled on the issue male of the second marriage, with remainder to the respondent; but, whether the lands of Clonagh, Clongannagh, or Clonmain, were directed by the award to be so settled, yet the appellants could have no right or title thereto on the foot of the award, in regard those lands were in no case to go or be limited to the issue female of the second marriage; but on failure of issue male of that marriage, were, by the express words of the award, to remain and go over to the respondent. That it did not appear, that any part of the £1900 was laid out in the purchase of Clonmain; on the contrary, it was fully proved, that the same was purchased with the proper money of Richard Blake, the respondent's father, and that part of these lands was contracted and paid for, before the second marriage; and it appeared that the £1900 was otherwise made up, and well secured to the appellants; so that the recital in the lease for 999 years was inserted by some mistake, and was not agreeable to that part of the award, by which the lands of Clonmain were directed to be settled; and which, by the deed of the 12th of May 1713, were accordingly settled on the said William Vincent Blake, and the heirs male of his body, with remainder to the said Constantine Blake, and his issue male, [248] remainder to the respondent; and by the award and 999 years lease, £2000 was secured to the appellants, over and besides the £1900 provided for them by their mother's marriage-agreement. That the purchase of the 81 acres in Clonmain from Honora Burk, was made by Richard Blake with his own proper money; and though the conveyance thereof was taken in the name of the said Richard Thomas Blake, the infant, yet Richard the father, declared it should go with the rest of his estate to the respondent, according to the uses of the settlement of 1681; and the mother of the appellants was so far from being concerned therein, that the respondent's father desired the witnesses not to acquaint her with the purchase; adding that he took that conveyance in the child's name, because he apprehended, that by the acts for preventing the growth of popery, the child was to be deemed a protestant, forasmuch as his mother was one. That the respondent's father was bound to convey all his interest in Clonmain to the respondent, and did, by the deed of May 1713, covenant, that he was seised of Clonmain in fee, and had good right to grant the same, and was therefore brought before the court at the hearing, as a necessary party; consequently, his wife could not be admitted as a witness in the cause, when, by the event of it, he was to be charged or discharged. That the lands of Clonmain lay in the parish of Kilrickill, and by the deed of 1700, which was tortiously cancelled by the appellant's mother, the said Richard Blake covenanted to settle all the lands which he should purchase in that parish, to the uses of the settlement of 1681, so that the appellants could not possibly be entitled thereto, while there was any issue of the respondent's body; and the rather, for that by virtue of the act for preventing the growth of popery, the respondent became entitled to the reversion of the purchased premises, expectant upon his father's death. That the said Richard Blake having, in pursuance of the award, settled 122 acres in Clonmain to the uses thereby directed; and having omitted to settle the other 81 acres, which had been purchased in trust for him, in the name of the said Richard Thomas Blake, the respondent ought not to be prejudiced by such omission, but ought to be decreed, as well to those 81 acres, as to the other 122 acres; and the rather, because his said father had, by his answer, confessed that by the award, all the lands

of Clonmain were intended to be settled in the manner before mentioned, and that he all along intended, that they should go according to the uses of the settlement of 1681. That by the agreement made on Richard Blake's second marriage, he was, during his life, to have and receive the yearly produce of the £1900; and therefore, if it could possibly be supposed, that any part thereof had been laid out in the purchase of Clonmain, yet the appellants, during their father's lifetime, could not be entitled thereto; and since he had thought fit to acquiesce under the decree, it was apprehended, the appellants had no reason to impeach it; but, that they ought to have rested satisfied with the large provisions made for them by [249] the award, which were much beyond any thing stipulated for them by their mother's marriage-agreement.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree, and the affirmance thereof, therein complained of, affirmed. And it was further ORDERED, that Elizabeth Blake, the appellant's mother and guardian, who had brought this groundless appeal in their name, should pay to the respondent, out of her own pocket, the sum of £50 for his costs, in respect of the said appeal. (Jour. vol. 21. p. 587.)

But Mrs. Blake neglecting to obey this order, she was, on the 9th of August, ordered into the custody of the Gentleman Usher of the Black Rod, for her contempt; and there to remain until the said costs were paid. (*Ibid.* p. 590.)

CASE 7.—WILLIAM FOLEY,—*Appellant*; ATTORNEY-GENERAL, and Others,—*Respondents* [1st December 1721].

[Mews' Dig. v. 1246; xiv. 542. Cited in *In re St. Stephen, Coleman Street*, 1888, 39 Ch. D. 504.]

[A. being impropiator of a parish, demised part of the tithes to certain parishioners as trustees for 1000 years, who redemised the same to him for 999 years, under a yearly rent of £50 payable to the trustees as a provision for a preacher to be nominated by the trustees. The heir of A. afterwards sold the rectory to B. and the representative of the surviving trustee was prevailed upon to assign to B. the right of nominating the preacher. From the date of the original demise and for 40 years and upwards after the latter transaction, the preacher was constantly nominated by the parishioners; but upon a contest between them and B. it was held that the right of nomination was absolutely in the trustees, and that the assignment of that right was a breach of trust. And directions were given by the House of Lords for the re-establishment of the trust in trustees to be impartially chosen.]

The rectory of the parish-church of Kinfare in the county of Stafford being appropriated to the abbey of Borsley, no vicarage was ever endowed; but the cure was served by chaplains from time to time provided by the abbot as perpetual-rector.

After the dissolution of this abbey, King Henry VIII. by letters patent, in the 35th year of his reign, granted the rectory of Kinfare to William Whorwood Esq. and his heirs; on whose death it descended to John Whorwood his son and heir; but this John neglecting to supply the cure, £560 was raised by several persons and paid to him for the purchase of a rent-charge of £50 as a provision for that purpose; £33 6s. 8d. part whereof, was to be paid to Mr. Cross the then preacher at Kinfare, so long as the trustees should think fit, and afterwards to such preacher as they and their assigns, or the majority of them, should nominate [250] and appoint; and £10 other part thereof, was to be paid to the curate of the said parish. But if the preacher should desire to be curate, then the £10 per ann. was to be paid to him; and the remaining £6 13s. 4d. was to be paid to the schoolmaster of the said parish of Kinfare.

In pursuance of this agreement, the said John Whorwood, by indenture dated the 10th of May, 6 Car. I. demised the tithes of part of the parish of Kinfare, and also the nomination of a curate to Rowland Heylin and Samuel Brown, and eleven other trustees for 1000 years; and, by another indenture of the same date, those trustees re-demised the said tithes and premises (except the nomination of a curate) to Whor-

wood for 999 years, under the yearly rent of £50, payable to the trustees for the purposes above mentioned.

By indentures of lease and release, dated the 29th and 30th of March 1672, Wortley Whorwood Esq. the grandson and heir of the said John Whorwood, conveyed the advowson of the vicarage of Kinfare, and the rectory impropriate, and all glebe lands, oblations, obventions, and other profits thereunto belonging, to Philip Foley Esq. his heirs and assigns for ever. And, by indenture dated the 20th of December 1676, Thomas Brown, sole executor of John Brown, who was the sole executor of the above named Samuel Brown, who was the surviving trustee named in the above indenture of demise; granted, surrendered, and assured unto the said Philip Foley, his heirs and assigns, the nomination and free disposition of the curate of Kinfare, and all his estate, term of years and interest therein.

From the date of the original demise down to the year 1716, the curates of Kinfare had been successively appointed by the parishioners; and upon the death of Mr. Jonathan Newy, which happened on the 10th of September 1716, and who had supplied the cure for fifty-four years, the parishioners appointed the relator Richard Bate to be preacher or curate of the said parish in his room; but Paul Foley Esq. the appellant's father, who was the son and heir of the said Philip Foley, thought proper, under colour of the above assignment from Brown, to nominate one Mr. Thomas Oliver to the said curacy.

Whereupon, in Michaelmas term 1716, the respondents exhibited an information and bill in the court of Chancery against the said Paul Foley, Thomas Oliver and others, praying to have the nomination of the plaintiff Bate established, and that he might have the stipend of £43 6s. 8d. per ann. as preacher and curate of the said parish, and that the right of nominating such preacher and curate for the time to come might be settled according to the original trust.

The defendants having answered, and the cause being revived on the death of Mr. Foley, against the appellant, his son and heir, it came on to be heard by the Master of the Rolls, in the absence of the Lord Chancellor, on the 25th of June 1719, when his Honour declared that the question was, Whether the [251] deed of demise to the trustees was not a trust for the parish that they might have the nomination of a curate? That the last person who officiated as curate continued fifty-four years, so that a clear proof could not be expected by whom his predecessors were nominated; but that the evidence was strong that they came in by the nomination of the parish, it not appearing that the trustees ever interposed therein; and upon the construction of the deed of the 20th of December 1676, the trustees might have assigned to any other persons in trust for the parish, or have declared a trust for the parish: And upon the whole matter, his Honour was of opinion, that the trustees did by writing or parol, declare a trust for the parish that they had the right of nomination; and that the first act which appeared to have been done in opposition to the parish, was by the said Thomas Brown in 1676, but that such act of opposition did not overthrow the right of nomination in the said parish; but he conceived that the nomination of the relator Richard Bate ought not to stand, and did therefore order and decree that the parishioners of the said parish of Kinfare, paying to the church and poor, upon a week's notice to be published in the said parish-church, should proceed to a new election of a minister, which election was to be in the school-house of the said parish; and if they should confirm the election of the said Mr. Bate, then it was ordered that the £10 and the £33 6s. 8d. per ann. discounting what had been paid by the sequestrators, should be paid to him; but if they should not confirm his nomination and elect another minister, then it was ordered that the said £10 and £33 6s. 8d. per ann. after such deduction as aforesaid, should be paid to the person who should be so nominated; for which purpose it was referred to a Master to see what was so paid by the sequestrators, and ascertain what was to be paid to the plaintiff Richard Bate, or to such other person as should, on such election, be nominated curate of the parish of Kinfare; but as to costs, his Honour did not think fit to give any on either side.

Pursuant to this decree, notice was given for a new election; and on the day appointed for that purpose, viz. the 20th of July 1719, the parishioners elected one Mr. Edward Hale to be curate of Kinfare; but Mr. Oliver alleging that he was elected by the majority of the parishioners, preferred his petition to the Lord Chancellor Parker, praying that his election might be confirmed; and upon hearing this petition on the 19th of December following, his Lordship was pleased to declare that Mr. Hale was duly elected; but that

he apprehended a popular election might be attended with many inconveniences, and would therefore consider further of the matter and give proper directions therein.

The defendant, Mr. Foley, apprehending himself aggrieved by the decree, petitioned the Lord Chancellor for a re-hearing; which being granted, the cause was again heard on the 25th of June 1720, when his Lordship declared his opinion, That the [252] deed of demise to the trustees was a trust for the benefit of the parishioners of the said parish of Kinfare; and that the right of election of a minister or curate was in them the said parishioners, and that the trustees ought to nominate such person as by them elected, to be admitted by the bishop of the diocese; and therefore ordered that the said petition should be dismissed, and the said decree confirmed; with this addition, that in regard the term was merged, a new term should be raised by the defendant, in whom the inheritance was, for the remainder of the years yet to come and unexpired, to such new trustees as the Master should appoint; and that the Master should take an account of the trust-monies from the persons who had received the same from the death of Mr. Newy; and if the bishop of the diocese had appointed any sum thereout for the person who had since supplied the curacy, the same was to be allowed; but if the bishop had not made any appointment, then such sum as the Master should think reasonable to be allowed for supplying the said curacy was to be deducted out of the said trust-monies. And as the defendant did not oppose the election of Mr. Hale to be minister or curate, his Lordship did not think fit to direct him to pay the plaintiffs any costs to that time; but the consideration of subsequent costs was reserved: And if the persons who had received the said trust-monies should refuse payment thereof as aforesaid, then the plaintiffs were to resort to the defendant Foley for the payment thereof; and the £10 deposited with the register was to be paid to the plaintiffs.

Soon after this decree, Mr. Hale died; whereupon the relator Bate was duly elected, but before he was nominated to the bishop, the defendant Foley appealed from both the decrees, insisting (J. Darnall, W. Peere Williams), that no deed or writing appeared, or was in proof in the cause, to shew that the trustees were trustees for the parishioners of Kinfare; so as to give the inhabitants a right of electing a curate for the said parish. It only appeared, by the proofs taken on behalf of the respondents, that the witnesses had heard, that the most substantial inhabitants used to nominate a curate. That four or five of the curates who were nominated after Cross, who was curate in 1630, when the indenture was made by Whorwood to the trustees, were in the rebellious times of Oliver Cromwell; and particularly, one Moreton, who was curate before Newy, was turned out in the year 1662, for refusing to conform and read the service of the church of England; at which time Newy, the last curate, came in, and continued there till his death, which happened in the year 1716. That the reason on which the decree was founded, was, "that the last person who officiated as curate, continued 54 years; so that a clear proof " could not be expected, by whom his predecessors were nominated, but that the evidence " was strong, that they came in by the nomination of the parish, it not appearing, that " the trustees did ever interpose therein:" but the appellant apprehended, it ought not to be expected so much from him, to prove that the [253] curates were nominated by the trustees, as from the respondents to prove that they were appointed by the parishioners; and as there was no proof on either side beyond hearsay evidence, the trust of the deed of demise ought no way to be impeached, but on the contrary to be performed, whenever the trustees should think fit to put it in execution, though it might happen to be against the inclination of the parish. That the inhabitants of Kinfare, were not capable by law, of taking any estate, either by grant, devise or otherwise. That by the deed of demise, the trust-money was to be paid to such curate, and no other, as the trustees and their assigns, or the greater number of them, should nominate and appoint; and therefore, neither a pretended prescriptive right, or an implied trust, could overthrow the express trust declared by that deed. That the term being merged, a court of equity could not carve a new term out of the appellant's estate, for settling in the inhabitants the right of nominating a curate; and as to the trust-term for the charity, it still remained in the representative of Brown, the surviving trustee. That by the indenture of demise, it plainly appeared, that the curate and preacher were two distinct persons; and as the trustees had only the right of nominating a curate granted to them by Whorwood, there could be no sufficient ground for decreeing the £33 6s. 8d. settled upon the preacher, to be paid to the curate. That the appellant being impropiator, might nominate a preacher, the same not being granted by Whorwood to the trustees; and such preacher was entitled

not only to the £33 6s. 8d. but also to the £10 per annum settled on the curate, so long as he performed the duty of curate; and this by the express words of the deed. That this popular way of election (there being no person decreed to preside over those who took the poll, and determine who had the majority) unavoidably tended to the utmost confusion, and setting up a faction throughout the whole parish; and therefore, it was humbly hoped, that their Lordships would reverse the said decrees, and declare that the appellant had the sole right of nominating a curate to the said parish.

On the other side it was contended (T. Lutwyche, S. Cowper), that there was not any colour of right in the appellant to nominate a minister, he claiming only under the deed of 1676, from Brown, who did not appear to have any right himself; it not being proved, that Samuel Brown was the surviving trustee, or that the executor of his executor executed that deed. That it appeared plainly that Mr. Newy was elected by the parishioners, the trustees never attempting to interpose in the nomination; and it was scarce possible for the memory of any person to extend to the admission of any Minister before him.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the two decrees complained of should be reversed; and it was adjudged and declared, that an absolute power was vested in the trustees named in the deed of 6 Car. I. to nominate such preacher or curate, of the parish of Kinfare, in the [254] county of Stafford, as they, or the major part of them, thought fit; and that the surrender or assignment of December 1676, was a breach of trust; and therefore it was adjudged and decreed, that a new term for the residue of 1000 years, for which the original demise was made, ought to be created and vested in thirteen new trustees, as to the said right of nomination of a preacher or curate; which thirteen trustees should be nominated by a Master of the court of Chancery, subject to the direction of that court; and both parties should be at liberty to propose proper persons before the Master to be trustees; and that four of the said trustees, at the least, should be clergymen of the same county or diocese, in which Kinfare lies: and that a proper demise or grant of the said nomination to the said trustees, should be prepared by the Master, and executed by the appellant when he should come of age, or by his heirs; and that the same should be inrolled in the court of Chancery, and likewise entered in the register of the bishop of the diocese; and the making of such grant, and the inrolment and entry thereof, was to be at the charge of the appellant, or his heirs. And it was further ORDERED, that when the number of the said trustees should be reduced to nine, then, or as soon after as conveniently might be, the survivors, or the major part of them, should choose so many new trustees, as should make up the full number of thirteen; and that when such new trustees should be chosen, proper conveyances should be executed, to vest the said nomination in all the thirteen trustees, during the residue of the term: and it was further declared, that as soon as the representative of the surviving trustee could be found, he ought to assign to the same trustees, the reversionary interest in the 1000 years term, to which the rent of £50 per annum, reserved on the re-demise to John Whorwood, esq. was incident. And it was further ORDERED and ADJUDGED, that in the mean time, the said rent should from time to time be paid to the trustees, who should be nominated as aforesaid; and that the first trustees, with all convenient speed, after they should be settled, should appoint a curate for the said parish of Kinfare; and that in the mean time, Richard Bate, the present curate, should continue to officiate as such and be allowed the salary for the time he had officiated, or should officiate. And it was recommended to the said trustees, to nominate him the first curate; he being the relator, at whose suit the trust had been restored and established. And it was further ORDERED, that as often as any future vacancy of a curate should happen, the same should be supplied by the trustees for the time being, or the major part of them; and that the court of Chancery should give proper directions touching the arrears of the said annuity for the time past; and likewise such other directions from time to time, as should be proper for the better executing this judgment. (Jour. vol. 21. p. 616.)

[255] CASE S. JOHN CROOKSHANKS, *Appellant*; RICHARD TURNER, and
Another, *Respondents* [19th March 1723].

[Mews' Dig. xiv. 750, 866. See now Judicial Trustees Act, 1896 (59 & 60
Vict. c. 35), s. 3.]

[A trustee shall not be answerable for a mistake committed innocently, and from
which he derived no advantage: and a Court of Equity will grant a
perpetual injunction to prevent any proceedings at law, grounded on such
mistake.]

[Decree of Lord Macclesfield, C. affirmed.]

The respondents were partners and money-scriveners, keeping cash as bankers for
several gentlemen, and serving them by commission in buying and selling stocks,
Government securities and South-Sea subscriptions.

In May 1720, the appellant and one Mr. Rigby employed the respondents to buy for
their joint account several South-Sea subscription receipts, which they did; and par-
ticularly one receipt for £1000, in the first subscription, which they delivered to Rigby.

On the 17th of June following, the appellant gave orders to the respondents to buy
for him several receipts in the third subscription to the South-Sea Company; and as a
security to the respondents for his performing such contracts as they should make for
him, the appellant deposited with them the said first subscription receipt for £1000;
and their servant Pheasant Blackler, gave the appellant a note, acknowledging the
receipt thereof in the following words: viz. "June 17th 1720, Received of John
"Crookshanks Esq. £1000, in the first subscription to the South-Sea Company, to
"account for on demand. For Messrs. Turner and Marke, (£1000 receipt, No. 268.)
"P. Blackler." And having so done, he put the said receipt into a public drawer, where
other receipts of the like nature were promiscuously kept, but did not in any book, or
elsewhere, mark down the number of it, or acquaint the respondents what the number
thereof was, or that he had put the same in the margin of the receipt which he had
given; nor were the particular numbers of such receipts, in the great hurry of business
at that time, commonly regarded by the dealers in them, all receipts for the like sum
being of equal value.

Pursuant to the appellant's order, the respondents contracted for two-third
subscription receipts, for £1000 each for the appellant's account; for the performance
of which contracts the said first subscription receipt for £1000 was deposited as a
security, and which contracts still remained to be performed.

At this time the respondents had in their custody several other first subscription
receipts which they kept for different persons; particularly, one for £1000 belonging to
Mr. David Mitchell, which by his order and for his account, the respondent Turner,
[256] on the same 17th of June, when the appellant's receipt was left, sold to Mr. Shaw,
for £5900, and which sum was paid by him to the respondents upon delivering to Shaw,
a subscription receipt for £1000, but which, as it afterwards appeared, happened to be
the receipt which the appellant on that day left; and most probably, because it lay
uppermost in the drawer; the respondents in delivering out receipts, not regarding the
number, but only the sums; and the very same day, the respondents paid over, or
allowed in account to the said Mr. Mitchell, the said £5900, which they received for
the same, and had no other benefit whatsoever by it, but their commission, nor did the
appellant sustain the least prejudice thereby.

About a year afterwards, and not before, when the said subscription receipts were
fallen very low in price, the appellant came to the respondents, and told them, he found
his subscription receipt had been sold and delivered to the said Mr. Shaw, and that he
had paid the respondents £5900 for the same, and therefore he required them to pay
that sum to him; whereupon, the respondents told the appellant, that they had always
in their custody, a receipt for £1000 to deliver to him, and which they kept for that
purpose; but that as to the number of receipts, they paid no regard to them, and were
strangers to the particular number of his receipt, as they were likewise to the number of
Mr. Mitchell's receipt which they had sold; nor did Mr. Mitchell himself know the
number of his receipt, which he had left with the respondents: and that as every first

subscription receipt for the same sum, though of a different number, was of the same value, the appellants were no sufferers thereby.

Notwithstanding this, the appellants in Trinity term 1721, brought his action of trover, against the respondents for having converted his subscription receipt to their own use; and also another action, for money had and received: whereupon, the respondents, who had behaved themselves in the trust reposed in them by the appellants with the greatest integrity, and had exposed themselves to the said action by an accidental and inadvertent delivery of the appellants' receipt to Mr. Shaw, instead of another of the same value, without the least advantage to themselves, or prejudice to the appellants; brought their bill in the court of Chancery, to be relieved, and also indemnified against the contracts which they had entered into upon the appellants' account, and to be discharged of their trust.

The appellants, instead of answering this bill, stood in contempt for about six months, and then being arrested on an attachment, he put in his answer; and thereby insisted, not only on the payment of the said £5900 by reason of his receipt being delivered instead of the other, although the respondents had before paid the money to Mr. Mitchell; but likewise on having so much more money, as his receipt might have been sold for, in August 1720, when such subscription receipts were at a much more advanced price, and when he applied to the respondents, [257] and they as he pretended (though untruly) refused to sell the same.

On the 20th of May 1723, the cause was heard at the Rolls: when his Honour conceiving, that the matters in question were properly triable at law, was pleased to order, that the appellants should be at liberty to proceed to trial, in the actions at law brought against the respondents, notwithstanding the injunction in this cause; and after the said trial, either party was to be at liberty to resort back to the court: and he reserved the giving directions, touching the appellants' indemnifying the respondents, in respect of the contracts made on his behalf, as also the consideration of costs, till after the trial.

The respondents apprehending that they were properly relievable in a court of equity, when it so fully appeared by the proofs in the cause, that they had not in any manner misbehaved themselves in the whole transaction, and that the appellants was no way a sufferer thereby, appealed from the said decree to the Lord Chancellor Macclesfield; and the cause being heard on the 13th of December 1723, his Lordship was pleased to decree, that a perpetual injunction should be awarded, to stay the appellants' proceedings at law against the respondents, for and touching the said subscription receipt, No. 268, for £1000, in the first subscription, taken in by the South-Sea Company, or for the sum of £5900 for which the respondents sold the same; but that the respondents should pay the appellants his costs at law, to be taxed by a Master: and, that the appellants should indemnify the respondents, against the contracts by them made on his behalf, with Halhed and Caswell, for two £1000 third subscription receipts, by giving to them, in a fortnight, his own bond, in such penal sum as the Master should think sufficient, to indemnify the respondents against the said contracts: which bond, when given, was to be esteemed a sufficient indemnification for the respondents against the said contracts: and the respondents were thereupon to transfer to the appellants or his order, all the South-Sea stock, and the produce thereof, arising from the £1000 first subscription receipt; or in case the respondents had reserved a first subscription receipt not claimed, they were then to deliver the same to the appellants; who was thereupon to deliver up to the respondents, the said accountable note for the said £1000 subscription receipt, No. 268.

From this decree the appellants appealed, insisting (C. Wearg, T. Lutwyche), that he had fully proved his property in the deposited subscription receipt, both by mark and number. That the respondents, by their accountable note, of the 17th of June 1720, being engaged for a specific subscription receipt, No. 268, and having, while those things were fresh in memory, and obvious to view, committed a breach of trust, by selling the appellants' property without his knowledge; and having afterwards received orders for the sale of this identical receipt, they were become responsible for the specific receipt, or the money for which it had been sold, or might have been [258] sold, in a fair and honest method, by a faithful trustee. That there was nothing suggested by the respondents, but what they might insist upon, as far as it should have any weight, in mitigation of damages at law, where, as the appellants conceived, the matter was

properly triable in an action of trover; and on which trial, the circumstance of the respondents' selling the receipt, and the intent of doing it, might properly come in question. That it was admitted, the appellant had properly commenced his action at law, because the decree had ordered the respondents to pay him his costs at law; and if the appellant was entitled to his action at law, he was entitled also to recover damages; which was proper for the consideration of a jury, and also whether the respondents had only committed an innocent mistake, as they pretended. For it did not certainly appear, that they had Mr. Mitchell's receipt in their custody, on the 17th of June; or if they had, that they did not deliver out that, as well as the appellant's, or that they kept any receipt for the appellant; the evidence being very loose as to these points, and therefore proper to be left to a jury. As to the appellant's suffering no damage, if a first subscription receipt for £1000, though differently numbered, was delivered to him; it was said, that if another receipt had been rendered at the time it was demanded for sale, the one might then have been an equivalent for the other; but a subscription receipt in December 1723, could never be of the same value as a subscription receipt which was sold in June, or might have been sold in August 1720. Besides it was unreasonable, that the respondents should have all the benefit, when the appellant ran all the hazard in case the respondents had failed. It was therefore hoped, that in this particular case, where the appellant's property had been clearly ascertained and fully proved, and which had been disposed of without his authority, he should be at liberty to proceed to a trial at law; wherein all the circumstances of the case, the credibility of the evidence, and the whole matter in question, might be fully examined and fairly discovered, and the jury might give what damages they should think reasonable.

On the other side (J. Darnall, C. Talbot) it was said to be fully proved in the cause, that other persons who kept subscription receipts as well as the respondents, seldom regarded the number, but only the sums of such receipts; all receipts for the said sums, being of equal value. That the respondents had no advantage but their commission, nor was the appellant in any manner prejudiced by this sale; as the respondents had always kept a subscription receipt by them, to answer that which was deposited by the appellant. That it was manifest, that this transaction of the respondents, in delivering to Shaw the appellant's number instead of Mitchell's, was merely an innocent mistake, without any design; and therefore, considering the nature and circumstances of the case, the decree was agreeable to justice and equity, and ought to be affirmed.

[259] Accordingly, after hearing counsel on this appeal it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of affirmed. (Jour. vol. 22. p. 293.)

CASE 9.—JOHN EMELIE, and Others,—*Appellants*; FRANCIS EMELIE, and Others,—*Respondents* [20th January 1724].

[Mews' Dig. xiv. 693.]

[Trustees may lend trust-money upon good personal security till a proper purchase of lands can be had, but are not justified in placing it in a fluctuating or precarious public fund.]

[The above seems too broadly stated; nor can it be considered either as an established general principle, or as resulting from the facts of the case, which arose out of transactions connected with the infamous South-Sea bubble. —Nothing can be a greater breach of trust than gambling with a fund, which it is the very purpose of the trust to secure from such iniquitous vicissitudes.]

By virtue of articles dated the 2d of April 1718, made previous to the marriage of the respondents Francis Emelie and Frances his wife, sister of the other respondent Sir John Elwill, £3000 bank stock, being part of the fortune of the said Frances, was transferred to the respondent Sir John Elwill and the appellant John Emelie, upon trust to be sold, and the money arising by the sale thereof to be invested in lands, to be settled on the said Francis Emelie for his life; remainder to the said Frances his

wife for her life; remainder to their issue, with remainder to her right heirs; and, until such purchase was made, the money was to be placed out at interest, and the interest thereof, as also the dividends of the stock till sold, was to go and be applied as the rents and profits of the estate when purchased ought to be applied.

After the marriage the respondent Francis received the dividends of the said Bank stock till Lady-day 1720, at which time the price of that stock being greatly advanced, the respondents Francis and his wife were desirous to sell part thereof; and thereupon in Trinity term 1720, they exhibited their bill in Chancery against the respondent Sir John Elwill, and the appellant John Emelie, praying a sale of the said Bank stock; and that the money thereby arising might be invested in lands pursuant to the marriage-articles.

On the 11th of August 1720, the cause was heard before his Honour the Master of the Rolls; when it was ordered that all parties should attend Mr. Bennett, one of the Masters of the said court, who was to examine whether it would be for the benefit of the plaintiffs to have the said stock sold or not; and [260] if he found it was for their benefit, that then it should be sold by the Master's approbation, and the money laid out in the purchase of lands, to be settled on the said Francis and his wife, and their issue, according to the articles; and that until such purchase was made, the money should be placed out at interest, and the interest be applied and go, as the rents and profits of the lands when purchased ought to go.

But the respondent Francis fearing that the price of Bank stock might fall before this decree could be perfected and the Master's approbation had; (it being then in the long vacation, and the Master out of town,) and being well assured that it would be for the advantage of all parties to sell the said Bank stock, and that the Master would (as he afterwards did) so certify: he, by one Abraham Edlin, his mother's broker, sold £2000 of the Bank stock for £4315, which was received by one Mr. Wyatt, who was authorised by the respondent Sir John Elwill for that purpose, in order to be brought before the Master, and laid out in a purchase of lands pursuant to the said decree and marriage-articles.

At this time, Martha Emelie, mother of the respondent Francis, having a great opinion of South-Sea stock, was very importunate with her son to purchase £500 of that stock; which he accordingly did, at the rate of £680 per cent. for the next opening of the South-Sea books, which was to be on the 14th of September 1720. The respondent Francis thereupon applied to the said Mr. Wyatt (the respondent Sir John Elwill being then at Tunbridge) for money to pay for this £500 South-Sea stock, out of the said £4315 in his hands, but which Mr. Wyatt refused to do, alleging, that it being trust-money, wherein other persons were interested besides the respondent Francis, he could not with safety apply the same otherwise than according to the trust: And Edlin, the broker employed in buying the said stock, informing the respondent Francis that the same must be again sold, he thereupon applied to his mother Martha Emelie and acquainted her therewith, who still persisting in her opinion that South-Sea stock would assuredly rise again, undertook, that rather than the stock should be then sold at so great a loss, she would, at her own risque, take the same to herself.

In pursuance of this undertaking, and in order to enable herself to pay for the said South-Sea stock, Mrs. Emelie borrowed of the trustees the said £4315; and for securing the re-payment thereof with interest, executed a bond bearing date the 20th of September 1720, to the said trustees Sir John Elwill and the appellant John Emelie, with a condition reciting the articles, and taking notice that the said £4315 was lent to her, that she should repay the same to the said trustees on the 20th of March then next: And because the appellant John Emelie was a co-obligee in the said bond from Martha Emelie, there was another bond executed by him to Sir John Elwill alone; conditioned that the said Martha Emelie should pay the said [261] £4315 and the interest thereof, according to the condition of her bond.

The respondent Francis Emelie was not present at the execution of these bonds, or lending the £4315 to the said Martha and John Emelie; nor was the same lent by Sir John Elwill on any other terms than that it should be in good and responsible hands at interest, until it could be invested in lands pursuant to the said decree and marriage-articles; and the said Martha was so far from expressing any fear or apprehension in relation to the said South-Sea stock, that she even then declared her firm belief that that stock would rise again. But finding soon afterwards that South Sea stock had

fallen below any probability of its rising again to the expected height, the said Martha and John Emelie endeavoured to turn the loss thereof upon the trust-money, in prejudice of the respondent Frances and her issue, and contrary to the said decree and marriage-articles and the express conditions of the bonds.

And for this purpose the said John Emelie and Martha Emelie in Trinity term 1721, after the respondent Sir John Elwill had recovered judgments against them upon the said bonds, exhibited their bill in Chancery against the respondents, to have the bonds delivered up and cancelled, upon transferring the said £500 South-Sea stock, and paying £915 and interest, residue of the said £4315, founding their equity upon some letters that passed between the respondent Francis and the appellant John Emelie, to which Frances the wife, and her trustee the respondent Sir John Elwill, were no way privy or consenting.

To this bill the respondents appeared and put in their answers; but before any farther proceedings were had, the said Martha Emelie died, having made her will and appointed the appellants executors thereof; and thereby bequeathed the interest of £1000 to the respondent Francis Emelie for his life, and the principal to his child or children in such proportion as he should think fit, with a devise over in failure of such child or children; and the residue of her estate to her executors in trust for all her children; but after taking notice that she had paid £3400 for the said £500 South-Sea stock, which the respondent Francis was to make good to her; she declared, that whatever the said Francis or his heirs could claim under her said will was to be liable to make good the loss that she should sustain by the said £500 South-Sea stock.

The executors having proved this will, exhibited their bill of revivor and supplemental bill, to which the respondent Francis and his wife put in their answer, insisting, that on the sale of the Bank stock they had no view of purchasing South-Sea stock, and that though the said Martha Emelie had prevailed on the respondent Francis to purchase South-Sea stock, yet she had taken the same upon herself; and that the £2000 Bank stock ought not to be replaced, but that the whole £4315 should be applied according to the said marriage-articles and decree.—The respondent [262] Francis admitted his mother's will and hoped to have the benefit thereof; but he nevertheless submitted to the court how far the legacies thereby given him, or any part thereof, should be liable to make good the £500 South-Sea stock, he conceiving himself not to be in any manner concerned therein.

On the 27th of June and the 3d of July 1722, the cause was heard before his Honour the Master of the Rolls, who was pleased to decree, That the £500 South-Sea stock should be sold by one of the Masters of the court, and that with the money arising thereby, and the £915 residue of the money raised by sale of the Bank stock in the plaintiff's hands, and out of the personal estate of the said Martha Emelie deceased, £2000 Bank stock should be bought by the approbation of the Master, and replaced to the same trusts, as the £2000 Bank stock formerly sold was subject to: And that thereupon the bonds should be delivered up, and satisfaction acknowledged upon the judgments, and that Sir John Elwill should be indemnified, and have his costs of that suit; and so much as the said Martha Emelie's estate was damaged by replacing the said £2000 Bank stock, was to be made good out of the £1000 legacy, and the respondent Francis Emelie's share of the surplus of the said Martha Emelie's estate.

The respondent Sir John conceiving himself aggrieved by this decree, appealed therefrom to the Lord Chancellor; insisting, that the same ought to be varied; for that the whole £4315 for which the Bank stock was sold, ought to be made good to the trust, and the bonds and judgments to be taken as a security for the same; that he ought to have had his costs at law as well as in equity; and that if the decree had been right as to the £500 stock, yet there was no direction for the application of the dividends thereof, or of the interest of the £915.

On the 1st of February 1723, the cause was re-heard before the Lord Chancellor Macclesfield, who was pleased to order that the said decree should be reversed as to the purchasing £2000 Bank stock, and re-placing it to the same uses and trusts as the £2000 Bank stock formerly sold was subject to; and decreed that the bonds entered into by the plaintiff John Emelie and Martha Emelie deceased, should not be delivered up, or satisfaction acknowledged on the judgments recovered thereon, but upon payment of the said £4315, with interest for the same; which interest was to be paid to the defendant Francis Emelie, but the principal to be placed out at interest on security

to be allowed by the Master, till a purchase of lands could be found, and a settlement made pursuant to the marriage-articles and the decree in the former cause; but his Honour's decree was to stand, as to the account thereby directed to be taken of the said Martha Emelie's personal estate; and likewise as to the account of what was due to the defendant Francis Emelie and his children, for the legacy of £1000 devised by the will of the said Martha Emelie to him and his children, with interest for the same, and [263] what his share of the surplus of the said Martha Emelie's personal estate amounted to. But before the defendant Francis Emelie was to have any benefit by the will of the said Martha Emelie, he was to indemnify her estate against any loss that might happen by the said South-Sea stock, as her will directed, to be ascertained by the Master: And in case the said defendant Francis Emelie should pay the money which the said Martha Emelie's estate was liable to pay, to make good the said £4315 and interest; then the said decree was to be varied as to the sale of the said South-Sea stock; and the same was to be transferred, together with all advantages arising thereby, to the defendant Francis Emelie, who, in that case, was also to have the benefit of his mother's will; otherwise the said stock and advantages was to be sold by the approbation of the Master, and the money arising thereby, and what should be coming to the said Francis or his children under his mother's will, was to be applied towards payment of the said £4315 interest and costs; and that the said decree should stand as to the direction touching costs, with this further direction; that the defendant Sir John Elwill, who was thereby to have his costs in this court only, should be also paid his costs at law, to be taxed by the Master.

From this last decree the appellants appealed, insisting (P. Yorke, C. Talbot) that it fully appeared in the cause, and particularly by a letter from the respondent Francis, dated the 7th of September 1720: that he directed the £500 South-Sea stock to be bought, and ordered the Bank stock to be sold to raise money to pay for it; and in his answer he admitted, "that believing he had power to invest in South-Sea stock the " money arising by sale of the Bank stock, he ordered the said £500 South-Sea stock to " be bought, expecting the trustees would have paid for it out of the money arising by " the Bank stock." That the sale of the Bank stock and the transfer by the trustees, being without the Master's approbation, and therefore not pursuant to the decree in the amicable cause, the trustees must have made good that stock if the price of it had risen; and consequently, the money being applied to make good another part of the same transaction, viz. in paying for the South-Sea stock bought at the same time; the utmost that equity required was, that either the profit upon the whole transaction, if there had been any, or the Bank stock itself, if there was a loss, as had actually happened, should be made good to the trust. But it was objected by the respondent Sir John Elwill, (who was presumptive heir to his sister, she having as yet no issue,) that by the bonds, the money arising by sale of the Bank stock was declared to be the trust-money, and must therefore always remain such; to which it was answered, that the bonds were drawn by Mr. Wyatt, and executed by the appellant John and his mother, without having previously any copy of them; and their applying the money immediately to pay for the South-Sea stock bought by the respondent Francis, at the rate of £680 per cent. when at that time the stock was under £370 per cent. [264] shewed, that they had no other view in taking the money, than to discharge the respondent Francis's contract, or in all events to provide that Sir John Elwill, as a trustee, should be indemnified. It was also objected, by the respondent Francis, and sworn in his answer, that Edlin, in a day or two after he had bought the South-Sea stock, informed him that it must be again sold, for that Mr. Wyatt would not consent to pay for it out of the produce of the Bank stock; and that thereupon the respondent Francis applying to his mother to be security to Edlin for the difference, which was about £300, she answered, that stock would rise, and rather than there should be such a loss, she would take the £500 South-Sea stock upon herself, and that therefore he, the respondent Francis, did not further trouble himself about the stock, or any profit or loss attending the same: but to this it was answered, that this part of the said respondent's answer, was not supported by any proof; and that in a letter sent by him to his brother, the appellant John, dated four o'clock on Tuesday, which by the bill was charged to be the 13th of September, the day before the opening of the South-Sea transfer books, he wrote thus: " I am afraid I cannot be in town to-morrow, so this serves to advise you, that whatso- " ever you and Mr. Wyatt agree upon, I will acquiesce to it: I see that stock to-day is

“ £580, and probably may be lower as yet, however that doth not frighten me, if you
 “ agree that it should be sold when it comes up to the price again, ’tis equal to me, I
 “ will by no means that you should be a sufferer, provided the decree be not as Mr.
 “ Hill told us : I am ready to indemnify you, in whatsoever manner you and Mr. Wyatt
 “ shall agree on, and will be in town on Thursday to confirm it.” And that the
 respondent Francis, by another letter to his said brother, dated from Richmond, on
 Tuesday, which was the 20th September, the day of giving the bonds, wrote thus :
 “ I being not very well have excused myself from being in town this day, my
 “ mother goes, and I hope may make matters easy. I beg that at your meeting Mr.
 “ Wyatt to-day, you would mention the money I am to have out of the £900,
 “ (meaning the surplus of the Bank stock, beyond what was sufficient to pay for the
 “ South-Sea stock,) that he may agree to the payment of it, and also agree to the
 “ settling the account with Mr. Hill.” That these letters plainly contradicted the
 answer, and shewed that the respondent Francis always looked upon himself to be con-
 cerned in the South-Sea stock, at least until and upon the said 20th of September ; and
 it appeared, that the stock was then fallen to about £370 per cent. which was a demon-
 stration that Martha Emelie, the mother, would not then have taken it at £680 per
 cent. on her own account : that therefore the respondent Francis ought, in all events,
 to make good the loss by the South-Sea stock : whereas by the decree, he was to have
 the benefit of the high price at which the Bank stock was sold, though the money
 thereby arising was paid for the South-Sea stock which he bought ; and subsequently
 the loss was turned on [265] the mother’s estate, to the great prejudice of her other six
 children ; who had by her will, only an equal fortune with what was thereby given to
 the respondent Francis : and even his legacy fell much short of this loss, as was evident
 from his giving up the legacy rather than pay the loss : for in fact, his legacy would
 not amount to more than £1350, whereas the loss or difference was above £3350. And
 therefore the appellants hoped, that the decree of the 1st of February 1723, would be
 reversed, and the former decree of the 3d of July 1722, affirmed ; with this addition,
 that all the dividends arising on the Bank stock since the sale, and which were thereby
 decreed to the respondent Francis, together with the future dividends thereof during
 his life, might go towards making good the loss, until the estate of the said Martha
 Emelie should be fully indemnified.

On the part of the respondents Francis Emelie and his wife, it was insisted (C.
 Wearg, H. Henley), that the respondent Francis could not, by his act or writing, subject
 the £4315, being trust-money, to any other uses or purposes than what were warranted
 by the marriage-articles, and the decree of the 11th of August 1720 ; and so he con-
 stantly, during all these transactions, declared both to the said Martha his mother, and
 the appellants. That the said sum of £4315 ought, pursuant to those articles and
 decree, to have been brought before the Master, and laid out in a purchase of lands, or
 on good government securities, or placed out at interest, with the Master’s approbation.
 That the same was lent by the respondent Sir John Elwill, to the said Martha Emelie
 and the appellant John, to the intent that it might not lie dead, but bring in a certain
 income for the subsistence of the parties entitled, until a proper purchase of lands could
 be had ; but not to be invested in South-Sea stock, which was then so precarious and
 fluctuating. That in case any profit had arisen from this South-Sea stock, the respon-
 dent Francis and his wife had not any right or claim whatsoever thereunto ; and
 consequently, in case of any loss, they ought not to make good the same : but Martha
 the mother, out of her parental kindness, and from an opinion that South-Sea stock
 would rise, did absolutely take the said stock upon herself.

And on the part of the other respondent Sir John Elwill, it was contended (T.
 Lutwyche, N. Fazakerley), that if the appellants were to purchase only £2000 Bank
 stock, and replace it to the same uses as the £2000 Bank stock formerly sold was subject
 to, the parties interested in the trust, would be deprived of a very considerable part of
 the said £4315 : whereas, the whole being the produce of the Bank stock sold, ought
 to be laid out in lands, pursuant to the marriage-articles and the first decree. That the
 former decree made in this cause, seemed to be founded on certain proceedings between
 the respondent Francis and his mother ; but the respondent, his wife, and the respon-
 dent Sir John Elwill, the trustee, were no way consenting, or even privy to such pro-
 ceedings ; and therefore she, and those who might hereafter be interested in the trust,
 ought not to be prejudiced, or their estate affected [266] therewith ; and the rather,

because the respondent Francis, her husband, had no estate or fortune of his own to settle upon his said wife, nor was anything settled but what arose out of her own fortune. That by the former decree, the bonds and the judgments obtained thereon, were, upon replacing the £2000 Bank stock, to be of no effect: whereas there was no evidence, nor the least surmise of any fraud in the obtaining those bonds; on the contrary, the same were freely and voluntarily executed, for the absolute payment of the principal money and interest thereby secured, at the end of six months; and the executing those bonds by Martha Emelie and the appellant John, to the respondent Sir John Elwill, could be for no other reason but to shew, that they were to be answerable for the money and interest, and to prevent any such dispute as had now arisen: it was therefore hoped that the last decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed. (Jour. vol. 22. p. 388.)

CASE 10.—MARY DANSON, Widow,—*Appellant*; NICHOLAS TROTT, and Others,—*Respondents* [27th March 1729].

[A. is a trustee for B. as to an estate, and lays out money in relation thereto, after which B. the *cestui que* trust, assigns his interest to C.—A. brought a bill against C. to be reimbursed, and C. brought a cross bill for a conveyance of the estate. Lord Chancellor Macclesfield held that C. should have no conveyance until A. was paid all the money expended by him about the premises. But this decree was reversed in the House of Lords, there being no contract between A. and C. relative to the money so expended; and the credit being given by A. to B. personally.]

[This case arose from some schemes as to settling the province of Carolina, and depends upon many minute circumstances.]

1 Wms. 780. Viner, vol. 21. p. 521. ca. 13. Reported by the name of Trott v. Dawson. [See Lewin on *Trusts*, 8th ed., 639 n. (c).]

King Charles II. by several letters patent of the 24th of March, in the 15th year of his reign, and the 30th of June, in the 17th year of his reign, granted and confirmed the province of Carolina in America, with several powers and privileges, to Edward Earl of Clarendon, George Duke of Albemarle, William Earl of Craven, John Lord Berkely, Anthony Lord Ashley, Sir George Carteret, knt. afterwards Lord Carteret, Sir William Berkeley, knt. and Sir John Colleton, bart. and their heirs. Soon after which the patentees, by several deeds, agreed to hold the same as tenants in common.

[267] Sir William Berkeley died in 1682, having first by will devised his 8th part of the said province, to Dame Frances his wife in fee: who having afterwards married Philip Ludwell, esq.; they agreed to sell the same to Christopher, then Duke of Albemarle, the then Lord Carteret, the Earl of Craven, and Sir Peter Colleton, four of the then Lords proprietors, for £300; who made use of the name of Thomas Amy, citizen and grocer of London, as their trustee in such purchase: and accordingly, by indentures dated the 10th and 11th of April 1684, Ludwell and his wife, in consideration of £300 really paid by the *cestui que* trusts, though mentioned in the release to be paid by Amy, conveyed the said proprietorship to Amy in fee.

The equitable estate of the Duke of Albemarle, Earl of Craven, Lord Carteret, and Sir Peter Colleton, becoming vested in John Lord Granville, William Lord Craven, John Lord Carteret, and Sir John Colleton; they, by indentures of the 29th and 30th of June 1705, reciting the conveyance to Amy, and his being only a trustee as aforesaid, in consideration of £100 a-piece paid to them by John Archdale, esq. the appellant's father, conveyed the same eighth part to the said John Archdale and his heirs.

The appellant soon afterwards married John Danson; and thereupon, Archdale by indentures dated the 21st and 22d of October 1708, in consideration of £200 paid him by Danson, and of love and affection to the appellant, conveyed the said eighth part to Danson and the appellant, and their heirs; and Danson was put into possession accordingly.

On the death of Amy, the legal estate in the said eighth part descended to the respondents Ann Trott and Elizabeth Moor, as his daughters and coheirs; whereupon Trott and his wife and Elizabeth Moor, set up a title thereto in their own right, and exhibited a bill in Chancery against the appellant and her then husband, to be put into possession and have an account of the profits; but they afterwards struck Elizabeth Moor out from being a plaintiff.

To this bill Danson and the appellant answered, insisting on their title, and that the £300 purchase money mentioned in the deeds to Amy, was really paid by the Duke of Albemarle, Earl of Craven, Lord Carteret, and Sir Peter Colleton; which, and also the said trust, Amy had acknowledged both by a letter dated the 28th of August 1700, and by an answer put in to a bill in Chancery exhibited against him and others, by the Lord Carteret when an infant.

Afterwards Danson and the appellant exhibited a cross bill against the said Trott and his wife and Elizabeth Moor, praying, that they might convey the legal estate in the said eighth part to Danson and the appellant: to which bill the respondents answered, and denied their knowing that the £300 purchase money was paid by the Duke of Albemarle, Earl of Craven, Lord Carteret and Sir Peter Colleton; and, pretending they knew [268] of no declaration of trust signed by Amy, insisted on the statute of frauds; and that Amy had, for about eighteen years, spent much of his time in the service of the colony and board of proprietors, for which he had received no acknowledgment. And Elizabeth Moor said, that she and her late husband had assigned and released her interest to Trott and his wife, and her issue, and therefore disclaimed all right to such proprietorship.

Both causes being at issue, and witnesses examined, the same were on the 7th of November 1721, heard before the Lord Chancellor Macclesfield; who was pleased to declare, that he saw no cause to relieve the respondents Trott and his wife on their bill, and therefore dismissed the same: but in the cross cause, decreed it should be referred to the Master to see what expence the said Amy was at, and what he deserved for his trouble, about the trust, which Danson and the appellant should pay to Trott and his wife, as the Master should appoint; and they were thereupon to convey the legal estate to Danson and the appellant at their charge; but as to costs, his Lordship did not think fit to give any on either side.—This decree was only unless cause as to Moor, who made default; but was afterwards made absolute against her, by an order of the 13th of February following.

On the 9th of June 1723, the Master made his report, the appellant's husband being then dead, and first mentioning the conveyances to Amy, and that the same were only in trust as aforesaid; certified, that the Lords Proprietors of Carolina, by warrant under their hands and seals, dated the 17th of October 1694, required John Archdale, esq. then Governor of that province, to order the Surveyor-general to admeasure out 12,000 acres of land for the said Amy, and to pass grants thereof to him and his heirs, in consideration of his good services; and that by a grant under the Great Seal of the province, dated the 22d of August 1697, produced by the respondents, the said Lords Proprietors, as a further consideration of the said Amy's services, created him a Landgrave of the said province, and granted him a barony of 48,000 acres, paying 1d. per ann. per acre, to commence from two years after his taking possession; and that by a copy of a further grant, dated the 29th of September 1697, produced also by the respondents, the said Lords Proprietors, by virtue of their original grants and fundamental constitutions, appointed the said Amy to be one of the eight hereditary Lords Proprietors, in the room of Seth Southwell, esq. who had purchased the Earl of Clarendon's share, and was dead without heirs or assigns who could claim the same. The Master also certified, that by an entry in the Lords Proprietors' books, proved before him, dated October 1697, the said grants were all mentioned to be made to Amy, in consideration of his good services to the said Lords Proprietors, and particularly for his faithful discharge of the trust reposed in him by four of them; and it was also thereby recited, that the said Amy had agreed to reconvey the trust when required, to William Thornburgh, esq. then guardian of Sir [269] John Colleton, who was directed forthwith to act in the said trust, as he did that day at the board, in the presence and with the concurrence of the said Amy, and continued so to act afterwards, both at the board and elsewhere.—The Master further certified, that the appellant's Solicitor had insisted, that the said several grants were a sufficient recompence for all the said Amy's

expence and trouble about the trust, till the 29th of September 1697; when Thornburgh, being deputed to act in such trust, took his place at the board; but that it did not appear to the Master, that the 48,000 and 12,000 acres were ever admeasured out to Amy, or that any actual grant of the said 12,000 acres was made, pursuant to the said warrant of the 17th October 1694, or that Amy had ever received any profits from the said grants, or any gratuity for his trouble and expence. And the Master also certified, that from the 11th of March 1684, to the 2d of April 1698, Amy constantly acted at the board as a Lord Proprietor, and from the 2d of April 1698, to the 21st of December 1699, he acted as a Lord Proprietor under the grant of the 29th of September 1697, as appeared by an instrument, dated the 11th of April 1698, made to John Blake, and signed William Thornburgh for Sir John Colleton, Thomas Amy, and William Thornburgh, from which time all the deeds and instruments were so signed. And also, that by a settlement duly proved, dated the 21st of March 1700, Amy as a portion with the said Ann his daughter, assigned his eighth part of the said proprietorship, (late Southwell's, and granted to him by the grant of the 29th of September 1697,) to the defendant Nicholas Trott in special tail, with remainder in fee; which testified the said Amy's acceptance of such grant.—As to Amy's expences and trouble in the trust, from the 11th of March 1684, to the 2d of April 1698, the Master certified, that Amy had been industrious in promoting the interest of the province, and procuring people to go thither, and meeting and treating them at the Carolina coffee-house and elsewhere, and might expend therein £50 a-year, and deserve for his trouble £80 a-year, in all £130 per ann.; which, for the time aforesaid, amounted to £1696 9s. and which sum, the Master conceived, ought to be borne in average amongst all the eight Lords Proprietors; because Amy acted not for the benefit of the appellant's share only, but for the whole province; and that £212 1s. 3d. being an eighth part of the said sum, he conceived reasonable to be allowed by the appellant, and therefore appointed the appellant to pay the same on the 20th of July then next, at the Roll's chapel; and thereupon appointed Trott and his wife to reconvey the legal estate in the said eighth part to the appellant, pursuant to the decree.

To this report, the respondents took three exceptions: I. For that the Master had not carried on the £130 a-year to the 21st of September 1704, when Amy died. II. That the Master had ordered the appellant to pay only an eighth part of the said sum, [270] and not the whole. And III. That the Master had certified several matters no wise relating to the inquiry directed.

The appellant also took two exceptions to this report: I. For that £50 per ann. for Amy's expences, and £80 per ann. for his trouble was too great an allowance; the proofs in the cause which related thereto being very loose, and not sufficient to warrant the same. And II. For that the Master had made no deduction for the grants and allowances, mentioned in the report to have been made to Amy; although it appeared they were made in consideration of his trouble and expence relating to the trust.

These exceptions on both sides were argued on the 15th of January 1723, before the same Lord Chancellor, who was pleased to over-rule both the appellant's exceptions; but allowed the respondents' first and second exceptions, by ordering the appellant to pay the whole £130 per ann. down to Amy's death, amounting to £2538 11s. to the respondents Trott and his wife, and on payment thereof, they were to convey over to the appellant, at her charge what had been granted to the said Thomas Amy by the said Lords Proprietors.

The appellant being prosecuted to a sequestration on this order, it was, on the 29th of October 1724, ordered, that the said two proprietorships should be sold before the Master, to answer the £2538 11s.; and that a commission of rebellion should be renewed against the appellant, until she should perform the decree.

And on the 16th of February following, the Master reported the respondent Hugh Watson the best purchaser of both the said proprietorships at £900, and the same were conveyed to him accordingly. But Watson was only a trustee and agent in such purchase for the respondents Henry Bertie and James Bertie; and afterwards conveyed one of the said proprietorships to the said James Bertie and his heirs, and the other of them to the said Henry Bertie, in like manner.

The appellant after being confined in prison near two years, for not paying the money, appealed both from the decree and the order upon arguing the exceptions, and also from the several subsequent proceedings: and as to the decree, it was, on her

behalf, contended, (C. Talbot, J. Finch) that the respondents Trott and his wife were not ordered to pay the appellant's costs, on the dismissal of the original bill; notwithstanding they had, against all conscience and justice, set up a right in themselves to the proprietorship, and endeavoured to defeat the appellant and her late husband of their just title thereto, and put them to great charges in defending it against their unjust pretensions. That the appellant and her late husband were decreed to pay Trott and his wife, what the Master should find Amy deserved for his trouble, and what he had expended in the trust: whereas it does not appear in either of the causes, nor did Trott and his wife pretend, that they were either executors or administrators of Amy, and consequently they were not entitled to any satisfaction on that account, if any ought to [271] be allowed; and even should the appellant pay them what she was ordered to do, it would be no bar to any demand which might be made by Amy's proper representatives on the same account. But if Trott and his wife had been Amy's representatives, and entitled to any satisfaction for his expences and trouble, yet the appellant and her husband ought not personally to have been decreed to pay the same; because they never entered into any personal contract with Amy for that purpose, nor had they any interest in the proprietorship till after his death. And as Trott's bill was dismissed, it was apprehended that such a decree could not properly be made against the appellant and her husband upon their own bill. That the respondents Trott and his wife were decreed to convey the said eighth part to the appellant's late husband only; whereas it ought to have been to him and the appellant and their heirs, pursuant to the settlement made by Archdale. And that the respondent Elizabeth Moor was not decreed to join in such conveyance, although she was one of Amy's coheirs; for as to her conveyance to Trott and his wife, it appeared of their own shewing to have been by lease and release only, without a fine, so that the legal estate of one moiety still remained in her. As to the order made on arguing the exceptions, it was insisted, that if the respondents Trott and his wife were entitled to have an allowance for Amy's trouble and expences beyond the grants made to him by the Lords Proprietors, yet they ought not to have had so great an allowance as £130 per ann. the proofs in respect of such trouble and expences being very loose, and several of the witnesses examined thereto being persons of mean condition, and incompetent judges of what Amy might either expend or deserve. That no deduction or allowance was made to the appellant for the value of the several grants to Amy, in consideration of his trouble in the trust; although it appeared by the Master's report, that he accepted the grant of Mr. Southwell's proprietorship, and thought the same of so great value, as to settle it upon the respondents Trott and his wife, as a portion for her. That the £130 a-year was allowed to the death of Amy, whereas it appeared by the books of the Lords Proprietors, that after Amy had obtained a grant of Mr. Southwell's proprietorship, viz. from the 2d of April 1698, Mr. Thornburgh acted in the trust, and Amy acted in his own right only. Lastly, that the appellant was ordered to pay the whole sum of £2538 11s. when it appeared by the Master's report, and so the fact was, that what Amy did was not only for the benefit of the appellant's eighth part, but for the joint advantage and common good of the whole province: And therefore it was conceived, that if the appellant was to pay any thing for Amy's trouble and expences, it ought to be no more than an eighth part of what was reasonable to be allowed on that account.

On the part of the respondents Trott and his wife, and Elizabeth Moor, it was said (T. Lutwyche, C. Ford), that it appeared both by the proofs in the cause, and the Master's report, that neither Amy or these [272] respondents ever had any benefit or advantage from the proprietors' warrant to Amy for 12,000 acres of land, or the Landgraveship of 48,000 acres, those lands never having been admeasured out, but still remained in the Lords Proprietors' power of disposal; neither did they make any benefit or advantage of the escheated proprietorship which was Seth Southwell's, granted to Amy by the proprietors; for the respondent Trott, to whom Amy conveyed it as a portion with his daughter, was kept out of the possession and profits of the same by the proprietors ever since the grant thereof to Trott. Besides, it did not appear that this proprietorship was granted Amy in consideration or recompence of any services done by him; but only to keep up the number of eight proprietors according to their own constitutions, and as such Amy accepted it. That the appellant submitted to the decree by her not shewing any cause why the same should not be revived against her, when she was served with a *subpoena scire facias* for that purpose, upon the death of her husband; but on the contrary,

examined witnesses before the Master to whom the cause was referred. That the appellant not paying the respondents the money reported due, the proprietorship which was Southwell's and granted to Amy, as well as that claimed by the appellant, were twice advertised in the Gazette to be sold, and were accordingly sold before the Master, and had since been conveyed to the purchaser; and though this transaction took up near a year, yet the appellant never complained of the decree during all that time, but suffered the purchase to be completed, and ought therefore to be bound by it.

On behalf of the respondent James Bertie, it was contended (D. Davenport), that he was no party to the decree or proceedings appealed from, and consequently could have no opportunity of asserting his right to the proprietorship, which for a valuable consideration he had purchased from the heirs at law of Southwell: and therefore it was conceived, that his title could not be affected by the dispute between the appellant and the respondents Trott and his wife, nor ought he to be in any manner drawn into such dispute; and the rather, as the appellant did not by her appeal pretend to be any way prejudiced by the sale of the said proprietorship to this respondent.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree and subsequent orders complained of, made in the case where the appellant was plaintiff, should be reversed: and it being offered on the part of the appellant, to pay the respondent Henry Bertie the money that he paid for the purchase of the proprietorship in question, together with interest for the same; it was further ORDERED, that the court of Chancery should cause an inquiry to be made what was the principal sum of such purchase money, and from the time of payment thereof to compute interest for the same; and on the appellant's paying what should be found due for such principal money and interest to the said Henry Bertie, it was further ORDERED and [273] ADJUDGED, that he should at the costs and charges of the appellant, convey the proprietorship in question to her and her heirs; and that the respondent Elizabeth Moor should likewise, by proper conveyances at the charges of the appellant, convey all her right to the said proprietorship to the appellant and her heirs. And, pursuant to the consent of the appellant's agent, signified at the bar, it was further ORDERED and ADJUDGED, that what the appellant should so pay to Mr. Bertie, should be repaid her by the respondent Ann Trott, out of the assets of Nicholas Trott her deceased husband; and if she should not admit assets, then an account was to be taken of assets. And as to the respondent James Bertie, it was ORDERED, that the appeal should be dismissed with £10 costs to be paid him by the appellant. (Jour. vol. 23. p. 380.)

CASE 11.—THOMAS ACHERLEY,—*Appellant*; ANN ACHERLEY, Widow,—*Respondent* [21st February 1732].

[Mews' Dig. xiv. 324, 431. See *Withers v. Withers*, 1752, Amb. 151.]

[C. lends money upon the mortgage of a copyhold estate, but being infirm and unable to travel, the surrender, etc. is taken in the name of D. her son-in-law, who executes a declaration of trust. C. afterwards purchases the equity of redemption, and the second surrender is, for the same reason, taken in the name of D. but no declaration of trust is made on occasion of this purchase. Held, that the heir of D. was a trustee of the estate for the heir of C. and that D. having expressly declared the trust as to the first surrender, there was no necessity for a new declaration of trust as to the equity of redemption; even under the statute of frauds.]

[Decree of the Court of Exchequer affirmed.]

Richard Acherley the respondent's husband, in consideration of a marriage to be had between them, and of £100 paid to him as part of the respondent's marriage-portion, and also of a settlement to be made by Arthur Manwaring the respondent's father, of a farm and lands in Nonnelly in the county of Salop, of the value of £40 per ann.; by indentures of lease and release, dated the 17th and 18th of July 1689, conveyed a farm

and lands in Wolverley in the said county of Salop, of £60 per ann. to the use of himself for life, with remainder to the respondent for life, for her jointure and in full satisfaction of dower. And by another settlement of the same date, the said Arthur Manwaring, in consideration of the marriage, conveyed the said farm and lands in Nonnelly to the use of Richard Acherley and the respondent, and to the survivor of them for life; remainder to the issue of that marriage, with remainder to Richard Acherley in fee.

The marriage took effect; and soon after Arthur Manwaring died, leaving Mary Manwaring, the respondent's mother, his [274] widow, who being left in good circumstances, was applied to by one William Vaughan to advance him £700 upon a mortgage of a copyhold estate in the manor of Loppington in the said county of Salop.

After the security was approved of, she agreed to lend the money; but being at that time aged and infirm, and the manor lying at a considerable distance from the place of her abode, so that she was unable to travel thither to take an admittance to the estate, and reposing a great confidence in Richard Acherley her son-in-law; she therefore entrusted him with the payment of the money, and agreed that he should take a surrender of the said copyhold estate to himself, but in trust for her.

Accordingly William Vaughan, at a court held on the 12th of December 1699, surrendered the said farm and lands in Loppington to Richard Acherley and his heirs, subject to redemption. And by deed poll, dated the 14th of the same month, Richard Acherley declared that the estate so surrendered was in trust for Mary Manwaring, and that the £700 was her proper money; and covenanted that he and his heirs would surrender the said premises to the said Mary Manwaring and her heirs, and that all the interest of the said £700 should be to her use.

William Vaughan having surrendered the equity of redemption of this copyhold estate to Sarah his wife, she, some time after his death proposed to sell the same; and there being a considerable arrear of interest due on the said mortgage, an agreement was made by Richard Acherley with Sarah Vaughan, for the absolute purchase of such equity of redemption for £300, and Mrs. Manwaring still continuing infirm and unable to travel, Sarah Vaughan, at a court held on the 10th of May 1704, surrendered the said premises to the said Richard Acherley and his heirs. And upon payment of the purchase money he took a release in the words following, viz. "Know all men by these presents, that I Sarah Vaughan of Aston in the parish of Wem in the county of Salop, widow, do hereby acknowledge to have had and received of and from Richard Acherley of Shiffnall, in the said county of Salop, Gent. the full and just sum of £1000 of lawful English money, being the full consideration of the purchase of a certain copyhold estate, lying and being in Loppington in the said county of Salop, by me lately sold to the said Richard Acherley; of and from which said sum, and of and from all other debts, accounts, reckonings, sum and sums of money, dues and demands whatsoever, I do hereby for myself, my heirs, executors and administrators, fully, clearly and absolutely release, acquit and discharge the said Richard Acherley, his heirs, executors and administrators, and every of them for ever, by these presents. In witness whereof I have hereunto put my hand and seal this 17th day of June in the third year of the reign of our sovereign Lady Anne, by the grace of God, Queen of England, etc. Annoque Dom. 1704."

[275] On the 10th of August following Mary Manwaring died intestate, leaving the respondent her only child, who soon afterwards obtained letters of administration of her personal estate; by virtue whereof Richard Acherley her husband, in her right became well entitled to the real and personal estate of Mary Manwaring, which was of considerable value.

Richard Acherley and the respondent his wife having received a considerable accession of fortune by the death of Mrs. Manwaring, and having been married several years without having any children, the respondent was desirous, that in case she should have no issue by her husband, she might have the liberty of disposing of £1000 at her death, to which he consented; and accordingly by an indenture dated the 20th of February 1704, reciting this agreement, and the circumstances under which it was made, Richard Acherley and the respondent agreed to levy a fine of the said farm in Nonnelly, to the use of the respondent for life; remainder to trustees for 200 years from the death of the survivor of them, in trust to raise any sum not exceeding £1000, and pay the same pursuant to the directions of the respondent by her will or deed; with remainder to Richard Acherley in fee.

In August 1723 Richard Acherley died intestate and without issue, leaving the appellant his brother and heir, and the respondent his widow ; whereupon administration of his personal estate was granted to her.

The respondent being entitled to the copyhold estate at Loppington as heir to Mrs. Manwaring her mother, the same having been, as she conceived, purchased in trust for her by Richard Acherley, she, upon the death of her husband, entered into possession of it : but the appellant having the legal title by descent from his brother, though in trust for the respondent, thought fit, in Trinity term 1728, to bring an ejectment against the respondent's tenant to recover the possession. Whereupon in Michaelmas term following the respondent exhibited her bill in the Court of Exchequer against the appellant ; insisting upon the surrender to Richard Acherley in December 1699, and the deed poll declaring the trust thereof, and also the surrender in May 1704, and that both those surrenders were made in trust for Mrs. Manwaring her mother, and that she being her heir at law, was entitled to the estate ; and therefore prayed an injunction to stay the appellant's proceedings at law, and to be quieted in the possession.

The appellant, by his answer, admitted the surrenders and the declaration of trust, but insisted, that previous to the indenture of the 20th of February 1704, there was an agreement between Richard Acherley and the respondent, that he should enjoy the said copyhold premises and the £700 secured to Mary Manwaring, discharged of all trust and claim whatsoever of the respondent, in consideration of his agreeing to give her power to dispose of the £1000 : and that, in pursuance of such agreement, the said indenture was executed ; he insisted also on a custom of the manor, that if any person claiming any trust [276] in any copyhold inheritance in the said manor, did not claim the same in a copyhold court of the manor, and pray that such claim might be entered in one, two, or three years after the right accrued, the right or trust of such person was barred, by virtue of the custom which operated by way of non-claim. And further, that Richard Acherley had purchased the equity of redemption with his own money, and had never declared any trust thereof.

In Hilary term following, the appellant exhibited his cross bill against the respondent, insisting on the said agreement, and also upon the said custom, as to the forfeiture of trust estates within the said manor ; and prayed a discovery of the agreement, and such relief as might enable him to maintain his ejectment, to recover the possession of the said premises, and the rents and profits thereof received by the respondent.

After the appellant had answered the original bill, an injunction to stay his proceedings at law, which had been obtained by the respondent for want of an answer was continued, on hearing of counsel on both sides upon the merits.

The respondent soon afterwards put in her answer to the cross bill, and thereby denied, that there was any agreement between her and the said Richard Acherley her husband, that he should enjoy the copyhold premises and the £700, discharged of all trusts or claims of the respondent ; she also denied the pretended custom, and insisted that Richard Acherley purchased the equity of redemption with the money of Mrs. Manwaring, and that the purchase was made in trust for her, and that the release from Sarah Vaughan was a strong evidence of such trust.

On the 19th of February 1730, both causes were heard ; when the court were pleased to declare, that the appellant, as brother and heir of Richard Acherley, was a trustee in the second surrender for the respondent ; and therefore decreed, that he should surrender to the respondent the copyhold estate at her expence, and that a perpetual injunction should be awarded, to stay the appellant's proceedings at law, and that the appellant's cross bill should be dismissed with costs, both at law and in that court.

Soon after pronouncing this decree, the appellant applied by petition for a rehearing, and obtained an order for that purpose ; but he neglecting to draw up the order in a reasonable time, the respondent upon motion got it discharged.

The appellant therefore appealed from the decree *in toto* ; and on his behalf it was urged (J. Willes, W. Peere Williams), that by the statute of frauds and perjuries, it is expressly enacted, that all declarations or creations of trusts of lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. Now it was admitted by the respondent,

that no writing was ever signed by Richard Acherley her husband, to declare any [277] trust concerning the second surrender; and yet the court were pleased to declare, that the appellant was a trustee in the second surrender for the respondent: but it was apprehended, that in cases where there was no proof by writing, there was no ground for the court to declare a trust for any person to be good, which the statute had declared should be void. That the mortgage for £700 was considered, both in law and equity, as a personal estate, which should go to executors and administrators, and the right of redemption was to be considered as the surplus of the land which remained unsold, and as an inheritance that went to the heirs and assigns; this right Sarah Vaughan had, and might sell to any person, and having accordingly sold it to Richard Acherley, the second surrender from her to him was a fair sale, subject only to the mortgage for £700, and as he might have redeemed on payment of that sum, so might Mrs. Manwaring have foreclosed for the non-payment of it. That the intention of the parties was fully expressed in the agreement of the 20th of February 1704; viz. that Richard Acherley should on his part have and enjoy the £700 as Mr. Manwaring's personal estate; and that he, in consideration thereof, should give the respondent, his wife, a power of charging his farm in Nonnelly with £1000. But by the present decree, this intention was wholly frustrated, for Mrs. Manwaring had no personal estate besides the £700, and therefore, if Richard and his heirs were not to have the mortgaged estate, he had no consideration for the £1000 charged on his farm in Nonnelly; and yet the respondent insisted upon and claimed by virtue of that agreement. That declarations of trusts as to lands, are questions of fact, properly triable by a jury at common law; and the appellant accordingly had, by his counsel, prayed an issue at law to try the question, Whether Richard Acherley did ever declare any trust concerning the second surrender, or any trust at all, except for the £700, but this issue was denied, and a perpetual injunction awarded to prevent all trials. It was therefore prayed, that the decree in the original cause might be reversed, and the bill dismissed; and that the decree of dismissal in the cross cause, might also be reversed; and that the respondent might be decreed to account for the rents and profits from her husband's death, and to deliver up the writings to the appellant, and to pay him his costs in both cases.

On the other side (P. Yorke, R. Wilbraham), it was said to be admitted, that Richard Acherley was a trustee for Mrs. Manwaring as to the mortgage made by the first surrender, he having expressly declared the same by his deed poll; and as that surrender was in fee, and declared to be in trust for Mrs. Manwaring and her heirs, there was no occasion for a new declaration of trust upon the surrender of the equity of redemption; and she, very probably, entrusted Richard Acherley in this purchase, by reason of the confidence she reposed in him as being her son-in-law, and of her inability to travel to take an admittance in person. That by the release [278] which was taken by Richard Acherley, upon the surrender of the equity of redemption, it appeared, that the consideration of the mortgage and purchase of the equity were consolidated together, which was an implicit acknowledgment that both came from the same hand; and as the consideration of the mortgage was indisputably the money of Mrs. Manwaring, there was the strongest presumption imaginable to suppose, that the consideration of the equity of redemption was likewise her money; there being no pretence that a distinct sum of £1000 was paid for the purchase in 1704. That there was not the least colour of evidence from the recitals in the deed of February 1704, or from the proofs in the cause, that the power given to the respondent of charging £1000 was in lieu of her pretensions to the copyhold estate, or to discharge it from the trust of the mortgage; but it was only intended by Richard to gratify the request of his wife, in whose right he had just before received a considerable accession of fortune, by giving her a power, in case she had no issue, to dispose of some part of it as she thought proper: as therefore the appellant had no pretence of title to the copyhold premises, at least till the mortgage was discharged, it was conceived to be a notorious violation of the rules of equity, for him to take advantage of his legal title as trustee, and make use of it against his *cestui que* trust, to turn her out of possession by ejectment, and thereby put her under the absolute necessity of exhibiting a bill in equity to protect her possession by an injunction. But further, the appellant did not by his cross bill, set up a title to the equity of redemption only of this copyhold estate, and pray to be admitted to redeem; but he set up an absolute title to the

whole inheritance, upon an imaginary agreement and custom, which had no manner of foundation either in law or in fact. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed. (Jour. vol. 24. p. 191.)

[279] CASE 12.—DENNIS DELANE, *Appellant*; DENNIS DELANE, and Others,—*Respondents* [24th March 1736].

[Mews' Dig. xiv. 428.]

[A. purchases an estate in the name of B. and suffers him to execute a lease thereof, and gives receipts for the rents in the name of B. but no declaration of trust was ever executed by B. After both their deaths, the heir at law of A. insists that B. was only a trustee for A. and therefore demands a conveyance and an account of rents and profits, and files a bill for that purpose. Bill dismissed with costs.]

[This case appears to be very incompletely and confusedly stated.]

Dennis Delane, deceased, having been several years married, without any issue, came to a resolution of settling his whole estate, both real and personal, upon the appellant, the second son of his eldest brother, Solomon Delane, clerk; who was accordingly taken under his care, and maintained and educated, and in all respects treated and considered by him as his own son, during the remaining part of his life.

In the year 1707, the said Dennis Delane contracted for the absolute purchase of the inheritance of the lands of Killreagh, Tullin Keelty, Lissensykey, and Killtristan, situate in the county of Roscommon, from John Ballingbrook, clerk, and Mr. John Massey, and actually paid down the sum of £623 for the purchase thereof; but as there were some reasons why it might not be proper that his own name should appear in the transaction, and more particularly from an apprehension that the sum laid out upon this occasion might be supposed to be part of the money then in his hands belonging to the Bishop of Elphin, or other persons, whom he served as steward and agent, in the receipt and collection of their rents, as well as in the management of their other affairs; the said Dennis Delane chose the conveyances should be made to George Delane, a younger brother of his; and accordingly, at his instance, Mr. Ballingbrook and Mr. Massey did, for the aforesaid consideration, grant and convey all and singular the premises unto the said George Delane, his heirs and assigns for ever.

Immediately after this purchase, the said Dennis Delane entered upon the premises, and received the rents, issues and profits thereof to his own use so long as he lived, and was reputed by every body the owner and proprietor thereof; and frequently declared his intentions of settling, and he did accordingly settle the same as a provision for the appellant.

In the year 1712, Dennis Delane died suddenly, when the appellant was a minor, and at a great distance, being then a student in the university of Dublin. Whereupon the said George Delane having had early notice of his death, went immediately to the house of the said Dennis in the country, and got into [280] his possession several of his deeds, papers, and writings; among which there was great reason to presume there was some settlement or will in favour of the appellant, and also some declaration of trust executed by the said George, declaring such conveyances, though in his name, to be in trust for the said Dennis and his heirs.

George Delane having thus possessed himself of the deeds of lease and release, whereby the said premises were conveyed to him (but in trust as aforesaid) he then, and not before, set up a pretence, that the conveyance had been originally executed for his own use and benefit; and that he, with his own money, had paid the consideration thereof; and under this colour, he immediately entered upon the lands in question, and

not only continued in possession thereof during his life, but sometime before his death, which happened in the year 1720, took upon him by his will, to charge the same with divers legacies to and for the benefit of his younger children, the respondents; and with an annuity of £20 to his wife, the respondent Joan, for her life; and subject to the said incumbrances, devised the same to the respondent Dennis for life; with several remainders to the rest of the respondents.

The appellant's father, Solomon, who was the eldest brother and heir at law of the said Dennis Delane, and, as such, entitled to have inherited the trust and equitable interest which he had in the premises, in case no disposition appeared to have been thereof made by will or otherwise; did by deed poll, dated the 14th of December 1728, agreeable to his said brother's real intentions and repeated declarations on that head, convey and assign over the said premises to the appellant and his heirs, the better to enable him to sue for and recover the same, in case he should not be able to make out any other more immediate title under the said Dennis Delane, against those deriving under the said George Delane.

In Micheltmas term 1729, the appellant exhibited his bill in the court of Chancery of Ireland against the respondent Dennis, as heir at law of the said George Delane, and against the other respondents the wife and younger children of George, and against the respondents Patrick Delane and Owen Lloyd, who were trustees named in the will of George, and also against the said Solomon Delane, the appellant's father; praying, that they, as trustees, might be decreed to assign and convey over the legal estate in the premises, to the appellant and his heirs, and to deliver up possession, and account for the rents, issues, and profits.

The respondents, by their answers to this bill, admitted that George Delane never so much as once viewed the lands, or made any inquiry about the number of acres, measures, bounds, or value thereof; and that the purchase had been first proposed, and afterwards carried on by the said Dennis Delane, who continued to let, demise, and receive the rents, issues, and profits of the premises; but they insisted nevertheless, that the said purchase [281] had been so transacted and carried on for the use and behoof of the said George Delane; but, supposing it had not, yet that any trust which might have been intended for the said Dennis Delane not appearing by any declaration thereof in writing, the same was to be considered as null and void by the statute made in Ireland, for preventing frauds and perjuries, in the 7th year of King William III. The respondent Joan, however, by her answer acknowledged, that one moiety of the sum so paid as aforesaid, was the proper money of Dennis; and not of her husband.

The cause being at issue, and witnesses examined, came on to be heard before the Lord Chancellor of Ireland, on the 16th, 17th, and 18th of December 1731; and to be further heard, on the 28th of February following; when his Lordship was pleased to order and decree, that the appellant's bill should be dismissed with costs.

After four years acquiescence under this decree, the appellant thought proper to appeal from it; and on his behalf it was said (N. Fazakerley, W. Hamilton), to appear in proof, that the agreement for the purchase was made by Dennis; that George was not privy to it; that the purchase money was paid to the vendor by Dennis; that he borrowed £150 of a gentleman to complete the sum, and afterwards repaid it; that he continued in possession of the premises during his life, and received the rents and profits thereof to his own use: And there was no proof that George paid any part of the purchase money, nor was then in circumstances to do so. That all these circumstances were apprehended to be sufficient evidence to establish a resulting trust for Dennis; and the greater weight ought to be given to the appellant's evidence, in regard all the deeds and writings of Dennis his uncle, were seized and carried away by George, so that the appellant was deprived of making proof of any express declaration of trust. And if these circumstances were sufficient to establish a resulting trust, there was no occasion for a declaration of the trust in writing; because trusts arising, or resulting by implication, or construction of law, are saved out of the statute of frauds and perjuries.

On the other side it was insisted, (D. Ryder, J. Browne), that the estate in question was not only conveyed to George Delane and his heirs, but he also acted as the owner thereof; the lease of it being not only executed by him, but attested by Dennis as a witness; and who, in his receipts for the rents, expressed the same to be received for

the use of George: And considering that George survived his brother Dennis many years, and that the appellant and his father Solomon acquiesced under the right of George and the respondents his devisees, from the death of Dennis in 1712, to the year 1729, when the appellant filed his bill, being near 17 years; it was hoped, that the pretence of a trust set up at such a distance of time, and so long after the death of all the parties between whom the matters were transacted, did not deserve the least encouragement. That the statute of frauds was a good and effectual bar [282] to the relief sought by the appellant's bill; and if in cases of this nature, parol evidence should be admitted to establish a trust of lands, it would again introduce those great and dangerous mischiefs, for the prevention whereof that law was made. That Solomon, the heir at law of Dennis, and father of the appellant, and under whose conveyance the appellant claimed, was never in possession of any part of the premises; and the conveyance of a pretended title, by a person who has never been in possession, is not only disallowed by the common law, but is also prohibited by the statute; and therefore ought not to receive any countenance from a court of equity.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed: And it was further ORDERED, that the appellant should pay to the respondents, £100 for their costs, in respect of the said appeal. (Jour. vol. 25. p. 59.)

CASE 13. —GEORGE MACKENZIE,—*Appellant*; MARQUIS of POWIS, and Another,
—*Respondents* [1st March 1737].

[Where property is deposited on the undertaking of three persons, jointly and severally to return the same, and two of them are abroad out of the jurisdiction of the Courts, the one remaining shall be answerable on the undertaking to the amount of the full damages, sustained by the depositor.]

[In what case a court of equity will restrain a man from pleading the statute of limitations to an action at law.]

[A Court of Equity will not ascertain the amount of damages, for a breach of contract in not returning property deposited in trust, without the verdict of a jury.]

The appellant in the year 1721 residing at Paris, and being possessed of one hundred old actions, or shares in the India Company there, which cost him 10,000 livres each; and the French government soon after calling in all such old actions, an account was taken to whom they belonged, and what had been paid for them respectively, to the end that satisfaction might be made to the proprietors: And the government there thought fit to give other actions, called liquidated actions, in lieu thereof; by the numbers of which liquidated actions it appeared who were the proprietors of the old actions and what they cost. And accordingly, among others, an account was taken of the appellant's one hundred old actions so called in, and what they really cost; and thirty liquidated actions, from No. 17870 to No. 17899, both inclusive, were issued and delivered to the appellant in lieu of them.

[283] In the month of July 1723 the respondent, the Marquis of Powis, Anne Countess of Carington his sister, and the Lady Mary Herbert his daughter, being in Paris, and having a prospect of obtaining some considerable advantage from the government of France by having these thirty liquidated actions in their hands, applied to the appellant to deposit the same with them: and the appellant having a great opinion of the respondent the Marquis, and relying singly upon his credit, was prevailed upon, after much intreaty, to entrust his Lordship and the said Ladies with the liquidated actions for fifteen days; at the expiration whereof they were to be restored to the appellant.

Accordingly the appellant on the 16th of July 1723, N. S. delivered the said thirty liquidated actions to the respondent the Marquis and the Ladies; who thereupon gave a receipt for the same in the French language to Captain Robert Sempill, who was employed by the appellant to deposit these actions in their hands, and who took the said

receipt in his own name, barely as a trustee for the appellant : which receipt was in the following words :

*Nous soussignés my Lord Duc de Powis, Madame la Comtesse de Carington, et Mademoiselle de Powis, reconnaissons avoir reçu de Monsieur Robert de Sempill, Capitaine dans le régiment de Dillon, le nombre de trente actions dont le dividendes des six derniers mois de l'année 1722, sont attachés depuis No. 17870, jusqu'à No. 17899 ; que nous nous obligeons de garder entre nos mains nous étant conjoints comme un dépôt les quelles nos actions ces No. 17870, 17899, cy dessus nous nous engageons solidairement * de rendre au dit Sieur Sempill, ou à son ordre le vingt un trente un du present mois de Juillet, sans autre jour de grace, et pour l'exécution du present engagement nous elisons nos domicils à l'hôtel de Bruxelles rue St. Benoist, Fausbourg St. Germain. Fait à Paris le seize Juillet mille sept cent vingt trois. — Upon the back of which receipt was an indorsement in the words following ; viz. " A Paris 16 Juillet 1723. Je cede, a Monsieur Mackenzie et a son ordre, les trente actions cy dedans, valeur recue dudit Sieur*

ROBERT SEMPILL."

This receipt being translated into English is to the effect following : " We the under-written, my Lord Duke of Powis, Madam the Countess of Carington, and Mademoiselle of Powis, do acknowledge us to have received of Mr. Robert Sempill, Captain in the regiment of Dillon, thirty actions ; on which the dividends for the last six months of the year 1722 [284] are due, from No. 17870 to 17899, both inclusive ; which we oblige ourselves to keep in our hands, being entrusted with us as a deposit : Which same actions, from No. 17870 to 17899, as above, we jointly and severally engage ourselves to restore to the said Mr. Sempill, or his order, the twenty-first, thirty-first of this present month of July, without any other day of grace : And for the execution of this present engagement, we have chosen our domicile at the hotel of Brussels, the street of St. Bennet, in the suburbs of St. Germain. Done at Paris the sixteenth of July 1723." And the indorsement is, in English, to the effect following : " Paris, 16th July 1723. I assign to Mr. Mackenzie and his order, the within thirty actions, for value received of that Gentleman,

ROBERT SEMPILL."

The time of restitution elapsing, the appellant applied to these noble persons to have back his actions ; but, to his great surprise, was put off with repeated promises and delays : and after many fruitless solicitations, was forced, in December 1723, to commence a suit against them for relief, in the name of the said Mr. Sempill his trustee, in one of the courts of justice in Paris ; and in the month of May 1724, he obtained a decree against them for 150,000 French livres, principal money, amounting to £6900 sterling, in case they did not restore the said numerical actions forthwith ; and also for 15,000 livres, amounting to £690 sterling for damages, and for 1250 livres, amounting to £58 sterling for costs.

By this decree the defendants had their election either to restore the identical actions to the appellant, or to pay him 150,000 livres as the value thereof ; but being determined to do neither, and to elude the force of the decree, they soon after withdrew from France, the Ladies into Spain, and the respondent the Marquis into England ; without making the appellant any satisfaction.

The appellant being thus defeated of the benefit of his decree, and the actions themselves being of great value ; and the said defendants, or some person by their order and for their use, continuing to receive the annual dividends and produce of the actions, which every year amounted to a considerable sum : the appellant was obliged to follow the respondent the Marquis for redress into England : and accordingly, in Michaelmas term 1733, exhibited his bill in the court of Exchequer against the Marquis alone (the Ladies continuing in Spain, and not being amenable by the process of any court of

* In the margin of the appellant's printed case is the following note, " The meaning of this well known term in the law of France is explained in Domat's Civil Law in its natural order ; and in the translation thereof by Dr. Strahan, book iii. title 3, in the chapter concerning solidity among debtors ; and in the following dictionaries of arts and sciences of the greatest authority in France, viz. *Dictionnaire de l'Académie Francoise ; Dictionnaire de Trevoux ; Dictionnaire de Furetiere*, vide the word *Solidairement*. By which authorities it appears that that word means jointly and severally, or, each for the whole."

justice in England); praying that the Marquis might come to an account with him for the dividends of the said actions, and might restore the actions themselves to the appellant, or make him an adequate satisfaction for the same.

The Marquis, in Easter term 1734, put in his demurrer to part, and his answer to the residue of this bill: the substance of which demurrer was, For that the said note or receipt was given at Paris in France, and the said contract to be performed there by him, jointly with the said Ladies Carington and Herbert; and that therefore, the court ought not to take cognizance thereof, [285] especially as the plaintiff had obtained a decree in Paris against him the said Marquis and the said Ladies, for 150,000 French livres, amounting to £6900 sterling, and for other great sums for costs and damages; which decree was still in force and unreversed; and if the plaintiff should proceed in the said court of Exchequer, he might receive a double satisfaction: and also for that in case the said contract was cognizable in England, the same was properly triable at law.

By his answer he admitted that the government in France did call in all the old actions or shares in the said company, and that actions called liquidated actions were given in lieu of such old actions; believed, that by such liquidated actions the government there might know who were the proprietors of the old actions; and that he had heard that the plaintiff, in the name of Mr. Sempill, commenced such suit in one of the courts of justice in Paris, and procured such sentence or decree as aforesaid; which he believed was still in force against him the said Marquis and the said Ladies.

The demurrer coming on to be argued before the Barons on the 22d of June 1734, they were pleased to over-rule the same.

And the answer, upon exceptions taken, being reported insufficient, the respondent the Marquis, put in a further answer: by which he admitted, that some time in 1723, he signed a paper, written in French, relating to a deposit of actions made by Mr. Sempill; but insisted, that as the said contract was to be performed by him jointly with the said ladies at Paris, and not elsewhere, the plaintiff ought rather to proceed upon the said decree made in Paris, than in the said court of Exchequer; which ought not to decree a specific performance of the said contract, by obliging him to restore the said thirty actions, the same having been deposited with him jointly with the said ladies, and therefore he ought not to be solely charged therewith; and he the rather hoped the court would not take cognizance thereof, as well for that the same was properly triable and determinable at law, as for that he did not promise either the plaintiff, or Mr. Sempill, to restore the said actions, or any thing in lieu thereof, at any time within six years next before the exhibiting the plaintiff's bill.

This answer being also judged insufficient: the Marquis, by his third answer, admitted, that the plaintiff was prevailed on about the month of July 1723, to entrust the said ladies with the said actions, and did then deliver the same to them; but whether the plaintiff would not have been persuaded thereto but upon the credit of him the said Marquis, he knew not. He also admitted he signed a paper, wrote in French, relating to a deposit of actions; but whether to the effect in the bill mentioned, he could not set forth: He further admitted, that the ladies then were, and had for some years before been, at Seville in Spain: and that since his return into England, he had been often applied to on the plaintiff's behalf, by divers persons, for satisfaction of [286] the said actions, but could not at that distance of time, recollect what answer he gave them, nor whether he lately, or ever, acknowledged the justice of the plaintiff's demands, to the said persons; but admitted he did not know or remember that the plaintiff ever received any satisfaction from the ladies, or either of them, for his said actions.

To these answers the appellant replied, and publication being passed, the cause came on to be heard on the 6th of July 1737: when an exception being taken for the respondent the Marquis, that the representative of Mr. Sempill was not before the court as a party: the court, on debate of the matter, directed the cause to stand over, with liberty for the appellant to add parties.

Mr. Sempill having died at Paris intestate, and no administration having been sued out of his effects: administration thereof was granted, under the seal of the Prerogative Court of Canterbury, to the respondent Garden; to the end and intent only to attend, supply and substantiate the proceedings in this cause, or any other cause between the same parties, touching the premises. The appellant thereupon amended his bill, by

making the respondent Garden a party; who by his answer admitted, that the thirty actions in question were the property of the appellant, and that Mr. Sempill's name was used in the said writing, in trust only for the appellant.

On the 2d of December 1737, the cause came on again to be heard; when a like objection was taken by the Marquis's counsel, in point of form, for that the ladies who had subscribed, and were bound by the receipt together with the Marquis, were not brought as parties before the court: but it appearing, by his Lordship's answer, that those ladies were, and had for several years before been, in Spain, and consequently, were not amenable by the process of any court of justice in England; the court were of opinion that the proceedings were regular, without bringing the ladies before the court as parties. And therefore were pleased to decree, that the appellant should be at liberty to bring on action or actions at common law, against the respondent the Marquis, and the said ladies, or any or either of them, touching the matters demanded by the bill, as he should be advised: And that the respondent Garden should permit the appellant to make use of his name in such action or actions, or any other action or actions that he should think fit to bring, touching the said matters; he the appellant first giving sufficient security to the respondent Garden, to indemnify him from costs in that behalf: And that the appellant's bill should be retained for one year; and that the cause should be continued in the paper of causes, to be further heard after the determination of such suit or suits at common law, so as that the same should be determined within one year then next ensuing; when the court would (in case such trial should be had in the mean time) make such farther order therein, as should be just: And the consideration of costs was reserved till the further hearing of the cause.

[287] From this decree the appellant appealed: insisting (W. Hamilton, W. Murray), that his remedy lay properly in a court of equity, as it was the case of a deposit, which is a trust. That it was the case of an agreement, a specific performance whereof can only be decreed in a court of equity, and which in equity is considered as performed, at the time when it ought to have been performed. It was also the case of an account of dividends, and other annual and casual produce of thirty actions, or shares in the French East-India Company, for many years; which could not be so well taken at law as in a court of equity, where the respondent might be examined upon interrogatories, and obliged to produce all books and papers relating to such account. Besides, the appellant was altogether without remedy at law; the respondent being at liberty to plead the statute of limitations, even during the time the cause had depended in the court of Exchequer: whereas in equity, the statute of limitations is no bar in the case of an agreement, or in the case of any trust; and much less in the case of a deposit, the profits of which are annually received by the person with whom it is deposited. If the court had wanted the assistance of a jury to ascertain any fact, an issue might have been directed to which the appellant could have had no objection; but to send him to bring an action at law, when under the circumstances of his case no action would lie, was in effect denying him any relief at all; though the justice of his case was not denied by the respondent, who did not dispute the right which was incontestable; but contended in a court of equity, that this right should be without a remedy; and, for that purpose, rested his defence principally upon these two points; either, that the appellant ought to be barred from prosecuting any suit here, because he had obtained a decree for it in Paris, though he had never received any satisfaction in pursuance of that decree, nor could receive any, the respondent being come over to England with all his effects, and his daughter and sister withdrawn into Spain: Or, if the appellant's demand was cognizable here, notwithstanding the decree obtained in Paris, yet it was only triable at law; because at law the appellant could not now possibly maintain any action. It was therefore hoped that the decree would be rectified; and that the respondent the Marquis would be decreed to restore to the appellant the said numerical actions, and account with him for the dividends accrued thereon; or make him an adequate satisfaction in that behalf.

On the other side it was contended (J. Strange, N. Fazakerly) that the appellant's cause of suit was a mere legal demand, and that there was now no obstruction to his bringing an action at law, he having the liberty to use the name of Sempill's representative for that purpose; and therefore there was no necessity for a court of equity to interpose in this case. That the respondent ought not to be deprived of the benefit of a legal trial; and in case of an action being brought, he ought to be at liberty to plead

such matters, and make such defence as he should be advised, and as the law allowed. [288] That the note and the promise thereby made was a matter triable at law only; and in case the appellant was entitled to any satisfaction from the respondent alone, who never had the actions, the damages in respect thereof ought to be settled by a jury. It was therefore hoped that the decree would be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that this addition should be made to the decree, viz. ["and that in such action or actions to be brought at law, the respondent the said Marquis shall not be permitted to plead or insist on the "statute of limitations:"] And that in the close of the said decree touching the reservation of costs, should be left out ["is"] and instead thereof should be inserted ["and all further directions are"]. And it was further ORDERED and ADJUDGED, that the said decree, with the addition and variation above mentioned, should be affirmed.* (Jour. vol. 25. p. 177.)

CASE 14. SIR DARCY LEVER, -*Appellant*; JOHN ANDREWS, -*Respondent*
[4th March 1737].

[Mews' Dig. xiv. 429.]

[A. being in possession of lands for a long term of years, contracts for the purchase of the reversion and inheritance, but to prevent a merger of the term, takes the conveyance to B. absolutely, and without requiring any declaration of trust. The title deeds were all along in the custody of A. and those claiming under him; but a descendant of B. having by accident discovered that the conveyance was made absolutely to him, lays claim to the estate as his heir at law. Held, that under these circumstances B. was a trustee for A.]

[Decree of the Chancery Court of the County Palatine of Lancaster reversed.]

John Hunt of Manchester, being in his life-time seised of a messuage with the appurtenances in Manchester, situate in a certain street called the Market-Street Lane, and one barn with the appurtenances to the said messuage belonging, and three closes in Manchester, lying near and belonging to the said messuage called by the several names of the Great Meadow, the Brick Kiln Meadow, and the field at the back of the house; and afterwards divided into four closes, by the several names of the Great Brick [289] Kiln Meadow, the Little Brick Kiln Meadow, the Kiln Field, and the House Field, containing, by estimation, ten acres; did, by indenture dated the 26th of May 1612, made between the said John Hunt of the one part, and Robert Lever of Darcy-Lever in the county of Lancaster, clothier, of the other part; in consideration of £120 paid by the said Robert Lever, demise to him the said premises, for the term of 21 years from Michaelmas then next, under the yearly rent of 20s. And some time after making this lease, the said John Hunt did by deed demise the said premises to the said Robert Lever for the term of 100 years, to commence from Christmas 1632, under the yearly rent of 10s.

Robert Lever being thus possessed of the said premises, soon afterwards died; having first made his will, whereby he gave the premises to his son John Lever, the appellant's great grandfather, so long as the said leases should continue.

Soon after the death of Robert Lever, the said John Lever being entitled to the premises for the said term, purchased the reversion and inheritance thereof from the said John Hunt, or some person claiming under him; whereby the said reserved rent, as incident to the reversion, passed along with the inheritance: and accordingly, John

* A trial at law was accordingly had, and a verdict found in favour of the appellant for £5257 1s. 8d. And the cause being heard on the 21st of February 1738, upon the equity reserved, the Marquis was decreed to pay this sum to the appellant with costs both at law and in equity. Register of Decrees, from Easter 1735 to Trinity 1743, p. 297.

Lever never after the said purchase paid the said reserved rent to the said John Hunt, his heirs or assigns, or any claiming under him. But one John Holcroft, pretending that John Hunt had, by indenture dated the 24th of March 1625, conveyed the reversion and inheritance of the said premises to him and his heirs, on his marriage with Margaret the daughter of the said John Hunt, set up a claim to the inheritance of the premises; and thereupon there were divers suits and controversies between the said John Holcroft and John Lever, as appeared by an award under the hand and seal of John Langley, bearing date the 24th of March 1626, whereby it was awarded, that all suits between them should cease; and that the said John Holcroft should convey and assure the said premises unto the said John Lever and his heirs.

Some time after the death of John Hunt, viz. in 1642, George Hunt Gent. claiming the reversion and inheritance of the said premises, expectant on the determination of the said term of 100 years, either as heir at law of John Hunt, or by some intail created by him after his granting the said terms, with remainder to Edmund Hunt, brother of the said George and John; the said John Lever, in order to strengthen his title, and more effectually to secure to himself and his heirs the said reversion and inheritance, and to take away any pretence of right that might afterwards be set up against his title thereto; agreed to purchase the right and interest of the said George and Edmund Hunt in the said reversion: and accordingly by a bond dated the 15th of August 1642, the said George Hunt became bound to the said John Lever in the sum of £1000, under a condition that the said George Hunt should, at all times assure, convey and confirm unto the said John Lever, and his heirs, the said premises, with the appurtenances, then [290] before in the tenure and occupation of one John Hunt, so as the said John Lever, his heirs and assigns, might have and enjoy the freehold thereof for ever; which conveyances and assurances were to be had and done by the said George Hunt to the said John Lever, his heirs and assigns, either by fine, feoffment, recovery, or by any other lawful ways and means, according to the advice of the counsel learned in the law of the said John Lever, and at the costs and charges of him, his heirs and assigns. And by another bond, dated the 19th of the same month, the said George Hunt became bound to the said John Lever in the penal sum of £1000, under a condition that the said George Hunt should convey and assure to the said John Lever and his heirs, in like manner as he had agreed by the condition of the said former bond, the said premises free from all fines, feoffments, sales, statutes, contracts and assurances whatsoever; with some other little variations from the former condition. And some time afterwards, by another bond dated the 10th of February 1644, the said Edmund Hunt became bound to the said John Lever in the penal sum of £300, under condition that the said John Lever, his heirs and assigns, should hold and enjoy the said premises without any let, suit, trouble or disturbance, and free from all incumbrances by or from the said Edmund Hunt, or any claiming under him.

John Lever having thus contracted with the said George and Edmund Hunt for the purchase of the reversion and inheritance of the said premises, directed proper conveyances thereof to be made: but in order to prevent the said term of 100 years, which was then in the said John, from merging or being lost, as it would have been if the inheritance had been conveyed to him, it was thought advisable to take the conveyances of the inheritance in the names of trustees; and therefore the said John directed that they should be taken in the names of Robert Lever of Darcy-Lever Gent. and James Lever of Manchester, clothier, who were near relations of his. And accordingly, by indenture of feoffment, dated the 17th of December 1644, the said George Hunt, for the considerations therein mentioned, granted and conveyed to the said Robert Lever and James Lever, their heirs and assigns, the reversion and inheritance of the said premises; with several covenants for quiet enjoyment, and against incumbrances (except the said lease for 100 years) and for further assurance. And by another indenture of feoffment, dated the 11th of February 1644, the said Edmund Hunt in like manner granted and conveyed the said premises to the said Robert Lever and James Lever, their heirs and assigns. And by an indorsement upon each of these deeds respectively, it was mentioned that the said John Lever did consent and agree thereunto, and pay twopence in the name of attornment to the said Robert and James Lever.

Some time in 1646 John Lever died intestate; whereupon Katherine his wife took out letters of administration to him, and afterwards called upon George and Edmund Hunt to make further assurance. Accordingly, by indenture tripartite, dated the 6th

[291] of March 1646, and made between the said George Hunt and Edmund Hunt of the first part, the said Robert and James Lever of the second part, and Thomas Warburton and Richard Warburton of the third part; George and Edmund Hunt did covenant and agree, to suffer a common recovery of the said premises to the said Robert and James Lever to the uses following; for the strengthening, corroborating and confirming of the before mentioned lease for 100 years; and as to the reversion and inheritance of the said premises, expectant on the determination of that lease, to the use of the said Robert and James Lever, their heirs and assigns.

Pursuant to this deed, a common recovery, wherein the said Thomas and Richard Warburton were demandants, the said Robert Lever and James Lever tenants, and the said George Hunt and Edmund Hunt vouches, was duly suffered of the said premises; by virtue whereof, and of the several before mentioned purchase deeds, the said Robert and James Lever became legally seised of the reversion and inheritance of the said premises, expectant upon the determination of the said term of 100 years, in trust for the heirs of the said John Lever, and those claiming under him.

On the death of John Lever, the equitable reversion and inheritance of the premises descended to Robert Lever his eldest son, the appellant's grandfather; but the said Katherine Lever held and enjoyed the premises, and afterwards assigned the same to her younger son John Lever, and then devised the same to him by her will; and after her death, he enjoyed the same for his life: the term going all along till the determination of it in a course of administration, disannexed from the inheritance.

On the death of Robert Lever, the premises descended to John Lever, his only son and heir, the appellant's father; and upon his death, came to the appellant in that right. But before the determination of the term, there being some suits revived against John Revel Lever, the appellant's brother, to whom the said John the father had given the premises; which suits had, for many years, been carried on in the court of Chancery concerning the inheritance of the said premises and the said John Revel Lever being informed, that the respondent could give him some light into his family affairs, produced the title deeds to the respondent for that purpose; who finding the same to have been taken in the names of the said Robert and James Lever, set up a title to the premises, as heir at law of Robert Lever, one of the trustees; who, as he pretended, survived James Lever, the other trustee.

The lease of 100 years expired at Christmas 1732; and soon afterwards the respondent, by means of some indirect practices with the tenants, obtained possession of the barn and closes; but not being able to prevail with Sarah Brearcliffe, the tenant in possession of the said messuage, to attorn to him, he served her with a declaration in ejectment: but instead of proceeding therein, the respondent, on the 7th of December 1733, exhibited his bill in the Chancery Court held for the county palatine of [292] Lancaster, against the said John Revel and Sarah Brearcliffe; pretending, that the said Robert and James Lever were the real purchasers of the premises, and that he was the heir of the survivor of them; and therefore praying, that he might have an account of the rents and profits of the said premises, and be let into possession of such part thereof, as the defendant Brearcliffe held and enjoyed.

To this bill the said John Revel Lever, on the 28th of February 1733, put in his answer: and thereby swore, that one Leigh Page claiming title to the premises, under a pretended grant thereof from John Hunt, and he being informed that the respondent could give some light into his pedigree, applied to him for that purpose, and produced some abstract of the purchase deeds, or otherwise acquainted the respondent with the same; who, by this accident, having discovered that the deeds were taken in the names of the said Robert and James Lever, without any trust being expressed in the same, and presuming that the said John Revel Lever had no manner of evidence of the said trust, set up his pretended title to the premises.

Pending this suit, John Revel Lever died intestate and without issue; whereupon the premises descended to the appellant, as his only brother and heir at law, and on the 22d of July 1734, the appellant exhibited his bill in the said court against the respondent; praying, that he might have an account of the rents and profits of the said estate, and have the possession and a conveyance thereof in execution of the said trust, and that he might hold and enjoy the same against the respondent and his heirs.

The respondent, by his answer to this bill, admitted that the said John Revel Lever

applied to him, and made inquiry touching the pedigree of the Levers, and that the purchase deeds were then mentioned; but pretended, he knew and was apprised of the said deeds and title before such application was made; but said, he could not set forth when, or by what means he first discovered the purchase deeds, save as aforesaid; and admitted, that he never, to his knowledge, had the purchase deeds, or the deeds, papers, and writings relating to the premises in his custody or possession; and also admitted, that he gave one of the tenants £20 and another £4 10s. and thereby got into possession of the said barn and closes.

Both causes being at issue, and witnesses examined, they came on to be heard in the Dutchy Court of Lancaster, on the 24th of November, the 6th of December, and the 3d of February 1736; when the court, refusing to permit the award made by the said Langley to be read, declared, that the reversion and inheritance of the said premises was not a trust for the appellant, but that it was vested in the respondent and his heirs; and therefore ordered and decreed, that the appellant should account with the respondent, for the rents and profits of the estate received and enjoyed by him since the determination of the said lease for 100 years, and should deliver up possession thereof, with the deeds and [293] writings relating thereto, to the respondent: And it was referred to the clerk of the court, or his deputy, to take an account of what the appellant, or any for his use, had received by the rents and profits for the time aforesaid, which, after a deduction of just allowances, the appellant was to pay to the respondent. And it was ordered, that the appellant's cross bill should be dismissed, and that the respondent should have his costs in both causes, and that the appellant should pay the same.

The appellant, conceiving himself aggrieved by this decree, appealed from it; insisting (D. Ryder, J. Strange, J. Idle), that it was manifest, his great grandfather agreed with George and Edmund Hunt, for a conveyance of the reversion and inheritance of the premises, and for that purpose took the said bonds from them: And as on the one hand, it was natural to suppose that a person entitled to so long a term, would be desirous of purchasing the inheritance, and keeping the estate always in his family; so on the other hand, it was absurd to suppose that two strangers, who lived at a great distance from each other, should purchase a dry reversion of an estate, and make themselves joint tenants of it, when neither of them would, probably, live out half the term. That it appeared, from the times of the conveyances of the premises to Robert and James Lever, that they were, in pursuance of the respective agreements, contained in the conditions of the bonds; and though not made to John Lever, to whom the said bonds were given, were nevertheless in trust for him and his heirs; and the only inducement to take the conveyance in the name of trustees, was to prevent the term from merging in the inheritance. That though Katherine, the widow and administratrix of John Lever, had in that right possessed the term, and afterwards assigned, and then devised the same to her younger son; yet, as John Lever had not declared the term to be attendant on the inheritance, she might consider it as her right, or as assets to pay debts: Terms in the owner, where the inheritance was in his trustees, having been considered as assets to pay debts; but if he knew that the term ought to go with the inheritance, it amounted only to this, that she designedly concealed her eldest son's title from him. Besides, the conveyances of the inheritance of the premises had never been in the possession of the respondent, or any under whom he claimed; but had all along been in the possession of those claiming under John, the devisee of the term, and under whom the appellant claimed.

To this it was said (J. Brown, N. Fazakerly) on the other side, that the respondent's title arose under deeds of absolute purchase in 1644, in which no trust was mentioned or intimated; but on the contrary, the purchase money was expressly mentioned to be paid by the respondent's ancestors: And this clear, legal title was endeavoured to be taken away, solely by the pretence of a trust arising above 90 years ago, without any declaration of trust in writing, or the least evidence of payment of the consideration money: but [294] founded merely upon uncertain conjectures, which were not only unsupported by any possession, agreeable to the trust, but contradicted by a long successive possession, inconsistent with it. That if John Lever, who was entitled to the term, purchased in the reversion, though in another's name, he was then owner of the term and inheritance too; and the term would have been no longer a term in gross, but attendant upon the inheritance, and on his death, the estate ought to have been enjoyed

by Robert, his eldest son and heir ; but instead of that, though he died within a year of this pretended purchase of the inheritance, and when the fact, if true, was recent, and could not be forgotten by the family ; yet Katherine, his widow and administratrix, entered and enjoyed it as a leasehold, and settled it upon her youngest son ; and it had ever since been enjoyed as a leasehold only, and by those who could not claim it as an inheritance. That the pretence set up to make it probable, that the inheritance was purchased in trustees' names, was, that the term might not be merged ; whereas it was more probable, that the term would have been assigned to a trustee, and the inheritance taken in the name of a real purchaser : But this appeared to be a mere pretence ; for when John Lever died, the term vested, in point of law, in his administratrix, and his heir might safely have taken a limitation of the inheritance, without a merger of the term ; and yet the uses of the recovery, which was suffered after John Lever's death, were declared to the respondent's ancestors ; though no account can be given, why their names should be again used as trustees, when the sole reason for it ceased, and when there was no declaration or other writing to manifest the truth.

But several objections were taken to the right claimed by the respondent. I. That the uses of the recovery were first to corroborate the term, and then to the respondent's ancestors in fee. II. That the bonds of the 19th of August 1642, and 10th of February 1644, from Edmund and George Hunt to John Lever, were proofs of his being the real purchaser. III. That it was improbable, that Robert and James Lever should purchase only a dry reversion, expectant upon so long a term. And IV. that the purchase deeds were in the appellant's hands.

To the first objection it was answered, that the declaring the uses of the recovery in this manner, was not only proper, but necessary, even for the sake of the vendor, who sold to the respondent's ancestors a reversion only ; for no use could have been limited of that reversion, without mentioning the particular estate upon which it was expectant. —As to the second objection it was said, that the bonds were, at the most, but proofs that John Lever once intended to purchase, but not that he actually did purchase ; and their remaining uncanceled and in the appellant's hands, afforded a much stronger proof, that whatever intention or agreement there once was to convey the reversion to John Lever, it never was carried into execution ; for otherwise, these bonds would have been cancelled or delivered up on [295] the execution of the conveyances ; unless it was to be imagined, that in this transaction, contrary to the course of business, and even to common prudence, the vendee completed his purchase, without having any thing to shew for it : and that the vendor performed his agreement, without cancelling or taking up his bonds, or having any discharge from them : For the conveyances to the respondent's ancestors neither recited the bonds, nor were a performance of the conditions, but were made to different persons, and different uses ; and though at this distance of time it was impossible for the respondent to shew upon what occasion these bonds were given, yet neither did the appellant shew how they came to remain uncanceled ; and upon the foot of conjecture, there was as much room to imagine, that the name of John Lever was made use of in the bonds as a trustee for Robert and James Lever, as that their names were used in the conveyances in trust for John Lever. — To the third objection, it was said to be far from improbable, that both branches of the family might be trying to get this reversion, and that the respondent's ancestors, who were the elder branch, might, as the premises lay convenient and near to the family estate, endeavour to buy the reversion, as a means of buying the term also. But if that argument weighs any thing, the objection is the same to the appellant as the respondent ; for supposing the appellant and his ancestors to have been entitled, yet it was only to a dry reversion, expectant upon the determination of a 100 years term ; and it being certain, that the term was constantly enjoyed as a chattel interest, and by the younger branch of the family, it was equally improbable that John Lever should purchase the reversion and inheritance for the benefit of the heirs of his family ; in whom it was not to take place, otherwise than as a dry reversion, for near the space of 100 years. — And as to the fourth objection, it did not appear how the purchase deeds came into the appellant's hands ; but it was probable, that upon the death of Robert Lever without issue male, and the appellant's ancestors coming into possession of the bulk of the family estate, the deeds in question might, by mistake or accident, be intermixed with the family deeds, and thereby come into the hands of the appellant's ancestors : For it was plain, that they knew nothing of these deeds, because the appellant's father claimed his

estate by collateral descent from the younger branch of his family, which was inconsistent with the purchase deeds, and even with the appellant's own title; he deducing the same as heir to the elder branch of his family, in a direct line from John Lever, the pretended real purchaser of the reversion.

After hearing counsel on this appeal, it was DECLARED, that the inheritance of the premises in question, was vested in the respondent, in trust for the appellant and his heirs: And therefore it was ORDERED and ADJUDGED, that the decree complained of should be reversed: and that the respondent should, at the charge of the appellant, convey the legal estate of the premises in [296] question, to the appellant and his heirs: And it was further ORDERED, that the respondent should forthwith deliver possession of such part of the premises as was in his possession, or in the possession of any of his under tenants, to the appellant: and should also deliver to the appellant all deeds and writings in his custody, or power, relating to the premises upon oath; and should come to an account with the appellant before the clerk of the court of the Dutchy Chamber of Lancaster, or his deputy, for the rents and profits thereof received by the respondent, or any other person by his order or for his use, and pay to the appellant what should be found due on the said account, after a deduction of all just allowances; and that for the better taking such account, the respondent should be examined on interrogatories, as the said clerk or his deputy should direct; and should produce upon oath all books, papers, and writings relating thereto: And it was further ORDERED, that the respondent's bill should be dismissed, and that no costs should be paid on either side hitherto; but that the costs of taking the account now directed, and all other subsequent costs, should be reserved till after the said clerk or his deputy should have made his report: And it was further ORDERED, that the said court should give all necessary and proper directions for carrying this order and judgment into due execution. (Jour. vol. 25. p. 180.)

CASE 16.—RICHARD WILSON, Esq. and Others,—*Appellants*; SAMUEL KIRSHAW, Clerk, and Others,—*Respondents* [13th February 1750].

[*Quere*, Whether trustees of an advowson can vote by proxy?
The decree of the Court of Chancery regulating the mode of election was affirmed by consent.]

[1 Vesey 413. by the name of Attorney General v. Scott.]

The parish of Leeds in the county of York, is about thirty miles in circumference, and contains at least 20,000 inhabitants. In the reign of Queen Elizabeth, the parishioners, with a sum of money raised by a collection among themselves, purchased the advowson of the vicarage, in the names of trustees for the use of all the parishioners, in order that they might after the death of the then incumbent, successively, from time to time, be provided and furnished with honest, learned, and able ministers.

After the death of some of the trustees, in whose names the advowson was purchased, the survivors pretended, that they held it in their own right, and not as trustees for the use of the parishioners; and thereupon a suit was commenced in the court of Chancery, by divers of the principal parishioners, on behalf of [297] themselves and all the other parishioners, against such surviving trustees, and against Richard Middleton, a clerk by them presented to the vicarage, and also against the then Archbishop of York, the ordinary; which suit was brought to a hearing before Sir Francis Bacon, then Lord Keeper of the Great Seal, on the 23d of June 1617, when it was, amongst other things, decreed, that the surviving trustees should convey the advowson to twenty-five other persons named in the decree, and their heirs, in trust, to and for the only use, benefit, and behoof of the parishioners of the said parish of Leeds, and of their successors for ever: And that upon the death of any one, two, three, four, five, six, or seven at the most of the said trustees, the survivors should make a new grant of the advowson to some other persons, and their heirs, to the use of themselves, and such number of other parishioners of the said parish, to be by them

elected, as with them, to make up the number of twenty-five persons, and of their heirs, in trust, to the use of the said parishioners, and of their successors for ever; and that from time to time the said grant should be in this sort perpetually renewed: And that for the better choice of sufficient ministers, there should, from time to time be joined with the trustees seven sufficient preachers, inhabiting within or near the West-Riding of the county of York, who should be assistant to the said trustees in the choice of their ministers; and that as often as any of the said seven assistants should die or depart out of the county, the rest, or survivors of them, should make choice of others to be assistant with them, so as the full number of seven assistants might always be continued. And it was further decreed, with the consent of the plaintiffs in the suit, that every minister who was from thenceforth to succeed in the said church, should be chosen in manner following, and not otherwise; viz. that all the trustees for the time being, or the greater number of them, so often as the church should become void, should, within four months next after, proceed to elect and choose a fit person to succeed in the said church; whom they should nominate to the assistants, to the intent that they might consider and determine of his ability and fitness; whom, if they should, upon a solemn meeting for that purpose, and mature consideration thereupon, or any four of them, approve of, the said choice was to stand; otherwise the trustees were to proceed to a new choice of a more fit and able person, whom they should in like sort nominate to the said assistants, who in like manner should have power either to approve or disallow such choice; and that no person should be presented by the trustees except he was approved of by the assistants, or some four of them.

The advowson was accordingly conveyed to twenty-five trustees, and their heirs, upon the trusts in the decree mentioned. But it doth not appear, that since 1632, there ever were seven assistant-preachers, or any choice of assistants, or that any person ever acted as such.

[298] The trustees for the time being, or the greater number of them, from time to time, elected and presented a fit person to the vicarage, when and so often as the same became vacant, without the approbation of any such assistant-preachers: And the clerks so presented, were admitted and instituted accordingly.

Joseph Cookson, clerk, and last vicar, died on the 20th of February 1745; and thereupon, there being then only twenty-four trustees living, twenty of them, who were all that were then within the parish, did, upon notice given to them respectively for that purpose, meet at the vestry-room in the parish-church, on the 27th of the same month, and appointed the 22d of March following, for electing a vicar of the said church: And it was then agreed, that such of the trustees who could not be personally present at such election, might make proxies; but that no proxies of such absent trustees should be allowed to be made, by virtue of any deed or instrument to be signed by him or them, unless the person or clerk such proxy should vote for, should be nominated in the deed or instrument; and that such proxy should be made to a trustee for the time being, and not to a stranger.

Accordingly, all the trustees, except Sir William Rooke and John Tomlinson, met on the said 22d of March in the vestry-room for the purpose aforesaid, when the respondent Samuel Kirshaw, and the appellant James Scott, were candidates; and eleven of the trustees then present, in their own names, and the respondent Robert Denison as the proxy, and in the names of John Tomlinson, another of the trustees, did then and there vote for the respondent Samuel Kirshaw; and eleven of the said trustees then present, in their own names, and the appellant Richard Wilson, esq. as the proxy and in the name of Sir William Rooke, another of the trustees, voted for the appellant James Scott; so that no election was then made, by reason of such equality of votes, but each party entered a caveat with the Archbishop.

The said John Tomlinson, one of the trustees, died in the latter end of July 1746, in the city of Westminster, whereby the trustees were reduced to twenty-three in number.

Richard Wilson and six other of the trustees, who had at the meeting on the 22d of March 1745 voted for the said James Scott, did thereupon, in a hasty and precipitate manner, meet at a public house called the King's Arms in Leeds aforesaid, on Thursday the 7th of August 1746, and then and there, in their own names, and some of them as proxies for five other of the trustees, voted for the said James Scott to be vicar of the said vicarage. Thus at a meeting of but seven trustees only out of twenty-three, and

by the help of five proxies, two of which were given previous to the former meeting, they pretended that James Scott was elected vicar by the major part of the trustees at the said meeting, on the 7th of August 1746. And immediately thereupon, they respectively executed a presentation of the said James Scott to the said vicarage.

[299] The respondent Thomas Denison and seven other of the trustees, who at the meeting on the 22d of March 1745, had voted for the respondent Kirshaw, were not present at the said meeting on the 7th of August 1746, at the King's Arms, where such irregular election of the said James Scott was made, and in pursuance whereof such presentation of him to the said vicarage was executed as aforesaid; nor had they, or three other of the trustees, who had likewise voted for Mr. Kirshaw, due notice of this latter meeting, and therefore though the presentation of Scott was on the same day tendered to them to execute, yet they respectively refused so to do, for this amongst other reasons, that they had not due notice of the meeting at which such election and presentation was made.

Soon afterwards Scott tendered his presentation to his Grace Thomas Archbishop of York, the ordinary, and prayed to be admitted and instituted to the vicarage; but his Grace declining to accept, an action of *quare impedit* was brought in the names of the said James Scott, and of all the other appellants, and of Sir William Rooke, since deceased, and of the respondent Sir Henry Ibbetson, against the respondent Samuel Kirshaw, and the Archbishop, and also his Majesty's writ of *ne admittas* thereon.

And in Michaelmas term 1746, the said Sir William Rooke and the appellants exhibited their bill in the court of Chancery against the respondents and the Archbishop, charging, that the election of the said James Scott to be vicar of the said vicarage, on the 7th of August 1746, at the King's Arms, was a due and regular election, being made by the major part of the trustees then alive, and that all the trustees had notice of such meeting; and therefore praying that the appellant James Scott might be effectually presented, admitted, instituted and inducted to the said vicarage, and be confirmed the vicar thereof; and that the respondents the trustees might be compelled to do every act necessary for that purpose; and that in the mean time the Archbishop might be stayed by injunction from admitting or collating any other person to the said vicarage.

To this bill all the defendants except the Archbishop appeared and put in their answers, and insisted that the election of the said James Scott, on the 7th of August 1746, was an undue and irregular election, for that it was made without giving due notice to eleven of the trustees, of the time, and place, and intent of the meeting at which such election was made; and likewise that, pursuant to the trust limited in the said decree, and in the several conveyances made in pursuance thereof, the election of a vicar ought to have been made within four months after the death of the late vicar; that in default of an election of a vicar within that time by the trustees, the right of election devolved upon the parishioners at large; and that accordingly the said parishioners, at a popular election, where the said Samuel Kirshaw and one Edward Cookson were candidates, had elected him the said [300] Kirshaw; and that about sixty of them had presented him as their clerk to the ordinary.

The Archbishop afterwards put in his answer, claiming nothing but as ordinary, and submitted to act as the court should direct.

In Easter term 1748, his Majesty's Attorney-General, at the relation of the said Samuel Kirshaw, and of John Dixon and others, parishioners of the said parish of Leeds, exhibited an information in the said court of Chancery against the said James Scott, and all the trustees of the advowson, and against Edward Cookson clerk, and the Archbishop of York, setting forth the same matters as were mentioned in the answers of the defendants in the original cause, and insisting that the election of the said James Scott was void for the reasons stated in those answers, and particularly for that such election was clandestine, and without giving notice to the other trustees of the time and place of the meeting at which it was made; and therefore praying that the election of the said Samuel Kirshaw by the parishioners might be confirmed; and that the Archbishop might admit and cause him to be instituted and inducted to the said vicarage: that seven assistant-preachers, for the examining of any person chosen by the trustees to be vicar of the said parish of Leeds, might be appointed according to the direction of the former decree, and might be from time to time continued; that the full

number of twenty-five trustees might be filled up out of the principal inhabitants and parishioners of the said parish; and that all the trusts mentioned in the said former decree, relating to the said vicarage might be performed and carried into execution, and continued from time to time; and in case it should appear that the said Samuel Kirshaw had not been duly chosen vicar of the said parish, that then a new election might be made of a proper person to be such vicar, by such persons as should appear to have a right to elect, and subject to the approbation of such seven assistant-preachers, and under such rules and directions as in the said former decree are mentioned, or as the court should think fit.

To this information the appellant James Scott, and the trustees who were his electors, appeared, and put in their answers, and thereby insisted, that the popular election of the said Samuel Kirshaw was irregular and void; and the defendant Edward Cookson, by his answer admitted that he was a candidate at the said popular election, but afterwards declined the same and gave up the poll.

Witnesses being examined on both sides, and publication duly passed, both the causes came on to be heard before the Lord Chancellor Hardwicke, who, after several days hearing, was pleased, on the 23d of February 1749, to order, that the information, as against the defendant Cookson, should stand dismissed, with costs to be taxed by the Master: And his Lordship declared, that the election and presentation of the appellant Scott was void, [301] and that by the decree made by the Lord Keeper Bacon, on the 23d of June 1657, and the several conveyances subsequent thereto, the right of electing and presenting a vicar of the said parish, was vested in the trustees for the time being, for ever, without any intention that the same should at any time devolve upon the parishioners at large, to the end that the inconveniences of a popular election, in so extensive and populous a parish, might be avoided: and therefore, that the election insisted upon by the relator Kirshaw, to have been made by the parishioners at large, was also void; and did therefore decree, that the original bill should be dismissed, and that the information should be also dismissed, so far as it sought to establish the election of the said Samuel Kirshaw: And to the end, that the true intention of the said former decree might be observed and pursued, so far as the alteration of circumstances introduced by length of time would admit, his Lordship, upon the residue of the said information, was pleased to order and decree, that the surviving trustees, or the major part of them, should assemble in the vestry of the parish church of Leeds, on Thursday the 26th of April then next, between the hours of twelve and two in the afternoon, and then and there elect a sufficient number of parishioners of the said parish, to fill up the number of trustees to twenty-five; and that after such election should be made, the trustees so assembled, should appoint a time and place for electing a vicar of the said parish, such time not to be less than eight days after the time of such first meeting; and it was further ordered, that the surviving trustees should execute a conveyance of the advowson, to the use of themselves and of such new trustees, and their heirs, upon the trusts mentioned and declared in and by the last conveyance thereof, dated the 10th of December 1745, and that notice in writing should be given of the time and place of such meeting, for electing of a vicar, to the new trustees, and to such of the old surviving trustees as should not be present at such first meeting, either personally, or by leaving the same at their respective dwelling-houses or places of abode, with some person of the family there. And it was further ordered, that the said trustees, or the major part of them, should assemble at such time and place to be so appointed, and elect a fit and proper person to be vicar of the said parish: And a question being made in the cause, touching the discontinuance of the seven assistant-preachers mentioned in the said former decree, and whether the same ought not to be revived; his Lordship was pleased to declare, that it did not appear that there had been any such assistant-preachers since the year 1632, and that all the conveyances of the advowson of the vicarage, made since the restoration, imported the contrary, which amounted to a reasonable evidence, that the said assistant-preachers had been discontinued and laid aside, by the common consent of the trustees and parishioners of the parish: Therefore his Lordship did not think fit, after this great length of time, to give any directions for the reviving or appointing of such assistant-[302]-preachers, and the rather, since the matter referred to them by the said former decree, touching the qualifications of the vicar to be elected, was proper

for the judgment and determination of the Lord Archbishop of York, the ordinary of the diocese for the time being. And it was further ordered, that the clerk who should be elected by the trustees, or the major part of them, so to be assembled as aforesaid, should be presented to the Lord Archbishop of York for the time being, to be duly admitted by his Grace to the said vicarage, and that all the trustees should join in and execute a presentation of such clerk so to be elected; and for the more regular and orderly proceeding to the election of a vicar upon any future vacancy, it was further ordered, that as often as the said vicarage should become void, such of the trustees resident in the said parish of Leeds, who should happen to stand first named in the then subsisting deed of trust, should, within fourteen days after such avoidance should happen, send notice in writing to every one of the other trustees for the time being, appointing a meeting of the trustees to be held in the parish church, on some day, not less than fourteen days after sending such notice; which notice should be delivered either personally to such trustees, or left at their respective dwelling-houses, or places of abode, with some of the family there; and in case it should appear at such meeting, that the number of twenty five trustees was then complete, and that a major part of them were assembled, then the trustees so assembled should proceed to the election and presentation of a vicar in the manner before directed; but in case it should appear at such meeting, that there was or were any vacancy or vacancies in the number of twenty five trustees, then the trustees so assembled, or the major part of them, should proceed to fill up the number of the twenty-five trustees, and make new conveyances, and afterwards proceed to elect a vicar in the manner before directed; and his Lordship was pleased to declare, that no proxies ought to be admitted, or made use of at any election of trustees, or of the vicar of the said parish: And it was further ordered, that the injunction formerly granted should be continued; and the said decree was to be without costs on either side to that time; and any of the parties were to be at liberty to apply to the court for further directions, as there should be occasion; and his Lordship reserved the consideration of the costs of such subsequent applications.

From so much of this decree as dismissed the original bill, and declared the election of Scott to be void, or as affected that election, and would introduce a new method of proceeding to fill up any future vacancy, the plaintiffs in the original cause appealed: And as to Mr. Scott's election, it was contended (A. Forrester, G. Perrot), that the only rule and guide by which the trustees could conduct themselves upon the late vacancy of the vicarage, was the decree of Lord Bacon: the usage subsequent to that decree, which was the best interpreter of it, and the trusts declared in the deed by which the advowson was conveyed to them; all which such of [303] them as presented Mr. Scott had duly pursued. That Lord Bacon's meaning was not, that a meeting of the trustees, or a major part of them, upon a previous notice to each, should be absolutely necessary to the choice of a vicar, because in many instances it might be impracticable, and in every instance inconvenient to give such notice. That the decree does not direct the trustees to be residents within the parish, but parishioners; under which description any person having an estate within the parish might be a trustee, be his residence where it would; so that some of the trustees might reside at a very great distance from the parish, and by accidents to which all men are liable, even in places unknown to their co-trustees. In the first of these cases, it must be allowed inconvenient to require a formal notice to be given; in the latter, it would be impracticable to give it. The first happened at a former vacancy, by one of the then trustees residing near 200 miles from the parish; the latter existed at present, and had done so for near two years, one of the trustees having retired into parts beyond the sea. But even taking the word parishioners to mean residents only, the same inconveniences would remain; for the legal estate in the advowson being once vested in the trustees, will continue in them notwithstanding a change of residence, or removal to foreign parts; and how frequently changes of residence must happen in so large a number as twenty-five, must be obvious to every body. That where Lord Bacon intended to make a meeting necessary, he has declared it in express terms; as in the case of the assistant-preachers, who are directed, upon a solemn meeting to be held for that purpose, to examine into the fitness of the person nominated by the major part of the trustees; whence it might be inferred, that if he had meant to have made a meeting of the trustees necessary for the naming a person to the assistant-preachers, he would have declared it in the same express terms as he has

done in the other instance. That as no notice was by Lord Bacon required to be given, so neither was any one authorised or required to give notice, or indeed to appoint either time or place of meeting: and as all the trustees were equal in power, none had any greater privilege than another, and consequently an appointment by one would not bind the rest. Besides, where no particular persons are bound to give notice, every person interested is bound to take it. This holds invariably true in all cases of acts flowing from a legal title or interest, and particularly in the case of patrons, who, let them live where they may, or let the incumbent die where he may, are bound to take notice of the incumbent's death, and to present within six months from that time. That the choice of a proper vicar was most likely to be attained by pursuing the old method hitherto practised of choosing him by a majority of the whole number, without any formal meeting, or previous notice: whereas, if a formal meeting should be held necessary under the former decree, the major part of the whole number would be sufficient to constitute that meeting, and then [304] a majority of that major part would bind the whole. For example: If the number of trustees be twenty-five, by Lord Bacon's decree, as hitherto understood, thirteen must concur in the presentation: but, in the other sense, thirteen are sufficient to constitute the meeting, and seven of those thirteen to elect: and thus the election and presentation might be by a minority instead of a majority of the trustees, which was apprehended to be directly contrary both to Lord Bacon's word and meaning. That want of notice of the meeting of the 7th of August, was not once objected to Mr. Scott's presentation, till after he had brought his bill: for the trustees in the interest of Mr. Kirshaw, thought their power was determined by the expiration of the four months, and promoted a popular election from that apprehension. Not one of them had ventured to swear, that it was usual to give notice on such occasions, nor was there the least proof in either of the causes, of its ever having been given upon any former election or presentation of a vicar: and yet if such had been the practice, it was inconceivable that nobody should know it: or that, in a course of 130 years, some method of doing it should not have been established. Besides, the respondent Denison was proved, by two disinterested witnesses, to have had notice of this very meeting, and to have been desired to acquaint his and Mr. Kirshaw's friends therewith.

And as to the new method of proceeding to fill up future vacancies, it was said that the decree complained of required the trustee who stood first named in the deed of trust, to give the notices: which must be attended with great trouble, and possibly with considerable expence to such trustee, without any means of reimbursement. And as few people care to put themselves to trouble or expence in any but their own immediate concerns, and yet the validity of every future election and presentation of a vicar would depend upon the first step to be taken, as directed by this part of the decree: it was submitted, whether this method might not be attended with great inconveniences, and be productive of repeated litigations: especially, as there could be no coercion upon such trustee to perform what was here enjoined. That the direction that, before a vicar was elected, the surviving trustees should elect new ones in the room of those who were dead, and that a conveyance should be made to the use of the old trustees and the new ones so to be elected: and that a subsequent meeting should be had for the choice of a vicar, and he who had the majority of voices should be presented by all the trustees, as well the new ones as the old, would not only render the execution of the trust exceedingly troublesome, but seemed to interfere with the rule of law, whereby none can gain a right to present who had it not at the time of the vacancy. It might also be a means of introducing corruption: since, though it would be simony to elect the vicar himself for money or other reward, it might be very doubtful how far it would be so, to procure the election of one or more new trustees by bribery, or other undue [305] means, if the person afterwards chosen vicar, was not himself privy to such illegal contract. It was therefore hoped, that the decree would be varied in the particulars complained of, and that the appellant Scott's presentation would be established.

On the other side it was insisted (D. Ryder, W. Murray), that due previous notice of the meeting of the 7th of August was necessary, but not given: and that the election then made was for that reason alone void. That by the general rule none ought to be admitted at such meetings, by proxy: and if this could be dispensed with by the previous agreement of the 27th of February 1745, (in which it was apprehended the

trustees were misadvised,) yet that could have relation only to the meeting then appointed for the 22d of March following, and not to any subsequent meeting which was not then in view: much less could it give a right to make use of the proxy after the party had himself once voted in person. But it was in proof that Samuel Killingbeck did appear and vote in person at the meeting of the 22d of March 1745, and yet that Gervais Smith did vote in the name and as the proxy of Killingbeck for Mr. Scott, at the meeting on the 7th of August following, by virtue of no other authority than a letter of attorney, dated the 4th of March 1745, which, by Killingbeck's appearance and voting in person after the date of it, was revoked and made void: the vote therefore of Smith, as the proxy of Killingbeck under such revoked authority, was made void: and the election of Mr. Scott being thus made by eleven only of the trustees, who were not the majority then living, was for that reason also void. That Mr. Scott's presentation not having been executed by eleven of the trustees of the advowson, was void in point of law: all the trustees being at law joint-tenants of the advowson, and the law requiring, that where there are joint-tenants of an advowson, in order to make a valid presentation of a clerk upon any avoidance, all the joint-tenants must join in and execute such presentation. That every presentation of a person to this vicarage, ought to be grounded on a preceding due and regular election; and as Mr. Scott's presentation was not grounded on a due and regular election, but on an election which was irregular and void, there was no reason for a court of equity to compel the eleven trustees who had not executed this presentation to execute it, and therefore it was void both at law and in equity. That so much of the decree as directed the method of proceeding to fill up any future vacancy was well warranted, and the direction that notice should be given to every trustee was equitable and prudent, for notice is of the essence of every election, and the directing by whom it must be given would prevent all future contention and mistakes among the trustees about the person who was to give such notice. The direction for completing the number of trustees previous to the election of a vicar was highly reasonable and proper: for by this means the mischievous effects of an equality of voters amongst the trustees, and the inconvenience of a popular election in so [306] large and populous a parish would be perpetually avoided. The declaration concerning the proxies was also very proper, for the right of electing either trustees or a vicar is a personal trust, and a matter wherein discretion and judgment are to be exercised; and no man ought to make a proxy in any such case, unless some special custom enables him to do so: besides, it did not appear that the trustees of this advowson ever admitted or made use of proxies at any election except in the late instance. For these reasons, and considering the nature of the question, and the animosities thereby kept up in the parish, it was hoped that the decree would be affirmed, and the appeal dismissed with costs.

On the day appointed for hearing this cause, the appellants' counsel acquainted the House that they declined giving their Lordships the trouble of hearing it, and were willing that the appeal should be dismissed, and the decree of the court of Chancery affirmed: whereupon it was (by consent) ORDERED and ADJUDGED, that the appeal should be accordingly dismissed, and the decrees therein complained of affirmed. (Jour. vol. 27. p. 491.)

CASE 16.—VISCOUNT IRWIN,—*Appellant*; WILLIAM SIMPSON, and Others,—
Respondents [5th December 1758].

[*Mews' Dig.* vi. 641, 663; xiv. 423.]

[Where the Lord of a Manor by feoffment grants certain parcels of common or waste lands to trustees, for the benefit of themselves and the rest of the tenants of the manor, in lieu and recompence of their several claims of common in all the rest of the wastes and commonable grounds in the manor; the whole of the Lord's interest passes, and there is no resulting trust for him as to the ownership of the soil.]

[The office copy of a bill cannot be read in evidence if the original is not upon the file, tho' an officer of the court is ready to prove that the original cannot be found among the records. Entries of presentments in the books of a manor are not evidence of acts of ownership, nor used over lands by the lord of the manor.]

King Charles I. being seised in fee, in right of his crown, of the lordship or manor of Hatfield, and of the chace called Hatfield chace and Ditch Marsh with the appurtenances, and of divers waste grounds and commons to the said lordship or manor belonging, or thereunto near adjoining, in the county of York, great part whereof was subject to be drowned with water, so that little or no benefit could be made thereof without draining the same: by articles of agreement dated the 24th of March, in the second year of his reign, and made between his said Majesty of the one part, and Cornelius Vermuyden Esq. afterwards Sir Cornelius Vermuyden Knt. of the other part: the said Sir Cornelius Vermuyden undertook to drain the said drowned grounds, so as to make the same fit for tillage or pasture, and to keep them for ever in such condition; and in consideration thereof, his said Majesty agreed that the said Sir Cornelius Ver-^[307]muysden, his heirs and assigns, or such other persons as he should appoint, their heirs and assigns, should have one full equal third part of all the said drowned grounds; and that his Majesty, upon gaining thereof, would grant the said third part to the said Sir Cornelius, and his heirs and assigns, or to such other persons as aforesaid, to be holden of his Majesty, his heirs and successors, as of his manor of East Greenwich in the county of Kent, in free and common socage. And taking notice that the tenants of the said manor did claim common of pasture in the lands so to be drained as aforesaid, his Majesty agreed that a commission should issue under the Great Seal to certain commissioners, to treat and agree with the persons claiming common, concerning the said common and claim to the same.

Sir Cornelius Vermuyden having drained the wastes, his Majesty conveyed the third part thereof to him, his heirs and assigns; and his Majesty, in pursuance of the articles, granted divers commissions under the Great Seal, one whereof was directed to William Viscount Ayre, John Lord Saville and others, to treat and agree with the tenants and inhabitants of all the townships, parishes and precincts, in and adjoining to the said wastes and surrounded grounds, who claimed right of common in the same, touching what part of the commons to be improved they would accept in satisfaction of their right and title to the residue of the said wastes and commonable grounds; which commissioners agreed with the greater part of the said tenants and inhabitants concerning the same, and allotted and set out to them several parcels of ground and wastes, to be by them held and enjoyed in severalty, divided from the other two parts thereof.

Sir Cornelius having afterwards purchased the manor of Hatfield of his Majesty, and the residue of the waste and surrounded grounds; divers controversies arose between him and his assigns of several parts of the said manor of Hatfield of the one part, and the tenants and inhabitants of the said manor, and of the towns of Hatfield, Dunscoft, Woodhouse, Tudworth, Thorne, Sykehouse, Fishlake and Stainforth in the said county, of the other part; as well concerning their copyholds within the said manor and towns, as their demands of further perfecting the work of draining the

grounds, and the proportions and allotments claimed to be due to the said inhabitants, and securing their grounds from future damage by pretence of draining. And divers complaints being made before the Lords of his Majesty's most honourable Privy Council thereof, the same were in June 1630 referred to Thomas Viscount Wentworth and others, who in September following met there and viewed the premises, and heard the parties, and made an award in writing between them; to which some exceptions being taken, further differences arose between the said parties; but in November following they compromised the matter among themselves, and made a mutual and final agreement touching the parts of the award to be performed by Sir Cornelius.

[308] In order that the tenants and inhabitants might be decreed to stand to their parts of this award, and further agreement on their behalf to be observed, Sir Cornelius exhibited his bill in the court of Exchequer against Robert Portington, and the several other persons therein named, as tenants and inhabitants of the said manor of Hatfield; to which bill the defendants appeared and put in their answer, and confessed the agreement and the several articles of the award in the bill expressed, and consented to and allowed of such parts thereof, and such further agreements as were in the bill mentioned, and consented to have the same decreed. And to the end that Sir Cornelius might be also decreed to perform his part of the said award and agreement, Henry Lee and the said Robert Portington, and divers of the tenants and inhabitants of the said manor, and of the said towns, villages and hamlets, exhibited their bill in the same court against Sir Cornelius Vermuyden, who appeared to the said bill and put in his answer, and submitted that the award and the further agreements might be decreed to be performed by all parties.

Accordingly both causes came on to be heard on the 30th of November 1630, when the court ordered that the parts of the said award and the further agreements should be set down as they were agreed to on each side, and the same were accordingly set down as follows; viz. that the tenants, their heirs and assigns, should have their turfmoores, with all the profits thereunto belonging throughout the waste of turbary, in such manner and form as they usually thentofore had, and their copyhold lands there without admeasurement; and that there should be sufficient ways left to the moors for carriage; and that those who should come to build or dwell upon the ground of Sir Cornelius, his heirs or assigns, were only to have liberty to cut turf on 1000 acres of turf-moor towards Crowle, and 500 acres towards Sandtoft, to be set out by metes and bounds; and the turbary called the Lord's Moors, were likewise reserved to Sir Cornelius and his assigns; but Sir Cornelius and the new inhabitants were to take turf in these places only for their own burning, and not for sale. That the tenants of the manor and the members thereof should have to them and their heirs, and such persons and their heirs as they should appoint, their former allotments for their common confirmed to them, according as they were set out by the first commissioners, the said Lord Saville and others, on the 14th of March 1627, with an addition of 200 acres more in Ditch Marsh, and 403 acres of land in Ferne Carr, to be assured to the tenants in exchange for 403 acres in Westmoor. All which parcels of ground allotted and to be allotted and exchanged with the tenants, should be drained and so kept according to the articles made between his Majesty and Sir Cornelius Vermuyden; and that Sir Cornelius and his heirs, upon request, should convey or cause to be conveyed, unto such feelees and their heirs, as the tenants, or the major part of them should nominate, such part of [309] the moors not holden by copy of court roll, and other grounds within the said manor, as were allotted to and for the tenants, to be holden in free and common soccage. That the tenants should cause Ditch Marsh to be surveyed, so as it might appear that they should have a full moiety thereof, and 200 acres more, and that the same should be set forth by the referees, or any such two of them as aforesaid, so as it might lie conveniently for Sykehouse and Fishlake as well as for Thorne; wherein regard should be had to accommodate Sir Cornelius and his assigns with conveniences, as well for any new draining to be made therein as otherwise, without prejudice to the tenants. That the said tenants and inhabitants should have all lanes, ways and passages to continue to them, their heirs and assigns in common, as formerly they had; and that they should not be charged with payment of any toll for passage through the lock, or any other passage by water or by land. That Sir Cornelius, his heirs and assigns, should cause all their grounds to be sufficiently fenced and inclosed against the

allotments of the tenants; and that the said tenants and inhabitants, their heirs and assigns, should at all times thereafter be discharged of the deer, and of all laws of forest and chase.

The further demands of the said tenants assented to by Sir Cornelius and not mentioned in the said award, were as follows, viz. that neither the said Cornelius and his tenants of the two parts improved, nor their heirs or assigns, should have any common in the third part, allotted and set out for the use of the tenants and commoners. That the tenants and inhabitants of the several towns, villages and places aforesaid, their heirs and assigns, should have free liberty to dig clods, earth, and gravel, in and upon the said highways and lanes, in places fit and convenient for their necessary uses. That Sir Cornelius and his heirs should convey and assure to the said tenants and inhabitants, their heirs and assigns, one parcel of marsh-ground, called Bramwith Marsh, over and above the several parcels of marsh-ground allotted to them by the certificate of the said Lord Saville and others.—That Sir Cornelius and his heirs, and his and their tenants and farmers of such copyhold tenements as he had lately purchased from

Zanquer, one of the daughters of the said Viscount Ayre, should enjoy common of pasture and turbary, within the said wastes and moors allotted to the said tenants, according to the custom of the manor.—And it was further agreed on both sides, that according to the certificate of the said Viscount Ayre and others, the said tenants should have and enjoy the following parcels of commons, viz. The Westmoor, containing 893 acres, the Lings, containing 210 acres, Woodfree Carr, Brickhill Carr, and Halehill Carr, containing 347 acres, Remple Carr, 84 acres, the Clowns, 467 acres, East Ramlyns, 202 acres, Brereham and Kirton Carr, 380 acres, Bramwith Marsh, 35 acres, Burgarr and Hatfield Meer, 130 acres, Hatfield Hills, 66 acres, a piece [310] of ground called the Common, on the further side of the water, 65 acres, the West Nabb, 138 acres, Kirktown Nabb, 15 acres, the moiety of Dyke's Marsh, and 200 acres over: All which said parcels of ground the said tenants and inhabitants were, by the said certificate, to hold to them and their several heirs, in lieu and recompence of their several claims of common in all the rest of the said wastes and commonable grounds.

Whereupon the court decreed, in the presence of the counsel and parties on both sides, and with their mutual consent, that the parts of the said award and agreements before particularly expressed, and the said certificate of the Lord Saville and others, and every part thereof, should from thenceforth be observed and performed by the said parties; and that as well the said Sir Cornelius and his heirs and assigns, as the said tenants and inhabitants, and all other the tenants and inhabitants of the several towns, villages, and hamlets that then were, and that thereafter for the time being should be, and their heirs and assigns, should for ever thereafter be bound to observe and perform the said several parts of the said award and agreements, by virtue of the said decree.

Afterwards, by indenture of feoffment, dated the 15th of July 1633, duly executed with livery of seisin, and made between Sir Cornelius Vermuyden and John Gibbon, esq. of the one part, and Henry Lee, Roger Portington, and several others therein named, tenants of the said manor, of the other part, reciting the commission so granted to the said Viscount Ayre and others, and the allotment by them made as aforesaid, and the award so made by the said Viscount Wentworth, and other commissioners; and that his Majesty had granted to the said Sir Cornelius Vermuyden the said lordship or manor of Hatfield, with all the waste and commons thereto belonging; and that the said John Gibbon was lately become interested in the said lordship under the said Sir Cornelius. It was witnessed, that the said Sir Cornelius and John Gibbon granted, bargained, aliened, sold, enfeoffed and confirmed unto the said Henry Lee, Roger Portington and others, their heirs and assigns for ever, all those parcels of ground before mentioned, as the same were allotted to the tenants, and set forth as aforesaid, with the appurtenances, and all commons and turf-moors, rights, profits, privileges, emoluments, and commodities, to the said premises, or to any the messuages, lands, or hereditaments, of any the said tenants belonging, and all the right, title, claim, interest, property, and demand, of the said Sir Cornelius Vermuyden and John Gibbon, or either of them, of, in and to the same: to hold to them, their heirs and assigns for ever, to the only proper use and behoof of them, their heirs and assigns for ever. Nevertheless upon special trust and confidence, and for the sole benefit, profit and commodity of themselves and their heirs, and of all and singular other the tenants

and inhabitants of Hatfield, Thorne, Dunscroft, Stainforth, Fishlake and Sykehouse, and of all other the tenants and inhabitants of and within the said manor or lordship [311] of Hatfield, and of every of them severally and respectively, to use and enjoy the same, and every part and parcel thereof, as formerly they had done or been accustomed to do.

In pursuance of this award, agreement, decree and feoffment, the tenants and inhabitants of the several towns within the said manor of Hatfield, quietly and without any interruption, held and enjoyed all the said several lands allotted and conveyed to them and their heirs, together with all ways, easements, and profits thereto belonging; and also the navigation up and down the river Dunn, within the said manor, without paying any toll; and also the haling and towing paths there, up and down the said river, and fixing and mooring their vessels and ships to the banks of the said river, without interruption, till lately, and in the same manner as to the present river Dunn, as to the old river Dunn in all respects.

However, the tenants of the manor of Hatfield, being greatly interrupted and disturbed by Arthur Lord Viscount Irwin, and his agents and tenants, in the enjoyment of the lands allotted, and afterwards conveyed to them, or for their use, and the navigation within the manor, and other easements and privileges which they were entitled to; and several actions of trespass having been brought against several of the respondents and others, for matters done in the use and exercise of their rights; and the tenants not being able to produce the said indenture of feoffment (though one part thereof was in the hands of Thomas Canby, since deceased, one of the tenants of the said manor, in trust for himself and the other tenants and inhabitants of the said manor, and the steward or agent of Lord Irwin, which he refused to produce, or to permit the defendants in the actions at law to have the use and benefit of it), the respondent and several others, tenants and inhabitants of the said manor of Hatfield, on the behalf of themselves and other the tenants, freeholders, copyholders and inhabitants of the said towns of Stainforth, Hatfield, Fishlake and Thorne, within the said manor of Hatfield, in Trinity term 1731, brought their original bill in the court of Exchequer, against Lord Irwin and the said Thomas Canby, and one Robert Jennings, stating the several matters aforesaid; and praying, that the former decree might be carried into execution, and that they and the other tenants and inhabitants of the said several towns within the said manor, might be quieted in the enjoyment of the several lands allotted and conveyed to and to the use of the tenants and inhabitants of the said manor as aforesaid, and of the navigation up and down the said river Dunn, within the said manor, together with all other ways, easements, privileges and profits whatsoever, allotted to the tenants and inhabitants of the said manor, by or under the said agreements and decree, according to the true meaning thereof, and for an injunction in the meantime to stay the proceedings at law.

To this bill Lord Irwin and the other defendants appeared, and put in their several answers; and his Lordship by his answer [312] (among other things), insisted, that notwithstanding the said award, agreements, decree, and enfeoffment, he, as lord of the manor, was seised of and entitled to the freehold of all the lands allotted and conveyed to, or in trust for the tenants and inhabitants, and that they were only entitled to the herbage thereof, and to depasture the same; and also that several parts of the lands claimed by the will, were not really allotted as aforesaid, to the tenants and inhabitants of the manor. And the defendant Canby by his answer admitted, that he had in his custody one part of the deed of feoffment, and submitted to produce the same at the hearing. And the defendant Robert Jennings, as tenant of Lord Irwin, insisted on a right of common in part of the lands claimed to be allotted to the tenants.

The defendants Arthur Lord Irwin, Thomas Canby, and Robert Jennings, having all died, a bill of revivor and supplement was afterwards exhibited against Henry Lord Viscount Irwin, the now appellant, and also against Mordecai Cutts, and John Robinson and Mary his wife, suggesting the death of Arthur Lord Irwin, Thomas Canby, and Robert Jennings, and charging that the appellant was brother and heir of the said Arthur Lord Irwin, and as such was entitled to the said manor of Hatfield, with the appurtenances, and claimed the same rights; and that Mordecai Cutts was the executor of Thomas Canby, and refused to produce the feoffment; and that Mary, the wife of John

Robinson was the widow and administratrix of Robert Jennings; and that John Robinson and Mary his wife, threatened to proceed at law, and take out execution on the judgment obtained in the action at law brought by Robert Jennings.

The several parties appeared, and answered this bill; and the appellant by his answer admitted, that he was the brother and heir of Arthur late Lord Irwin, and that he claimed to be entitled to the said manor for his life, and derived such title under the will of his eldest brother Edward Machell, and that such title first accrued to him in remainder, after the death of his eldest brethren Richard and Arthur; and said, he had heard and believed, that Sir Cornelius Vermuyden was lord of the said manor of Hatfield, but knew nothing more of the several matters and things contained in the bill, than what were disclosed and set forth in the several answers of the said Arthur Lord Irwin, to which answers he referred, and submitted that the original bill, and the proceedings had thereupon, should be revived against him. The defendant Cutts by his answer admitted, that he had a part of the deed of feoffment, and submitted to produce the same, but admitted that he had refused to produce it, that the plaintiffs might have the benefit of it; and all the defendants submitted, that the proceedings should be revived against them, and the same were revived accordingly.

The cause being at issue, several witnesses were examined, and their depositions published; and on the 21st of April 1755, the cause was heard, when it was (among other things) ordered and [313] decreed, that it should be referred to a trial at law, in a feigned action to be brought by the plaintiffs, against the defendant Henry Lord Irwin, to try the following issues, viz. 1st, Whether the ground whereon the turnpike in the pleadings mentioned was erected, was or was not part of the tenants' allotments. 2d, Whether there was or was not, at the time of erecting the turnpike, a common highway over that ground. 3d, Whether there was or was not, at the time aforesaid, a way for the tenants over that ground where the turnpike stood, from Stainforth to a common field called Incroft, or Kirktown Nabb, or either and which of them. 4th, Whether the uninclosed ground, lying on the east side of the river Dunn, and between the river and the great bank, commonly called the Participants bank, and extending from a place called Ealand Lane South, to a place opposite to a place called New Went North, or any and what part thereof, was part of the tenants' allotments. Which issues were to be settled by the deputy remembrancer in case the parties differed therein, and were to be tried by a special jury for the county of York; and the consideration of costs and all further directions were reserved till such trial was had.

Afterwards the plaintiffs waived the first and second issues, apprehending that by the fourth issue all the matters really in question and then in dispute would be tried; and the defendants waived the third issue: so that the fourth issue only was settled and directed to be tried.

Accordingly at the summer assizes 1755, this issue was tried at York by a special jury, and took up above eighteen hours in the trial: and upon full evidence as to the right of the soil of the premises in question, a verdict was given for the plaintiffs, now the respondents, whereby it was found that the said uninclosed piece or parcel of ground, and every part thereof, was part of the said lands and grounds heretofore allotted to and for the benefit of the tenants of the said manor of Hatfield, entitled to right of common on the waste and commons of the said manor.

On the 13th of December 1755, the cause came on to be heard upon the equity reserved, when the deposition of one Robert Laverack, taken in the cause on the part of the appellant, and other evidence was offered by his counsel to be read to support their construction, that there was in the deed of feoffment a resulting trust in the Lord of the said manor, as to the soil of the lands and grounds thereby conveyed for the sole use of the tenants of the manor: but the reading of such deposition and other evidence being objected to by the counsel for the respondents, the further hearing of the cause was adjourned over to the then next Tuesday (being the 16th of the same December), when the cause came on again to be further heard, and upon hearing counsel on both sides the objection was allowed; and then a paper purporting to be a copy of a bill, said to be filed in the said court of Exchequer in the year 1640, between Perkins and other plaintiffs, and [314] Ingram defendant, being offered to be read, was rejected (see *post*); whereupon the cause was adjourned to be further heard on the then next day, when the same came on again; and the appellant having by his counsel insisted, that he as lord

of the manor had a right to the soil of the lands allotted to the tenants, the court over-ruled the same; and thereupon ordered and decreed, that the respondents and the rest of the tenants of the said manor, freeholders or copyholders, and their heirs and assigns, should, during the life of the appellant, quietly and peaceably hold, use, occupy and enjoy the several lands and grounds mentioned in the said fourth issue and verdict, and every part thereof, and all other lands allotted and conveyed to them, or in trust for them, according to the said decree of the 30th of November, 6th Charles I. and the said deed of feoffment, against the appellant as lord of the said manor; and that an injunction should be awarded to quiet them in such enjoyment, and to enjoin the appellant, his agents, servants and workmen, from interrupting or disturbing the same during the said time, and that the appellant should pay to the respondents their costs of the original bill, and bill of revivor and supplement, and the costs at law and in equity, subsequent to the said bill of revivor, to be taxed by the deputy remembrancer; and also, that the said Mordecai Cutts should bring into court the said deed of feoffment, and that the same should be enrolled amongst the records of the court, and that the respondents should pay to the said defendant Cutts his costs of the said cause to be taxed, so much of which costs were to be repaid to the respondents by the appellant as were incurred to the time of the said Cutts' answer, who was also to pay to the respondents the costs of the several motions and orders for producing the feoffment; and also, that so much of the bill as related to the respondent's claim of the ground whereon the turnpike therein mentioned stood, to be part of the lands allotted to the tenants, or to be a common highway, should be dismissed with costs to be taxed, to be paid by the respondents to the appellant; and by consent, the bill was dismissed as against the defendants John Robinson and Mary his wife, without costs.

From this decree Lord Irwin appealed, insisting (C. Pratt, T. Sewell, R. Wilbraham), that it appeared from the several acts and instruments above stated, that the controversies between Sir Cornelius Vermuyden and the tenants and inhabitants of the said manor of Hatfield, arose only upon the claim and pretension of the said tenants and inhabitants, to the right of common in the waste grounds of the said manor; for by the agreement of the 24th of March, 2 Charles I., Sir Cornelius was to drain the grounds, and to have one third part for the use of himself and his heirs absolutely, and free from any right of common; by which means the commoners would be deprived of their right of common in such third part of the waste. That the lands allotted and confirmed to the tenants and inhabitants of the manor by the commissioners' certificates, were agreed to be kept drained, and were so allotted to them as a satisfaction for [315] their right of common in the other part of the waste. But it was only intended that the tenants and inhabitants should have the sole benefit of the agistment of those lands which were to be so preserved drained for that purpose; not that they should have the ownership of the soil thereof. That the right to the soil of the said lands did not seem to have been in question, or at all attended to in the said award, articles and decree; the matter in controversy being only the right to depasture upon the commons and waste. And though by the feoffment of Sir Cornelius Vermuyden, the allotted lands were granted to the trustees and their heirs, in trust for the sole benefit, profit and commodity of themselves and their heirs, and of all other the tenants and inhabitants of the several townships therein mentioned, and other the tenants and inhabitants of and within the manor of Hatfield; yet that grant was made in performance of the award, and expressly in trust, that they should use and enjoy the same as formerly they had done, or been accustomed to do. So that as the feoffment was relative to the award, and as the award and all the other proceedings, which seemed to be relative to one another, had in view only the right of the common, and not the right to the soil of the lands; the right of common ought only to be enjoyed by the tenants and inhabitants and not the soil. But if the right to the soil passed to the trustees in fee, it must be in trust for themselves and the inhabitants as joint-tenants, or tenants in common of the equitable interest therein: if it were as joint-tenants, then the whole interest must be in the heir of the survivor, which was absurd; if as tenants in common, then every inhabitant and every tenant had by the grant a separate right to an equal undivided share of these lands, which had descended to their several heirs, or been conveyed by them, and must be now vested in a thousand different persons; and the heir of every cottager would be entitled to an equal share of the lands with the most substantial freeholder, and every

one of them might have a right to a partition. But if the trustees were trustees for the tenants and inhabitants, in order to enable them to enjoy the benefit of the depasturage of these lands, in the same manner as they formerly had been accustomed to do; and if the right to the soil was preserved by them as a resulting trust for the benefit of the lord, the same not having been intended to be granted for any other purpose than only to give the tenants and inhabitants a power to enjoy solely the depasturage of the allotted lands; then the feoffment would be free from all the absurd consequences above mentioned, and the tenants and inhabitants would thereby have effectually secured to them the full benefit intended for them. And lastly, that as the said deed was an ancient deed, executed above 120 years ago, if it was conceived in doubtful words with regard to the right of the soil, it was apprehended that any ancient evidence or writing ought to be admitted, to shew how the same was understood, and what was taken to be the intent and meaning of it, recently upon, or shortly after the making thereof.

[316] On the other side it was contended (C. Yorke, G. Perrot), that every part of the successive transactions relative to the improvement of the waste grounds and commons in question, tended to confirm the legal operation of the feoffment, and to rebut the resulting trust of the ownership of the soil, insisted on by the appellant. When the original project of draining and improving was first undertaken, the crown agreed to grant one-third of the lands as a recompence to Sir Cornelius Vermuyden the projector: at the same time, powers were given to proper persons, to treat with the tenants and inhabitants who claimed right of common, touching what part of the lands they would accept in satisfaction of such right; and allotments were made accordingly. Upon the disputes which arose after the purchase of the whole estate by Sir Cornelius, an award was made under a reference from the privy council, and a decree in the Exchequer was founded upon that award, and other subsequent agreements. From the terms of the decree it is evident, that the former allotments were confirmed with additions, and new exchanges made. The purchaser was directed to enfeoff trustees in such allotments and exchanges, for the benefit of the tenants and their heirs, in lieu of all their claims in the rest of the waste and commonable grounds; to be held of the Lord of the Manor, in free and common socage. On the 15th of July 1653, a feoffment was accordingly made to the feoffees and their heirs, to the use of them and their heirs, upon special trust and confidence, and for the sole benefit, profit, and commodity of themselves, and the other tenants and inhabitants. The manifest intent of this feoffment was to confirm and effectuate an exchange in the right of common, in two-thirds of the waste lands, with the right of soil in the remaining one-third. The tenants had originally a right of common over the whole: the lord had likewise a right in every part of the soil. On the one hand, the lord was encouraged to drain and improve, by being enabled to inclose free from the right of common: On the other hand, it was advantageous to the tenants to relinquish so large a proportion of the waste, for the sake of quietly enjoying one third of it improved and drained, under a conveyance of the absolute ownership of the soil, discharged from the right of the Lord. But if it was the intent of the parties, to secure only a right of common in one-third of the waste, still liable to the Lord's right of ownership in the soil: the proper method had been, not for the Lord to enfeoff trustees for the tenants in one-third of the waste, but for the tenants to have executed releases of their right of common on two-thirds of it to the Lord, reserving to themselves the free enjoyment of such right of common as they were accustomed to have, on the remaining third: Or the court, in consequence of the award and agreements, might have decreed the Lord to hold and enjoy the two-thirds, free from any right of common, or otherwise in the tenants; and that the tenants should enjoy their right of common in the remaining third part, exclusive of the Lord. [317] There would have been no occasion in this view for the solemnity of a feoffment, and the interposition of trustees. If the soil was not to be absolutely conveyed, the original customary enjoyment, and the right of common in the remaining third, was a better title than any new conveyance from the Lord, subject to be restrained and limited in the operation of it, by the words of his grant. But the vesting of the entire property of the soil in trustees, as a trust for the tenants, was the object of this feoffment: because it was the only effectual method of securing them from future vexation, as to pretence of digging the waste, surcharging the common, and doing other acts which might produce contests. That the parol evidence offered in this

cause to shew acts of ownership done, and the exercise of the Lord's rights upon the allotted lands, long after the time of the decree and feoffment, was justly rejected by the court; because it is contrary to the rules of law, to set up a resulting trust by parol evidence, where the plain words of the deed have disposed of the whole trust, or beneficial interest in the land; as it would render all titles to estates precarious, and insecure. And as to the costs decreed, the appellant having set up a defence both in law and fact, which could not be supported, and having insisted on a trial at law, in which a verdict went against him, which put the respondents to very great expence; it was apprehended, the court was in some measure bound to give them their costs. For though the giving or refusing costs in courts of equity, is in some measure discretionary; yet, unless there is something very particular in the case to vary the rule, costs always follow the right.

At the hearing of this appeal, the counsel for the appellant offered to read and give in evidence, a paper said to be an office copy of a bill filed in the court of Exchequer, in the year 1640, alleging that the original was lost; and that they had an officer of the court of Exchequer attending, to prove that the same could not be found among the records of that court. But the counsel for the respondent objecting thereto, the house determined that it could not be read. The appellant's counsel then offered to read several entries of presentments in the manor books, and a deposition of John Moxon, in order to prove acts of ownership done, and rights exercised by the appellant on the allotted lands in question: But this being likewise objected to, the house determined that they could not be read.—And after hearing counsel on both sides to the merits, it was ORDERED and ADJUDGED, that the appeal should be dismissed, and the decree therein complained of affirmed. And it was further ORDERED, that the appellant should pay to the respondents the sum of £60 for their costs, in respect of the said appeal. (Jour. vol. 29. p. 397, 398.)

[318] CASE 12. WILLIAM RICHARDSON, — *Appellant*; JOHN CHAPMAN, and Others, — *Respondents* [26th February 1760].

[Mews' Dig. v. 1235; vi. 1355; xiv. 781. See *Brown v. Higgs*, 5 Ves. 504, 505.]

[It is a universal proposition, and of great moment to the safety and property of mankind, that a trustee ought strictly to pursue the tenor of his trust, without perverting it directly or indirectly to his own personal advantage. And therefore where an executor intrusted with the disposition of some church preferments, made a presentation to A. under a secret condition for his own benefit, the presentation was set aside, and he was decreed to present a more proper person.]

[Where a trustee fails in performing his duty, it is the office of a Court of Equity to interpose and guide him; where such Court is bound in conscience to set aside the act of a trustee, it will at the same time decree the proper act to be done; not by referring the matter to his discretion, which is forfeited, but by directing him, as a mere instrument, to perform the thing decreed.]

[Order of Lord Keeper Henley reversed.]

[Words of desire, request, or recommendation, (for request and recommendation are considered as convertible terms,) are sufficient to create a trust; provided that the property be certain, and the objects distinctly marked. Where any person gives property and points out the objects, the property, and the way in which it shall go, that creates a trust unless he shews clearly that his desire expressed is to be controuled by the legatee, and that he shall have power to defeat it. See Gwillim's *Bac. Abr.* tit. "Uses and Trusts," vii. 140, and Fonblanque's *Treat. Eq.* lib. 2. c. 2. § 4. in n. and the cases there cited.]

See Burn's *Eccles. Law*, (edit. 1797 by Fraser,) vol. i. p. 240–246.

Doctor John Potter, late Archbishop of Canterbury, being entitled to the next presentation to, or disposition of several benefices or dignities in the church, commonly

called options, did, by his will dated the 12th of August 1745, bequeath the same in the words following: "I give and bequeath to my executors, all my options, in trust " nevertheless, that in disposing of the said options, regard be had, according to their " discretion, to my eldest son Mr. Potter, Archdeacon of Oxford, to my sons-in-law the " husbands of my daughters, to my present and former chaplains, and other domestics, " particularly to Doctor Tunstall, my chaplain, and to Mr. Hall my Librarian; also to " my worthy friends and acquaintance, particularly to the Reverend Doctor Richardson " of Cambridge, who will, I hope in due time, find some opportunity to rectify those " mistakes in his printed accounts of my dear and most honoured patron Archbishop " Tenison, of which he has been by me advertised."—And the Archbishop appointed George Paul, LL.D. John Andrew, LL.D. and the respondent Chapman, his executors.

The Archbishop died on the 10th of October 1747, and soon after Doctor Paul and the respondent Chapman proved his will, Dr. Andrew having died in the testator's lifetime.

The dignity or preferment of the treasurership of the cathedral church of Chichester, one of the options belonging to the Arch-[319]-bishop, and the first which fell, became vacant about the year 1750: whereupon the respondent Chapman was presented to the same by his co-trustee Dr. Paul, though he had been preferred by the Archbishop in his lifetime to the livings of Allington and Merham in the county of Kent, and to the archdeaconry of Sudbury, in the county of Suffolk, together of the yearly value of £600 and upwards.

Under such presentation of the respondent Chapman to the treasurership of Chichester, Dr. Potter and the sons-in-law of the Archbishop, filed their bill in the court of Chancery, insisting, that Dr. Potter, as being first named in the clause in the Archbishop's will, and after him the sons-in-law, were entitled before any other objects, to be presented to the options, as they became vacant; and praying, that the Lord Bishop of Chichester might be stayed by injunction, from inducting the respondent Chapman into the treasurership, and for other relief.

Dr. Paul by his answer to the bill said, that the respondent Chapman, having been one of the Archbishop's chaplains, he (the said Dr. Paul) taking into consideration, that, in case of his death, the sole right of presentation to the options, on a vacancy, would vest solely in the respondent Chapman, and that Chapman might, by means thereof, be hindered from having any of the options for his own benefit, but that the plaintiffs in the suit, or any of the other objects named in the testator's will, might at any time afterwards be presented to all the other options on a vacancy, he did present the respondent Chapman to the dignity of the treasurership of Chichester; and further said, that he was willing to join in presenting the several other persons named or pointed out by the Archbishop, in his will, to the options, as the same should become vacant; and did not intend, in case the respondent Chapman should be established in the treasurership, to present him to any other of the options.

The respondent Chapman by his answer, gave the like reasons for his being presented to the treasurership, and further said, that he was willing and desirous, and believed Dr. Paul was willing and desirous, from time to time, as the other remaining options should become vacant, to present thereto the several persons, named or pointed out by the Archbishop in his will, according to the best of their discretion, and according to the trusts reposed in them; and said, that he believed Dr. Paul did not intend to present him (the said Chapman) to any other of the options, in case he should be permitted to hold the treasurership of Chichester; and denied having given out, that he or Dr. Paul would hinder and prevent the plaintiffs from all future benefit and advantage from any other of the options, which might then after become vacant, or that he would take to his own use all the said options.

The injunction obtained in that suit having been dissolved soon after putting in the answers, the respondent Chapman was established in the dignity of the treasurership of Chichester, which [320] is not only of considerable yearly profit, but is increased in value to the respondent, by the dropping of two lives in a lease of an estate belonging to the same, for the renewing of which the respondent Chapman demanded £1500.

The place or dignity of precentor of Lincoln, was the third option which became vacant, (the second being a rectory with cure of souls,) and this vacancy was occasioned by the death of Dr. Trimnell, upon the 18th of May 1756.

The respondent Chapman, having long intended to procure this option to himself, had early intelligence of Dr. Trimmell's death; and on the 26th of May set out for Bingen, but not finding the Bishop at home, went on to Lincoln, and enquired into the state and condition of the house belonging to the precentorship, and talked with one Mr. Helling, the agent of the late precentor's widow, relating to the furniture of the house, and the time that the widow might probably be permitted to stay in the same; and from thence went to the Bishop of Lincoln, whom he met upon his visitation at Hatfield, on the 1st of June 1756, and desired the Bishop to admit him into the office or dignity of precentor, as patron of that turn, upon his own prayer; but the Bishop did not think proper to comply with the proposal, and told him, that he would write to him upon the subject; and accordingly afterwards wrote and informed him, that if he (Chapman) had been absolute patron of that turn, he would have admitted him to the precentorship upon his prayer; but as it appeared he was not such patron, but only in trust, he desired to see an extract of the Archbishop's will, and a copy of the order of the court of Chancery, relating to the treasurership of Chichester, before he would determine whether he could properly admit him to the precentorship or not.

The respondent Chapman, finding from the answer given by the Bishop, that it would be difficult to procure himself to be admitted to the precentorship in the manner he had first proposed, formed another scheme to accomplish his purpose; and with that view got the respondent Venner, a nephew of the wife of Archbishop Potter, who then resided upon a vicarage, to which he had been preferred in the county of Kent, to meet him at Rochester upon the 7th of June; and at such meeting, the respondent Chapman told him, that he had long intended to serve him, and that there was then an option vacant, by which he designed he should be benefitted; and then told him that the precentorship and canonry residentiary of Lincoln was become vacant, and talked to him about the nature and business of the precentorship; and before Venner had given any answer to what was so mentioned, the respondent Chapman told him, that perhaps the option itself might not be suitable to him, and asked him, if he should not like something else instead of the option, such as his (the said Chapman's) living of Mersham? Whereupon the respondent Venner desired to have the living of Mersham, instead of the precentorship; and the respondent Chapman then [321] asked Venner, if he would signify so much to the Bishop of Lincoln, upon which Venner declared that he would, and did accordingly, during the meeting at Rochester, upon the 7th of June, sign a certificate or petition, to the Bishop of Lincoln for that purpose.

This certificate was afterwards destroyed: and the respondent Chapman thinking it necessary that Venner should certify to the Bishop, that he had had an offer made him of the precentorship, afterwards sent to Venner to come to London; whereupon Venner met the respondent Chapman in London, upon the 11th of June, when Chapman told Venner that he was not quite satisfied with what they had done, with regard to the option; and the respondent Chapman, with a view that neither Venner himself, nor any one else, might have it in his power to say, that he, Chapman, had procured or persuaded Venner to make an exchange, again explained the nature and duty of the option, and made a pretended offer to Venner of a presentation thereto; and Venner declining such offer, and saying that he chose to exchange the same for Mersham, the respondent Chapman, at such meeting of the 11th of June, procured Venner to sign another certificate to the Bishop, in the words following: "Know all men by these presents, that I
 " Samuel Venner, clerk, vicar of Sutton Vallence in Kent, nephew to the late Most
 " Reverend Doctor John Potter, Archbishop of Canterbury, by his wife, and one of
 " those who are capable, by his Grace's will, of the benefit of some option left by the
 " said will, have had the offer from the Reverend Doctor John Chapman, executor of
 " his said Grace's will, of a presentation to the chantorship of Lincoln, one of the said
 " options now vacant, for which I am very thankful; but I hereby declare, that, upon
 " due deliberation, and for several reasons of private convenience thereunto me moving,
 " I choose in lieu thereof, and in the way of exchange for the said chantorship, certain
 " other preferment more suitable and more agreeable to me, in the present possession of
 " the said Doctor Chapman, which he at my instance is willing to assign and exchange
 " to me for that purpose; and it is therefore my most earnest desire, and my humble
 " request to the Right Reverend the Lord Bishop of Lincoln, that he would be pleased,
 " instead of myself, to admit the said Doctor Chapman to the said chantorship of

"Lincoln, and to put him in due form into the full possession thereof. Witness my hand and seal, this 11th day of June, in the year of our Lord, 1756. "Samuel Venner."

The respondent Venner, at the time of signing this certificate, was only bachelor of arts, and incapable of holding any other living with his vicarage; and the respondent Chapman was not patron of the living of Mersham, nor of any other of the preferments which were then in his possession.

A caveat being entered with the Bishop of Lincoln against admitting the respondent Chapman to the precentorship, and the Bishop having thereupon informed the respondent Chapman, that [322] it was necessary he should make a presentation, the respondent Chapman found he could not be presented as patron on his own prayer; and being so pressed to make a presentation, he on the 7th of July 1756, signed a presentation of the respondent Venner to the option, which he deposited in the hands of a friend of his own, who was a stranger to Mr. Venner, and did not acquaint him that he had made such presentation till the 28th of July; and after the respondent Venner was made acquainted with the same, he never prayed to be admitted thereon.

On the 16th of December 1756, the appellant filed his bill in the court of Chancery, against the respondents Chapman and Venner, and the Lord Bishop of Lincoln, which was afterwards amended, and the other respondents were made defendants, charging the several matters before stated; and that the first or principal view of the respondent Chapman was to obtain the precentorship to himself, without resigning any preferment; and when he found a difficulty in so doing, he then first resolved to make use of Venner, in order to procure the precentorship for himself, upon exchange of other preferment of less value, and that the respondent Venner was presented to the option upon an agreement or collusion between him and Chapman, that Venner should exchange the precentorship with the respondent Chapman, for some of Chapman's preferment of less value than the precentorship. And it was further charged, that all the persons particularly named in the Archbishop's will, had either from the Archbishop in his life-time, or since his death, by means of his opinions, received some benefit or preferment except the appellant, who had, since the Archbishop's death, altered his printed account of the life of Archbishop Tenison, agreeably to the intimation given by the Archbishop in his will; and all the respondents, except the Bishop of Lincoln, were required to set forth, whether they claimed to be presented to the precentorship of Lincoln. And the bill prayed, that the presentation of the respondent Venner to the precentorship, might be delivered up to be cancelled; and that the respondent Chapman might be compelled to present the appellant, and that the Lord Bishop of Lincoln might be directed to admit, institute, and induct the appellant into the precentorship; and that the trust reposed in the respondent Chapman might be executed according to the true intent of the Archbishop, expressed in his will; and that the Bishop might in the mean time, be restrained by injunction from doing any act for the induction, installation, or establishment, either of the respondents Venner or Chapman, or any other person, to the said precentorship.

To which bill the several defendants put in their answers. And the respondents Chapman and Venner, by their answers, insisted, that Venner was presented for his own benefit and advantage, and without any agreement or promise whatsoever for an exchange; but the respondent Chapman admitted, that he, for twelve months past and upwards, had within himself an intention of making an exchange with Mr. Venner for the option, in case [323] Venner, after his being admitted, should be willing to make such exchange, and believed that he had been, and would in such case be willing to make an exchange with him; but that he was not absolutely determined within himself, and therefore could not set forth, in case Venner should be admitted to the vacant option, and should offer to change with him for any preferment of his, whether he should or should not comply with such offer. The respondent Venner by his answer said, that in case he had been inducted into the vacant option, upon the presentation made by the respondent Chapman, without any obstruction or impediment, he should, after such induction, have been willing, and did within himself intend, to exchange the same with the respondent Chapman for his living of Mersham, or some other preferment in his possession, in case the respondent Chapman would have consented thereto.

The respondents, Dr. Potter, Dr. Sayer, Dr. Tanner, and Dr. Milles, by their

answers, renounced and resigned all right or claim of being nominated or presented to the precentorship. And the respondents, Dr. Tanner and Dr. Milles, said they were the more willingly induced to relinquish all right or claim thereto, in order to open the way to the appellant, whom they knew to be a person very much respected by the late Archbishop Potter in his lifetime.

The respondent Tunstall and the respondent Hall, by their answers, severally insisted on a prior right to the appellant, under the trust of the Archbishop's options, being named next after his sons and sons-in-law. And the respondent Hall brought a cross bill, praying relief, upon the foundation of such right.—But it would be immaterial to take further notice of their claims, the said respondents not having appeared to the appeal, and having thereby relinquished all pretence of right.

And the Bishop of Lincoln, by his answers to both bills, said, that he was willing to be restrained from inducting, installing, or establishing the respondents Venner or Chapman, or any other person, in the place or dignity of precentor, until the right and matter in dispute between the appellant and the other respondents, should be fully heard and determined by the court.

Both causes being afterwards at issue, divers witnesses were examined, and publication passed; and the Bishop being examined as a witness, proved the several applications made to him by the respondent Chapman, as before stated; and Mr. Thomas Potter proved, that the respondent Chapman acquainted him, that he (Chapman) intended to take the precentorship himself, and to resign his lesser living to the respondent Venner; and that if he, Mr. Potter, had no objection, the Bishop was desirous to carry the exchange into execution; but that upon Mr. Potter's objecting, that Venner being only a bachelor of arts, was incapable of taking a dispensation to hold two livings, the respondent Chapman replied, that point had been considered and settled, and that Mr. Venner was to go again to the university, and keep as many terms [324] as would enable him to take the degree of master of arts, which, with a chaplainship to some nobleman, would qualify him for a dispensation; and that it would be no difficult matter to obtain the consent of the Archbishop of Canterbury, or his successor, to exchange his (Chapman's) life in the living of Mersham, for the life of Mr. Venner; and that upon his (Mr. Potter's) asking what was to become of the living in the mean time, he replied, that he, (Chapman) should keep possession both of the precentorship and the living, making a stipulated allowance thereout to the respondent Venner.

On the 17th, 19th, 20th, and 21st of November 1759, both causes came on to be heard together before the Lord Keeper Henley, when his Lordship (see his opinion at large, 1 Burn, *Ecl. Law*, 244) was pleased to order, that the bill brought by the appellant, and also the bill brought by the respondent Hall, should stand dismissed as against the Lord Bishop of Lincoln, with 40s. costs; and as against the other defendants without costs; and that the injunction obtained by the appellant should be dissolved.

From this decree of dismissal the present appeal was brought; and on behalf of the appellant it was insisted (C. Yorke, E. Willes), that there is not a plainer proposition in conscience, nor of greater moment to the safety and property of mankind, than that a trustee ought strictly to pursue the tenor of his trust, without perverting it directly or indirectly to his own personal advantage. For this purpose courts of equity controul the conduct of trustees, and the same care and jealousy which are employed in the regulation of private trusts, must be deemed peculiarly due to such as are of a public nature, and concern the sacred offices of religion. That the sole view of the respondent Chapman, throughout this whole transaction, was to secure the preferment in question for himself. When he could not prevail to be admitted directly on his own request, his whole art and attention were exercised to gain it, in consequence of an indirect collusive engagement with the respondent Venner. And this fact appeared from the conversation between them, as stated in both their answers; it appeared also from his conversation with Mr. Potter; and above all, from the written memorandum laid before the Bishop in the form of a certificate from the respondent Venner, importing that he was desirous to take some other smaller preferment in the possession of Dr. Chapman, instead of the precentorship, which was much more valuable. The presentation was not drawn up in favour of Venner till after repeated refusals of the Bishop of Lincoln to admit Dr. Chapman, and information received that a bill in Chancery was to be filed against him. It was then detained in the custody or power of Dr. Chapman, for several

weeks before it was transmitted to the Bishop: and when it was transmitted, the respondent Venner never tendered himself for admission upon it. That these facts were not denied by the answers of either of them; and proved as legally to the conviction of a court of justice, as they did in reason to every man's own private conscience, [325] that a collusive agreement or plan was formed or entered into between the parties, to procure the precentorship for Dr. Chapman: and that this plan had existed without alteration, except in the manner proposed for accomplishing it, from the beginning to the end of the transaction. And it was admitted by the answers of both, that in case the presentation made to Venner should not be cancelled, the intention remained of resigning in favour of Dr. Chapman, though the agreement was verbally denied. That the selfish conduct and breach of trust complained of in this case was highly aggravated in respect to the respondent Chapman, by his personal obligations to the testator, who was his patron; by the considerable accession to his preferment out of these options since the testator's death, through the means of his co-trustee Dr. Paul; by the disclaimer in his answer to Dr. Potter's bill, of any future expectation of advantage from them; and by the simoniacal nature of his dealings with the respondent Venner, against the reason, rule, and authority of the canon law, and of all the canons which bind the clergy, and which are supported in some instances by penalties to be inflicted in the temporal courts under the authority of acts of parliament.

But it was objected, I. That the trust in question conferred no right or interest upon the persons particularly named in the devise, which could entitle them to any remedy in law or equity: it was a mere recommendation left by the testator to the discretion of his trustees, whether they would attend to it or not, in any one instance: and the options were submitted to their absolute power of disposing without control. II. That supposing, for argument's sake, the devise of the options was properly to be considered as a trust in a court of equity; yet the respondent Chapman had performed it according to the testator's intent, by presenting the respondent Venner, who was a friend and acquaintance of the late Archbishop, to the preferment in question. III. That allowing the utmost force to the arguments urged against the respondents, both in respect to the trust and the manner of performing it; yet the court was not warranted by any rule of equity or precedents in similar cases, to decree a presentation in favour of the appellant.

To the first of these objections it was said, that the trust was allowed to be discretionary, so far as concerned the order of choice amongst the objects named or described; but was plainly limited within the circle of those objects. Many reasons of prudence and honour might make it proper to depart from the strict letter of the devise, with respect to the priority of any one claimant: but it would be absurd to suppose that the trustees were invested with a power of neglecting wantonly, or without cause, every one of the *cestui que* trusts anxiously pointed out by the testator, and of conferring the preferments in question upon themselves or others, at their own pleasure. That the appellant's construction of the devise was not only most agreeable to the intent of the testator, who had proposed so many fit and worthy [326] objects; but was the most eligible construction to be made upon the will of an Archbishop of Canterbury, disposing of the fruits of the prerogatives of that see by his own discretion, as far as possible, rather than by the will and pleasure of an executor; who if this notion prevailed, might sell the grant of an option with impunity, in defiance of an express trust. That the construction contended for was also agreeable to many adjudged cases of a like nature. Words of desire, advice, and recommendation to an executor are always deemed legatary, especially when accompanied with a devise expressly in trust; and convey a right or interest which may be maintained in a court of equity, even though the testator himself should forbid any suit or action to be brought for the performance of his will in that respect. And the only case in which such words are held not to be legatary is, where they are inconsistent with the antecedent right or interest devised to that person to whom they are addressed. In such cases, the subject matter of the recommendation having been once absolutely devised away, it cannot be presumed that the testator intended to use his subsequent words of recommendation in a legatary sense, which would be to construe his will as inconsistent with itself in one and the same sentence.

As to the second objection, it was not to be imagined that the late Archbishop, speaking of his friends and acquaintance in his will, at his time of life, after his studies

and labours, and in the highest rank of dignity, would mean to include in that description a youth who had been sent to the University not long before his will was made, and to whose education his Grace contributed something; but the fruit of which education must be uncertain at that time, as well as the profession which he might choose to follow. And it was plain from the particular instance of the appellant being named by the Archbishop, that his Grace meant to describe persons in the church whom he had peculiarly honoured with his intimacy, conversation, and good opinion. But supposing the respondent Venner to be an object described within the meaning of the Archbishop's will, yet he was to be regarded in this cause as a colluding instrument in the hands of the respondent Chapman, to serve the purpose of breaking the trust in deceit of the Bishop of Lincoln, and the jurisdiction of the court of Chancery; and therefore ought not to be suffered to take the benefit of a presentation obtained by a corrupt agreement, or made out with a corrupt intention, which was still admitted to exist.

And in answer to the third objection, it was submitted, that the relief contended for, fell within all the general rules of trusts. Wherever a trustee becomes incapable of performing his duty, it is the office of the court to interpose and guide him; whether his incapacity proceeds from weakness or corruption. Constant experience proves this, in the case of guardians and trustees of every denomination; and there is no instance, where the court is bound in conscience to set aside the act of the trustee, [327] in which it has not at the same time decreed the proper act to be done; not by referring the matter to his discretion, which is forfeited, but by directing him to perform, as a mere instrument, the thing decreed. That the appellant stood now the preferable, and indeed the only object before the court. He had equal merit in the view of the testator, with most of those who were named. He had complied with the condition required in the devise. He never received any preferment from the Archbishop in his lifetime, either before or after the making of his will. The statutes of that college in the University of Cambridge, of which he was master, precluded him from accepting any benefice with cure of souls. This circumstance was known to the Archbishop, and was considered by him, as appeared in evidence; and the appellant had the peculiar merit, at his own great experience and hazard, of detecting, in this suit, the misconduct of two respondents, and vindicating the honour of the testator's trust: It was therefore hoped, that the decree of dismissal would be reversed; and that the appellant would have such or the like relief, as was prayed by his bill.

On the part of the respondent Dr. Chapman, it was contended (C. Pratt, T. Sewell), that he, as surviving trustee, had an absolute power of disposing of the vacant options, to such of the objects described by the Archbishop's will, as he should think the most deserving. For though the will observed an order in classing the several objects, whereby those first recommended might seem to have some priority of right given them; yet the trustees were not commanded to give such preference, but were only requested to have regard to the several persons there mentioned in the disposition of these options. From whence the respondent had always apprehended, the Archbishop meant to repose an entire confidence and discretion in his trustees, as his substitutes, to nominate from time to time, such as they, upon due consideration of all circumstances, verily believed the Archbishop himself in the like case would probably have selected for the vacant option. But if the respondent had no such power of choice, then not only the present, but every other option, as it fell, must be disposed of to the son and sons-in-law of the Archbishop, in the order they stood in the will, although they were already most amply preferred; and those who stood behind must be for ever excluded, unless those first mentioned would be pleased out of their courtesy, to pass by some little benefice for the present turn, for the sake of a better expectation. Whereas the respondent could not help thinking, that the Archbishop would have judged those worthy gentlemen very sufficiently provided for; and would have chosen in such case among his poorer friends, some other person whose merit, as well as condition in life, might require subsistence as well as reward. That if this discretion was taken away, then all consideration of fitness and propriety must be laid aside; neither merit, or learning, or doctrine could be any recommendation on the one side; nor the want of these accomplishments, any disqualification on the other: [328] The highest dignities, as it might fall out, must be given to the meanest, and perhaps the most unworthy: The old and young, the single and married man, the poor and rich, must all in their turns have such

casual preferments allotted to them, as chance should drop, however improper or unsuitable to their conditions. But the respondent could not believe, that his patron ever meant to impose so servile an office on his trustees. And from these considerations it follows, that no court of justice is capable of trying the merits of the several candidates: much less is any such court able of itself to exercise this discretionary power; not only because it is a mere personal confidence, and incommunicable in its nature, but because the court cannot obtain by any possible method, that knowledge of the parties, and their circumstances, which is absolutely necessary to decide in the choice. That in the present case the respondent Dr. Chapman, when he had taken a survey of the Archbishop's friends, could not help considering the case of Mr. Venner. He was a nephew of the Archbishop's wife, and a first cousin consequently to his own children. He had been in some measure adopted by the Archbishop in his lifetime, who had given him his education, and had himself preferred him to a small living. He was a person of unblemished character, and competent learning, incumbered with a large family, and without any other maintenance than that single living: the only one the Archbishop had a proper opportunity of giving him in his lifetime. These particulars weighed with Dr. Chapman: and he could not be brought to think, that any one of his patron's worthy friends and acquaintance was in all these respects so well entitled to the Archbishop's bounty: And this consideration determined him to give Mr. Venner the preference, and take the first care of him in the disposition of this vacancy. But though the respondent Dr. Chapman's principal view was to serve Mr. Venner, yet he would have been better pleased, if by the means of this precentorship, he could have extended the Archbishop's favour to more than Mr. Venner; and therefore, if he might have been permitted by taking the precentorship himself, to have given out of his own preferment a good living to Mr. Venner, and the Archdeacons of Sudbury either to Dr. Tunstall, or Mr. Hall, he might have gratified more than one person; according to which scheme he could have been no gainer himself, because those two preferments so proposed to be exchanged, were in truth of more value than the precentorship. But when this scheme was rendered impracticable, by the opposition of those who would be contented with nothing less than the whole precentorship, the respondent Dr. Chapman returned to his first object Mr. Venner; and presented him freely to the option, without any contract, promise, or engagement, directly or indirectly, whereby he might avail himself, or receive any benefit, either by any future exchange, or in any other manner whatsoever. It is however charged, that in this whole transaction, Dr. Chapman had no other view than a corrupt design, [329] to procure the benefice for himself: That Mr. Venner was the instrument pitched upon to accomplish this scheme by way of bargain, and that even the presentation now made, was infected with the same corrupt bargain, and therefore ought to be set aside in a court of equity. But no part of these charges was proved; and the respondent Dr. Chapman hoped, he should not stand convicted by suspicions without proof, when he had most solemnly denied the charge in his answer upon oath: and it would be very hard upon him to be adjudged guilty of simony, only because the appellant had been pleased to charge it in his bill, where every plaintiff is at liberty to charge what he pleases without the least regard to truth.

On the part of the respondent Venner it was said (C. Pratt, T. Sewell), that he conceived himself to be within the description of the persons to any of whom Dr. Chapman as surviving executor, might in his discretion dispose of the late Archbishop's options. It could not be supposed, that the Archbishop meant, that his executors, in disposing of these options, should be obliged to observe the order in which the objects were mentioned in his will, for that would in effect be leaving them no discretion, or power of disposition at all; though it appeared on the face of the will, that the testator intended, and in truth the nature of the thing required, that they should have the fullest and freest exercise of a discretion, which in the nature of it was personal, and not communicable, but must be wholly left to the private judgment of the person who was invested with it. That if a court of equity should take into consideration, and examine into the degree of fitness of the objects for the preferments in question, in order to determine to which of them Dr. Chapman should in any instance give the preference, in disposing of these preferments, it would be difficult to say by what rule or measure the court could guide itself in the exercise of such right or power of controul, or in judging which of the competitors, all things considered, should be deemed the fittest and most proper

object. But the respondent Venner hoped, that in the present instance, there could be no ground to object to the choice made of him, and the preference given to him by Dr. Chapman on this occasion. The Archbishop's son and sons-in-law had been amply provided for; Mr. Venner's relation to the Archbishop's family, the care which his grace had taken of his education, his known regard and concern for his welfare, his declared intentions of providing for him, which he had not an opportunity of effectually doing in his lifetime, and his circumstances and numerous family, were presumed to be sufficient reasons for Dr. Chapman's disposing of the option to him, in preference to any of the other claimants, and especially the appellant. That the pretence that the presentation made of the respondent Venner to this option, was not fair and absolute, and for his sole benefit, or that it was made on any agreement for the benefit of Dr. Chapman, was altogether groundless, and unsupported by any proof. The respondent Venner was not, nor [330] could be affected by any fraudulent or unfair views or schemes imputed by the appellant to Dr. Chapman, in the disposal of the option in question; but he was well satisfied from the known honour of Dr. Chapman, that all such suggestions were groundless and unwarrantable. The exchange of preferments at first proposed, in order to extend the benefit of the few remaining options, was to be submitted to the Lord Bishop of Lincoln. Such exchange was not illegal, and had been done on other occasions; the Bishop made no objection to it, and was desirous only that it should appear with certainty to be free on the part of Mr. Venner. But when Dr. Chapman found that the providing for two, in the manner he at first proposed, was attended with difficulty: he determined that the respondent Venner should have the full benefit of the vacant option, and presented him accordingly. If however, Dr. Chapman could still be supposed to entertain any hopes or expectations of any future exchange, the respondent Venner was not privy thereto, nor were they founded on any promise or assurance given by him. The Doctor could have no means of compelling Mr. Venner to comply with any such hopes or expectations; nor could any such exchange ever be effected, without the consent and concurrence of the Bishop of the diocese. It was therefore hoped, that the decree or order of dismissal would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order of dismissal therein complained of should be reversed: And it was further ORDERED, that the presentation made by the respondent Dr. Chapman, of the respondent Venner to the precentorship in question, should be set aside; and that the same should be delivered up by such of the parties in whose custody or power it was, to the appellant to be cancelled; and that the injunction to stay the admission of the respondent Venner to the said precentorship, should be made perpetual, and that the respondent Dr. Chapman should in due form forthwith present the appellant to the Lord Bishop of Lincoln, to be admitted to the said precentorship: And it was further ORDERED, that the respondent Dr. Chapman should pay the appellant the costs of this suit in the court of Chancery, to be taxed by a master, and that the said court should give all necessary and proper directions for carrying this judgment into execution. (Jour. vol. 29. p. 591.)

[331] CASE 18.—WELBORE ELLIS, *Appellant*; NEAL SEGRAVE,—*Respondent*
[5th May 1760].

[The decree or judgment of the trustees under the act of 11th and 12th Will. 3. c. 2. for sale of the forfeited estates in Ireland, is absolute and final.]

[See *ante*, ca. 2. S.P.] [7 Bro. P. C. 218.]

John Segrave, esq. deceased, being seised in fee of certain plots and parcels of ground, situate in Church Street and Bow Lane in Oxmantown, in the city of Dublin, whereon several houses and tenements were erected, did, some time in 1684, and previous to the 19th of September in that year, by some instrument in writing, executed or signed by him, agree, in consideration of £50, to be paid partly in money, and partly

in bricks, to demise all the said grounds and premises, with the appurtenance to William Ellis, afterwards Sir William Ellis, *knt.* for 101 years, to commence from the 29th day of September 1686, under the yearly rent of £30, payable half-yearly. And by virtue of this agreement, Sir William Ellis, or some person or persons claiming under him, entered on the premises, and enjoyed the same, and paid the said rent of £30 to the said John Segrave, until the time of his death.

Sir William Ellis was, on the 11th of May 1691, attainted of high treason, for having been concerned in the rebellion in Ireland in 1688; whereby his right and interest in the premises, by virtue of the said contract, became forfeited to, and vested in, their Majesties King William and Queen Mary.

On the 28th of June, 11th William III. a commission issued out of the Exchequer, directed to the Lord Mayor and Escheator of the city of Dublin, and others, reciting that Sir William Ellis was attainted of high treason; and requiring the commissioners therein named, to inquire what lands or tenements he was seised or possessed of, at the time of his attainder. By virtue of which commission, an inquisition was taken at the Tholsel in the said city, before the Lord Mayor and others, on the 8th of September in the same year; whereby it was found, that on the 11th of May 1691, Sir William was attainted of high treason; and that he was possessed of several lands and tenements in the said city, therein particularly described, by virtue of several leases, the terms, rents reserved, and lessors' names, being particularly mentioned in the inquisition: and amongst others, the said inquisition found, that he was possessed of the following premises—"By virtue of a lease made to him in due form of law by Segrave of Cabragh, for the term of 101 years, commencing at the 29th day of September in the year 1686, at the yearly rent of £30: [332] that is to say; of a large parcel of ground on which several houses had been built in Oxmantown, bounded on the North by the street called New Church Street, leading to the ground called the Bowling Green, from the city ground called Bellingham's Lot to the church stile; and on the South by the city ground; and on the East by the street called Hamon's Lane, the city ground, and the street leading to the house called The Tom of Lincoln; and on the West by the city ground called Bellingham's Lot." And the inquisition further found, that Sir William Ellis before his attainder had mortgaged the said lands amongst others to Hector Harris for £1000, and found several leases made by Sir William Ellis, of several parcels of the said lands, for the term of 101 years, from Michaelmas, 1686, at several rents particularly mentioned in the inquisition.

The person named Segrave in the said inquisition was John Segrave above named; and the lands and tenements therein described as being held by such lease for 101 years, were the same lands and tenements which were agreed to be let to Sir William Ellis.

His Majesty King William was pleased, by his letters patent under the great seal of Ireland, bearing date the 2nd of December in the said 11th year of his reign, in consideration of a large debt being due to John Ellis from the said Sir William Ellis, at the time of his attainder, to grant all the estate and interest forfeited by the said Sir William Ellis, and particularly the said lease and leasehold premises abovementioned to be specified in the said inquisition (which are in the letters patent mentioned to be held under Segrave for 101 years), unto the said John Ellis, who was brother of Sir William, his heirs, executors, administrators and assigns: by virtue of which letters patent, John Ellis entered on the premises, and enjoyed the same for some time, subject to the under leases or charges made by Sir William Ellis.

By an act of parliament made in England, 11th and 12th William III. cap. 2. intitled, "An act for granting an aid to his Majesty by sale of the forfeited and other estates and interests in Ireland, and by a land-tax in England, for the several purposes therein mentioned;" it was enacted (among other things), that all and every the honours, manors, baronies, castles, messuages, lands, tenements, rents, reversions, services, remainders, possessions, royalties, franchises, jurisdictions, privileges and appurtenances thereto belonging, or in any wise appertaining, rights of entry, rights of action, titles, conditions, uses, trusts, powers and authorities, leases for life, lives or years, pensions, annuities, rent-charges and hereditaments, whether freehold, copyhold, or of what nature or kind soever they were, within the said realm of Ireland, whereof any person or persons who stood convicted or attainted of high treason

or rebellion, or other treason committed in foreign parts, after the 13th day of February 1688, or who should be convicted or attainted of any such treason as aforesaid, by or before the last day of Trinity term [333] 1701, or who stood convicted or attainted of high treason, by reason of being found by inquisition to have died or been slain in actual rebellion, since the said 13th of February 1688, was or were seised or possessed, or interested in, or entitled unto, on the 13th of February 1688, or at any time since, in their own right, or to their own use, or whereof any other person or persons was or were seised or possessed, or interested in, to the use of, or in trust for them or any of them, on the said 13th of February or at any time after, should be and were thereby vested and settled, and adjudged, declared and taken to be in the actual and real possession and seisin of certain trustees therein named, and their heirs, executors, administrators and assigns respectively, from the 2d day of November 1699, according to the several estates and interests which the said persons convicted or attainted, or any in trust for them or any of them, or to their or any of their use or uses had therein, on the said 13th of February 1688, or at any time afterwards; to the end the same might be bargained, sold, disposed of, and applied by the said trustees, and the survivors of them, to and for such uses, intents and purposes as are therein after expressed, mentioned and declared.

And it was further enacted, that all grants, demises, or other alienations, after the said 13th day of February 1688, under the great seal of England or Ireland, or seal of the Exchequer in Ireland, or by any act or acts of parliament in Ireland or otherwise, of any of the said forfeited or forfeitable estates or interests should be, and were thereby declared to be null and void, to all intents and purposes whatsoever.

And for the better execution of the said act, the said trustees, or any seven or more of them, were directed and impowered to meet and act from time to time, with or without adjournment, and at such place or places within the said realm of Ireland as they or any seven or more of them should think fit, to send their precept or precepts for any person or persons whatsoever, within the said realm of Ireland, and for all such books, papers, writings and records as they should think necessary for their information in any thing relating to the said act; and to administer oaths for the better discovery of the truth of the inquiries by them to be made to any person or persons whatsoever.

And it was further enacted, that all and every person and persons whatsoever, having any estate, right, title, interest, etc. in law or equity, into, out of, or upon any honours, manors, baronies, castles, messuages, lands, tenements, or hereditaments whatsoever, or to any real or personal estate, or any other the premises whatsoever, within the said realm of Ireland, therein before vested in the said trustees, before the said 13th day of February 1688, for or by reason of any settlement, conveyance, judgment, statute, recognizance, extent, or other debt, charge or incumbrance affecting the same estate, before the said 13th day of February 1688, should on or before the 10th day of August 1700, enter all their respective claims and demands thereunto [334] before the said trustees, or any seven or more of them, in such manner as therein mentioned; or in default thereof, every such estate, right, title, interest, etc. should be, and was thereby declared to be void and of no effect, to all intents and purposes whatsoever; and the estate or estates so as aforesaid liable thereunto or charged therewith, should from thenceforth be freed, acquitted and discharged of and from the same.

By virtue of this act the letters patent above mentioned were rescinded and made void, and the said lands and tenements became vested in the trustees for all the remainder of the said term of 101 years, subject to the said yearly rent of £30, and to the right of any other person or persons who might duly claim any interest therein within that term, and whose claim might be allowed according to the act.

Accordingly Joseph Southern exhibited before the trustees a petition and claim, setting forth an agreement in writing made between him and Sir William Ellis, dated the 19th of September 1684; whereby Sir William set unto the said Joseph Southern a house and malt-house, wherein Southern then lived, with 20 feet to be measured from the west side of his gate in New Church Street (being part of the estate agreed to be let to Sir William Ellis by the said John Segrave), for 99 years, to commence from the 25th of March 1689, at the rent and on the terms therein mentioned: and that no lease had been made pursuant to the agreement, by reason of the

troubles in that kingdom; but that Southern had constantly enjoyed the premises by virtue of the said agreement; and praying an allowance of his claim by the trustees, and a confirmation thereof by their adjudication.

On the 15th of January 1700, this claim came on to be heard before seven of the trustees, who thereupon adjudged and determined that Southern was well entitled to a lease according to the said agreement, and the claim was thereby allowed: saving to all persons, their heirs, successors, executors, administrators and assigns, all such right, title and interest in law or equity, of, in, to, or out of the premises, as they had claimed before the trustees, and that had been, or should at any time thereafter be decreed or allowed according to the said act: and thereupon, by indenture dated the 16th of the same January, seven of the trustees demised the said house, malt-house and premises to the said Joseph Southern for the said term of 99 years, according to the said agreement.

John Segrave, esq. son and heir of the said John Segrave, also exhibited his claim before the trustees, reserving to himself liberty of making any other or further entries or claims, or adding to, or altering that claim, at any time before the 10th day of August then next: and therein stated, that his said father, by lease, dated in or about the year 1684, demised to Michael Cole a messuage or tenement and waste piece of ground adjoining, in Oxmantown, in the suburbs of the city of Dublin, (being the same messuage and land that was agreed to be let to Sir William Ellis,) [335] for 61 years, at £30 a-year; such rent to commence about Michaelmas 1688, or 1689; and that the claimant had been informed, that the said Michael Cole had assigned the said lease to some person, who had been indicted and outlawed on account of the late rebellion in that kingdom; and the said John Segrave thereby insisted, that before any grant or disposal of the premises for the said term, he ought to have the arrears of the said rent, and that each grant or disposal should be made subject to his reserved rent, and the conditions, covenants, provisoes, and agreements, in the said lease.

On the 2d of August and the 15th of December 1701, the said John Segrave's claim was heard before the trustees, when it was insisted by the counsel for the trust, that the lease was for 99 years, and that Sir William Ellis had let the premises for a longer term than 61 years; and it was on the said 15th of December 1701, ordered, that the said claimant should be allowed the rent and reversion on the said lease for 99 years, on producing the counterpart thereof; and on a further hearing of the claim, on the 14th of January 1701, the trustees decreed as follows: "*Curia*, Allow the rent and " reversion upon the lease for 101 years, and refer it to the Master to ascertain the " arrears, and what remains due for the money to be paid for the fine: viz. £20 19s. " and the interest since 1689, allowing for the troubles, and amend the claim:" Which adjudication the said John Segrave never got made up into form, nor was it ever drawn up in any other manner.

By a private act of parliament made in England, 1 Anne, intituled, "An act for the " relief of John Ellis, esq. with relation to the forfeited estates in Ireland;" after reciting the grant from King William III. to the said John Ellis, and that the same was made void, and the estate thereby granted, resumed, and taken away, by the act of the 11th and 12th William III. and became vested in the trustees in the said act mentioned, in trust, to be sold; whereby the said John Ellis would suffer greatly in his fortune by the loss of the said debt, and the public would gain but very little, the said granted premises being incumbered to the value thereof, the said debt due to the said John Ellis being reckoned as part of the incumbrance thereon; it was, amongst other things, enacted, that the said trustees should be, and they were thereby authorized, impowered, and required to convey unto the said John Ellis and his heirs, to his and their own use, or to such person or persons and their heirs, as he or his heirs should direct or appoint, all and singular the messuages, lands, tenements, and hereditaments, that were granted, or mentioned to be granted, by the said letters patent, to the said John Ellis, and all other the estate of Sir William Ellis, subject to such incumbrances as were allowed by the said trustees; provided, that the said act should not extend to any rectories impropriate, or vicarages, or to any tithes or other things thereto belonging.

[336] By another act of parliament, passed in the 6th year of the reign of Queen Anne, intituled, "An act for limiting a time to persons to come in and make their " claims to any of the forfeited estates and other interests in Ireland, sold by the

"trustees for sale of those estates to the governor and company for making hollow sword blades in England, and divers other purchasers," it was (amongst other things) enacted, That all persons who should claim any right or title to any of the estates purchased of the trustees for sale of the forfeited estates in Ireland, or any interest or incumbrance thereon, on pretence that the same were vested in the said trustees, or any other pretences, should prosecute such claim in two years, from the 24th day of June 1708; in one of Her Majesty's Courts of Record in Ireland; and in default thereof, the party claiming, his heirs, executors, administrators, and assigns, should be debarred and without remedy, either in law or equity.

Pursuant to the act of the 1st of Queen Anne, the surviving trustees, by indenture of bargain and sale, dated the 7th of March 1702, and duly inrolled in Ireland, did bargain and sell the said lands and premises unto the said John Ellis, his executors, administrators, and assigns; whereby he again became entitled thereto for the remainder of the said term of 101 years, subject as aforesaid; and he accordingly held and enjoyed the same from that time until his death, which happened in July 1738; and he, from time to time, paid the said yearly rent of £30 for the same.

John Ellis, before his death, duly made his will, dated the 2d of March 1733, and thereby appointed the appellant and Samuel Seddon executors thereof; by which will he devised and bequeathed all his lands, tenements, and estate in the kingdom of Ireland, to the said Samuel Seddon, his heirs, executors, administrators, and assigns, upon certain trusts therein mentioned, which were afterwards fully performed and satisfied; and after the performance and satisfaction of such trusts, to convey and assign all such lands, tenements, and estate, unto the appellant, his heirs, executors, administrators, and assigns. Both the executors proved this will, and by virtue thereof the appellant became entitled to, and accordingly entered upon, and took possession of the same premises; and the trusts of the said will having been performed before the month of July 1744, the said Samuel Seddon did, by indentures of lease and release and assignment, dated the 5th and 6th of that month, duly grant, release, and assign all the lands, tenements, and estates whatsoever, late of the said John Ellis, in the kingdom of Ireland, unto the appellant, his heirs, executors, administrators, and assigns, according to the natures thereof.

John Segrave, who made the aforesaid agreement with Sir William Ellis, for letting the premises to him, died some time in the year 1690, intestate, leaving two sons, John Segrave his eldest son and heir at law, and Henry Segrave his younger son; whereupon the said reserved rent of £30 a-year during the [337] remainder of the said term of 101 years, and the reversion and inheritance of the said lands and tenements, expectant on the determination of that term, descended to the said John Segrave the younger, who continued seised of or entitled to the same, until some time in the year 1709, when he also died intestate and without issue, leaving the said Henry Segrave, his brother, his heir at law: to whom the said yearly rent, and the reversion and inheritance of the said lands and tenements thereupon descended, and he accordingly continued seised thereof until the 4th of July 1739, when he died intestate, leaving the respondent his eldest son and heir at law, to whom such yearly rent, and such reversion and inheritance thereupon descended.

The appellant was never able to discover that any lease was ever granted of the said lands and tenements, or any part thereof, pursuant to the agreement between John Segrave and Sir William Ellis; (which agreement was long since lost or destroyed, and most probably at or about the time of the rebellion in Ireland;) but satisfactory evidence was given of such agreement, not only before the jury on taking the aforesaid inquisition, but also before the trustees for the forfeited estates in Ireland, on the aforesaid two several claims laid before them.

The said yearly rent of £30 was from time to time constantly paid by Sir William Ellis and John Ellis, and the appellant, from the time of the commencement of the said term of 101 years, to John Segrave the elder, to the time of his death, and afterwards to John Segrave the younger, until the time of his death, and afterwards to the respondent, to Lady-day 1744; during all which time receipts were given for the same in one usual form, expressing it to be for rent in general, without mentioning on what lease or agreement the same was due, or for what time such lease or agreement was to

continue : but after Lady-day 1744, the respondent alleged, that the appellant was not entitled to the premises under any such agreement as aforesaid, nor for the remainder of a term of 101 years, but only for the remainder of a term of 61 years, under a lease alleged to have been granted by John Segrave, the grandfather, to Michael Cole, and to have been assigned by him to Sir William Ellis : And the respondent, therefore proposed to express in the receipts for the rent offered to be paid to him after that time, that the same was paid by the appellant, as assignee of Cole : whereupon disputes arose between the parties, concerning the term and interest which the appellant had in the said lands and tenements, and the respondent caused declarations in ejectment to be delivered for recovering possession thereof : but the appellant, in order to prevent the proceedings on such ejectment, paid the money due for the rent, without taking any receipt for the same ; and he continued so to do for some time afterwards.

But on the 30th of August 1746, the respondent exhibited his bill in the court of Chancery in Ireland, against the appellant and several of his undertenants, and also against his Majesty's [338] Attorney-General ; setting forth (amongst other things) that John Segrave the elder did, by indenture dated the 5th of December 1682, demise to the said Michael Cole, the lands and tenements aforesaid, for the term of 61 years, to commence from the expiration, or sooner avoidance of a lease of part thereof, for a term of 41 years from Michaelmas 1647, the said lease for 61 years being at the yearly rent of £30, and that he the respondent had a counterpart thereof in his custody ; and that, by virtue of such lease, the said Michael Cole, or his assigns, had, on the 29th of September 1688, entered on the premises ; and that the same had, from that time, been enjoyed under the said lease : and that the respondent was entitled, in manner aforesaid, to the said reserved rent, and the reversion and inheritance of the said premises, expectant on the determination of the said term of 61 years ; and that, notwithstanding the said term would expire at Michaelmas 1749, the appellant, and the other defendants, or some or one of them, claiming under the said Cole, made leases of parts thereof for 99 years, or other longer terms : And it was particularly charged, that the said lease to Cole was made in trust for Sir William Ellis, or had been assigned to, or in trust for him ; and that the appellant was in possession of the said premises, or part thereof, by virtue of such lease, as claiming under Sir William ; and that the appellant and the other defendants, or those under whom they claimed, had altered and defaced several of the boundaries, mearings, land marks, and abutments of the said premises, in hopes that the same, at the expiration of the said term of 61 years, might not be capable of being ascertained or distinguished, whereby the respondent might be deprived of his inheritance : And therefore the bill prayed, that a fair and just survey and admeasurement might be made of the said estate, and the mearings, boundaries, and abutments thereof fairly traced and perambulated, and that the same might be distinguished and ascertained ; and that the respondent might have the quiet possession thereof, after the expiration of the said term of 61 years ; and that the same might be delivered to him by the same mears, bounds, abutments, and descriptions, as they were demised to Cole.

The appellant by his answer to this bill, stated the agreement made between John Segrave, the elder, and Sir William Ellis, for a lease of the said premises for 101 years ; and that the appellant was entitled to the said premises under such agreement, and for the remainder of the said term ; and that such evidence as aforesaid had been given of the said agreement, and he insisted on his right to the premises, under such agreement, for the remainder of the said term of 101 years ; and the appellant further set forth, that he was a stranger to the lease alleged to have been made to Cole, and believed that if any such had been made, the same had been surrendered previous to the agreement between Segrave the elder and Sir William Ellis ; and that the same never was assigned to, or in trust for Sir William, nor did the appellant claim any right to the premises under such pretended lease : and [339] that to his knowledge or belief, the mears, abutments, and boundaries of the said premises had not been changed, altered, or defaced, after the date of the said agreement, otherwise than by buildings being erected thereon.

In June 1750 the appellant exhibited his cross-bill against the respondent, and the Attorney General and others ; setting forth his title to the said estate under the said

agreement for 101 years, and under the said determination of the trustees, on the claims of the said John Segrave the younger and Joseph Southern; and prayed that the respondent might be compelled to execute a lease of all the said premises, for the remainder of the said term of 101 years, and to give proper receipts, as well for the rents thenceforth paid as for the growing rents; and that he might in the mean time be restrained by injunction from proceeding at law for the recovery of the said premises, or the rents thereof.

The respondent by his answer to this bill insisted, that the appellant's interest in the premises being only for the said term of 61 years, expired at Michaelmas 1749, and that he ought from that time to account for the rents and profits of the estate and deliver up possession thereof.

Both causes being at issue and witnesses examined, they came on to be heard together before the Lord Chancellor of Ireland, on the 17th, 19th, 20th, 26th, 27th, and 28th of June 1758, and on the 20th of November following his Lordship was pleased to order and adjudge that the respondent should, as of the then next Hilary term, commence a feigned action in his Majesty's court of Chief Pleas in Ireland, to which the appellant was to appear gratis and plead the general issue, and admit all matters of form, so as that a trial might be had between the parties at the bar of the said court, some time in the said term, by a jury of the county of the city of Dublin, upon the following issue, viz. under what lease or agreement for a lease Sir William Ellis deceased was in possession of the said premises under the said John Segrave the elder, at the time of the attainder of the said Sir William Ellis, and directions were given relating to such trial; and the judge or judges before whom such trial should be had, were desired to certify the verdict which should be given; and thereupon such further order should be made as would be fit.

Both parties appealed from this decree, and on behalf of Mr. Ellis it was contended (C. Pratt, C. Yorke), that by the statute of 11th and 12th Will. III. the lands and buildings in question were vested in trustees, according to the estate and interest which Sir William Ellis had in them, on the 13th of February 1688, or at any time afterwards; and that under the assignment from the trustees to John Ellis, the same premises vested in him for the same estate and interest; which by the adjudication of the trustees on the claims of John Segrave and Joseph Southern, was determined to be a lease for 101 years, and not for 61 years only; the trustees being by that act constituted a court of record, and empowered in a summary way to determine finally and conclusively on all [340] claims of right to, or incumbrances upon the estate of any forfeiting person. To their jurisdiction John Segrave the respondent's ancestor thought proper to submit by exhibiting a claim before them; and on hearing the merits of that claim they allowed his rent and reversion after the 101 years' term; and the time for amending such claim or making a new one, expired without any further steps taken by him concerning the same.

But it was said, that by this statute the lands of forfeiting persons were vested in trustees, according to the several estates and interests which the persons convicted or attainted had therein on the 13th of February 1688; and therefore no other estate or interest could in any wise vest in the trustees by virtue of the act, or be the object of their jurisdiction. And from hence it was argued that their determination was extra-judicial, so far as it pretended to bind or affect any rent, reversion, or remainder, to which innocent persons were entitled.

In answer to this objection it was said, 1. That the whole of this reasoning consisted in fallacy. It was admitted that the lands were vested only according to the estates and interests of the persons forfeiting; and all the powers of selling and conveying were adapted to this purpose. But though the powers of ownership were extended no farther, yet the powers of jurisdiction gave the trustees an incidental right to determine for what estates the lands were vested in themselves as a trust for the public; whether for a greater or less interest, for years, for life, in tail, or in fee, in possession or in remainder, subject or not subject to rents, mortgages, judgments, or any other charge or incumbrance. In order therefore to know and ascertain the rights of the persons forfeiting, it was necessary that a proper authority should declare the rights of the persons claiming, and distinguish what estates or interests affecting the same lands, were or were not vested by the statute; so that the agents for the crown on the one

hand, and for the claimant on the other, might dispute the nature, commencement and duration of the estate belonging to the attainted person. When these questions were determined, the decree was presumed in law to have declared, according to justice, the original right of the person forfeiting, and the original right of the party claiming, as they both stood at the time of the attainder. The right of the claimant once declared was no object of the act of parliament, but exempted out of it; nor liable to be questioned by the authority of the trustees, nor subject to any one of the powers with which they were invested. 2. The plan and tenor of the most material clauses in the act supported this construction. All persons having any reversion or remainder, or any charge or incumbrance, were required to exhibit their claims, and to express particularly out of what part of the premises, and by what title they claimed. If their claims were not made in time, or not allowed, the party was without remedy; and the judgment of the trustees was declared to be final and conclusive. All deeds and writings were to be produced [341] by the claimant, to be disposed of as the trustees should think fit in case the claim should be disallowed. The trustees were empowered to declare all voluntary conveyances made by the person attainted after the 29th of May 1688, to be fraudulent; and they were required to execute conveyances to purchasers for such estate or interest as they had contracted to sell; and every purchaser was enacted to hold and enjoy, free and discharged from all claims and demands, other than what should be allowed by the trustees.—These clauses proved that the judgment of the trustees was intended to be absolutely final as to the estates claimed in the lands of which the persons attainted were seised or possessed, or in which they were interested; for otherwise the trustees could not determine what estate should be sold or conveyed to any purchaser. And this construction explained the preamble to the 12th section, by which persons having any of the rights or titles described in that clause were enabled to exhibit claims before the trustees: to the end (as the act expresses) they may not be in any respect whatsoever prejudiced by the said act. 3. That all the cases which have hitherto been adjudged upon this act of parliament, established the appellant's construction. In some of them the forfeiting person had no estate or right whatsoever in the lands, in respect of which the trustees had received claims and entertained jurisdiction; and in others of them, though the forfeiting person had some estate or interest in the lands, yet the claim on which the trustees had determined affected not his particular estate, but the right or interest of an innocent stranger or third person entitled in remainder to the same lands. These were cases clearly not within the jurisdiction of the trustees; but it would be absurd to suppose that an act of parliament which was intended to raise a sum of money for the service of the public, by sale of the forfeited estates in Ireland, ever had been, or could be construed in such a manner as to leave open to the mercy of persons not claiming within the time limited, or whose claims had been disallowed, the rights of grantees or purchasers, who had paid a valuable consideration for the estates conveyed to them by the trustees, in any lands in which the attainted person had a forfeitable interest. Such a construction would be as inconsistent with the justice due to purchasers as with the purposes of the act in discouraging contracts for sale, by reason of the insecurity of the title offered. But if Neal Segrave was not precluded by this statute, and the determination of the trustees; yet it was apprehended he was barred by the act of 6 Anne from all right to the ground and buildings, other than the rent and reversion after a term of 101 years; his ancestors not having within two years after the 24th of June 1708, prosecuted any claim in any court of record in Ireland, as directed by that act.

But to this it was objected that John Ellis derived his right from the trustees under the act of 1 Ann. which was in the nature of a gift from the public to him; and therefore he was not a purchaser from the trustees under the act of 11 and 12 [342] Will. III. consequently the ancestors of Neal Segrave were not bound by the act of 6 Anne as they would have been if this estate had been sold by the trustees to John Ellis.—To this it was answered that John Ellis deriving his title under the trustees, by an actual conveyance from them, and under the private act of parliament which directed and empowered them to convey to him, and the conveyance appearing to have been made in consideration of a large debt due to him from Sir William his brother, he ought to be considered as a purchaser under the trustees, within the intent and meaning of the act 6th Anne, and especially as against Neal Segrave. But if Neal Segrave was not bound or precluded

either by the determination of the trustees on the claim of John Segrave his ancestor, or by the act of 6 Anne and the default of his ancestors in not prosecuting a claim according to that act; yet it appeared sufficiently clear, by the proof made in the cross cause, and by the exhibits produced at the hearing, that John Segrave had signed an agreement in writing, for letting the ground in question to Sir William Ellis for 101 years: And this proof, together with the proof made by the inquisition 11th Wm. III. which was never traversed, ought, after so great a length of time, to be considered as conclusive evidence of the agreement: and therefore no issue ought to have been directed, to try under what lease or agreement for a lease Sir William Ellis was in possession of the premises at the time of his attainer.

In opposition to the original appeal it was said (F. Norton, G. Perrot), that the question before the court of Chancery in Ireland was, whether the appellant was in possession of the litigated estate, under the lease of 61 years made by John Segrave to Cole, and assigned to Cole by Sir William Ellis the forfeiting person; or under an agreement or contract, pretended to have been entered into by John Segrave with Sir William, for a lease of 101 years; and which interests of Sir William Ellis, whatever they were, were admitted to be in the appellant, under the grants before stated from the crown. The respondent admitted the appellant's title under the lease of 61 years, but denied any agreement for a lease of 101 years; the merits therefore depended upon a question of fact, whether there was such an agreement for a lease of 101 years, as the appellant insisted on? If such an agreement had been fully proved, the court ought to have decreed the appellant the benefit of it; but if the evidence left it doubtful whether there were such an agreement or not, the court did right in directing the fact to be tried by a jury: If the appellant did not offer evidence sufficient to create a doubt, the bill ought to have been dismissed; but in this case there was not sufficient evidence of the agreement, and therefore the court had done right in not decreeing for the appellant. As to the proceedings of the trustees being final and conclusive against all the world, and that therefore the agreement was fully proved; it was said, that all the proceedings of the trustees were null and void as to Segrave, except what concerned his arrears of rent, being *coram non jure*. Nothing was vested [343] in them but what would have been vested in the crown by the statute of treasons; *i.e.* the estate or interest of the forfeiting person; and they had power to determine only upon the estates, rights, titles, charges, or incumbrances affecting the estates so vested in them, and not upon the title of the forfeiting person, or the quality of his estate; where such title was disputed, it was left to be determined by the ordinary courts of law. And a contrary construction would have put the estate of every innocent person in Ireland under their jurisdiction, upon any frivolous pretence that it belonged to an attainted person. And as to Segrave's submitting to the jurisdiction of the trustees by putting in his claim; it was said, that no submission of his could give them a power which the act of Parliament had not given them; and his claim, though it gave the trustees no further power, was highly commendable. For it gave notice to such as might become purchasers under John Ellis the grantee, what interest he allowed Sir William Ellis to have had in his estate, and what pretended interest he denied to be in him; that such purchasers might have no reason to complain, if they bought a greater interest than Sir William had. And as to the statute of the 6th of Anne, called the statute of periods, it was manifestly calculated for securing purchasers for a valuable consideration under the trustee act; but could give no aid to the appellant, who claimed under a voluntary grant from the crown. The court therefore had a manifest right to enter into the decision of the question, under what title the appellant held; and as he might on the trial have the benefit of all legal evidence in proof of the pretended agreement, his appeal was apprehended to be unreasonable, and calculated only for delay, and ought therefore to be dismissed with costs.

And in support of the cross appeal, which was grounded on there not being sufficient evidence whereon to direct any issue; it was contended, that the existence of the lease for 61 years, was proved by the counterpart signed by the lessee, in the possession of the respondent. It was also proved by the oath of the lessee, and the assignment of it to Sir William Ellis was likewise proved: And both the lease and assignment were to be presumed, from the nature of the receipts given by Mr. Segrave and his ancestors, which were in Mr. Ellis's possession, and which constantly contained an exception of

duties, that were prestatable only by the 61 years' lease, and evinced that it was upon the foot of that lease only, that the rent was constantly received. That there was no sufficient evidence produced on the part of the original appellant, of an agreement for a lease of 101 years, and therefore no good ground for directing a trial at law, but his bill ought to have been dismissed with costs; the evidence of Southern not being evidence in any court of law or equity, because he swore to the agreement in order to establish a lease to himself for the whole term; and the other evidence went no farther than to a treaty for a lease, which was afterwards broke off. That [344] the determination of the trustees under the act of re-assumption, was not evidence to affect Mr. Segrave's reversion, because their power or jurisdiction could not extend to the estate of an innocent person: Nor could the verdict of the jury on the inquisition be any evidence, not being taken under a proper authority: And indeed the appellant by his bill did not insist on the lease which the jury found, and from the whole tenor of this part of the inquisition, it was evident that no such lease was before them: But at all events, this inquisition, as to Mr. Segrave was *res inter alios acta*, and could not affect him, or be evidence against him. Lastly, that as Mr. Ellis set up a title under a pretended agreement for a lease of 101 years, if it had been proper to direct any issue, the only matter to have been tried would have been whether there was any such agreement; and the issue should have been confined to that: Whereas the present issue would let in evidence of leases or agreements made at any time, or for any number of years, not thought of by the parties, or mentioned in the cause.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed, and the original bill dismissed, without costs: And it was further ORDERED and ADJUDGED, that it should be referred to a Master of the court of Chancery in Ireland, to take an account of what was due to the respondent in the original appeal, from the appellant in the said appeal for arrears of rent, and also for the fine of £20 19s. with interest for the same from the year 1689; and that in taking such account, the Master should make all just allowances: and upon payment by the said appellant of what should appear to be due, at such time and place as the said Master should appoint, the said respondent should, at the appellant's expence, execute a lease to him for the remainder of the term of 101 years, commencing at Michaelmas 1686, at the yearly rent of £30 with usual covenants: and that the appellant should execute a counterpart of such lease: And if any doubt should arise upon the description of the premises, and the abutments and boundaries thereof, that the said court of Chancery should give proper directions for ascertaining the same; and that the injunction already obtained should be made perpetual: And it was further ORDERED, that the said court of Chancery should give all proper directions for carrying this judgment into execution. (Jour. vol. 29. p. 669.)

[345] CASE 19.—ISAAC ESPINASSE, and Others,—*Appellants*; EUSEBIUS LOWE, and Others,—*Respondents* [2d February 1764].

[Constructive trusts, or trusts resulting by implication of law, are not within the statute of frauds and perjuries; by an express exception in the statute itself. They arise from the apparent nature of the transaction.]
 [Decree of the Irish Chancery reversed.]

This suit was grounded on the Irish Popery laws, which have been repeatedly stated in the course of these reports; and the facts on which the present question arose were as follow:

Raymond Fitz-Simons, a Papist, and his ancestors before him, were possessed of the lands called Kill of the Grange, containing 158 acres, in the county of Dublin, by successive leases from the dean and chapter of Christ church, for the term of 21 years each, at the yearly rent of £40, which leases were customarily renewed at the end of the first seven years, on payment of a fine of about two years rent.

The last renewal to this family, was on the 27th of May 1723, when the lease was

taken in the names of Margery Nangle *alias* Fitz-Simons, widow, and Raymond Fitz-Simons, for 21 years, from the first of that month, at the rent of £40 per ann. and afterwards became vested in Raymond, by survivorship.

In the year 1725, one Edward Edwards, a Protestant discoverer, filed his bill in the court of Exchequer in Ireland, against Raymond Fitz-Simons, grounded on the Popery acts, to be decreed the benefit of this lease, upon an allegation that the £40 per ann. reserved rent, was less than two-thirds of the improved yearly value of the lands at the time of making the lease.

Fitz-Simons, by his answer, denied that the reserved rent of £40 was less than two-thirds of the real value, at the time of making the demise; and from that time, no proceedings were had in the cause for near four years.

In the interval, Raymond Fitz-Simons sold his interest in the lease to William Espinasse, a Protestant; but the particular time, manner, or precise terms of Espinasse's purchase did not, at the distance of above thirty years from the original transaction, appear. The most natural and obvious, and therefore the most probable method of effecting the transfer, was by an immediate surrender of the subsisting lease, which was renewable at short periods, on payment of a fine, and taking a renewal in the purchaser's name; and in order to such surrender and renewal, some previous assignment must have been made, by indorsement or otherwise, to vest the interest in Espinasse. This much however appeared, that William Espinasse, as proprietor of the lease, applied to the Chapter by memorial in his own name, for a renewal, [346] and that the Chapter, by their act of the 15th of May 1730, agreed, on such his memorial, to renew a lease to him by name, of the lands in question for 21 years, from the 25th March preceding, at £40 per ann. being the former rent; that a lease was accordingly made out to him in his own name, and sealed on the 25th of the same month, dated as on the 25th of March preceding, "in consideration of the surrender of a former lease of the thereby demised premises unto Margery Nangle *alias* Fitz-Simons, widow, and Raymond Fitz-Simons of the city of Dublin, merchant," and of the rents and covenants therein reserved: The tenants covenants, which were many, ran wholly in the name of Espinasse, who paid the renewal fine, Fitz-Simons's name being only once mentioned in the lease, upon reference to the surrender, and not at all taken notice of in the Chapter minute.

As the lease in 1723 must have been delivered up to the church at the time of this renewal, it was hoped a production thereof would at the same time have brought to light the assignment and surrender, as indorsed upon or otherwise accompanying it; but search having been made at the church, they all appeared to have been lost or mislaid from neglect, as writings of no consequence, after repeated renewals in the name of the new lessee and his descendants; nor were any vestiges of the transaction remaining with the church.

By an act made in Ireland, 10th and 11th Car. I. cap. 3. for the preservation of the inheritance of lands belonging to the church, all future ecclesiastical leases are made void, except leases for 21 years, of lands whereof there shall be no other lease or estate then in being, which shall not determine within a year; so that previous to the granting of this new lease, the legal assignment and surrender of the former lease (of which so many years were then to run) must have appeared to the satisfaction of the church, nor would Espinasse have accepted a new lease which must have been void, if the former had subsisted.

The actual purchase of Espinasse for a consideration of £450 paid in money, and an under lease, were admitted; but the respondents, in order to induce a suspicion upon the transaction as colourable, and a trust only for Fitz-Simons, pretended that the estate was sold at an undervalue, as being then worth £1600 and upwards: That Fitz-Simons, notwithstanding the sale, still continued in possession; and for that purpose the following receipt of 27th May 1730, signed by William Espinasse, was produced, viz. "Received from Mr. Raymond Fitz-Simons, £11 12s. 5d. being the remainder in full for a quarter's rent due the 24th of June next, for his holding called "Kill of Grange. I say, received the 27th day of May 1730." But this receipt was written evidence of a substantial title in Espinasse, and of an under-lease by him to Fitz-Simons, at a yearly reserved rent; and proved, that Fitz-Simons held the possession as his tenant, not that he was Fitz-Simons's trustee.

[347] Edwards having amended his bill, and Fitz-Simons again answered, witnesses were examined on both sides, and on the 6th of July 1732, the cause was heard; when there appearing a contrariety of evidence, an issue was directed to try what was the full improved yearly value of the lands for the term of 21 years, to commence from the 27th of May 1723, to be set to a solvent tenant. Upon this issue two trials were had, one in 1732, and the other in 1733; the verdict in the former finding the value to be £40, and in the latter £57 10s. so that both verdicts being alike unfavourable to the discoverer, that suit came to an end; whereby it was determined, and never afterwards controverted, that the lease of 1723 which had been assigned to William Espinasse, was not discoverable or affected by the Popery acts.

Seven years of the lease being run, Espinasse on the 26th of March 1737 again applied in his own name, and the church agreed to renew the lease to him for 21 years from the 25th, at the usual rent of £40 per ann. which new lease was made in consideration of the surrender of the former, Espinasse paying a fine of £80. And as mesne landlord, he made a derivative lease to Raymond Fitz-Simons of the whole lands for the term of 19 years, from the 25th of March 1738, at the yearly rent of £83 12s. But it is alleged that on the same day William Espinasse executed a bond to Fitz-Simons, in the penalty of £600, conditioned for the payment of £300 on the 25th of May 1757, the day on which the under-lease to Fitz-Simons was to expire; and that on this bond was the following indorsement signed by Fitz-Simons only, but whether with the privity of Espinasse or not, did not appear, viz. "I Raymond Fitz-Simons do oblige myself, my executors and administrators, not to call in the contents of the within bond if the within named William Espinasse, his executors and administrators, do not sell or incumber the lands of Kill of the Grange, or otherwise dispose of the interest therein."

Raymond Fitz-Simons constantly paid the rent reserved by this lease during his life. And on the 13th of November 1740 William Espinasse died intestate, leaving the appellant Isaac and several other children; and Isabella his wife administered to him, who, on the 1st of December 1743, when the first seven years of the lease were nearly expired, applied for and obtained a renewal in her own name for 21 years, from the Michaelmas preceding, at the former rent of £40 per ann. but with the addition of sixpence per pound receiver's fees, or twenty shillings per ann. increased rent, which had not been reserved by any of the former leases; and the renewed lease was accordingly made out to her as administratrix of her husband.

Soon after this renewal Raymond Fitz-Simons applied to the administratrix for a like renewal of his under-lease, upon a pretence of some parol agreement between him and William Espinasse, his former lessor, to that purpose; but the administratrix denied [348] the agreement, and peremptorily refused the renewal, which Raymond Fitz-Simons acquiesced under till his death in 1744: without even producing the bond and its indorsement, which, though unknown to the administratrix, were all the time in his own custody, and proved him fully sensible of the only use they were intended for, viz. to protect his then subsisting lease, but not to create a general right of renewal in him.

Thomas Fitz-Simons, his son and administrator, met with the same refusal from the administratrix, and from the same conviction acquiesced under it till his death in 1748; as did after him the respondent Christopher Fitz-Simons, who having administered to Raymond the original under-tenant, and possessed the lands under the lease from Espinasse, met with as peremptory a refusal from the administratrix to renew, as his father and brother had done.

But notwithstanding these repeated refusals, both father and sons continued paying her their rent, and never mentioned either the bond or indorsement, nor set up the least pretence of right to the original lease by way of trust or otherwise.

On the 11th of May 1749, Isabella Espinasse again renewed her lease with the church for 21 years, at the last rent of £40 per ann. and sixpence in the pound receiver's fees.

Christopher Fitz-Simons, convinced at length that he had no right to a farther renewal, and having lost all hopes of obtaining one, on the 28th of January 1750, assigned his interest in the under-lease, which had then seven years to run, to the other respondent Lowe for £350.

This assignment however, was but a prelude to a new attempt for obtaining obliquely what he could not get directly; and with this view the notion of a constructive trust in the original lease was set up, and as if that lease had been discoverable under the Popery laws, though there had been two verdicts and a judgment to the contrary, he borrowed the name of the other respondent Lowe (being himself a Papist) for the purpose of instituting a suit to get the lease adjudged nominally to Lowe as a Protestant discoverer, but really in trust for himself. But Christopher Fitz-Simons did not think proper to proceed at first in the name of Lowe; and therefore, in Hilary term 1750, a bill was filed in the court of Chancery in Ireland, in the name of one Matthew Smith as a Protestant discoverer, against Christopher Fitz-Simons, Isabella Espinasse, and Richard Matthew and Ann Farrell; charging that the dean and chapter of Christ church, Dublin, being in and before 1738 seised of the lands in question, leased the same to Raymond Fitz-Simons; and that he, upon the discovery bill brought by Edwards, surrendered in favour of Espinasse, in whose name a new lease had been made, but in trust for Raymond Fitz-Simons, at less than two-thirds of the yearly value; and praying to be decreed to the benefit of the said lease, and the several renewals thereon, with an account of rents and profits.

[349] Isabella Espinasse by her answer insisted on her husband's being a *bona fide* purchaser for his own benefit, and denied any trust for Fitz-Simons.

On the 4th of July 1752 a deed was executed between Isabella Espinasse, as the widow and administratrix of her deceased husband, the appellant Isaac her eldest son, and her two younger children William and Francis Espinasse; whereby after reciting her marriage articles, and the provision thereby stipulated for her and her children after her husband's death; that the children had all attained 21, and that she had furnished them with a just account of her husband's assets; it was agreed, and she accordingly, in consideration of three several sums, making together £1600 paid by the appellant Isaac to her and the younger children, and of an annuity of £20 by him granted to her for life, assigned to the appellant absolutely and in the most general and comprehensive terms, all the real and personal estate whatsoever of her deceased husband, including therein the lease in question.

Isabella Espinasse having afterwards married Thomas Colly, the bill filed in the name of Smith was amended, and Colly, together with the appellant Isaac and the other children, were made parties.

On the 12th of August 1754 a new lease of these lands for 21 years was made to the appellant Isaac, who, by settlement upon his marriage with the appellant Mary, then Mary Magennis, and in consideration of her portion of £2000, assigned the leasehold premises to Alexander MacAuley and Alexander Hamilton Esqrs. in trust to renew from time to time, and upon further trust for the appellant Isaac for life, and after his death, for the farther securing an annuity of £200 to the appellant Mary for her life, and the portions of their younger children, and subject thereto, in trust for the first and other sons and daughters. This settlement was immediately registered, and there was issue of the marriage, the appellant Richard only, who under the settlement was a purchaser for valuable consideration, and without notice of a reversionary interest in the premises expectant on the death of his father.

The appellant Isaac by his answer to Smith's bill also denied the pretended trust. Both answers were replied to, and witnesses examined, but the depositions were never published, nor was any further progress made in that cause.

At last, in the year 1757, being 27 years after the original transaction between Raymond Fitz-Simons and William Espinasse, and long after they and all the parties thereto were in their graves, a bill was brought in the court of Exchequer in Ireland, in the name of the respondent Lowe, against the appellants and the trustees in their marriage settlement, and against Christopher Fitz-Simons and others; charging, that the dean and chapter had, for upwards of 100 years, leased the premises in question to Raymond Fitz-Simons for 21 years, at £40 sterling per ann. rent, renewable every seven years, on payment of a fine of £84 14s. and stating Edwards' bill in 1725, the verdicts and judgments [350] against him, and that he afterwards dismissed his bill; but that Fitz-Simons, being apprehensive of some future discoverer, agreed, by the advice of one Richard Matthews, to make a colourable sale of his interest in the subsisting lease to William Espinasse, as for £1050 sterling; that it was concerted that

Espinasse should advance, and that he did advance £450 to Fitz-Simons, for which he was to be paid interest at £7 per cent. amounting to £31 10s. per ann. to be secured in the rent of an under-lease which he agreed to make, and made accordingly to Fitz-Simons. That the £450, as appeared by a paper of Fitz-Simons's hand-writing, in the plaintiff's custody, was made up of the following particulars, viz. £368 7s. 7d. paid by Espinasse to Fitz-Simons, £70 paid by him as a fine on the renewal of lease in his own name, and £11 12s. 5d. allowed to Espinasse for Fitz-Simons's part of a quarter's rent, from 1st May 1730, to 24th June following, the rent on both leases commencing the March preceding. That Espinasse, to complete the consideration for the purchase, executed his bond and warrant to Fitz-Simons, in the penalty of £1200 for payment of £600 in the year 1730, and at the same time gave him the receipt of 27th May 1730, before stated. And as a further evidence of the supposed trust, the bill stated, that Fitz-Simons paid the following sums for the renewal of the lease to Espinasse, viz. the fees of the lease, £4 for a map of the lands, 7s. 6d. to the servants of the church, 2s. 8½d. to Mr. Richard Baldwyn, clerk, 18s. 6d. spent after the lease was made, £2 4s. 2d. in all, £5 15s. 6d. besides £1 3s. to one Counsellor Plunkett, for drawing the draft of the lease to Espinasse, and 18s. 4d. to Joseph Crump, for the draft of the lease from Espinasse to Fitz-Simons. That Espinasse's bond was deposited with Ambrose Farrel, and Fitz-Simons, by indorsement, agreed not to call in the bond, unless Espinasse should dispense of the lease, which was intended to have the double effect of securing Espinasse from having the bond put in suit against him, contrary to the trust, and of securing Fitz-Simons against any assignment of the lease by Espinasse, to any person not having notice of the trust. That Fitz-Simons at the same time, perfected a bond and warrant to Espinasse for the £450. That Fitz-Simons, from 1730 to 1738, held the premises under the lease from Espinasse, who in 1730 renewed in his own name for 21 years, from 25th March 1730, and made the colourable under-lease to Fitz-Simons for 19 years; and that Fitz-Simons constantly paid Espinasse, quarterly, the rent payable by Espinasse, which was £40 a-year, and interest of the £450 and 3s. 6d. every quarter, which was left in Espinasse's hands, to make up the fine of £84 14s. payable for renewal at the end of every seven years. That in 1738, he, at the desire of Fitz-Simons, renewed the lease with the church, and made a new lease for 19 years, to Fitz-Simons, at the rate of £83 12s. payable quarterly, by which he reserved the rent of £40 payable to the church, interest money of £31 10s. and the quarterly sum of 3s. 6d. to make up the £84 14s. payable every seven years on renewal. That such [351] method disguised Fitz-Simons's interest, and concealed it from discovery, and Fitz-Simons constantly paid the rent to Espinasse, till his death in 1740, and afterwards to his administratrix, to whom Christopher Fitz-Simons was sent after the death of Espinasse, when she confessed she knew the transaction relative to the lease, and that it was taken for the benefit of Raymond Fitz-Simons; and that if he had any diffidence, she was willing to put the affairs in such hands as he should think proper; and that she some time afterwards told Christopher Fitz-Simons, she was then about renewing the lease, and that several others were treating about it, and desired him to apprise Raymond not to speak a word about it, for that she expected to get the renewal for less than he imagined. That when Espinasse, on the 16th of January 1738, executed a lease to Fitz-Simons, he complained it was hard his bond and warrant for £1200 should stand out against him; upon which Fitz-Simons consented he should take them up, and execute a new bond in the penalty of £600 without warrant, conditioned for payment of £300 on 25th March 1757; and pursuant to the opinion of counsel, caused the same indorsement to be made on that, as was on the former bond, and then signed it, and it was delivered to Ambrose Farrel, that Fitz-Simons should not have it in his power to put it in suit, unless Espinasse should, by sale of the lease or interest in the lands, or otherwise, attempt to deprive him of the trust; and Farrel certified, that it was lodged with him at their instance pursuant to the agreement. That both bonds were attested by the same witnesses, and no interest was ever paid on the last, which lay many years in Farrel's hands, and then came to his representatives. That by agreement, Espinasse and his representatives were every seven years to renew with the dean and chapter, and as often as they renewed were to make an under-lease to Fitz-Simons and his representatives, on the terms aforesaid; and Espinasse was at liberty to call in the

£450, and on payment thereof Fitz-Simons's rent was to be lowered by as much as the interest at 5 per cent. That the administratrix, Isabella Espinasse, in January 1743, renewed the lease for 21 years, and gave it Fitz-Simons to get one drawn to himself, which he did; but the execution was deferred, and he died, leaving Thomas Fitz-Simons, his eldest son, his executor and residuary legatee, who, on the 24th of April 1744, paid Isabella Espinasse £20 18s. for a quarter's rent due 25th March preceding; and then desired her to renew to him according to the agreement, which she refused, and referred the matter to her nephew and attorney John Stirling, who declared the purchase was a trust, and advised her to renew. That Raymond Fitz-Simons paid William Espinasse the interest of £450 as aforesaid, which he would not have done, had not the sale and the several renewals been intended to be a trust for him, who was a Papist; nor would he have sold his interest at so great an undervalue, nor have taken a bond payable in 1757 for one-half of the sum for which the first bond was given, nor would Espinasse have run any risque by making a real [352] purchase of the lease, as he knew he must lose the benefit of his purchase if Edwards prevailed on his bill, had not the sale been colourable, and all the securities and transactions a contrivance to elude the Popery acts. That all the Fitz-Simons's were Papists, and the respondent Christopher, as representative of his father and brother, claimed the benefit of the several leases and renewals. That the lands were in 1730 worth upwards of £80 a-year, and since considerably more; and the last renewal was obtained at the usual rent of £40 a-year, which being less than two-thirds of the yearly improved value, and being in trust for the respondent Christopher, a Papist, the plaintiff, as the first Protestant discoverer, was entitled to the benefit of the pretended purchase, and of the several leases and renewals made in consequence thereof, and to all other estates and interests in the premises taken contrary to the intent of the Popery acts; the rather, as the pretended purchase was made pending Edwards's suit, and when it was at issue, which was notice on record to Espinasse, and as all renewals after the purchase must pursue the nature of the lease, being grafted thereon. The bill also charged, that before the assignment to the appellant Isaac, all the family had notice of the supposed trust, and that their interest was a security only for the £450, and that the last lease was worth £1100 to be sold. That the bill filed in 1750, in Smith's name, was, by writing executed by Smith, declared a trust for Thomas Wright, an attorney employed by the plaintiff to file it; and that Wright executed an instrument, by which he assigned his interest to the plaintiff, which was registered 5th August 1754; and that Smith's cause proceeded to issue, but that publication never passed, as he the respondent was not able to find Smith the plaintiff, or whether he was a Protestant. And therefore the bill prayed, that the plaintiff as the first Protestant discoverer, might be decreed to the benefit of such lease then in being of the premises, made by the dean and chapter to any of the defendants, upon any trust expressed or implied for Raymond, Thomas, or Christopher Fitz-Simons; that he might enjoy the premises during the remainder of the term therein contained, and that such of the defendants as had received the rents and profits since the filing of Smith's bill, might account with the plaintiff for the same, or so much thereof as he was entitled to.

The appellants and their trustees, by their answers, made the same case as before stated, and insisted upon the marriage settlement of 1754: and that there was issue of the marriage a son, the appellant Richard, who was a purchaser of a reversionary interest in the premises, for a valuable consideration, without notice; and that the purchase made by Espinasse from Fitz-Simons was a real purchase, and that none of the securities and transactions between them were contrived to elude a discovery on the Popery acts.

An answer was also put in for Christopher Fitz-Simons, admitting (in consequence of the collusion between him and the other respondent Lowe) every charge in the bill.

[353] The cause proceeded to issue, and many witnesses were examined. For the respondent Lowe were produced and proved as exhibits, William Espinasse's receipt, dated 27th May 1730; the under lease to Fitz-Simons in 1738; and the bond of that date, with the indorsement thereon, which had been furnished him by the other respondent Fitz-Simons, and which had been all along in the power of him and his family, particularly from the first refusal of the renewal in 1743; and no other written

evidence, except the supposed case and opinion mentioned in the pleadings, which was rejected by the court.

But to supply this defect of evidence, he very irregularly examined Christopher Fitz-Simons, the Papist, his supposed vendor, and others, to prove that William Espinasse and Isabella his widow, had severally by parol confessed the trust, though she had by her answer positively sworn the contrary; and the witnesses gave their information and belief to most of the charges in the bill from 1730, though not parties to the transaction; and though Christopher Fitz-Simons was, in 1730, but five years old, being only thirty-three at the time of his examination, in August 1758.

The appellants objected at the hearing, to this attempt of proving a trust by parol, and taking away the force of the written evidence of a substantial title, arising from the receipt of 27th May 1730, and the lease made by William Espinasse to and accepted by Fitz-Simons; but the objection was over-ruled.

The appellants examined Isabella Espinasse and her younger children, to encounter the respondent's evidence, but the court rejected them; and the supposed trust not having been set up, or pretended, till after all the parties and witnesses to the transaction in 1730 were dead, and above 20 years after that transaction, the appellants could not make any proof of the payment of the consideration money, farther than the admission in the respondent's bill, of the payment of £450, nor of the original agreement, but relied on the length of possession as evidence of a title. And on the other hand, no proof was made by the respondent of the agreement in 1730, to pay the £1050, or of the first bond for £600, or the manner of payment of the £450, or of the computation by which the rent to be reserved on the lease to Fitz-Simons was ascertained, as alleged by the bill, or by whom the lease in 1723 was surrendered, or the renewal fine paid, or any new proof that that lease by reason of the value at the time of making thereof was discoverable (save the presumption, or rather proof to the contrary, arising from the concurrent verdicts in Edwards' favour), nor any proof that the lease and bond in 1738 were in consequence of the agreement in 1730.

The cause was several days in hearing before the court of Exchequer in Ireland, in the months of May, June, and November 1761; and after time taken to consider, the Chief Baron, on the 10th of February 1762, delivered the judgment of the court; by which they decreed the respondent Lowe, as the first real [354] Protestant discoverer, within the true intent and meaning of the several acts of parliament made in Ireland for preventing the farther growth of Popery, to the benefit of the lease of the lands in question, made by the dean and chapter of Christ church to William Espinasse on the 25th of March 1729, and also to the benefit of the several renewals thereof made by the dean and chapter to the said William Espinasse, the defendant Isabella Espinasse, and to the appellant Isaac Espinasse respectively, since the said 25th of March 1729; and to the rents and profits of the said demised premises, from the 8th of February 1757, being the time of filing the original bill. And it was referred to the remembrancer to state an account of the rents of the premises received by Isabella and the appellant Isaac respectively, from the said 8th of February 1757, and also of what sums of money were paid by them respectively, on each of the renewals to them made since the said 8th of February 1757, for fines and charges attending such renewals. And in case the said fines and charges exceeded the rent from the said 8th of February 1757, the remembrancer was to allow interest for such exceedings at £6 per cent. per annum; with liberty to the remembrancer to report any thing specially; on return of whose report such further order should be made as would be fit.

From this decree the appellants appealed, and on their behalf it was said (T. Sewell, A. Forrester), that the principles on which it was founded were, 1st, That the original agreement between William Espinasse and Raymond Fitz-Simons, which was not produced, must be presumed to be in the power of the appellants; and that the lease to Espinasse in 1730, purporting to be made upon a surrender of Fitz-Simons's lease, for which no consideration appeared to have been paid by Espinasse, must therefore carry a resulting trust. 2d, That the indorsement on the bond of 1738, restraining Espinasse from alienation, proved him not to be owner of the leasehold premises. And 3d, That the appellants not producing an account of Espinasse's assets, made up by his administratrix, in consequence of which the appellant Isaac purchased the lease, shewed that no mention was made therein of these lands, as not being any part of his fortune.

But to these objections it was answered that the original agreement, if importing to be for the benefit of Raymond Fitz-Simons, must be presumed to be not singly in Espinasse the trustee's power, but that a counterpart of it was in the custody of Fitz-Simons the *cestui que* trust: from whom it would certainly have come to the respondent Christopher, and would have been by him delivered to the other respondent Lowe among the many materials with which he furnished him. That the sum of £450 was the price agreed for and paid, which with the sublease to Raymond was a sufficient consideration for an interest that was liable to daily molestation by a Protestant discoverer, while in his hands. That the presumption arising from the indorsement on the bond was repelled by the written receipt of the 27th of May 1730, which [355] proved Fitz-Simons to have been tenant to Espinasse: and every suspicion arising from a restraint of alienation in the owner vanished by attending to the intent, which was as far as possible to secure Fitz-Simons by this derivative lease against any act of Espinasse, whose assignee might have endeavoured to wrest it out of his hands under the Popery acts; besides, this restraint of alienation was confined to 19 years, the term of Fitz-Simons's lease. And as to the supposition of the lease not being considered as part of Espinasse's assets, in the assignment made by his administratrix in 1752, to the appellant Isaac, the argument turned just the contrary way, by his settling this very identical lease, to which he could have no right but as part of his father's assets, upon his marriage in 1754.

It was further urged on behalf of the appellants, that after so long an undisturbed possession by their father and family, supported by Fitz-Simons's accepting a derivative lease, constant payment of the rent thereby reserved, and receiving the purchase money, no parol evidence of a trust ought to have been admitted. That constructive trusts, or trusts resulting by implication are certainly not within the statute of frauds and perjuries, which is law in Ireland as well as in England; but they arise from the apparent nature of the transaction: Whereas no such thing appeared in the present case without the help of extrinsic parol evidence, which is absolutely prohibited by the statute of frauds, and the prohibition has been constantly held in England to extend to trusts avoided by laws posterior to that act, which must appear by some writing. The introduction of it therefore in this case, upon any supposed peculiarity in the Popery acts was totally unwarrantable. But even allowing this evidence its utmost extent, the appellants could not be thereby affected: For the trust for the Papist, if any, was of a lease long since determined; whereas the present lease was made to a Protestant, and confessedly for his own benefit. Nor could the usual doctrine of a renewed lease being but an ingraftment upon the old one, and applicable to the same uses, help the respondent: the maxim being calculated only to support the ancient right of renewal in the first lessee; but Raymond Fitz-Simons being a Papist, had no right of renewal; and the applying it here would tend only to the creating a forfeiture, contrary to the standing rule of equity, and contrary indeed to the very drift of these Popery acts; which never meant to strip a Protestant purchaser in favour of a discoverer, who, as in this case, appeared to be himself but a trustee for the Papist. That the appellants Mary and Richard had insisted upon their being purchasers of this interest for a valuable consideration, under the marriage settlement of 1754, and without notice of any other title: nor was there any proof to the contrary, but by a supposed constructive notice of the bill filed by Smith in 1750, which was a suit totally different from and unconnected with the present, and the dropping whereof about the time of the settling [356] ment tended rather to explode than infuse any notion of a trust in the contracting parties. The decree however paid no regard to this, and had not even given the appellants, who were total strangers to the understanding between the then plaintiff and the present respondent, an opportunity of trying the point of notice. That though the payment of the £450 was admitted, and a strong argument for implying a trust raised from the smallness of the sum: yet no provision was made for repayment of the principal or interest either of that sum, or of the money paid for fines or renewals previous to the 18th of February 1757. It was therefore hoped that the decree would be reversed, and the respondent Lowe's bill dismissed.

But in support of the decree it was contended (C. Yorke, J. Madocks) that the surrender of the lease by Fitz-Simons on the 25th of March 1729, in favour of Mr. Espinasse, and his permitting Fitz-Simons to continue in possession, and take the profits

of the lands to his own use, shewed that there was originally no intention of purchasing the lands, but that such surrender was made, and the lands thereupon taken in confidence, and for the sole benefit of Fitz-Simons. That the lease afterwards made by Espinasse to Fitz-Simons, at a rent so greatly below the real value of the lands, was evidence of a continuance of the same confidence and trust, accompanied with the further evidence arising from the bond and indorsement thereon. It was also clearly proved in the cause, that Espinasse had frequently confessed his being a trustee for Fitz-Simons and his family, and that Mrs. Colly was informed of such trust and promised to continue it. And as the lands were let by the dean and chapter at less than two-thirds of the improved value, the lease from time to time renewed at the same rent, in trust for Fitz-Simons and his representatives, who were Papists; and Christopher Fitz-Simons who now stood in his father's place being a Papist; this case was within the words of the 8th of Queen Anne, and the respondent as a Protestant discover was entitled to the benefit of such trust.

As to the objection that there was no written declaration of the trust; it was said, that under the statute 8th Anne, there was no occasion for any declaration of trust in writing, because that statute requires only proof to be made of a trust, or confidence for a Papist, and then the case came within the statute; which proof could not be confined to proof by a declaration of trust in writing, as such a construction would be a certain means of furnishing an evasion of the act, by the parties omitting to make any declaration of trust in writing, upon purchases made for the benefit of Papists. And as to the other objection, that the appellant Isaac was a purchaser under the marriage-settlement of his father and mother, for valuable consideration, and without notice of the trust; it was answered that his father had notice of the trust long before the settlement was made, by being a party to Smith's bill; and that Mr. Magennis, the wife's father, had also [357] notice of the trust before the settlement; and that they being the contracting parties in the settlement, the appellant Isaac was bound by such notice.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the bill brought by the respondent Lowe in the court of Exchequer in Ireland should be dismissed. (Jour. vol. 30. p. 465.)

CASE 20.—OLIVER ISDELL, *Appellant*; OLIVER FITZGERALD, and Others,—
Respondents [9th March 1772].

[In general questions of resulting trusts, the rule of judgment must be the nature and circumstances of the case.]

[Decree of the Irish Chancery reversed.]

[The above point, such as it is, afforded the best reason possible for the omission of this and many other cases in this work. *See aliter visum* to the original editor.]

Oliver Fitzgerald, the respondent's grandfather, was in the year 1720 possessed of the lands of Conlanstown, and part of Lackanstown, in the county of Westmeath, for a term, of which 26 years were then unexpired, under a lease from Sir Joseph Tuite at the yearly rent of £132. And upon the marriage of his son Oliver, the respondent's father, with Elizabeth Smith, in consideration of the marriage and of a portion of £100 by articles dated the 31st of August 1720, Oliver the elder assigned, or agreed to assign to his said son, one undivided moiety of all the said lands, to hold during the residue of the term, subject to a moiety of the reserved yearly rent. But in these articles, which were a private family transaction, it afterwards appeared, that there was a covenant by Oliver the father, that it should be lawful for Oliver the son, his executors, etc. after the death of Oliver the father and Elizabeth his wife, to possess and enjoy all and singular the premises, to his and their own use, for the remainder of such term or interest, as Oliver the father or his wife should then have to come therein; subject to such rent and taxes as then were, or should thereafter be charged thereon.

A memorial was registered in Dublin, of so much of the articles only, as related to the father's assignment of an undivided moiety of the premises to his son, during the residue of the term of 26 years, then to come therein, under a moiety of the rent of £132 and the covenants in the lease. But not the least notice was taken in the registry, of the covenant extending to the whole of the lands, after the death of Oliver the father and his wife.

[358] Some time after this agreement or assignment, a partition was made of the lands of Conlanstown between the father and son, and the several parts were from thence occupied in severalty by them and their representatives; but the lands of Lackanstown, being leased to several tenants, the rents were received and equally divided between the father and son, till the son's death, and afterwards, till the appellant voluntarily gave up the part of Lackanstown which he was then in possession of.

In the year 1734, Oliver the son died, leaving the respondent Elizabeth his widow, and three sons, Henry, James, and the respondent Oliver, then infants, of whom the two former soon after died, and the respondent Oliver, only lived to attain 21. Oliver the son by his will, directed that all his stock should be sold, and his farms set, and that the money to arise by such sale, after payment of his debts and legacies, together with the yearly profits arising out of his farms, as also whatever profits might accrue by the reversion to which he was entitled of his father's part of the lands of Conlanstown, should be equally divided amongst his three sons, when they should severally attain 21; subject to an annuity to his wife, in lieu of the provision made for her on her marriage, and appointed Elizabeth his wife, Robert Meares, and John Harris, executors. The widow only proved this will, and took upon herself the care of her children, and entered into possession of that part of Conlanstown which had been held by her husband, and into the receipt of one moiety of the rents of Lackanstown.

In the year 1738, Oliver the father also died, and by his will appointed Elizabeth his widow, his sole executrix, and gave her all his residuary estate, real and personal, to be enjoyed by her, and she to give and dispose of the same to such person or persons as she should think fit. She accordingly entered into possession of that part of the lands of Conlanstown which remained in her husband's possession, and into the receipt of a moiety of the rents of Lackanstown; and being thus possessed, by deed in writing dated the 2d of October 1741, assigned her lands of Conlanstown, and part of Lackanstown, to the appellant her grandson, during the residue of the leases thereof made by Sir Joseph Tuite to her late husband, and also all the stock thereon, in consideration of £10 yearly, above the rent paid for the lands, being £76 and taxes, with a covenant for quiet enjoyment: And the appellant, at the same time executed a bond to her, in the penalty of £350 conditioned for payment of £175 on the 25th of December 1744, which she afterwards made him a present of.

On the 2d of August 1742, the appellant paid, and his grandmother gave him a receipt for £5, being the first half-year's rent: and from the time of this assignment, Elizabeth the grandmother lived with the appellant, in the house of Conlanstown, assisted him in the management of the farm, and he furnished her with every necessary, suitable to a woman of her age and [359] station, and likewise contributed to the maintenance of two of her grandchildren.

The lease made by Sir Joseph Tuite, being to determine at May 1746, and the appellant having acquired some interest with Sir Henry Tuite, the then owner of the lands, it was considered by Elizabeth, the only acting executrix of Oliver the son, and her then husband John Salmon, and by the appellant, that it would be more for the advantage of the family to obtain new leases, than suffer the subsisting one, whereof there remained about two years and a half to expire; and they accordingly agreed, that the appellant should use his interest with Sir Henry, to obtain new and separate leases of the respective shares of the lands: which the appellant having done, the old lease was, at the request of Elizabeth Salmon, and the appellant, surrendered by Elizabeth, the widow of Oliver the father, and in lieu thereof, Sir Henry granted two new leases, one dated the 9th of December 1743, to the appellant, of that proportion of the lands of Conlanstown, which had been reserved to and continued with the grandfather and his wife, containing 258 acres, for the lives of the respondent Oliver, Christopher Le Strange, and the appellant, then about 17 years of age, or the longest liver of them, at the yearly

rent of £103 4s. sterling, and some duty work. The other dated the 12th of the same month, to John Salmon, in trust for the respondent Oliver, of that part of the lands of Conlanstown, which had been held by his father, containing 226 acres, for the lives of Dalton Smith, John Nugent, and the said respondent, at the yearly rent of £90 8s. with some duty work. The lands demised by these leases, (in which the latter contained about 24 acres more than the other,) being demised according to the ancient boundaries set out by Oliver the father and Oliver the son, when they made the division of them, and as the rent reserved was an acreable rent, the appellant paid in proportion for the overplus acres contained in his part. Sir Henry Tuite at the same time granted a third lease, which was to the appellant of the lands of Lackanstown, theretofore held by the respondent's grandfather and father, for three lives; and the appellant afterwards by writing, dated in July 1744, voluntarily declared a trust of a moiety thereof for the respondent Oliver, and afterwards gave him up the whole lease to advance him in marriage, which the respondent afterwards again surrendered, and in 1752, took a new lease in his own name. By this transaction, the appellant became liable two or three years sooner than he would otherwise have been, to an advanced rent of £37 4s. being the difference between his moiety of the whole yearly rent of £132 and the £103 4s. which he was immediately to pay under the new lease.

Elizabeth Salmon, the respondent Oliver's mother, had at this time in her hands one part of the marriage articles of 1720, under which she was in possession of one moiety of Conlanstown, and in receipt of a moiety of the rent of Lackanstown. Elizabeth the [360] elder, the appellant's grandmother, though somewhat more than 70 years of age, was then also likely to survive the old term, and in fact lived till 1749, three years after it expired, having several years survived her son; and the respondent Oliver was then 17 years old, and afterwards attained 21, about 1746 or 1747.

The appellant, after obtaining this lease, expended upwards of £800 in building houses, and planting and improving the lands of Conlanstown, to make the place fit for the residence of his family, keeping the whole in his own possession, which he stocked with black cattle, sheep, and horses, (except about 30 acres which he let off to under-tenants,) whereby the inheritance of the lands, which, when the appellant renewed the lease, were not worth above £25 yearly profit rent, became greatly benefited and increased in its yearly value.

In 1749, Elizabeth the grandmother died, having by her will appointed the appellant executor and residuary legatee. At her death the respondent Oliver was about 23 years old, and had before the year 1751, seen the will of his father, and the notice therein taken of the reversion to which he was entitled in his father's part of the lands of Conlanstown; and living in the neighbourhood, had often been on the lands and seen the appellant daily carrying on his improvements, but never mentioned any claim he had to that part of the lands in the appellant's possession.

On the 17th of March 1753, the appellant registered his lease, as a matter of form, having no suspicion of any subsequent grant being made by his landlord, and the transaction being well known to the whole family, who were most of them parties to it. During this interval, and till long after, the appellant had no notice of the marriage articles, nor the least suspicion of any claim of title in the respondent; but having gone on for near twenty years in improving the estate, at the expence of his own private fortune, he conceived himself entitled to some farther favour and indulgence from his landlord; and applying therefore to Sir Henry Tuite, and his son and heir apparent, now Sir George Tuite, for an additional term, they by indorsement, dated the 14th of August 1760, made on the last renewed lease of Conlanstown, in consideration of the appellant's expences and improvements, and of 100 guineas paid by him, confirmed the lease, and demised the lands to the appellant for the farther term of 31 years, to commence from the death of the surviving life named in the lease, at the former rent.

The appellant and respondent, were not only near relations and neighbours, but lived for many years in great harmony and friendship, the latter encouraging the appellant in his undertakings and improvements, and the appellant occasionally assisting him with different sums of money to answer his exigencies. In 1760, they mutually adjusted their accounts, in which the respondent was assisted by Mr. James Hynes; and after full credit given therein by the appellant, for every shilling he had received from the respondent's effects, the respondent stood indebted to him in [361] a balance

of £410 2s. which he proposed securing by his bond, and a mortgage of the leases of Conlanstown and Lackanstown, which he sent to the appellant's house by Hynes, with directions to the appellant to get a bond filled up, and assignments of the two leases prepared; and on the 30th of July 1760, the respondent brought Hynes with him to the appellant's house, and Hynes having again inspected the accounts, which were then signed, and the vouchers delivered up, the respondent executed the bond and assignments, and the appellant executed defeazances for making the mortgages redeemable, on payment of £410 2s. and interest.

The respondent paying neither principal or interest, and failing to procure a transfer of the mortgages as he had frequently promised, and the appellant having advanced above £100 more for the respondent, in payment of his rent, and to extricate him out of his difficulties, he at last sued out judgment upon the bond, and was proceeding to a foreclosure of the mortgages; when, after twenty-five years acquiescence under the appellant's title, seventeen of which the respondent Oliver had been of age, living for the most part of the time, as well before as afterwards, in the neighbourhood, he seeing the appellant's improvements, and the great rise of lands in Ireland, filed his bill in the court of Chancery in Ireland (which was several times amended) against the appellant, and the other respondents Elizabeth Salmon and Michael Howard, stating the settlement in 1720, and the partial registry thereof in 1729, with the subsequent wills and deaths of the father and son; and charging, that the son's widow, who afterwards married Salmon, being unacquainted with the settlement and her first husband's affairs, and her son's title under the settlement, and a very weak woman, gave no attention thereto; but that the father's widow, in collusion with the appellant her grandson, who managed her affairs, and was well acquainted with the settlement and father's will, entered into a scheme to deprive the respondent Oliver of the benefit of the settlement; and with that view having prevailed on Salmon and his wife to surrender the former lease, during the respondent's minority, obtained the three different leases of 1743, from Sir Henry Tuite. That upon the grandmother's death in 1749, the whole benefit of all the leases, vested in the respondent Oliver, under the settlement of 1720, and his father's will. That the appellants did not register the lease of his moiety of Conlanstown, till March 1753, from a consciousness that it would be deemed a trust for the respondent from the grandmother's death; and though he knew of both the settlement and will, yet knowing the respondent was a stranger to his title, he obtained the confirmation of 1760, from Sir Henry Tuite. That to prevent an inquiry into the lease, and to amuse the respondent, the appellant in 1755, prevailed on the respondent to go into England to recover some estate in Oxfordshire, and lent him money to defray the expenses of his journey, which proved fruitless, and during his absence, received [362] his rents, but that no regular accounts were settled between them; and that the assignments of 1760 were obtained by menaces, and no such sum of £410 2s. was then due from him to the appellant: And that the respondent had never heard of the settlement of 1720, or his father's will, till very lately. He therefore prayed, that the appellant might be decreed a trustee for him, as to the lease of 1743, and the renewal thereof in August 1760, and might re-convey the premises, and account to him for the rents and profits thereof from the grandmother's death in 1749; as also touching his other receipts and payments on the respondent's account, and might be enjoined from proceeding at law.

The appellant answered this bill agreeably to the preceding state of facts, and disclaimed all knowledge of the settlement of 1720, having never seen nor heard of it except by the bill. He denied all the equity of the respondent's case, and insisted, that the registry of the settlement of 1720, in December 1729, could not affect his title; for that by the registry act, the memorial ought to express all the lands affected; whereas, in that memorial, only a moiety of the lands in question was mentioned to be conveyed to Oliver the younger, without any mention of the other moiety.

The respondent having replied to the appellant's answer, the cause proceeded to issue, and divers witnesses were examined on both sides. The respondent endeavoured to prove the detention of the settlement of 1720 from him without notice, (though all the while in his mother's possession) till a few years before filing the bill; and that the appellant had notice of it from casual conversation many years before; and that the grandmother, notwithstanding the assignment to the appellant, continued in possession

till her death. The appellant proved the assignment executed to him by his grandmother, in consideration of the £10 annuity reserved over and above the yearly rent to the landlord, and also the execution of a bond by him to her of even date, and attested by the same witnesses, in the penalty of £300, conditioned for the payment of £175, being the obligation for his maintaining the two grandchildren, and that he maintained and supported the grandchildren accordingly. He also proved the respondent's residence within twelve miles of Conlanstown from 1743, except whilst he was in England, and his being often there and holding a part of the land called Churchtown. He proved likewise his own valuable and lasting improvements, and the great rise in the lands of late years, as also the amount of the monies due to him from the respondent, and the respondent's mortgage of the lease of his part to the appellant for securing the same.

After several days hearing before the Lord Chancellor of Ireland, his Lordship, on the 2d of June 1770, pronounced his decree; but upon a re-hearing obtained by the appellant, he was pleased, on the 3d of July 1770, to make some variations, as to the mode of accounting and other particulars. By the decree so varied, his Lordship was pleased to declare, that the respondent [363] Oliver Fitzgerald was entitled to the renewed lease of 1743, and the reversionary lease of 1760, of the moiety of the lands of Conlanstown granted to the appellant, in the pleadings mentioned, and to the said moiety of the said lands therein contained; and the same were decreed to the respondent accordingly; and an injunction was awarded to the sheriff of the county of Westmeath, to put the respondent in possession of the said lands; but the execution of such injunction was to be suspended till the further order of the court: And his Lordship was also pleased to declare, that the respondent was entitled to an account of the rents and profits of the said lands from the time of filing his bill, and the said rents and profits from that time were decreed to him accordingly; and in case any of the said lands should appear to have been held by the appellant, it was ordered that the Master should inquire into the value thereof, and charge him therewith accordingly; and in taking the account the Master was to give the appellant all just allowances, and particularly of all such sums as he had laid out and expended in valuable and lasting improvements, so far as the mesne profits from the death of Elizabeth the respondent's grandmother in 1749, to the time of filing the bill, should appear to have been insufficient to satisfy the same; and for enabling the Master to judge thereof it was ordered, that he should inquire into the rents and profit during that time, as far as might be necessary to ascertain that matter; and the Master was also to allow in such account to the appellant, all such sums of money as had been paid and advanced by him, as a fine or fines on renewing the lease of 1743, and the reversionary lease of 1760, together with interest for such fine or fines respectively, from the respective times of advancing the same; and it was further ordered, that the respondent Oliver should have his costs to be paid by the appellant.

From this decree the present appeal was brought: and on behalf of the appellant it was contended (A. Wedderburn, A. Forrester), that there was not the least proof, or even charge of fraud against him: and that the respondent's claim was founded singly upon his reversionary interest after his grandmother's death in the old lease, and the supposed resulting trust for his benefit in the renewed lease of 1743, which he would have considered but as a continuance of the old one. Now in questions of resulting trusts, the nature and circumstances of each case, and not any general rule (for none such there is, or can be) must be the rule of judgment.—In 1743, the old lease was within three years of expiring: During that period, the respondent was entitled to one moiety of the lands in possession; but the other moiety being in his grandmother, he had nothing to do with it; she might, as in fact she did, outlive the three years, and then his reversionary interest was not worth any thing: and the appellant was in the same situation as to that moiety of the grandmother's, which he held by assignment from her. Thus circumstanced, it was evidently the interest of all parties to procure a renewal: and accord-[364]-ingly the old lease was surrendered, and a new one obtained, with the full concurrence of the respondent's mother and father-in-law, who were fully apprised of his reversionary interest, and the value of it under the old lease. At this time, these parties, who were mere country people, had certainly no idea of the artificial doctrine of resulting trusts, but fairly meant that the new leases of the several parts should enure to the benefit of the several possessors under the old

lease at that time. That this transaction, far from being to the respondent's prejudice, who was then an infant, was evidently for his benefit. He obtained a permanent interest in one moiety by giving up the remainder of a reversionary interest of three years only in the other. The renewal was procured solely by the appellant's credit with the landlord, and his surrendering up the old lease, which he was not at all compellable to do, and was a mere voluntary act of his own. Had he refused doing so, and waited the expiration of the lease, he might have procured a new one to himself of the whole lands, and thereby have stript the respondent; all which the respondent's mother and father-in-law must and did know. On the other hand, the appellant when subjecting himself to an advanced annual rent of £37 during the remaining three years of the old lease, and to a covenant for payment of this rent for the whole term, certainly meant to take this moiety to himself. And thus the intent of all the parties manifestly appeared, that each should take the beneficial interest of the moiety leased to him; and the transaction being fair and honest, there was not the least ground for the interposition of a court of Equity to controul that intent, by saying that the parties meant quite the contrary. That the respondent's acquiescence for full 17 years after he came of age, looking all the time on the appellant's daily improvements, and his bestowing his money and labour upon what he really believed to be his own, without uttering a syllable to undeceive him; was of itself a sufficient bar to the respondent's claim. His pretended ignorance of his title was incredible; for his mother had one part of the articles of 1720 in her hands, and an uncle of his had another. His original right to the moiety which he thus possessed, was under those articles and his father's will, both expressly mentioning and disposing of the reversionary moiety. Most clearly therefore, there was no ignorance, but full notice of this pretended title, which he purposely delayed setting up till after the lands were considerably increased in value, at the expence and by the labour and industry of the appellant: and which was so gross a fraud, as never could or would be countenanced in a court of equity. It was therefore hoped that the decree would be reversed, and the respondent's bill dismissed with costs.

On the other side it was insisted (J. Skynner, J. Dunning) that by the marriage articles of 1720, the respondent's father became entitled as a purchaser for valuable consideration, to one moiety of Conlanstown in possession, and to the other moiety in remainder, after the death of his father and mother; and by the wording of those articles it was plain [365] that the parties had a view to a future interest in those lands, to be acquired from the landlord; and that such future interest should go according to the limitation of the articles. For it was therein expressed, that after the death of Oliver the elder, and Elizabeth his wife, the respondent's father, his executors, etc. should hold the moiety settled in remainder, for the residue of such term or interest as Oliver the elder, or his wife, should then have to come therein; subject to the payment of such rent and taxes as then were, or should thereafter be charged or imposed upon the said premises by the ground landlord: and the respondent, as the only surviving issue male of his father, became entitled under his will to the whole interest which his father had in the lands, both in possession and reversion. That if the pretended assignment of October 1741, from Elizabeth the grandmother to the appellant, was out of the case, the lease of 1743, and consequently the lease of 1760 must be a trust for the respondent, because of the possible reversion which he had in the old lease at the time it was surrendered for the purpose of obtaining the new one; and because that new lease was plainly a trust for the grandmother, and therefore she then, and at her death, had an estate in the lands for three lives; and by the express terms of the articles, the father of the respondent, his executors, etc. were entitled to all the estate in those lands which Elizabeth the grandmother then had. But it was apprehended that this assignment could not make any title to the appellant, or in the least protect him: For 1st, It could not be conceived that if the appellant had been a real and fair purchaser, and considered himself as such, he would not at once have set out the consideration by him really given, instead of setting up, as he had done in his answer, three different considerations. 2d. It was in issue, and fully proved, that Elizabeth the grandmother, notwithstanding this pretended assignment, continued the visible owner of the lands, and that the appellant managed them under her directions. And 3d, It was admitted by the appellant, that after the supposed execution of this assignment, Elizabeth the

grandmother made the surrender of the lease in 1743, which, if the assignment of 1741 had been considered as a real conveyance, she had no right to make, nor could the legal estate pass by such surrender; and yet it also appeared by the appellant's answer, that he was not a party to the surrender, which it was absolutely necessary for him to have been, if entitled under such pretended assignment.

But supposing it to have been really executed, yet the appellant was not a purchaser under it for a valuable consideration; because his pretence of three different considerations being paid by him, strongly shewed, that in reality he did not give any consideration. Neither did it appear, that he ever paid any of the alleged considerations; for there was no proof of payment of either of the pretended annuities of £20 and £10 to Elizabeth the grandmother, save only by one receipt for one gale, before any gale could have become due under the assignment, and the obtaining [366] of that receipt shewed a fraud: And it was plain, that no part of the £175 bond was ever paid to or claimed by the grandmother: for the appellant's own witnesses proved, that the grandmother made a present of it to the appellant's mother-in-law, and that long after all remedy for that bond had been precluded by length of time and the non-payment of any interest, the mother-in-law made a present of it to the appellant; and besides, it was neither mentioned in the pretended assignment of 1741, nor attempted to be proved, if such proof could have been admitted, that the bond was any part of the consideration of that deed. If however, the appellant should be considered as a purchaser for a valuable consideration, under this pretended assignment of 1741, yet he clearly must have had notice of the respondent's title, at the time of the execution of that deed: It was his duty to inquire into the title of the person from whom he purchased, and if he omitted to make such inquiry, the rule *caveat emptor*, held against him; and had he made that inquiry, he must have known that Elizabeth the grandmother's only title was under the will of her husband; that by that will her husband had devised to her his whole real and personal estate: that he was lessee of the whole lands, by the old lease; and that the grandmother was therefore entitled to the whole lands, if her husband had not made some disposition of a part of them. The appellant knew, that under that will his grandmother had only a part of the lands, and paid only a moiety of the rent: that the respondent's mother was in possession of the remainder, and paid the other moiety of the rent; and therefore the appellant must have known that the respondent had a title, and that his only title was under the articles of 1720. That this was further evident from the appellant's admission, that his grandmother, with his knowledge, applied to Elizabeth the respondent's mother, to join in the surrender of the old lease: which shewed, that the appellant must have known that the respondent's mother had a title to the lands. But it was proved, that in 1739, express notice of the settlement of 1720, and of the respondent's claim in remainder under that settlement, to the lands then in possession of the grandmother, was given to her by the respondent's mother, and by his uncle, and that in the appellant's presence; and it was observable, that though the pretended assignment in 1741, was of the whole lands, yet the appellant never claimed title to more than a moiety of them.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the respondent's bill should be dismissed. (MS. Jour. *sub anno* 1772, p. 248.)

[367] CASE 21. JOHN BLEWETT,—*Appellant*; HUMPHRY MILLETT,—*Respondent*
[28th February 1774].

[See *Griffin v. Griffin*, 1 Sch. & L. 352.]

[Nothing is better established as a general proposition than that where a trustee for an infant renews a lease in his own name, the renewed lease shall endure for the infant's benefit. This is a doctrine founded on general policy to prevent frauds, and has long been an established rule in Courts of Equity.]

[As to the general principle see Fonblanque, *Treat. Eq.* lib. 2. c. 7. § 7. and the cases there cited.]

[The present is a glaring instance of the apparent contradiction between the state of the case as adopted by the original Editor, and the determination of the Courts.]

Humphry Millett, the respondent's father, was in his lifetime a considerable adventurer in mines; and his concerns therein were attended with that variety of success, which is usual in all undertakings of so precarious a nature. Among other shares of mines which Mr. Millett was entitled to at the time of his death, were seven thirty-second parts of a certain tin mine in the parish of Breage, in the county of Cornwall, called the Western Great Work, and one-tenth part of an adjoining tin mine called the Eastern Great Work; both these mines having been granted by the Earl of Godolphin, as the lord and owner of the soil, to one Stephen Pearce and his co-adventurers, under a reservation of every sixth dish of fine ore, deliverable on the grass, as the Lord's dole, according to the laws and customs of the stannaries.

Mr. Millett, sensible of the uncertainty of advantages arising from this species of property, and of the many casualties to which it is liable, appeared very anxious, upon the final disposition of his fortune, to guard as much as possible against them; and as his son, the respondent, for whom the bulk of that fortune was intended, was then an infant, the most probable method which suggested itself to him of effectuating this intention, was to invest his executors with a discretionary power of carrying on or relinquishing his mine adventures, as time, accident, or other circumstances, should render it most for his son's benefit.

Accordingly on the 6th of April 1750, Mr. Millett made his will, and after giving several legacies, he thereby disposed of the residue of his estate, in the following words: viz. "Lastly all the rest, residue and remainder of my goods and chattels both real and personal, rights, credits, and effects whatsoever, I do hereby give, devise, and bequeath the same unto my son Humphry Millett; and I do hereby make, ordain, constitute, and appoint my well-beloved wife Grace Millett, Edward Collins, John Millett, and George Blewett (the appellant's [368] father) executrix and executors of my last will and testament, in trust for my said son Humphry Millett: and to be guardians and trustees over my said children, until they shall respectively attain the age of 21 years: And I do hereby will and desire, direct, authorize, and empower my said executrix and executors from time to time, during the minority of my said son Humphry Millett, to carry on and adventure my several and respective parts and shares of adventure, in the several tin and copper mines, in which I shall adventure at the time of my death, for my said son Humphry Millett, and in trust for him, or to discontinue the same, or such of them as they in their discretion shall think fit: And moreover, for them my said executrix and executors to retain, deduct, and keep, out of my goods and chattels, all their charges and expences in adventuring as aforesaid, or otherwise relating to the trust I have hereby reposed in them."

On the 13th of June 1750, the testator died, without altering or revoking his will; at which time the respondent was an infant of about five years old; and soon afterwards the executrix and executors duly proved the same, and acted in the execution thereof for the respondent's benefit, by carrying on the testator's shares in such mines as were deemed profitable and advantageous, and discontinuing his shares in such as were in a contrary situation.

Among the latter sort were the two mines abovementioned, called the Western Great Work and the Eastern Great Work : for both of them having been wrought deep, and the charges of working and drawing the water from the bottoms becoming consequently very great, they, in a short time after the testator's death, became losing and unprofitable adventures.

George Blewett the appellant's father was a co-adventurer with the testator, and several other persons in these two mines ; he having one-eighth share in the Western Great Work, and one-tenth share in the Eastern Great Work.

About two years after the testator's death, a meeting of the several persons interested in these two mines was held, in order to consider and determine on what was most proper to be done concerning them ; when as well on account of the very unpromising condition thereof, as because the Lord Godolphin had by his steward insisted, that the sets of the mines, and the right of working the same, was become forfeited according to the Stannary Laws : It was unanimously agreed, to discontinue working the mines and surrender the sets thereof ; and some of the old partners agreed to make an application to the Lord, to consolidate both the mines into one, and to grant a new set thereof, when so consolidated, to such of the old adventurers, and such other persons as should be willing to become partners, upon more beneficial terms than before ; and in pursuance of this agreement, the working of the mines was accordingly discontinued, the sets thereof surrendered, and the materials sold for the benefit of the partners. But many of the old partners declined any concern [369] with the new partnership, which was formed and consisted of some of the old partners, and some new persons. The mines were also consolidated, and called by the name of the Great Work.

On the 1st of May 1753, a new set thereof was granted to the said George Blewett, for the benefit of himself and the new partners therein, under the reservation of every ninth, instead of every sixth dish of the ore, deliverable on the grass, as the Lord's dole.

It is usual for sets of mines, or tin works in the county of Cornwall, to be granted to one of the adventurers only ; who, though he is considered as a trustee for himself and his co-adventurers, yet he never makes any assignment of, or executes any declaration of trust touching the respective shares of such co-adventurers, but only enters their names and shares in a book called the Mine Book, which is deemed a sufficient evidence of their right and property in the mine.

Accordingly, in the month of February 1754, the names and shares of the several co-adventurers in this consolidated mine, were entered and declared in the Mine Book as follows : viz. John Rogers, one fourth ; George Blewett, one eighth ; the executors of Humphry Millett, one eighth ; William Tremayne and son, one eighth ; Captain James Dewen, one eighth ; Humphry Cole, one sixteenth ; the executors of John Millett, one sixteenth ; Captain John Richards, one sixteenth ; Captain Hugh Rogers, five ninety-sixths ; Richard Jones, one thirty-second ; Captain Samuel Lemon, one forty-eighth ; John Nancarrow, one forty-eighth ; and the said John Nancarrow was then appointed manager of the mine.

At the time of this transaction, Mr. Blewett, Mrs. Millett and Mr. Collins were the only surviving executors of the testator's will. It did not appear that either Mrs. Millett or Mr. Collins was consulted upon the propriety of subscribing an eighth share in this new mine for the infant's benefit, and therefore it was presumed that Mr. Blewett subscribed this eighth part for the infant's benefit conditionally, if the other two executors should think proper to confirm the act by their approbation ; and this presumption was confirmed by Mr. Blewett's advancing to Mr. Nancarrow several considerable sums on account of this eighth part, to the amount of £253, and upwards, without charging the same or any part thereof to the account of the testator's estate, until such approbation should be obtained.

Proper measures were soon afterwards taken for improving the mine, by erecting a fire-engine, driving adits, sinking shafts, and in other necessary works, at an expence of £7000 and upwards. But it was for a long time a matter of very great doubt, whether the mine would ever turn up a sufficient quantity of tin stuff to repay such expence, and satisfy the current charges of working it.

The apprehension of loss arising from the state of the mine, occasioned Mr. Collins and Mrs. Millett to express their uneasiness [370] and dissatisfaction with Mr. Blewett's

conduct, in engaging any share of it for the infant; they being apprehensive that the expence of working the mine being very considerable, and the probability of profit very uncertain, it could not be for the infant's interest to continue his concern therein any longer; but they declined being explicit on the occasion, and would not in positive terms either assent or dissent to the continuance of such concern.

However, as the annual period of settling the accounts of the mine approached, and as Mr. Blewett did by no means relish the conduct of his co-executors, or the equivocal situation in which he stood with respect to them; he thought it absolutely necessary for his own safety that they should come to a precise determination, whether the share which he had subscribed for the benefit of the infant should be continued or not: For this purpose Mr. Blewett in the beginning of October 1754, wrote the following letter to Mr. Collins: "I have again considered of what passed between us when I last saw you, relative to the carrying on the late Mr. Humphry Millett's adventures, and more particularly that of the Great Work; and am still of opinion it would be for the child's benefit to adventure therein: However, as you was pleased to express yourself of a different opinion, and we are very soon to settle the accounts relating to that mine, I desire your's and Mrs. Millett's final resolution in answer, for my government therein." To this letter Mr. Collins on the 9th of the same month returned the following answer: "I am so much a stranger to the state of all Mr. Millett's adventures, both in mine and at melting-house, that it is my final resolution not to engage in any of them as one of his son's trustees, and therefore utterly decline being concerned in that particularly which you call the Great Work."

This letter from Mr. Collins conveying only his own negative, Mr. Blewett thought it necessary to obtain Mrs. Millett's direct sentiments upon the matter; and accordingly, on the 20th of the said month of October 1754, he sent Mr. Collins's letter to her by Mr. William Cornish his clerk, requesting her final resolution on the subject of it: And after reading that letter, and entering into some conversation with Mr. Cornish about the condition of the mine, and the expences likely to be incurred in adventuring the same, Mrs. Millett desired Cornish to acquaint Mr. Blewett that she would concur in every thing relative to her son's affairs with Mr. Collins, and that therefore she could by no means consent to the carrying on the one eighth part of the said adventure called the Great Work, on her son's account.

Mr. Blewett, in consequence of these concurring sentiments of his co-executors, thought it incumbent on him to get rid of the said one eighth share which he had so subscribed in the best manner he could. And as it is never customary in mine adventurers to expose any relinquished share to a public or open sale, but to offer it to the other co-adventurers; Mr. Blewett, at a public meeting of such co-adventurers held in December 1754, for the [371] purpose of auditing and settling their annual accounts, informed them of what had passed between Mr. Collins, Mrs. Millett and himself, respecting the share which he had originally subscribed in the name of Humphry Millett's executors; and offered the same to such of them as would accept it, and in case of their refusal, proposed to carry on that share for his own benefit. But none of the co-adventurers seeming inclined to increase their respective concerns in the mine, by taking up such relinquished share, nor in any manner objecting to Mr. Blewett's taking it up on his own account, his name was accordingly at such meeting, and with the unanimous consent of every person present, entered in the Mine Book for one fourth part of the said adventure, consisting of the one eighth part which he had originally taken up for himself, and the eighth part which had been entered for the infant's benefit, but was afterwards relinquished in the manner above mentioned. And thereupon Mr. Blewett was charged therewith, and paid one fourth part of the costs attending the said mine, from the time of the new grant, and which included the before mentioned sum of £253, and upwards, which he had formerly paid on account of the testator's estate, but had never charged the same therewith, because the object of such charge had not been approved of by his other co-executors.

In December 1765 Mr. Blewett died intestate, leaving the appellant his only son, who soon afterwards obtained letters of administration to him, and thereby became his personal representative.

On the 1st of March 1766 the respondent attained his age of 21; and soon after-

wards thought proper to file his bill in the court of Exchequer against Mrs. Millett his mother, and against the appellant as the personal representative of his late father, charging the whole of his said father's conduct respecting the mine to be fraudulent; and therefore praying that the appellant might come to an account for the profits which had been received by Mr. Blewett in his life-time, or by the appellant since his death, for or in respect of the said one eighth share of the mine, from the time that such share was changed into the name of Mr. Blewett as aforesaid: that the appellant might pay the respondent what should appear due to him upon the balance of such account with interest: and that the appellant might procure the respondent to be entered in the Mine Book as an adventurer for the said one eighth share of the mine, together with all the gains and profits thereof unreceived and unaccounted for.

To this bill the appellant put in an answer, and thereby, after stating the several facts before set forth, he insisted that the respondent was not entitled to any share or interest in the mine, whereon to ground the relief prayed by his bill; and that the whole of Mr. Blewett's conduct, as one of the respondent's trustees under his late father's will, was in every respect fair and honest, and free from the least imputation of fraud.

[372] The cause being at issue, and several witnesses examined on both sides, came on to be heard before the Barons of the Exchequer on the 17th of December 1772, when the court was pleased to declare, That the respondent was entitled to an eighth share of the said mine: and to decree the appellant to account for the profits thereof received by the said George Blewett in his life-time, and by the appellant since his death; and it was ordered that the appellant should do all necessary acts in order to vest the interest of such share in the respondent, and that the respondent should pay the defendant Grace Millett her costs to be taxed, and should have the same over again, together with his own costs, against the appellant.

The appellant apprehending himself aggrieved by this decree, appealed from it: And on his behalf it was contended (A. Wedderburn, R. Perryn, J. Madocks, J. Brown) that this case did not fall within the general rule, that no trustee shall benefit himself out of his trust estate: for here the testator invested his executors with a discretionary power to carry on or discontinue his mine adventures as they should see proper. This power, with respect to the share of the mine in question, was actually and deliberately executed by the major part of the surviving executors; and the share being thus relinquished, became free for any person to take it up who should be inclined to do so. Besides, the ground of that relinquishment plainly shewed in what light the object of it was then considered, namely, as an unprofitable not a beneficial interest: and that therefore it was for the respondent's advantage to get rid of it. Mr. Blewett in this transaction must be considered as acting in two different capacities: As a trustee, he recommended the continuance of the share upon motives the most disinterested and conclusive with respect to himself, because he was thereby determined to continue his own share; and as a trustee he was controuled by the joint negative of the other two, and the share in question was consequently relinquished and given up. Here then an end was put to Mr. Blewett's conduct as a trustee, *quoad* this part of the respondent's property: and in every thing that happened afterwards he acted in his own private and personal capacity. If therefore the general rule could be extended to this case, it must of necessity follow, that if any one of the other proprietors of the mine, or indeed any other person, had taken up this relinquished share, he would have been considered as a trustee thereof for the respondent's benefit; which no one would contend.

It had been, and might again be urged on the part of the respondent, that upon the relinquishment of the share in question, Mr. Blewett ought to have sold the same in an open and public manner, and to the best advantage: But to this it was answered, and was in evidence of the cause, that the mine was at that time in debt to the proprietors in upwards of £6000, and that the prospect of its ever clearing itself of this debt was then very uncertain: The relinquished share was not therefore a marketable commodity, being loaded with a proportionable part [373] of so heavy a debt. And with respect to the manner in which it was transferred, the offering it to the several co-adventurers at a public meeting, and with the most explicit declaration of the occasion of such offer, was actually exposing it to sale in the most open and public manner that

could be, and had all the effect which could be expected from any other mode; inasmuch as the purchaser took it *cum onere*, and no claim was ever made by him upon the respondent, or his estate, for any part of the expence which had been previously incurred upon this share. Further: By this decree, the respondent was to pay Mrs. Millett's costs, and to recover them over again from the appellant, whereas it did not appear that she was in any shape a necessary party to the suit, having no kind of interest in the matter in question; but, on the contrary, had been examined as a witness for the respondent: His bill therefore, as against her, ought to have been dismissed with costs; and those costs paid by the respondent himself.

On behalf of the respondent it was said (J. Skynner, Ll. Kenyon), that nothing is better established as a general proposition, than that where a trustee for an infant renews a lease, the renewed lease shall enure for the benefit of the infant. This is a doctrine founded on general policy to prevent frauds; and the known case of *Rumford market* (*Keech v. Sandford*, select cases in Chan. 61, 2 Eq. Ab. 471), has established it as a rule of equity. The trustee's situation in respect of the estate, gives him access to the landlord; and it would be dangerous to permit him to make use of that access for his own benefit. In this case the new grant which was obtained, was in the nature of a renewal; it came in the place of the old adventures, which subsisted in the time of Humphry Millett. George Blewett understood it so, and by the indorsement on the indenture, or the entry in the Mine Book, allotted one eighth to Millett's executors; and in consequence thereof, payments were made by the executors, and they were debited in their capacity of executors.

But it is objected, that the executors had power to abandon any of the adventures that should be thought fit to be abandoned; and that in the moment when great expence was likely to be incurred, Mr. Blewett was obliged to abandon the one eighth in dispute, as executor, because Mrs. Millett and Mr. Collins refused to concur in carrying it on. It was conceived, however, that the facts did not warrant the objection. Mr. Collins's letter only imported, that he was a stranger to the matter, and could not judge what was expedient to be done, and that therefore he could not personally engage in any of the mine adventures. But it was not from thence to be inferred, that all were to be abandoned; and it was plain, that this was the manner in which Mr. Blewett understood Mr. Collins's letter; for though Mr. Collins had declared he would not engage in any of the mine adventures, yet, with Mr. Blewett's approbation, many other adventures were carried on, on account of the executorship. As to what passed between Mr. Blewett and his agents and Mrs. Millett, it appeared [374] by her evidence, that she left it to his discretion, to carry on or to sell the share belonging to the infant; but she did not appear to have an idea that the share was to be wholly abandoned; she only desired that he would act for her infant son, as he meant to act for himself. If the evidence of Cornish (examined on the part of the appellant, and to whom George Blewett gave one 48th share of the adventure) was attended to, it did not shew that Mrs. Millett determined, on a clear and full state of facts, to abandon the adventure: Cornish stated, that before Mrs. Millett signified her dissent, some conversation passed between him and her about the state of the mine, the prospect it afforded, and the charges likely to be incurred in carrying it on. What the conversation was, or what account the witness (Mr. Blewett's messenger and favourite clerk) gave to Mrs. Millett's enquiries, was not stated; but if she acted upon that conversation, it might be supposed, that Cornish represented the adventure as not worth pursuing; and though Collins's letter was produced to her, yet she did not appear to have been at all apprised of the contents of Blewett's letter to Collins. Besides, Mrs. Millett resided 20 miles from the mine; but Mr. Blewett in the neighbourhood of it. What the general opinion of the neighbourhood in respect to the mine was, could not be unknown to him, though it probably had not travelled 20 miles; and many witnesses proved, that so early as May 1753, more than a year before the application to Mrs. Millett, it was the general opinion, that the mine would turn out advantageous. But none of the witnesses said, that this opinion was carried to Mrs. Millett; and it was no unfair intendment to suppose, that Mr. Cornish's conversation with her (which he had thought proper to withhold) gave her a very different state of things. And that the mine would probably prove a beneficial adventure at the time when Mrs. Millett was applied to, and when it was admitted she enquired after the prospect of things; was

proved decisively against Mr. Blewett and Cornish, by their continuing adventurers in it.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, confirmed. (MS. Jour. *sub anno* 1774, p. 170.)

[375] CASE 22.—JOHN BARTLETT ALLEN, his Wife and Children,—*Appellants*; FRANCES HANCORN, Widow, and her Children,—*Respondents* [31st March 1775].

[A trustee is only answerable for fraud, or a gross neglect, which is equal to fraud; and therefore where trust money is suffered by a trustee to remain in the hands of A. with the privity and approbation of the parties beneficially interested, instead of laying it out in a purchase pursuant to marriage-articles, and A. becomes insolvent; the trustee is not in this case answerable.]

[We need no Case in Parliament to tell us this; nor is the statement of the facts in this case sufficiently clear or satisfactory to account for the reversal of the decree of Lord Chancellor Bathurst.]

This suit was originally commenced by Thomas Hancorn, and the respondent Frances Hancorn then his wife, and by their children, against John Hensleigh since deceased, and the appellant Elizabeth Allen his daughter, and the several other appellants parties thereto; and the single question in the cause was, Whether the respondents, who were the *cestui que* trusts under a marriage settlement, or the trustees named in such settlement, should bear the loss of the trust fund?

On the 10th of August 1730, the respondent Frances Hancorn, who was then the widow of Rowland Owen, esq. entered into articles of agreement with Thomas Owen, esq. the brother and heir of the said Rowland Owen; whereby Frances, in consideration of £1552 17s. 5d. to be paid her by Thomas Owen, agreed to sell and release to him all her right as well to a certain annuity of £150, which she was entitled to under her former marriage settlement, as all her right to the real and personal estate of the said Rowland Owen, her husband.

The respondent Frances being thus entitled to the said sum of £1552 17s. 5d. and a marriage being intended between her and Thomas Hancorn, it was by articles dated the 15th of December 1739, agreed, that if the marriage took effect, then £1500, part of the £1552 17s. 5d. should be laid out in the purchase of lands, to be settled to the use of Thomas Hancorn and Frances his intended wife, and the survivor of them, for their lives, with remainder to the issue of the marriage as therein mentioned; and that the residue of the £1552 17s. 5d. with the accruing interest, should be paid to Thomas Hancorn for his own use.

On the 29th of the same month, the marriage was solemnized, and soon afterwards Thomas Hancorn and his wife were advised by her uncle Thomas Phillips, and others of her relations, to assign the said sum of £1552 17s. 5d. to Phillips, for the uses and purposes mentioned and declared by the said articles, and which they consented to do. And accordingly, by indenture dated the [376] 30th of May 1740, between Thomas Hancorn and Frances his wife, of the one part, and the Reverend Thomas Phillips, clerk, of the other part, reciting that by the above agreement of the 10th of August 1739, the said Frances Hancorn was entitled to the sum of £1552 17s. 5d. and some interest; it was witnessed, that as well in consideration of the marriage between the said Thomas Hancorn and Frances his wife, as in pursuance and performance of the said marriage articles, and for securing a provision and maintenance for the said Frances, in case she should survive the said Thomas, and for making a provision for the heirs of their bodies, the said Thomas Hancorn did grant, bargain, sell, assign, and set over, unto the said Thomas Phillips, his executors, administrators, and assigns, the said

£1552 17s. 5d. and all interest due, and to become due, for the same; to hold to him, his executors, administrators and assigns, in trust, that the said Thomas Phillips should receive the said £1552 17s. 5d. and the interest thereof, of and from the said Thomas Owen, and that with all convenient speed after receiving the same, the said Thomas Phillips, his executors, administrators, and assigns should, by and with the joint consent and approbation of the said Thomas Hancorn and Frances his wife, during their joint lives, and of the survivor of them, after the decease of either of them, and of the heirs of their two bodies, after the decease of such survivor, lay out and invest £1500 part thereof in the purchase of lands, in the county, or county borough of Carmarthen, or in the county of Glamorgan, and which, when so purchased, should be conveyed to the said Thomas Phillips and his heirs, or some other person or persons, and his or their heirs, to the use of the said Thomas Hancorn and Frances his wife, and the survivor of them for life, without impeachment of waste, and after the decease of the survivor of them, to the use of some person or persons, and his or their executors, administrators, and assigns for 500 years, for raising £300 for the portion or portions of such younger child or children as should be begotten by the said Thomas Hancorn, on the body of the said Frances his wife, and to be paid entirely to such younger child, if but one, and if more than one, then to be divided among such younger children, equally share and share alike, immediately after the decease of the survivor of them, the said Thomas Hancorn and Frances his wife; and after the determination of the said term, and in the mean time subject thereto, to the use of the first and other sons of the said Thomas Hancorn, on the body of the said Frances his wife begotten, or to be begotten, successively in tail male; and for want of such issue, to the use of the daughter or daughters of the said Thomas and Frances Hancorn, and the heirs of the bodies of such daughters, as tenants in common, and not as joint tenants: with remainder to the use of the right heirs of the survivor of the said Thomas and Frances Hancorn for ever: And on further trust, that in the mean time, and until such purchase, the said Thomas Phillips, his executors, administrators, and assigns, should by and with such consent and approbation as aforesaid, lay out the [377] said £1500 at interest, and annually pay the interest arising therefrom, to and for the use and benefit of such person and persons, as according to the intent and meaning of the said indenture, should or ought to receive the rents and profits of such lands if purchased; and in default of such purchase, the said £1500 should be and remain to the same uses, intents, and purposes as the said lands ought to be and remain, in case the same were purchased and settled to such uses as aforesaid; and as to the residue of the said £1552 17s. 5d. and all interest thereof, in trust, to pay the same to the said Thomas Hancorn.

By indenture of six parts, dated the 6th of September 1740, between the said Thomas Hancorn and Frances his wife, of the first part, the said Thomas Phillips of the second part, James Phillips, clerk, of the third part, Roger Mostyn and Hugh Owen, esqrs. of the fourth part, Richard Owen and Ann his wife, of the fifth part, and the said Thomas Owen, the brother and heir of the said Rowland Owen deceased, of the sixth part; reciting, among other things, the agreement of the 10th of August 1739, and the marriage settlement of the 30th of May 1740, it was witnessed, that in consideration of £1500 paid to Thomas Phillips, and £126 13s. 10d. (part being accruing interest) paid to Thomas and Frances Hancorn, the said Thomas Phillips, Thomas Hancorn, and Frances his wife, did bargain, sell, release, assure, and quit claim, unto the said Thomas Owen and his heirs, as well the said annuity of £150 per ann. as all their right to the real and personal estate of the said Rowland Owen deceased; to hold to the said Thomas Owen, his heirs and assigns for ever.

Thomas Phillips, at the time he executed this indenture, actually received the sum of £1500, and signed a receipt for the same, upon the back of the deed.

Thomas Hancorn and his wife being entitled to the interest of this £1500 during their joint lives, under the settlement of the 30th of May 1740, the respondent Frances did, in 1741, apply to Thomas Phillips, the trustee, for the interest thereof, who directed his brother, John Phillips, who was his banker, to pay such interest; and accordingly the same was so paid by him, as it became due, to the respondent Frances, until the 12th of April 1744: when Thomas Hancorn requested the said Thomas Phillips the trustee, to advance him £145 part of the trust money; which sum Thomas Hancorn had lent to William Bennet, on a mortgage of lands, and Thomas Phillips

accordingly paid that sum to Thomas Hancorn, and the security taken by him of the said William Bennet for the same, was placed in the hands of Thomas Phillips, on account of the said trust, which reduced the trust money in the hands of Thomas Phillips to £1355, and from that time he permitted Thomas Hancorn to receive the interest of the mortgage, and the interest of the residue of the trust money was paid to the respondent Frances, until near the time of the death of Thomas Phillips, which happened on the 23d of June 1748.

[378] The said Thomas Phillips, by his will, dated the 14th of January 1747, in the first place, subjected his real and personal estate to the payment of his debts, and after discharging his debts, legacies, and funeral expences, he willed, that his personal estate should be sold, and the produce thereof laid out at interest, or in a purchase, in order that it might be annexed to and attend his real estate; which he thereby devised to his brother John Phillips, and his son-in-law John Hensleigh, in trust, and for the use and benefit of his grand-daughter Elizabeth Hensleigh, (the appellant Elizabeth Allen,) for her life; with remainder to her first and other sons, successively in tail; with remainder to her daughters, as tenants in common; and in default of such issue, to Vaughan Phillips for life, with other remainders over; and of his said will appointed his brother the said John Phillips and his said son-in-law John Hensleigh, executors in trust for his said grand-daughter.

Upon the death of Thomas Phillips, John Phillips and John Hensleigh proved his will, and thereby obtained possession of the deed of settlement of the 30th of May 1740, and the security whereon the £145 had been placed out; and they or one of them paid interest for the residue of the trust money, being £1355, until the month of June 1751; when Thomas Hancorn represented to them that he had purchased the equity of redemption of the premises on which the said £145 was secured, for the sum of £161 14s. and requested them to pay that sum, and that the said premises should remain to the several uses mentioned in the settlement of the 30th of May 1740, which request the said John Phillips and John Hensleigh complied with; and accordingly in June 1751, Thomas Hancorn received of John Phillips, by the order in writing of the said John Hensleigh, the sum of £161 14s. and the conveyance of the said premises purchased therewith was deposited in the hands of the said John Hensleigh, for the uses mentioned in the settlement.

After making this purchase, there remained of the trust money £1193 6s. the interest whereof was paid to Frances Hancorn, down to the 11th of August 1757.

On the 18th of May 1758 John Phillips died, whereby the trusts which remained unexecuted became vested in John Hensleigh; in consequence whereof, Thomas Hancorn and his wife afterwards applied to Hensleigh for the interest of the £1193 6s. the residue of the trust money remaining uninvested, but he declined paying such interest, pretending that the trust money was placed by his testator Thomas Phillips in the hands of John Phillips, and that John Phillips having died insolvent, the said sum of £1193 6s. was lost; and there being infants concerned, he could not pay the said money, or the interest thereof, without the directions of a court of equity.

Whereupon, in Michaelmas term 1760, Thomas Hancorn, his wife, and their children, then infants, exhibited their bill in the court of Chancery against the said John Hensleigh, as the surviving executor of Thomas Phillips, and also against the other [379] appellants, praying that the defendants John Hensleigh and Elizabeth Hensleigh might either admit assets of Thomas Phillips, or account for his estate and effects, and that an account might be taken of the said sum of £1193 6s. being the residue of the trust money and of the interest remaining due thereon, and that such interest might be paid to the then plaintiff, Thomas Hancorn, for his own use: And also, that the said principal sum of £1193 6s. might be raised and paid in such manner as the court shall direct, in order that the same might be laid out and invested in the purchase of lands of inheritance, to be conveyed and settled upon the trusts, and for the uses in the said indenture of the 30th of May 1740 mentioned, so that the plaintiff might have the benefit thereof, according to their respective rights and interest therein under the said indenture.

The defendants John Hensleigh and Elizabeth Hensleigh put in a joint answer to this bill, and John Hensleigh thereby admitted the most material of the several facts

stated in the bill, and particularly that he had possessed assets of his testator Thomas Phillips, more than sufficient to satisfy his just debts and funeral expences, and whatever demands the plaintiffs might justly have upon his estate; and he also admitted that several applications were made by Thomas Hancorn to Thomas Phillips in his lifetime, to lay out the trust money in purchases; and he likewise admitted his having given an order in writing to John Phillips his co-executor, to advance £161 14s. part of the trust money, for the purpose of purchasing the equity of redemption of the said mortgaged premises; and that the deeds of such purchase, together with the settlement of the 30th of May 1740, were in his custody. But he insisted, that if the estate of John Phillips should not be sufficient to pay the £1193 6s. the residue of the trust money and the interest thereof from August 1757, no part of the estate of Thomas Phillips the trustee was liable to make good any such deficiency; because Thomas Hancorn and his wife were privy and consenting to Thomas Phillips's placing the whole £1500 in the hands of John Phillips, and knew what security was given for the same, and approved thereof; and that the loss which had happened did not arise from any wilful default or neglect of Thomas Phillips, but rather through the default of Hancorn and his wife in not objecting to John Phillips's security, and procuring some other security or mortgage for the trust money.

The cause being at issue, divers witnesses were examined on both sides. And the substance of the evidence adduced on the part of the respondents, was the due execution of the several deeds before stated, and the signing of the receipt by Thomas Phillips for the £1500 trust money; a treaty between Thomas Hancorn with one Powell in the year 1747, for the purchase of several estates in the county of Glamorgan; his informing John Phillips of such treaty, and Phillips's answer in writing, that his brother Thomas and not himself was accountable for Mrs. Hancorn's fortune; and a remarkable conversation between Mr. [380] Hensleigh and one Joseph Chapman in November 1768, wherein Hensleigh acknowledged that he thought Mrs. Hancorn ought not to lose her money, as it was her just due; that he had no objection to her being paid, but could not do it, as there were infants in the case, without the direction of a court of equity; and that he would not oppose her being paid, but on the contrary, would do all in his power to procure a decree for that purpose, as he was satisfied with the justness of her demand. The appellant's evidence proved an accountable receipt from John Phillips to his brother Thomas for £1500, dated the 11th of September 1740; the goodness of his circumstances at that time, and for several years afterwards; and divers receipts for the interest of the trust money, and for such part of the principal as was really invested.

Upon this evidence the cause came on to be heard before the Lord Chancellor Bathurst on the 2d of May 1774, when his Lordship was pleased to decree that it should be referred to the Master, to take an account of what was due for principal and interest, in respect of the sum of £1193 6s. the remainder of the trust money in question, such interest to be computed from the death of the late plaintiff Thomas Hancorn, after the rate of £4 per cent. per annum; and it being admitted that John Phillips, in whose hands the same was lodged by Thomas Phillips, the trustee thereof, was dead insolvent, his Lordship declared that the same was to be considered as a debt due from the estate of the said Thomas Phillips, and the defendants John Bartlett Allen and Elizabeth his wife, the administratrix of the defendant John Hensleigh, who was the surviving executor of the said Thomas Phillips, admitting assets of Thomas Phillips, it was ordered that the said defendants John Bartlett Allen and Elizabeth his wife, should pay what should be found due for the interest of the said £1193 6s. to the plaintiff Frances Hancorn, widow, and that they should also pay the said principal sum of £1193 6s. into the Bank, in the name and with the privity of the Accountant-General, to be placed to the credit of the cause, and that the same, when so paid in, should be laid out in the purchase of Bank £3 per cent. annuities, in the name and with the privity of the Accountant-General, in trust in the cause, upon the trusts in the indenture of the 30th of May 1740, and he was to declare the trusts thereof accordingly, subject to the further order of the court; and it was ordered that the interest to accrue on the said Bank annuities should be paid from time to time to the said plaintiff Frances Hancorn widow during her life, or until further order; and upon her death, any of the parties or other persons entitled to the capital of the said Bank annuities, were to be at liberty to apply to the court concerning the same. And it was further ordered, that

the plaintiff should pay the defendant Vaughan Phillips his costs of the suit, to be taxed by the Master; and that the plaintiffs should be paid such costs over again, together with their own costs of suit, to be taxed by the Master, by the defendants John Bartlett Allen and Elizabeth his wife, they admitting assets as aforesaid.

[381] From this decree the appellants appealed, insisting (E. Thurlow, A. Wedderburn, T. Nedham), that the remaining principal and interest of the trust monies in question, ought not to be considered as a debt due from the estate of Thomas Phillips, nor ought the appellants Allen and his wife to pay the same or the costs of the several parties in the cause, as by the decree was directed; because a trustee is only answerable for fraud, or a gross neglect, which is equal to fraud. That no fraud was imputable to Thomas Phillips, in placing the trust monies in the hands of his brother John. The terms and intention of the trust created by the deed of May 1740, did not require the trustee to lay out the money in the funds, or on real security, but only directed it to be placed out at interest, with the consent of the husband and wife; the trustee might therefore take such personal security as they approved, and as there was no reason to suspect, without any imputation of neglect. That the trust monies in question were at the time of Thomas Phillips's death, safe in the hands of John Phillips, who as one of the executors of Thomas, became himself the trustee, and responsible for the money. Any loss therefore which arose from subsequent events, ought not to be made good out of Thomas's estate, but must be answered by his executors, in so far as any misconduct could be imputed to them, or either of them. That John Hensleigh, the other executor of Thomas Phillips, not having received any part of the trust money, nor misbehaved in the trust, he was not answerable, neither had the decree charged him; but if he was liable from personal misconduct, it would afford no reason to charge the estate of his testator. But the loss in the present case was really to be imputed to the confidence not unreasonably placed in John Phillips, by Mr. and Mrs. Hancorn, his daughter and son-in-law; the direction of this trust was expressly reserved to them; without their consent no estate could be purchased, nor any security changed; if there had been any neglect, it was owing to their continuing that credit too long; and it would be a very dangerous precedent to charge the estate of a trustee with a loss arising long after his death, from the neglect of the *cestui que* trusts.

On the other side it was said to be clear (R. Perryn, J. Madocks, J. Brown), that Thomas Phillips received the £1500 upon the trusts of the settlement of May 1740, to be laid out in the purchase of lands, and in the mean time to place it out at interest, with the joint consent of the husband and wife. How he applied or disposed of it, did not clearly appear; for though it was alleged by the appellants, that he paid it to his banker John Phillips, upon the accountable receipt mentioned in the pleadings, yet there was nothing upon the face of that receipt to induce a belief, and much less to prove, that it was the trust money; nor was there a tittle of evidence in the cause to shew, that either the husband or wife was previously informed of, or consented to such payment. And therefore the appellants were reduced to the necessity of inferring that consent, from the subsequent transactions of the husband and wife with [382] John Phillips. But supposing they had consented, and even requested Thomas Phillips the trustee, to have placed this money in the hands of John Phillips, it was further submitted, that he would not thereby have been justified in so doing; for he was not a trustee for the husband and wife only, but for their issue then unborn; it was therefore his duty to have taken care of the interest of such issue, and he ought not to have lent the money upon any such precarious security. In point of fact, however, it was clear, that the husband never consented to, or approved of the money remaining in the hands of John Phillips; but endeavoured to get the same out, by treating with several persons for the purchase of estates to invest it in. That if the £1500 paid to John Phillips was really the trust money, yet the trustee had not pursued the terms of the trust, nor taken a reasonable security. An accountable receipt only was taken, without specifying any interest, or promising any farther security. The person giving this receipt was the father of the wife, brother of the trustee, and a remitter of money. In the two first characters he was improper, as having much influence over the parties; and in the third character he was improper, as being liable to frequent and considerable losses in the course of his business.

But it is contended by the appellants, that the breach of trust, if any, was in the

executors of Thomas Phillips after his death, and not in him: and that therefore the estate of Thomas Phillips is not liable to make good any loss which should arise by the default of his executors. It is however plain, that in this case Thomas Phillips was guilty of a wilful and inexcusable neglect and breach of trust: for supposing the £1500 paid to John Phillips was the trust money, the trustee, after advancing it on an accountable receipt only, suffered it to remain in John's hands for many years, without requiring any further security of him: without endeavouring to place it out on mortgage; without making any enquiry after proper purchases. And when the *cestui que* trust was in treaty for estates to invest the trust money in, the trustee referred the propriety of such purchases to the very person who had the money in his hands, and whose interest it was to prevent such purchases from being completed, and who in fact always disapproved thereof.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the respondents' bill should be dismissed, without costs. (MS. Jour. *sub anno*, 1774-5, p. 500.)

[383] CASE 23.—THOMAS PILKINGTON,—*Appellant*; FRANCES BAYLEY, Widow,—*Respondent* [26th January 1778].

[Mews' Dig. xiv. 423.]

[J. S. grants a lease to A. which is intended to be in trust for the lessor, and A. declares the trust in writing accordingly. This lease is afterwards surrendered, and J. S. grants a new lease to B. without any trust being declared. Held that B. was entitled to the whole benefit of the new lease, and that there was no resulting trust for the representative of J. S.]

[Decree of Lord Chancellor Bathurst affirmed.]

[There appears much good sense and reason in the argument for the respondent in this case, that no implied trust can subsist between a lessor and a lessee, because every lessee is a purchaser by his contract and his covenants, which excludes all possibility of implying a trust for the lessor, and therefore if in that case there be any trust at all, it must be declared in writing. But between an assigner and an assignee there may be an implied trust. *Hutchins v. Lee*, 1 Atk. 447.]

The Rev. Matthew Pilkington, prebendary of the prebend of Ryton, in the county of Warwick, founded in the cathedral church of Litchfield, was, in right of the said prebendary, seised of the prebend rectory and other particulars, etc. and being so seised, and in actual possession thereof, he by indenture of lease, dated the 18th of August 1762, made between the said Matthew Pilkington of the one part, and the Rev. Thomas White of the other part, for the considerations therein mentioned, demised to the said Thomas White, all that his prebend, rectory, parish, or parsonage of Ryton aforesaid, with the rights, members, and appurtenances thereof; and also all that his mansion-house, with the buildings thereto belonging, and all manner of glebe lands, woods, underwoods, commons, wastes, fields, leasows, meadows, pastures, fishings, fruits, and all manner of tithes, predial or personal, pensions, oblations, obventions, portions, hereditaments, and advantages whatsoever, to the said prebend or rectory belonging (the nomination of a curate to officiate in the said church of Ryton only excepted); to hold (except as before excepted) to the said Thomas White, his executors, administrators, and assigns, from the day next before the day of the date thereof, for the term of 21 years, from thence next ensuing: yielding therefore yearly, during the said term unto the said Matthew Pilkington and his successors, prebendaries of the said prebend of Ryton, in the said church of Litchfield, upon the font stone there, the rent of £15 quarterly: And also making several other annual payments, in the said lease particularly mentioned.

This lease was made to White, in trust for the said Matthew Pilkington; and accordingly, Mr. White signed the following declaration of trust to him. "18th August 1762. I Thomas White, clerk, do hereby acknowledge, that the lease of the "prebend of Ruiton, otherwise Ryton, bearing date this day, is made and [384] granted "to me in trust, for the Rev. Matthew Pilkington and his family; and I hereby "promise to assign the same, as the said Matthew Pilkington, or his executors or "administrators, shall direct and appoint."

The said Matthew Pilkington married the respondent Mrs. Bayley, the daughter and only child of Mrs. Frances Clerke; and Mrs. Clerke, after her daughter's marriage, lived for many years at Mr. Pilkington's house, as a companion to her daughter; and continued so to do as long as Mr. Pilkington lived.

During this period, Mr. Pilkington, finding his health declining, came to a resolution of making a lease of his prebend to Mrs. Clerke, his wife's mother, for her own benefit; and accordingly, by indenture, dated the 23rd of June 1764, in consideration that Mrs. Clerke had procured to be surrendered into his hands, the aforesaid lease made to Thomas White, and also in consideration of the rents, covenants, and agreements therein after expressed and reserved, he demised to Mrs. Clerke, her executors, administrators, and assigns, all the aforesaid premises, for the term of 21 years; subject to the like rents and sums of money, and to the like covenants and agreements as were mentioned in such surrendered lease.

This lease was drawn from instructions given by Mr. Pilkington; and about the time it was made, an inclosure of the prebendal estate was in contemplation, and likely to take effect; which made it proper that John Kelham, the tenant occupying the premises, should come to a new agreement for his holding; and accordingly, in the summer of 1764, soon after the execution of this lease, Mr. Pilkington called upon Kelham on his return from London, and told him that he had granted a lease of the prebendal estate to Mrs. Clerke, and that Kelham must agree with Mr. Clement Wilson, who was authorised by Mrs. Clerke to treat with him, for granting him a lease; for that he, Mr. Pilkington, had parted with the estate, and had nothing more to do with it. Kelham accordingly treated and agreed with Wilson for a lease; and Mrs. Clerke granted a lease of the estate, dated the 10th of July 1764, to William Kelham and John Kelham his son, for 21 years, from the 9th of that month, at the yearly rent of £110 for the first four years, and £214 for the remainder of the term, clear of all deductions, except the payment of the land-tax, and the several yearly rents and sums of money reserved by the said lease from Mr. Pilkington to Mrs. Clerke. Mr. Pilkington was a subscribing witness to Mrs. Clerke's execution of this lease, and the lease from him to Mrs. Clerke was therein recited; and from the time of granting the lease to the death of Mr. Pilkington, and afterwards, Kelham paid his rent to Mrs. Clerke, and continued so to pay it to the time of her death.

Mr. Pilkington was seised of several freehold and copyhold lands and premises at Donnington, in Lincolnshire, which let together at £124 a-year, subject only to a mortgage for £1100, and were worth at least £4000 to be sold; and after his decease, they [385] were greatly improved by an inclosure. He had no near relation, his nearest being a first cousin, and the appellant was only his second cousin.

On the 17th of December 1764, Mr. Pilkington made his will; whereby he directed, that all his just debts (except the principal money secured by mortgage on some part of his estates,) funeral expences, and the expences of proving his will, should be first paid and satisfied, out of such part of his personal estate as was not therein after specially bequeathed; and he devised and bequeathed to his affectionate wife Frances Pilkington, and her assigns, for her life, all his freehold, copyhold, and leasehold messuages, lands, tenements, hereditaments, and estates in the counties of Lincoln, Warwick, Derby, and Nottingham, or elsewhere, in the kingdom of Great Britain; and from and immediately after her decease, he devised and bequeathed all the said estates and premises to the appellant, his heirs, executors, administrators, and assigns for ever; subject nevertheless, and he thereby charged the same with the several legacies therein after mentioned, and then proceeded to give several money legacies to several persons; and gave all the rest and residue of his goods, chattels, ready money, debts, and securities for money, plate, household goods, stock, and all other his personal estate whatsoever and wheresoever, and of what nature, kind, or quality soever the same might be, and

not otherwise thereby given or disposed of, after payment of his debts (except the principal money charged upon the aforesaid estate, funeral expences, and a legacy of £10 payable to the poor of Stanton) unto his said wife Frances Pilkington, her executors, administrators, and assigns, to and for her and their use and disposal absolutely, and appointed his said wife, Frances Pilkington, sole executrix of his said will.

The testator at the time of making this will, had no estate in either of the counties of Derby or Nottingham; but his estate in Lincolnshire was much more than sufficient to pay off the mortgage, and the legacies charged thereon by his will.

The testator died in November 1765, without revoking or altering his will; and his widow, the present respondent, proved the same.

In 1766, Mrs. Pilkington married the Reverend Mr. John Bayley, and soon afterwards Mr. Bayley paid the £1100 mortgage on Mrs. Pilkington's real estate, and it was assigned to Thomas Blackwell, in trust for Mrs. Bayley.

In 1768, Bayley died, having made his will on the 23d of October 1767, wherein he bequeathed the residue of his personal estate to his wife, and appointed her executrix thereof, and she proved the same.

Dr. Du Quesne, who succeeded Mr. Pilkington in the prebend, agreed to renew the aforesaid lease of the prebendal estate, for a fine of £215, and accordingly, the old lease was surrendered by Mrs. Clerke, and on the 21st of December 1770, a new lease was executed to her for 21 years, subject to the like payments, [386] covenants, and agreements, as in the surrendered lease. Mrs. Clerke paid the £215 fine, and Dr. Du Quesne gave her a receipt for the money, but she being very old and infirm, this business was negotiated by Mrs. Bayley for her.

On the 14th of December 1772, the appellant filed his bill in the court of Chancery, against the respondent, and her mother Mrs. Clerke, suggesting, that the lease of the prebendal estate was made in trust for Mr. Pilkington, and intended by him to pass to the appellant by his will, which was made within less than six months after.

The defendants Mrs. Clerke and Mrs. Bayley put in separate answers, and Mrs. Bayley by her answer disclaimed any right to the prebendal estate, for that Mr. Pilkington had given the same to her mother Mrs. Clerke; and that such lease was not granted in trust for Mr. Pilkington, or on any trust, but for Mrs. Clerke's own use and benefit; and denied all fraud and contrivance to wrong the appellant; and also denied and disclaimed all trust for herself in the renewed lease.

The defendant Mrs. Clerke in her answer said, that the lease was given and granted to her by Mr. Pilkington, and that the premises were let to tenants by her, and in her name, and denied that Mrs. Bayley ever had any benefit under Mr. Pilkington's will in this estate; or that she Mrs. Clerke ever signed or executed any declaration of trust to Mr. Pilkington of this estate, neither did he ever desire her so to do, but positively told her that the same was her own property, and that she might do what she pleased therewith; and that she always understood that the said leasehold premises were her own absolutely, and that she always claimed an absolute interest therein, by virtue of the lease granted to her as aforesaid.

On the 12th of December 1774 Mrs. Clerke died, having first made her will; by which she appointed her daughter, the respondent, executrix and residuary legatee.

The suit being afterwards revived against Mrs. Bayley, several witnesses were examined on both sides; and the cause came on to be heard before the Lord Chancellor Bathurst, on the 3d of May 1776, when his Lordship was pleased to order that the appellant's bill should be dismissed, but without costs.

The appellant therefore appealed from this decree, contending (A. Wedderburn, J. Dunning, L. Kenyon) that so long as the legal interest in the lease was vested in Mr. White, it was clearly in trust for Mr. Pilkington the testator; and it appeared from the evidence, that the only avowed reason for substituting the name of Mrs. Clerke in the place of Mr. White, was, because she lived in Mr. Pilkington's family, and therefore would be a more convenient trustee. The age of the two parties rendered it improbable that Mr. Pilkington should give so large a part of his property from himself and his family to a person who might in his lifetime dispose of it to strangers. The unreasonableness of the disposition contended for by the respondent could not be disputed; but it is said that the statute of frauds [387] requires that all declarations of trusts of any lands must be in writing or else they are void. But the

proviso in the act following that clause, excepts all trusts arising or resulting by implication or construction of law; and declares that such trusts shall have the same force as if the act had not been made. Now it was conceived that this was a case of that kind. No money was paid by Mrs. Clerke: the surrender of the former lease was not procured by her; nor did she give any directions respecting the lease made to her; on the contrary, all was done by Mr. Pilkington's direction, and he paid the expences of preparing the lease and counterpart. If there had been a fine paid for the renewal, and it had been paid by Mr. Pilkington, the case would have been clearly in the appellant's favour; the largeness or smallness of the fine could have made no difference in the question of right: And though no fine was paid, yet it was conceived that Mr. Pilkington's bearing the expences of renewing the lease was equivalent to the payment of a fine, and raised a resulting trust for his benefit. The delivery of the lease and counterpart to Mr. Pilkington after the execution, the management of the estate by him after the lease was made, his receiving the rents, and rendering no account to Mrs. Clerke for them, were all circumstances to shew that the trust for Mr. Pilkington was in fact carried into execution. And though she endeavoured by her answer to insinuate that the rents were accounted for by Mr. Pilkington to her, yet she dared not positively to say so. The whole case appeared to be a very gross fraud: and if it be a rule that the statute of frauds shall not be made use of to protect frauds, it was conceived that rule applied here; and therefore it was hoped that the decree would be reversed.

On the other side it was said (E. Thurlow, J. Madoeks, T. Emlyn), that the only question in the cause was, whether the benefit of the lease made by Mr. Pilkington to Mrs. Clerke, on the 23d of June 1764, was a resulting trust for himself by operation of law, or not; there being no declaration of trust in writing by the lessee, or any trust expressed upon the lease itself. All trusts by operation of law are to be created by rules established in courts having the jurisdiction of trusts. These rules have gone no farther than to cases of purchases made by one man in the name of another; where the implication of a trust is necessary if the nominee is a stranger to the purchaser. But no case has extended an implied trust as between lessor and lessee, nor is it possible that any implied trust can subsist between parties in that relation, because every lessee is a purchaser by his contract and his covenants, which excludes all possibility of implying a trust for the lessor; and therefore if in that case there be any trust at all, it must be declared in writing. This distinction was observed in the present case; for Mr. Pilkington intending White to be a trustee in the first lease, took from him a declaration of trust in writing, but upon the second lease made to Mrs. Clerke, he did not take or require any writing, which afforded the strongest inference, that he did not intend there should be any [388] trust. The statute of frauds has shut out all evidence of an express trust but written proof of it. But if equity is to create an implied trust, from circumstances concurring with the rules of equity, it lets in the defendant to evidence to rebut the equity, either by controverting the truth of the circumstances offered by the plaintiff, or by opposing other circumstances to them to take off their effect. And accordingly in this case, notwithstanding the plaintiff had failed in the proof of any circumstances in favour of a trust, the defendant had given strong evidence of circumstances inconsistent with a trust, and in support of her answer, by which the supposed trust was fully and absolutely denied.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed, and the decree therein complained of affirmed. (MS. Jour. *sub anno* 1777-8, p. 112.)

CASE 24. The HON. HENRY LAWES LUTTRELL,—*Appellant*; The RIGHT HON. SIMON LORD IRNHAM,—*Respondent* [4th May 1778].

[In a Possessory Bill in the Court of Chancery in Ireland, the setting up a title in the defendant is wholly inconsistent with the nature of the proceeding: [as to which see the note [7 Bro.] p. 394.] any such claim of title being a matter to be made out by the defendant in a course of law. And the Court will not delay the proceedings in the possessory bill on a suggestion in another bill (brought by the defendant against the plaintiff in the possessory bill) of an agreement, under which the defendant claims title, which is positively denied by the plaintiff in the possessory bill.]
[Order and Decree of the Irish Court of Chancery affirmed.]

The respondent Lord Irnham, being seised, as tenant for life without impeachment of waste, of the mansion-house, offices, demesne, park, and paddock of Luttrells Town, in the county of Dublin, which is the respondent's only family seat in Ireland, made an agreement with the appellant his eldest son, to let him a lease thereof for the term of seven years, if they should both live so long, at a rent of £400 a-year; and accordingly, on the 24th of May 1769, the respondent, by indenture of lease then dated, in consideration of the rents and covenants therein expressed, demised to the appellant, the said house, offices, demesne, park and paddock of Luttrells Town, with the appurtenances, to hold for the term of seven years, from the first of May then instant, provided the respondent and appellant should so long live, at the annual rent of £400 Irish currency, and payable half-yearly, with the usual and common covenants: And there being great quantities of useful, ornamental, and growing timber on the park and [389] lands, it was also covenanted and agreed, that neither of the parties should cut down any trees whatsoever upon the demised premises, without the consent of the other party. Which lease the respondent executed upon the same day of its date, in the presence of Matthew Duane, esq. who prepared the same, and of Thomas Morgan, stationer; and in a few days afterwards, the appellant executed the counterpart, (which was not finished when the lease was executed) in the presence of the said Matthew Duane and Thomas Morgan, who were the subscribing witnesses; and soon afterwards, the appellant entered upon and took possession of the demised premises.

In the year 1771, the respondent discovered, that the appellant had cut down and disposed of a great quantity of timber in the woods upon the demesne, to the value of £4000 and upwards; and had also pulled down part of the mansion house: And the appellant appearing determined to strip the estate, which could not be prevented without the interposition of a court of equity; the respondent therefore, on the 28th of June 1771, filed his bill in the court of Chancery in Ireland against the appellant, in order to restrain him from committing waste upon the premises, and obtained an injunction for that purpose: To which bill the appellant put in his answer, on the 6th of November 1772, and thereby denied, that he believed he had ever executed a counterpart of the lease. Whereupon the respondent replied to the answer; and issue being joined, he examined Mr. Duane to prove the execution of the lease, who not only proved the execution thereof by the respondent, and the counterpart by the appellant; but also proved the original agreement to have been for five years; and that when the lease came to be prepared, they agreed to extend it to seven years; and that the respondent executed the lease upon a promise of the appellant, that he would call at Mr. Duane's to execute the counterpart when it should be ready, which he accordingly did; and that it was read over to him before he executed the same. The appellant did not think proper to cross examine Mr. Duane to any particulars; and his deposition was duly published in the cause.

The appellant's lease was to expire on the 1st of May 1776; and the appellant apprehending, that the respondent would require the possession of the mansion-house and premises to be restored to him at the expiration of the lease, which the appellant was unwilling to part with; he therefore contrived a bill in Chancery against the

respondent, in order to involve him in an account ; and under pretence of a balance due to him, to find a colourable ground for retaining the possession, and preventing the respondent from recovering the same by due course of law. Accordingly, on the 20th of April 1776, the appellant filed a voluminous bill in Chancery against the respondent, to which he annexed a pretended account of money dealings between them ; and alleged a different agreement for the lease from that contained in it, and [390] prayed an injunction to restrain the respondent from proceeding at law, to recover the possession of the premises in the lease.

The term of the lease expired on the 1st of May 1776 ; and the respondent upon the 2d of that month, sent persons authorised for that purpose, to demand and receive the possession of the demised premises on his behalf : But the possession was, by the order of the appellant, refused by his servants, and particularly by his bailiff or steward, Francis MacFarland ; and by the appellant's order, the gates were also locked up, and all access denied to the persons empowered and sent by the respondent to receive such possession, with declarations of resistance if any force should be used ; whereby the possession of the premises was forcibly withheld and detained from the respondent, on the behalf, and under the direction of the appellant.

Upon this unjust detainer of the possession, the respondent, on the 3d of May 1776, exhibited his possessory bill in the court of Chancery against the appellant and MacFarland, stating the right and possession of the respondent for 40 years and upwards ; the lease, and the appellant's enjoyment under it ; and that the rent had been paid, allowed, or accounted for to the respondent : the expiration of the term, and the respondent's right to the possession : the demand of possession, and the forcible and unlawful detainer thereof ; and praying the relief usual in such cases, namely, to be restored to, and quieted in the possession of the premises : and for an injunction to that effect, to be directed to the defendants in that cause : and in default of their obeying the same, praying an injunction to the sheriff of the county of Dublin, commanding him to restore the respondent unto, and to quiet him in such possession, until thereout evicted by due course of law. And the truth of this bill being verified by the usual affidavits, upon application to the court, on the 4th of May 1776, it was ordered, that an injunction to be directed to the defendants, should issue to give and restore to the respondent, or his assigns, the actual, quiet, and peaceable possession of the premises ; the same to continue until the respondent should be thereout evicted by due course of law, or the further order of the court.

The appellant and MacFarland having been served with this injunction, and not choosing to yield obedience to it, they appeared in consequence of such process, as upon a contempt for disobeying the injunction, and according to the practice in such cases, required personal interrogatories to be exhibited unto them ; and the same were accordingly filed upon the 17th of May 1776, but the defendants, although resident within five miles of the city of Dublin, did not answer these interrogatories until the 18th of July following, when they put in their answer : And the appellant thereby admitted, that the respondent was, from the death of his eldest brother, seised in fee of the whole family estate, till the execution of his marriage settlement in January 1745, and that from the date of that settlement, to 1769, he was seised [391] in fee of the mansion-house and park of Luttrells Town : and from the date of a settlement of the 22d and 23d of May 1769, he had been tenant for life of the mansion-house, park, and paddock, and of the other estates comprised in that settlement. He said, that before the year 1769, the respondent had agreed to give him an annuity of £400, which in 1769 he agreed to increase to £600 upon a new arrangement of their family affairs ; and he said it had been agreed, respecting the lease, that it should be during the joint lives of himself and the respondent, or for seven years, at his option ; and that he was to be at liberty to cut down trees, and out of the value of them to repair. That the agreement was reduced into writing, and left with the respondent, in order that he might have a lease prepared by Mr. Duane, the respondent's law agent : That he had no recollection of the execution of the lease or counterpart : but that if he did execute the counterpart, he executed it in the hurry of the Middlesex election, and by mistake and surprise the same day the several other family deeds were executed, supposing it to be a counterpart of some other family deed. That on the 19th of April 1776, the appellant filed his bill in the court of Chancery of Ireland, for a discovery of the agreement, and for a

performance thereof, and for an injunction to restrain the respondent from recovering the possession at law. And the appellant further stated in his answer to the said interrogatories, a certain annuity deed, bearing date the 24th of May 1769; whereby the respondent had granted to the appellant, one annuity of £600 English money, making above £650 Irish currency, payable at the Royal Exchange of London, by quarterly payments, during the joint lives of the appellant and respondent; and charged upon all the respondent's estates in the counties of Dublin, Meath, and Kildare, and in the city of Dublin, and which are of the yearly value of £2500 and upwards; and by such deed a power of distress was given, if such annuity should be in arrear by 21 days; and if the same should be unpaid by the space of 40 days, it should be lawful for the appellant to enter, etc. And he further alleged, that a considerable arrear of that annuity was due to him at Christmas 1776, and for forty days next following; and that from the end of those forty days, he, without any legal or notorious proceeding, or act, was to be considered as possessing and holding the said lands, as part of the Dublin estate, subject to such annuity, under his said clause of entry, and not under the said lease. And the appellant further alleged by this answer, that the rent reserved by the agreement for a lease, and by the respondent alleged to have been reserved by the lease, was during all the term, by being credited to the respondent out of the rent charge, allowed to the respondent, or to his use: And he admitted, that possession of the premises was demanded on behalf of the respondent by his agents, and that that possession was demanded from the keepers of the gates, and that the same was refused, by the outside gates and doors of the premises being shut against them, and by their being denied admittance; and that the respondent's agents were [392] so opposed, with the knowledge, and under the authority of the appellant; and that the park gate was locked to prevent the entry of the said agents; and that he the appellant had ordered them to be locked, because the respondent had declared his resolution to turn the appellant out of possession, after the 1st of May 1776.

It being the practice of the court upon possessory bills, to read evidence at the hearing, in support of any charges in the bill which happen to be denied, or not admitted in the answer; and the appellant in this cause not having admitted the lease stated in the bill, and the respondent being in possession of the deposition of Mr. Duane, taken in the former suit between him and the appellant, as already mentioned to that point, the respondent upon the 6th of November 1776, obtained an order for liberty to read these depositions as against the appellant, saving just exceptions; and publication being passed by rules in both the causes, the one brought by the respondent for staying waste, and the last mentioned cause for possession, they were both set down to be heard; and possessory causes being usually heard as short causes, the respondent therefore moved upon notice, that the possessory cause might be transferred from the grand list, to the list of short causes; which was ordered accordingly.

On the 2d of December 1776, the appellant moved the court in the two causes, viz. the suit for waste, and the suit for possession, that the proceedings in both the causes might be stayed, till the respondent had put in his answer to the bill filed by the appellant, on the 20th of April 1776; when the court ordered that those causes should keep their places, and that the respondent should put in his answer within ten days before the then next term: Accordingly the answer was put in, within the time limited by the order; by which answer the pretended agreement differing from the lease, was peremptorily and absolutely denied; and upon the state of the account set forth in the answer it appeared that the appellant was the debtor instead of the respondent.

On the 26th of February 1777, the appellant applied again to the court, by motion, that the appellant's cause upon his bill, and the causes upon the respondent's bills, might proceed and come on together; which motion was made just before the short cause upon the possessory bill came in turn to be called: When the court, upon debate of the motion, was pleased to refuse the application.

The cause upon the possessory bill was heard and debated on the 26th and 27th of February, and also on the 1st and 3d of March 1777; and upon the said 3d of March, the Lord Chancellor was pleased to adjudge, that the defendants were guilty of the contempt charged against them in that cause, and thereupon decreed an injunction, directed to the sheriff of the county of Dublin, commanding him to restore the respondent unto and quiet him in the possession of the said premises, until he should thereout be evicted

by due course of law, or the further order of the court to the contrary : But the counsel for the defendants declaring, that they intended to appeal from this decretal order, the Lord Chancellor was pleased to respite the issuing such injunction for a month.

[393] Accordingly the present appeal was brought, as well from the decree itself, as from the order of the 26th of February 1777, refusing to hear the causes together. And in support of the appeal it was said (E. Thurlow, J. Dunning, F. Buller), that the appellant's cause instituted for the purpose of establishing his title to the possession of the demesne of Luttrell's town under the agreement for a demise, and for a specific execution of that agreement, having been instituted prior to the respondent's cause, and prosecuted with all possible diligence ; and it being evident that the same proofs would be necessary for the appellant in both causes ; it was apprehended, that his application that both causes should be brought to a hearing together, ought to have been granted, as the then danger of contradictory decrees in the different causes, would have been effectually avoided. That although possessory bills have, in some cases, been allowed in the courts of equity in Ireland, as a mode of proceeding for a landlord to recover possession of his lands, against a tenant holding over after the expiration of the term granted ; and the tenant's breach of trust in not yielding up that possession, is, for the very purpose of maintaining such bill, construed into a force : actual, or constructive force, being absolutely necessary to support this bill ; and although on such bill being filed, the tenant will not be suffered to avail himself as against his lessor, of any title to the possession derived from any other person ; yet until the decree now appealed from, it never was known, that on such a bill, a tenant holding over after the expiration of the term, and claiming title to the possession under another deed executed by the same lessor, was evicted therefrom. And it was conceived, that possessory bills need not now be extended farther than they have hitherto gone ; they were framed in times of national distraction, when, in the general confusion of the country, title deeds were frequently lost, and when therefore, the loss of possession would be the loss of title : they seem to have originated from the instructions, as to restitutions of possession, given to the president of Munster, in the reign of James I. grounded on the English statute of 8 Henry VI. and unsupported by any Irish statute ; but in the present settled state of the country, justice may be obtained in the ordinary course of law.

On the other side it was said (A. Wedderburn, J. Madocks), that the form of the proceeding in question is by bill filed, praying an injunction to the party wrongfully in possession, commanding him to restore the possession to the plaintiff the former possessor ; and in case of disobedience, then an injunction to the sheriff to put the plaintiff into possession ; but no subpoena is prayed to appear and answer (see Note, p. 256). The [394] truth of the bill is verified by an affidavit filed, which must prove these charges : That the title is undetermined ; that the plaintiff has been by himself, or his tenant, in quiet possession for three years ; and a forcible possession and detainer after the expiration of the lease, in case the premises have been in lease. And upon [395] application to the court, and reading the affidavit, to see that the case is both proper and true, the writ of injunction to the party is ordered, and he is served with it. In case the writ be disobeyed it becomes a matter of contempt, and the court may issue an attachment for the contempt ; upon which an order is obtained of course for an injunction to the sheriff. If before the entry of the attachment, and after service of the injunction to the party, he enters an appearance, he is then to be examined upon interrogatories touching his contempt ; and interrogatories may be exhibited for that purpose. And as the writ issued upon an *ex parte* application, therefore the defendant in his examination is at liberty to deny all or any part of the case made by the bill ; and to insist upon such matters as go to the point of possession, or the contempt, but not to the right. If the plaintiff thinks it proper he may examine witnesses in support of his bill ; and so may the defendant examine witnesses in support of his answer, and therefore the cause cannot be set down till a rule is given to publish : but when that is given and expired, the cause is set down and transferred to the paper of short causes at the request of either party, as such causes from their nature require dispatch.

In the present case the possession of the estate in question from before the year 1735 was admitted ; the execution of the lease though not admitted was proved : the payment of the rent by being accounted for was admitted ; the expiration of the term was self-evident ; the demand of possession and the refusal together with the locking

up the gates and doors by the appellant's order, to resist the taking possession, was admitted: so that there could be no controversy upon the respondent's case. The appellant however by his answer aimed at setting up a title; and by his petition of appeal complained that the court read this part of the answer only for the purpose of seeing what the appellant had put in issue, but would not receive the answer as evidence. But it was submitted that the court judged right in looking upon this part of the answer in that view, as the setting up a title was wholly inconsistent with the nature of the proceeding: for the suit being possessory only, the court was only to see whether the right to the possession, under which the appellant originally entered, still remained in force or not; and if it did not, the appellant's opposition was an usurpation of the possession. Any claim of a new and different right, accrued since the appellant originally entered, was a matter to be made out by him in the proper course of law, and he was not to be his own judge of such claim; nor would the court try and determine upon such a claim, in a suit wherein the court was exercising the jurisdiction and authority with which it was armed, of not suffering the possession of lands to be changed but by due course of law, and of not suffering the appellant to take advantage of a tortious possession, and put the respondent to his remedy. The court therefore rightly considered those parts of the answer which set up a new title as read only for the purpose of seeing what case the appellant made, and did not receive the same as evidence of [396] a right which could not be contested in that suit; and rightly decreed an injunction to restore the possession. So that if the appellant had a right of entry for breach of a condition, he might be redressed by the laws, and not by his keeping possession with violence and a strong hand. As to the order of the 26th of February 1777, by which the court refused to delay the possessory cause, and to permit that and the other causes to come on together, the court justly refused to make such an order; because the first of the causes was brought by the respondent to stay waste, and to account for timber fallen; and was totally unconnected with the possessory cause, and therefore it was improper that the one should occasion a delay of the other. And as to the cause upon the appellant's bill, it would have been unjust as well as inconsistent with the nature of the proceedings to have delayed the possessory cause upon the mere suggestion of an agreement in that bill, which by the respondent's answer to it was positively denied.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order and decree therein complained of, affirmed. (MS. Jour. *sub anno* 1777-8, p. 832.)

NOTE.—[393] The nature of these possessory bills, and the course of proceeding on them are thus explained in Howard's treatise on the rules and practice of the equity side of the court of Exchequer in Ireland, p. 304.

"The possessory or injunction bill is a summary method of proceeding, which hath been for many years past practised by courts of equity in this kingdom; and is used for the restoring of persons to the possession of their lands who have been forcibly or fraudulently dispossessed, or for quieting parties in possession, according to the different circumstances of the case.

[394] "And these bills are very frequent in this kingdom, by reason that by the many rebellions and troubles which have happened here from time to time, the Protestants were robbed and plundered, and their houses burnt, with their effects therein; by which means their deeds and titles have been lost or destroyed, which rendered the possession the best title to many estates. And therefore, it was found necessary to guard that possession against fraud or force, and to restore the person forcibly or fraudulently dispossessed: until the right could be tried by due course of law.—Wherefore, if it appears to the court, that the person who has been dispossessed or disturbed, has had a peaceable and quiet possession for three entire years before the filing of the bill, save the force or disturbance complained of, they will restore him, as possession is the semblance of right; and the party giving the disturbance shall be left to his remedy in the ordinary course of law, either by an ejectment or otherwise, as he shall think most proper.

"But where a landlord brings this bill against his tenant for holding over after his term is expired, which is a forcible, or rather a fraudulent detainer; as where a

“ person had made a lease for seven years to a tenant, the landlord or lessor, the day
 “ the seven years are expired, or the day after, demands the possession of the tenant
 “ or lessee, and he refuses to deliver it, the landlord need not make an affidavit of
 “ a triennial possession, and a title still in being: for in this case the bill is founded
 “ upon the fraud, in which cases courts of equity have an original jurisdiction; for
 “ the tenant is considered in equity, as a trustee for the landlord; and upon this
 “ trust and confidence between the landlord and tenant, it is deemed a fraud if he
 “ refuse to give up the possession, or return it when his term is expired: But the
 “ landlord is to make it appear by affidavit that such a demise was, that the term in
 “ that demise is expired, and that the tenant holds over his term; and thereupon a
 “ bill is to be framed, with a prayer therein to be restored, and an injunction for that
 “ purpose, to be put into possession of the lands so demised.

“ So when a party has been in possession for seven years as above, and before
 “ that seven years be expired he may have got a further term, suppose of ten years,
 “ from his landlord, in that case the landlord cannot have an injunction; because,
 “ though the seven years be expired, yet the subsequent agreement for ten years is a
 “ continuation of that possession, which was first given for seven years: And if the
 “ landlord should force or disturb the tenant in his possession, he, upon filing a bill and
 “ setting forth his case would be quieted by injunction, upon proper affidavits of the
 “ matter, against his landlord.

“ But in these suits it seems that there is no necessity to go into the right or the
 “ title, but into the question of the possession only, so that the plaintiff has a title
 “ still in being; and a feasible title will be sufficient: And in a late case between
 “ Sir Fitzgerald Aylmer and others plaintiffs, Barnwell Fitzgerald and others defendants,
 “ which depended in Chancery before the late Chancellor, Lord Viscount Jocelyn, upon
 “ a possessory bill, an issue being directed, upon the trial at the assizes, the plaintiffs
 “ were suffered to go into evidence of the original right and title to the lands in ques-
 “ tion, whereupon the jury found a verdict for the plaintiffs: but upon showing this
 “ matter to the court of Chancery, his Lordship was pleased to set aside the verdict,
 “ and ordered a new trial; and afterwards upon the second trial, the plaintiffs not
 “ being suffered to give evidence of any matter except such as tended to show the
 “ triennial possession, the jury found a verdict for the defendants: and the plaintiffs
 “ having applied to the present Lord Chancellor for a new trial, it was refused;
 “ and the cause being afterwards heard, an injunction went to the sheriff with costs.”

The following instances of this proceeding between landlord and tenant were cer-
 tified from the Register's book of the court of Chancery in Ireland, on occasion of the
 present appeal. *Holt v. Reilly*, 24th February 1758. *French v. Wade*, 29th of June
 1758. *Lord Annesley v. Radford*, 16th of June 1763. *Cullen v. Dillon*, 28th of
 June 1770. *Parsons v. Butler*, 25th of June 1772. *Cunningham v. Mason*, 2d of
 July 1772. *Nicholson v. McKiernan*, 19th of November 1772. *Evans v. Fitzpatrick*,
 10th of July 1773. *Lady Shelburne v. Tracy*, 13th of July 1773. *Maine v. Hicker*,
 15th of July 1773. *Higginbottom v. Power*, 20th of July 1773. *Gorman v. Brown*,
 11th of May 1775.

[396] VERDICT.

CASE 1.—TOWN of SHREWSBURY,—*Plaintiffs*; CORBET KYNASTON,—*Defendant*
(in Error) [31st March 1737].

[On the trial of an issue joined upon a *mandamus*, the jury find a special verdict as to the facts, but omit to find damages or costs. This verdict is imperfect, and therefore no judgment ought to be given upon it, but a *venire facias de novo* should be awarded.]

[Judgment of the court of K.B. reversed.]

Strange, 1051; Viner, vol. 14. p. 583. ca. 4.

In Trinity term 1733, a writ of *mandamus* was granted by the court of King's Bench, directed to the mayor, aldermen, and assistants of the town of Shrewsbury; reciting that the said Corbet Kynaston was duly elected, sworn, and admitted into the office of one of the aldermen of the said town; but that they the said mayor, aldermen, and assistants had, without any reasonable cause, removed him from such his office: The writ therefore commanded them to restore him, or show good cause to the contrary.

[397] To this writ the corporation made a return, that the town of Shrewsbury was an ancient town, which had been incorporated by divers names; that King Charles I. by his letters patent, dated the 16th of June 1638, after having described the boundaries of the town, made and constituted them into a body politic, by the name of the mayor, aldermen, and burgesses; and thereby declared, that there should be for ever nominated and elected out of the free burgesses of the town, one who should be the mayor, twenty-four who should be called aldermen (of which the mayor should be one,) and forty-eight others, who should be called assistants of the said town; and that the aldermen and assistants, should be called the common council of the said town; and that the aldermen and assistants should be assisting and advising to the mayor, and to the senior alderman, supplying the place of the mayor, in matters relating to the town.—Then the return set forth, that the said king, by his charter, appointed a mayor, aldermen, and assistants (naming them particularly): That the charter farther granted to the mayor, aldermen, and burgesses of this town, that on Friday next after the feast of St. Bartholomew yearly, it should be lawful for the mayor, aldermen, and assistants of the said town for the time being, or the major part of them, to elect the senior alderman of the said town, who had not exercised the mayoralty, to be mayor; and that he, after such election, should, before he should be admitted to exercise that office (viz. on Friday before Michaelmas) take an oath before the late mayor, for the due execution of his office, and then he might execute his office for a year: That if it should happen, that all the aldermen should have exercised this office, then the senior alderman should be again elected, and the rest of the aldermen according to their seniority. That the aldermen should also take an oath of office; and that if any of the aldermen should die, or be removed from the office, within a reasonable time after such death, or removal, the mayor and the rest of the aldermen, or the major part of them, should elect one of the assistants into the office, to fill up the number of aldermen; who should take an oath, and then should exercise that office during his life, unless he should be removed, for the causes mentioned in the charter. That if any of the assistants should die, or be elected an alderman, or be removed, that then they should fill up such vacancy out of the burgesses, who was to take an oath in the manner therein prescribed, and that then he should continue an assistant for his life. That by the same charter it was ordained, that the mayor, aldermen, and assistants, were to be inhabiting, abiding, and constantly residing, in their persons, or with their families, in the said town or suburbs thereof, unless in the time of plague, or other contagious distempers. That it should be lawful for the mayor, aldermen, and assistants, or the major part of them, as often as there should be occasion, to remove from his office any mayor, alderman, or

assistant, for non-residence within the said town and suburbs, and other places particularly mentioned in the charter, or for misbehaviour: That [398] these letters patent were accepted and agreed to by the mayor, bailiffs, and burgesses. And that King Charles II. afterwards, by other letters patent, dated the 6th day of July in the sixteenth year of his reign, confirmed the former charter: and that the town, by these charters, had been governed ever since.—That the said Corbet Kynaston was, on the 10th of May 1717, by the mayor and aldermen, elected into the place and office of one of the aldermen of the said town, then vacant: That he was duly sworn and admitted into that office, according to the charter: That he, upon the 23d of February 1732, and for three years and more last past, was not residing, inhabiting, or abiding in his own person, or with his family, in the town of Salop, or within the suburbs thereof, although there was then no plague, or other contagious distemper there: but that during all that time, he neglected, omitted, and discontinued the duty and execution of his place and office of one of the aldermen of the said town, contrary to the directions of the said letters patent: That he was, upon the said 23d of February 1732, and for the time aforesaid, inhabiting, abiding, and residing out of, and in places very remote and distant from the said town of Shrewsbury and suburbs of the same, to the mayor, aldermen, and assistants unknown, though there was no plague, or other contagious distemper there at that time: for which cause he became removeable from his said place or office of an alderman, and subject to be removed by the mayor and the rest of the aldermen and assistants, or the major part of them: That he being so removeable, before the issuing of the said writ of *mandamus*, viz. on the said 23d of February 1732, the then mayor of the said town, viz. Richard Lloyd, esq. and the major part of the then aldermen and assistants of the said town, were duly assembled at the Guildhall of the same town, to consult and treat of and concerning the affairs and business of the said town: and being so assembled, then and there did consider what was proper for them to do in respect of the non-residence and absence of the said Corbet Kynaston: and it manifestly appearing to them, that the said Corbet Kynaston, at that time, and a long time before: viz. for the space of three years and more than last past, was not inhabiting, abiding, or residing in his own person, or with his family, within the town of Shrewsbury, or suburbs of the same: and for that he was inhabiting, abiding, and residing out of, and in places very remote and distant from the said town of Shrewsbury and the suburbs thereof, to the mayor, aldermen, and assistants unknown; although within that time, there was not the plague, or other contagious distemper there: and that he the said Corbet Kynaston, for that cause, ought to be removed from his place or office of one of the aldermen of the said town: The said mayor and the major part of the aldermen and assistants so as aforesaid assembled, then and there adjudged and ordered, that the said Corbet Kynaston, for that cause, should be removed from his said place or office, according to the form and effect of the said letters patent: and that he had not since been chosen into the [399] place or office of an alderman of the said town. And this they assigned as the cause, why they should not restore him to his office of alderman of the said town of Shrewsbury.

To this return, the said Corbet Kynaston pleaded, and traversed several facts set forth therein: And first he said, that he was not, at the time mentioned in the return, by himself or family, inhabiting, abiding, or residing in places, to the mayor, aldermen, and assistants unknown, as they had alleged. And upon this the first issue was joined.

He then traversed, that there was not at the time before mentioned any plague, or other contagious distemper, within the said town, or suburbs thereof, but that there were several contagious distempers there during that time: And upon this a second issue was joined.

By his plea he farther traversed, that the said Richard Lloyd was mayor of the said town, at the time in the return mentioned, as by the said return was alleged: And a third issue was joined thereon.

He also traversed, that on the 23d of February 1732, the then mayor of the said town, and the major part of the then aldermen and assistants, were duly assembled to consult and treat of and concerning the affairs and business of the said town, as they had by their return alleged: And upon this a fourth issue was joined.

He said farther, that he was not removed from the place or office of alderman of

the said town, as by the said return was alleged: And upon this a fifth issue was joined.

These issues came down to be tried at the assizes held the 26th of March 1734, at Shrewsbury, before the Lord Chief Justice Reeve: when the jury found a verdict on the first and second issues, for the corporation: And as to the third, fourth, and fifth issues, they found a special verdict to the following effect:

As to the third issue, they found the charter of King Charles I. and some farther clauses therein, than were set forth in the return; viz. one clause whereby it was ordained, "That as soon as any one should be elected to be mayor of the said town, and should die, or refuse the office of mayor, before he should take the oaths directed by the said letters patent, that then the like election should be immediately made." And another clause, whereby it was directed, "That in case any mayor should die, or be removed from his office, within one year after he should be so elected as aforesaid, it should be lawful for the aldermen and assistants of the said town, or the major part of them, to elect and constitute the senior alderman of the said town, who had not exercised the office of mayor, in the place and office of such mayor." That by another clause in the said letters patent, it was ordained, "That as often as it should happen that the said office of mayor of the said town should be vacant, or that the mayor of the town for the time being, should be hindered by sickness, or be otherwise employed, so that he could not attend the business of the town as mayor; then and [400] so often, the senior alderman of the said town for the time being, (having taken an oath of office) should execute the office of mayor during such vacancy, sickness, or absence: And that a due and impartial election might for the future be had, and for ever inviolably observed: it was by the said letters patent ordained, that the senior of the aldermen, who had not exercised the office of mayor, should be chosen mayor; and if such senior alderman, so elected, should refuse to execute the office of mayor, that then the senior alderman next in order after such alderman so refusing, should be elected mayor; and so every other alderman successively according to seniority, from time to time, for ever." That this charter was accepted. Then they found the charter of King Charles II. in such manner as mentioned in the return. They also found, that Corbet Kynaston was, upon the 25th of August 1732, the senior alderman of the said town, who had not exercised the office of mayor; and that he by himself, or family, was not on the said 25th day of August, or for three years then last past had been inhabiting, or resident in the said town of Shrewsbury, or the suburbs thereof: That the said Richard Lloyd was, on the said 25th day of August, an alderman of the said town, and the next alderman to the said Corbet Kynaston in seniority, who had not exercised the office of mayor: That the said Richard Lloyd being an alderman of the said town, was on the said 25th day of August, being the Friday next after the feast of St. Bartholomew in that year, by the mayor, aldermen, and assistants, or the major part of them, in fact elected into the office of mayor of the said town, (the said Corbet Kynaston, at the time of such election, being the senior alderman of the said town, who had not exercised the office of mayor): That before he entered upon the said office, viz. on the 6th of October in the same year, he took an oath before Abraham Davies, the late mayor, and the rest of the aldermen and assistants who would be present, faithfully to execute the office of mayor; that he was afterwards, in fact, admitted into the exercise of the said office, and did in fact exercise the same for one whole year from thence next ensuing, without interruption: But whether upon the whole matter, he was mayor of the said town, at the time of the motion of the said Corbet Kynaston from the said office of alderman, within the intent of the said third issue, they knew not; but prayed the advice of the court.

As to the fourth issue, they found, that the said Richard Lloyd being in fact mayor of the said town, the major part of the then aldermen and assistants of the said town, did, upon the said 23d of February 1732, assemble themselves together in the Guild-hall of the said town, to consult and treat of the business of the town; but that Andrew Corbet of the Park, esq. being then one of the aldermen of the said town, and having then a house and family in the said town, was not present at the said assembly; neither was he the said Andrew Corbet summoned to attend at the [401] said assembly, though the then mayor gave the usual and general orders for summoning the then aldermen and assistants of the said town; nor did Henry Morgan, one of the sergeants at mace of

the said town, (being the proper officer to have summoned the said Andrew Corbet to attend at the said assembly,) endeavour to summon the said Andrew Corbet; being informed and believing that he was out of summons, and so returned him at the said assembly to be out of summons, according to the method used of returning persons that are absent and out of summons: But whether, etc.

And as to the fifth issue, the jurors found, that on the said 23d of February, the said Richard Lloyd, the then mayor of the said town as aforesaid, and the major part of the aldermen and assistants, being so assembled as aforesaid in the Guildhall of the said town, did then and there, in fact, adjudge and order the said Corbet Kynaston to be removed from the said office, or place of alderman of the said town; but whether, etc.

This special verdict being twice argued before the court of King's Bench, they were unanimously of opinion, that the return was not sufficient to preclude the said Corbet Kynaston from being restored to his office of alderman; and therefore adjudged, that it should be disallowed and quashed.

To reverse this judgment, the corporation brought a writ of error in parliament; and on their behalf it was said (R. Hollings, R. Lloyd), that upon arguing the special verdict, there were three objections made. I. That Mr. Lloyd was not a lawful mayor, Mr. Kynaston being the senior alderman when Lloyd was elected and sworn mayor. II. That if Mr. Lloyd was not mayor *de jure*, but only *de facto*, he had no power to summon or preside at the assembly which removed Kynaston; and consequently his removal was illegal. III. Supposing Mr. Lloyd to be mayor, and capable of summoning and presiding at this assembly; yet that the mayor, aldermen, and assistants were not duly assembled, for want of summoning Mr. Andrew Corbet, one of the aldermen of the town.

To the first of these objections it was answered, that Lloyd was apprehended to be a legal mayor, the corporation not being obliged by their charter, to choose the senior alderman mayor at all events: but if they were, yet as the senior alderman had a power of refusing the office, his wilful absence in unknown parts must be looked upon as a renunciation of his right to that office.—To the second objection it was said, that the acts of officers in reputed authority are to be favoured in courts of justice; and that there are many cases where both the judicial and ministerial acts of officers *de facto* have been held valid: The removal of Mr. Kynaston was in pursuance and execution of the authority of the charter, and therefore a valid act, within the reason of the cases which have been established, respecting the acts of officers *de facto*.—And in the third objection it was answered, that where by accident only, and not through practice or design, a member of a select body is not summoned, the acts of the assembly will be good. That in the present case, the usual and general orders [402] were given by the mayor for summoning the whole body; and the officer returned Mr. Corbet out of summons, according to the method of returning persons who are absent and out of summons; and that more caution to have a regular assembly could not possibly have been used by the mayor than what in this instance had been used.

It was further contended to be an undeniable maxim in law, that in special verdicts nothing can be intended but what is expressly found; and it not being expressly found that Mr. Andrew Corbet was within summons, and it being returned that he was out of summons, it could not be intended that he was within summons; but supposing it doubtful, there ought to be a new trial to ascertain so material a fact: for had Mr. Corbet been found to have been out of summons, as he really was, there could not remain the least doubt of its being a legal assembly. But besides these reasons, it was apprehended that this was an imperfect verdict, the jury not having found damages and costs in pursuance of the statute 9th Ann. c. 20, and therefore no judgment ought to have been given thereon, but a *venire facias de novo* should have been awarded.

On the part of the defendant in error it was said (J. Strange, N. Fazakerly), that the principal question in this case was, Whether he was legally removed from his office of alderman or not? And it was apprehended that he was not well removed, because Mr. Lloyd, who presided as mayor at this assembly, was not a lawful mayor; the defendant being, when Lloyd was chosen mayor, the senior alderman who had not exercised that office. That the charter, by which the corporation was governed, prescribed a regular rotation of the aldermen in the enjoyment of this office; and intro-

duced the direction, with the reasons upon which such order and method was founded; viz. "That a due and impartial election may be for the future had, and for ever inviolably observed, it is ordained, that the senior alderman, who hath not exercised the office of mayor, shall be chosen mayor; and so every other alderman successively, according to their seniority, from time to time for ever." And nothing being found, or appearing by the verdict, sufficient to dispense with, or deprive Mr. Kynaston of his right of succession to the mayoralty of this borough for the year 1732, the choice of Mr. Lloyd was a proceeding directly contrary to the express words and direction of their charter, and consequently void. If this conclusion be just, that Mr. Lloyd was no legal mayor, it follows that the assembly at which Mr. Kynaston was removed from his office of alderman, was not a regular assembly: for to constitute a regular assembly, there should be a legal mayor to summon the members, and to preside therein. As to the objection that Mr. Lloyd was mayor *de facto*, and that such an officer may act, or join in the doing of corporate acts: it may be answered and admitted to be true as to some particular acts of necessity, for the preservation of the corporate body; but that acts of violence, and such as are [403] injurious to the right or property of another, were never allowed to be done by a mere officer *de facto*. That the amotion of Mr. Kynaston was not any act of necessity was plain; because the preservation of the corporate body did not depend upon it: and, that it was injurious to Mr. Kynaston was as plain: because he had been thereby deprived of an office which was his freehold. But, in case the mayor *de facto* had authority to preside at an assembly for the amotion of officers; yet that this assembly was not regularly convened: for it was not held on any day appointed by the charter, or by usage; and therefore in such case, all the members who constituted the assembly ought to have had due notice of it, according to reason and the usage of the place; for otherwise, corporate acts might be done by the majority of such members as were assembled, not only against the interest, but even against the sentiments of the corporate body; and if one member could be omitted, or left unsummoned, so might others; and this would leave it in the power of a mayor to have a meeting of his own friends only, and to do therein whatever he thought proper. In the present case, one of the aldermen was not summoned, nor endeavoured to be summoned; and for any thing which appeared to the contrary, his single negative, or the exercise of his right to advise and debate, might have turned the majority in favour of Mr. Kynaston; and it would be of the most dangerous consequence to permit the inferior officers to summon, or omit to summon, as they should think fit. The mayor should not only give orders, but should see that those orders were obeyed; otherwise the neglect of the inferior officer is the neglect of the mayor.—But it is objected, that because some small damages were neglected to be found by the verdict, no judgment can be entered for the costs: and if no judgment for costs can be given, there can be no judgment at all. If, however, the defendant in error cannot, by reason of this omission, have any judgment for his costs, he must submit to the loss of them; but it was hoped that he should not be precluded from having his judgment, because that was wholly founded upon the insufficiency of the facts returned in excuse by the corporation for their not restoring him; and upon which insufficiency the court of King's Bench had always awarded a peremptory *mandamus*.

After hearing counsel on this writ of error, and the Judges (who attended according to order) having delivered their unanimous opinion touching certain points of law to them proposed*; it was ORDERED and ADJUDGED, that the judgment given in the court of King's Bench should be reversed: And it was further ORDERED, that the said court should award a *revire facias de novo*, and proceed according to law; and that the record should be remitted. (Jour. vol. 25. p. 68.)

* These points do not appear upon the journal; but are stated in Sir John Strange's report of this case.

[404] CASE 2.—WILLIAM PLUNKET,—*Appellant*; LORD VISCOUNT KINGSLAND, and Others,—*Respondents* [11th January 1749].

[Mews' Dig. xi. 483, 523. As to modern practice in Supreme Court, See R.S.C. 1883, Order 39, rr. 6-8; *Webster v. Friedeberg*, 17 Q. B. D. 736.]

[A verdict certified by the judge to be entirely to his satisfaction is never suffered to be impeached, as contrary to evidence, by affidavits; and though the jury state the particular evidence on which they find the fact, yet this is only surplusage, and will not vitiate the verdict.]

[Decree of the Irish Court of Chancery reversed.]

Vide ante, [1 Bro. P. C.] p. 322.

In consequence of the affirmance of the decree in this cause, the issues thereby directed, were tried in the court of King's Bench in Ireland, on the 26th of June 1747; when the jury found a verdict in the following words: "We find it was no part of the agreement between the Right Honourable Henry Lord Viscount Kingsland and the plaintiff, for a lease of the warren and mill of Portmarnock, in the pleadings in this cause mentioned, that the consent or approbation of Peter Daly, esq. in the pleadings also mentioned, should be had to make such lease valid: And we find, that the said Peter Daly gave no such consent or approbation: And we find, the Right Honourable Francis Lord Baron of Athunry, and the defendant Wakely, had, on or before the 1st of January 1741, sufficient notice of the agreement between the plaintiff and the said Lord Kingsland, for a lease of the said warren and mill of Portmarnock."

This verdict being certified by the court of King's Bench to the court of Chancery, the respondents, on the 8th of July 1747, moved that court for a new trial; upon an affidavit, that the answer of Lord Kingsland was permitted to be read upon the former trial: but the Lord Chancellor having discoursed with the judges before whom the trial was had, and being by them informed, that they were satisfied with the verdict, and that the jury were expressly told by the Court, that Lord Kingsland's answer was not evidence against the respondent Wakely; his Lordship, on the 8th of February 1747, refused to grant a new trial upon that foundation.

The appellant, apprehending the verdict to be now confirmed, brought on his cause to hearing upon the equity reserved, and on the 10th of May 1748, the same was heard accordingly; when it being objected by the counsel for the respondents, that the verdict upon the second issue was so totally uncertain and insufficient, as to make it impossible for the court to found any decree upon it in favour of the appellant; the Lord Chancellor was pleased to order, that the parties should proceed to another trial at law, upon the said second issue.

Accordingly, on the 15th of June following, this issue was again tried; when the jury returned the following verdict: [405] "We find, that the Right Honourable Francis, Lord Baron of Athunry, had notice, before the 1st day of January 1741, of an agreement made between the plaintiff and Lord Kingsland, for a lease of the warren and mill of Portmarnock, in the issue mentioned, for a term of 31 years, at the yearly rent of £45, to commence from the 1st day of November 1741, and a fine of £61, which was paid: which notice appeared to us, by letters written and signed by the said Lord Athunry, and the testimony of Mr. Cornelius Kelly: and that Thomas Wakely the defendant, had also notice of the said agreement, before the 1st of January 1741: which notice was given him by Mr. Goddard, then agent and receiver to Lord Kingsland."

In a few days after this verdict, application was made to the court of Chancery by the respondent Wakely, to set it aside and grant a new trial; because the jury had not found the nature of the agreement between the appellant and Lord Kingsland, whether it was by parol or in writing, nor what the notice was, which Lord Athunry and Mr. Wakely had of such agreement; also because the commencement, term, and rent of the

lease agreed for, was proved by parol evidence only, which was contrary to the statute of frauds and perjuries, and ought not to have been received by the court; and because the jury had mentioned the particular evidence on which their verdict was founded, and which they ought not to have done.

To support this motion, two affidavits were laid before the court, made by Mr. Wakely and one Nicholas Mullegan, his agent; stating, that Mullegan had attended, and taken notes at the last trial; and that the appellant's counsel having offered to prove the agreement between the appellant and Lord Kingsland by parol evidence, the counsel for the respondents objected thereto, as contrary to the statute of frauds and perjuries, but that the objection was over-ruled. That Kelly, whose testimony was mentioned in the verdict, gave no evidence of the commencement of the appellant's term. That the only written evidence read for the appellant on the trial, were two letters of Lord Athunry, and one from Lord Kingsland; but in which neither the land, rent, term, or commencement were mentioned. That Goddard, the other witness mentioned in the verdict, being examined for the appellant, declared he could not say, that he told Mr. Wakely the terms of Lord Kingsland's agreement with the appellant, or when the appellant's term was to commence. That the counsel for the respondents insisted on the trial, that if the jury should find an agreement between the appellant and Lord Kingsland, they ought to find the nature of such agreement, whether by parol, or in writing; and if they should find, that the respondents had notice of such agreement, they ought to find what such notice was, and the nature of it. That the verdict being read, and no mention made when the appellant's term was to commence, it was observed to the jury, that the verdict did not fully answer the issue directed; whereupon one of the jurors informed the court, [406] that it did not appear to them by any evidence, when the appellant's term was to commence; upon which, one of the appellant's counsel said, they had Mr. Goddard in court to prove that matter. And that Mr. Goddard being thereupon examined, said, that he told Mr. Wakely, in one of the three first holidays in Christmas 1741, that the appellant's term was to commence the 1st of November 1741; after which the following words were interlined in that part of the verdict relating to notice on Lord Athunry, viz. "to commence from the 1st of November 1741."

No affidavits were made by or on the part of the appellant; but his counsel informed the court, that in order to save the expence of any more trials, they were ready to consent, that the cause should be heard upon the agreement, as if it had been found to be a parol agreement; because, under the circumstances of the case, they apprehended it did not come within the statute of frauds. The respondent's counsel, however, insisting upon their motion for a new trial, the Lord Chancellor ordered it to stand over, till he had talked with the judges who sat on the last trial. This conversation was accordingly had, when the judges gave their opinion, that the verdict was agreeable to the evidence; notwithstanding which, and though the appellant's counsel, upon the question being put to them, admitted that there was no other evidence of the commencement, term, or rent, but parol evidence only; yet his Lordship, on the 3rd of December 1748, was pleased to set aside the last verdict, and grant the respondents a new trial.

The appellant, therefore, appealed from this order; insisting (D. Ryder, W. Murray), that the former decree, and the affirmance of it, had already determined what were the issues proper to be tried, previous to the appellant's relief, viz. 1st, Whether the agreement was absolute or conditional, depending upon Mr. Daly's subsequent consent; which had been found in favour of the appellant, was confirmed by the court below, acquiesced in by the respondents, and was now at peace.—And by the second issue, the notice of that agreement, and not the agreement itself, was the subject of the inquiry; in which the jury were likewise to find the nature of the agreement, of which the respondents had notice, whether absolute or conditional, according to the first issue: And this second issue had been likewise determined in the affirmative, by two concurrent verdicts. That neither of the issues ever meant to inquire, if there was any, and what agreement, between the appellant and Lord Kingsland; because such issues would have been unnecessary and improper, without the previous admission of the existence of an agreement; neither was there any question between the parties what the agreement was, or whether in writing; but whether the consent of Mr. Daly was

necessary, and whether the respondents had notice. And as the court could not regularly go into any proof of the reality of the agreement, as being out of the issue, it was immaterial what kind of proof was given of it; for the nature of the agreement was [407] well known, and that it was by parol; and therefore an inquiry was only necessary and directed, as to collateral circumstances attending it. That after the order affirming the decree, the court below had no power to vary the issues at first directed; and as the two concurrent verdicts fully answered the issues so directed, they ought to have satisfied the conscience of the court; and especially, as those verdicts were to the entire satisfaction of the judges who tried the issues.

It was however objected, that the evidence laid before the jury was of a parol agreement, yet the verdicts, as they stood, insinuated a written agreement. That parol evidence of the agreement ought not to have been laid before the jury, as being contrary to the statute of frauds and perjuries. That Lord Athunry's letters, which were the only written evidence laid before the jury, specified neither rent, term, or commencement; and that therefore the jury had not sufficient evidence to support the verdict.

But it may be answered, that a verdict found by twelve men, upon their oaths, and certified by the judges to be entirely to their satisfaction, is never suffered to be impeached as contrary to evidence, by affidavits. That the finding the particular evidence, was surplusage, and would not vitiate the verdict; nor could the impropriety of finding what they were not desired to find, be a reason for defeating the only matter referred to them; and which they had found. That the appellant never pretended to more than a parol lease, reduced into writing by Lord Kingsland's receipt of the 5th of December 1741, which ascertained all the terms of the agreement, as to rent, commencement, and term; and this receipt, or written agreement, being confirmed by the appellant's payment of his fine, and possession, his improvements, and payment of his rent, fully removed the objection arising from the statute; and the reference to the letters went only to the point of notice, and not as to the commencement, rent, or term. That if a parol agreement was within the words of the issue, as it undoubtedly was, parol proof might certainly be given of it; and the appellant's counsel admitted there was no other testimony of the term, commencement, or rent, but what was parol. That whether the appellant was entitled in a court of equity, to a specific performance of such an agreement as he claimed under, attended with such circumstances of possession, improvement, and expence, in opposition to a subsequent lessee with notice was a mere question of law and equity; the only facts upon which any doubt arose, were whether the agreement was absolute, or whether Lord Athunry, or Mr. Wakely had notice: By directing these and no other facts to be tried, the House, upon the former appeal, had in effect declared, that if they came out in favour of the appellant, he would be entitled to relief; the direction of such issues, proceeded upon the agreement as a certain established fact; and so did the verdicts, by which it was found that a particular condition was not annexed to the agreement, and that the respondents had notice of it. That if two [408] concurrent verdicts upon trials at bar, by special juries, and to the entire satisfaction of all the judges, were not sufficient to establish so simple a fact as notice of an agreement, there could be no end; but if the court was satisfied with the fact of notice, and intended by this third trial, to be informed whether the agreement was by parol, or in writing, it ought to have been so expressed and declared, that the jury might see upon what point the court wanted further satisfaction; but surely, if this was the desired information, it was directing an issue to try a matter not disputed. That these repeated trials were the more grievous in the present case, because the question only concerned a lease for a term of years, a great part of which was expired; and the expence of the litigation, had already been almost equivalent to the value of the inheritance.

On the part of the respondent Lord Kingsland, who appeared on this appeal, it was argued (W. Noel), that his agreement with the appellant did not rest in parol and executory only, but was immediately executed by the appellant's possession, payment of his fine, and improvements; and that the defeating an agreement attended with these circumstances, because it was not reduced into writing, would, instead of preventing frauds and perjuries, render the statute made for that purpose, a snare in the hands of designing men, to defraud the more incautious to their ruin. That the

controversy between the parties had not arisen upon the reality, terms, commencement, or duration of the agreement, all which were fully stated by the bill, and admitted by the answers; but whether the agreement was conditional, or absolute, and the first verdict had fully established it as an absolute agreement, to the satisfaction of the parties, as well as the court. That actual and not circumstantial notice only of this agreement, had been found upon the respondents Lord Athunry and Mr. Wakely, by two concurrent verdicts of different juries, on the testimony of living witnesses, cross-examined by the respondents, and unimpeached by other evidence; which must in a court of equity, render them trustees for the appellant, as having the prior equity. But if it was intended by a new trial, to let in the question arising upon the statute of frauds, whether a parol agreement would, under the circumstances of this case, be executed in a court of equity; the benefit of that question was fully saved by the appellant's admission, and an agreement confessedly parol, could not admit of any other than parol proof; so that if the cause was to be tried *ad infinitum*, no other evidence could be given of the agreement; and therefore the directing a new trial, was in effect to direct the finding a verdict against the appellant; at least, the cause must return to the jury very much prejudiced by so many repeated trials. That the verdicts of twelve men upon their oaths, were not rashly to be brought in review by loose uncertain affidavits of two persons only, the one a party concerned in interest, the other his agent; whose memory and notes were not to preponderate the balance against a solemn verdict, ratified by the sanction of the judges [409] under whose direction it was given. That the decree and the order of affirmance had established the proper issues between the parties; and those issues had been satisfied by repeated verdicts: It was not therefore in the power of the court below, to vary or depart from the issues originally directed, but the consideration of the appellant's relief upon the facts found by the verdict, was fully and properly before the court, and ought to have been determined.

On behalf of the other respondents it was said (J. Brown, T. Clarke), that two things were necessary for the appellant to make out in proof, upon the trial of the second issue: viz. 1st. That a proper agreement was entered into between him and Lord Kingsland, and what were the terms of such agreement: And 2dly, That Lord Athunry, or the respondent Wakely, had notice of such agreement; and what that notice was. But in both these particulars, it was apprehended the appellant had failed; for the verdict on this issue, as to the agreement therein mentioned, was founded only on parol evidence of a verbal agreement: the letters of Lord Athunry not proving any agreement, and much less specifying the terms, or any of the other essential parts of an agreement. That such parol evidence of a verbal agreement ought not to have been admitted, as being of itself improper and of mischievous consequence; and not only contrary to the statute of frauds and perjuries, but contrary to what seemed to be the intention of the court in directing the issue. That though it was alleged on the part of the appellant, that if the agreement was originally a verbal one, the same was in a great measure carried into execution by subsequent acts and transactions; such as the appellant's paying the fine, and half a year's reserved rent, and his having possession of the estate, and making improvements thereon; yet those acts and transactions appeared, and were proved in the cause to have been extremely fraudulent on his part, and were of themselves sufficient to destroy that equity, which he attempted to set up in support of his claim. But supposing the evidence laid before the jury on the part of the appellant, had been proper and unexceptionable, it by no means warranted the verdict certified; for the verdict certified, substantially varied from the verdict originally brought in by the jury, by the addition of a material fact; and this variation was made irregularly, and without proper evidence. It was therefore hoped, that as the order appealed from was made up on deliberate consideration of the nature and circumstances of the case, and was perfectly agreeable to the rules of equity and justice, the same would be affirmed, and the appeal dismissed with costs.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of, should be reversed; and it was further ORDERED, that the court of Chancery in Ireland should proceed to the hearing of the cause on the equity reserved, according to the course of that court; and that on such hearing, the appellant should be bound by the admission [410] of his counsel, mentioned in the said order "that there was no other evidence given at the trial of the cause in the court of King's

"Bench, than what was parol, of the commencement or duration of the term claimed by the appellant in the premises in question." (Jour. vol. 27, p. 389.)

VOLUNTARY CONVEYANCES.

CASE 1. HENRY CLAVERING,—*Appellant*; SIR JAMES CLAVERING, and Others,—*Respondents* [16th January 1705].

[Mews' Dig. xii. 1073; xv. 1845.]

[A. made a voluntary settlement of lands, (subject to an annuity of £100 to his youngest son,) in trust for his eldest son and his heirs, which settlement did not contain any power of revocation. The eldest son being dead, the father made another voluntary settlement of the same lands to the use of himself for life, remainder to his youngest son for life, remainder to trustees to preserve, etc. remainder to the first and other sons of his youngest son in tail. The first deed came to the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first: both sons having been otherwise provided for, it was held in Chancery, that though both deeds were voluntary, yet the consideration of being a younger child was not sufficient to set aside the first deed. And this decree was affirmed in the House of Lords.]

Preced. in Chan. 235. 2 Vern. 473. 1 Eq. Ca. Ab. 24. c. 6. Viner, vol. 4. p. 168. ca. 23; vol. 8. p. 226. ca. 24; vol. 13. p. 103. ca. 11; vol. 22. p. 19. ca. 8.

Sir James Clavering Bart. having three sons, namely, John, James, and the appellant Henry, and one daughter named Jane; and, being seised in fee of the manor of Lemadon in the county of Northumberland, of £214 per ann. by indentures of lease and release, dated the 20th and 21st of August 1684, conveyed the same to trustees and their heirs, in trust, to raise and pay an annuity of £100 per ann. to his son Henry for life, by quarterly payments; and the like annuity to his daughter Jane for life; both of them to commence from his death; and upon further trust to pay and apply the surplus profits of the premises to John his eldest son, and his heirs; and within one month after the annuities should cease, to convey the premises to his said eldest son John and his heirs.

In February 1687, John, the eldest son and heir apparent of Sir James, died, leaving the respondent, Sir James, his eldest son and heir at law.

[411] By indentures of lease and release, dated the 10th and 11th of March 1690, Sir James Clavering the father conveyed the said estate of Lemadon to other trustees, and their heirs, for the use of himself for life; with remainder to the appellant for life; remainder to trustees to preserve the contingent remainders; remainder to the first and other sons of the appellant in tail male, with other remainders over; but, subject to a power of revocation.

Both these settlements remained in the custody of Sir James, until his death; and Jane, the daughter, died in his life-time, whereby her annuity of £100 lapsed and became void.

In December 1697, Sir James Clavering made his will, whereby he gave the appellant a legacy of £20, together with the arrears of rent, due from the tenants of Lemadon; and, by such will, and a deed of appointment made pursuant thereto, he directed his personal estate to be laid out in the purchase of lands, and settled to the use of the respondent Sir James, his grandson, for life; remainder to his first, and other sons, in tail male; with other remainders over.

In March 1701, the testator died; and, the two several settlements, being then

found amongst his writings, the appellant, in Michaelmas term 1702, exhibited his bill in the court of Chancery, against the respondent Sir James, and other proper parties, in order to have the settlement of 1684, set aside : and the subsequent settlement of 1690, established.

In Hilary term 1704, the cause came on to be heard before the Lord Keeper Wright : when the bill as to the relief thereby sought against the settlement of 1684, was dismissed : whereupon, the plaintiff's counsel prayed a decree, for the arrears and growing payments of his annuity of £100 per annum, under the said settlement, which was decreed accordingly : and the subsequent settlement of March 1690, being in the hands of the defendant Sir James, he was ordered to produce it, upon the trial of any action at law, which might be brought by the plaintiff, within a year.

The plaintiff, instead of trying his title at law, appealed from the decree : contending (J. Cheshyre), that the settlement of 1684, ought to be looked upon as only a temporary provision for himself, and his sister : suitable to the then situation of his father's estate, and to the provision which he, about the same time, made for his other children. But, his estate being after that time greatly increased, he first gave his daughter Jane, a mortgage of £1500 instead of her annuity : and then settled the Lemadon estate upon the appellant, in lieu of his annuity. That on this account, the deeds of 1684, were kept in the father's custody, till his death : and he therefore might have cancelled them, or conveyed the premises to a purchaser. That those deeds lodged the legal estate in trustees, and left a trust in Sir James the father ; which, being the creature of a court in equity, might be fitly moulded, according to the declared and repeated intention of the owner. That this intention was manifest from the proofs in the cause ; which shewed, 1st, That the father wrote, with his own [412] hand, on the back of the deeds of 1690, [the settlement of Lemadon] and laid it up among his other family settlements, where it was found after his death. 2dly, That the father, after the settlement of 1690, frequently declared to his relations and friends, and to the tenants of Lemadon, on payment of their rents, that he had settled the said estate on the appellant, that he should be their landlord, and called it the appellant's estate : and constantly called him to inspect and understand the accounts of it : and also declared, that the appellant should never be an annuity-man : expressing his dislike of the ill consequences of giving children only annuities. 3dly, That the father, in his last sickness, gave directions to look after this estate, for the appellant's benefit : and the very night before his death, declared, that he had not only settled the said estate on the appellant, but had given him all the arrears by will, that so he might not be destitute of present subsistence. That both the deeds were prepared, by the same trustee and counsel, and had the father been advised, or in the least apprehended there could have been any danger that the deeds of 1684 might arise to defeat his intention, declared by those of 1690, several expedients might have been easily found out, to have avoided the former deeds : at least he might, and doubtless would, have provided for the appellant out of the great estate which he otherwise disposed of by his will, codicil, and deed of appointment, in favour of the respondent Sir James, as an equivalent for the estate in question. And therefore, inasmuch as provisions for younger children are ordinarily favoured and considered as purchases : it was hoped, that the decree would be reversed, the deeds of 1690 established, and such further conveyance made of the Lemadon estate, as that it might be enjoyed according to the appellant's father's intention.

On the other side it was argued (H. Penton), that the settlement of 1684, was fairly made, and in full force, having no power of revocation therein contained ; and that as the appellant (who was a bachelor) had a provision made thereby, it was a very extraordinary attempt to set it aside, by a subsequent voluntary conveyance, made by the same person, without any consideration, and with an express power of revocation ; and this against the heir of the family, who was to support the dignity of a baronet. And, that the appellant had, in effect, given judgment against himself, in declining to try his title at law ; when, by the decree he had liberty given him so to do.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed ; and the decree therein complained of, affirmed. (Jour. vol. 18. p. 66.)

[413] CASE 2.—REYNOLDS CALTHORPE, and Another,—*Appellants*; CHARLES MAY and Others,—*Respondents* [5th December 1707].

[C. having two sons by her first husband, made a settlement previous to her second marriage and without the privity of the intended husband, whereby she limited the estate to herself for life; remainder as to one moiety to Christopher, her youngest son, in tail; and for want of issue of his body, to Reynolds, her eldest son, in tail; and as to the remainder of the other moiety to Reynolds, in tail; and for want of issue of his body, to Christopher in tail; with remainder as to both moieties, to her own right heirs. The second marriage took effect, and the estate lying in Ireland, the husband made claims, and sued out decrees from the commissioners under the acts of settlement and explanation, for some parts of this estate, to himself and his wife, and her heirs, and for other parts of it, to himself and his wife and his heirs. The lands so limited to his heirs, the second husband, having survived his wife, devised and otherwise disposed of. Held, that Reynolds and Christopher, the two sons of the first marriage, were entitled under their mother's settlement to all the lands; and that the parties claiming under the second husband, were accountable for the rents and profits from his death.]

[See *Bowes v. Bowes*, *ante*, [6 Bro. P. C.] p. 427.]

In the year 1659, commissary John Reynolds, in satisfaction of his own debentures, and such as he had purchased from others, was entitled to divers lands in the counties of Waterford, Kilkenny, and Cork in Ireland, amounting in the whole to 16,157 acres; and dying intestate, and without issue, Dorothy Calthorpe, his only sister and heir at law, and also his administratrix, became entitled to all his real and personal estate.

The said Dorothy was the widow of James Calthorpe Esq. by whom she had two sons; namely, the appellant Reynolds and Christopher; and being minded to make a settlement of her estate, did, by lease and release, dated the 16th and 17th of April 1662, convey all her lands in Ireland (except certain lands in West-Carberry, then in the possession of one Henry Beecher, and afterwards sold to him), to the use of herself for life; with remainder as to one moiety, to Christopher her second son, in tail; and, for want of issue of his body, to the appellant Reynolds in tail; and, as to the remainder of the other moiety, to the appellant Reynolds in tail; and for want of issue of his body, to the said Christopher in tail; with remainder as to both moieties, to her own right heirs. But subject to a proviso, that it should and might be lawful for the said Dorothy, during her life, by any deed or writing, to grant to any person a rent-charge not exceeding £200 a-year, to be issuing out of the said premises. And it was covenanted, that in case any of the said lands should be evicted or restored to the former proprietors, and other lands gotten in reprise for the same, such reprised lands should be to the same uses.

At the time of making this settlement there was a treaty of marriage between the said Dorothy Calthorpe and Sir Algernon [414] May; but it does not appear that he was, at that time, privy to it. This marriage took effect on the 25th of June following; and in Hilary term 1663, Sir Algernon and his lady levied a fine of the lands of Leek and other lands in the county of Cork, to the use of themselves and the heirs of Sir Algernon.

By the acts of settlement and explanation, all adventurers and soldiers were to retrench a third part, and to enjoy only two-thirds of their original lots; and several disputes arising concerning the lands of Dame Dorothy, Sir Algernon exhibited a claim in his own and his wife's name, before the commissioners appointed to put those acts in execution, for the said lands as her inheritance; and in May 1666, he sued out a decree from those commissioners for the lands of Clonmogle and Ross, and other lands in the counties of Waterford and Kilkenny, to him and his said wife, and her heirs; with a saving to one Margaret Power, of a third part of the woods of Gilcock. And at the

same time another decree was sued out, that the said Sir-Algernon and his wife should hold the lands of Leek, and other lands in the county of Cork, to him and her, and his heirs. But these last-mentioned lands being short by 1955 acres, of the full two thirds which should have been held in that county; the commissioners decreed, that the said Sir-Algernon and Dame Dorothy, and the heirs of Sir-Algernon, should have and enjoy the lands of Ballioquin and Rockett's Castle, in the county of Waterford, together with Graeciedieu, and some fields in the liberties of the city of Waterford, amounting to 871 acres, by way of reprisal for the said 1955 acres so deficient in the said county of Cork. And, upon the commissioners' certificates of these decrees, letters patent were granted accordingly.

The earl and countess of Thomond had an annuity of £230 per annum issuing out of the lands of Clonmogle, and other the lands in the counties of Waterford and Kilkenny, for 99 years, if the countess should so long live, in lieu of her thirds of the said lands, as the widow and relict of the said commissary Reynolds; and, in regard one third part of the said lands were retrenched, Sir-Algernon May obtained an order from the commissioners, that the said earl and countess should be paid their arrears of the said annuity up to the time of passing the said act of explanation, amounting to £1130; and that from thenceforth they should abate one third part of the said annuity.

This transaction happened in May 1666; and on the 12th of July following, Dame Dorothy, by a deed-poll, reciting the settlement of April 1662, in pursuance of her power thereby reserved, granted an annuity of £200 per annum to Sir Thomas Hervey, in trust for Sir-Algernon May; but redeemable on payment of £1000 within six months after her decease.

The £1130 arrears decreed to be paid to the earl and countess of Thomond, were paid by Sir-Algernon; and in consideration thereof, and as a recompence for his trouble and expences in obtaining the said several decrees, and passing the said letters patent; Sir-Algernon and his wife, in Michaelmas term 1666, [415] levied fines of the lands in the counties of Waterford and Kilkenny, which, by the commissioners' decree, were granted to him and her, and her heirs; and by deed dated the 25th of August 1668, the uses of those fines were declared to be to the use of Sir-Algernon and his wife for their lives, without impeachment of waste; and after both their deaths, to the intent and purpose that Sir John Mordaunt and Robert Maltwood, esq. should, as trustees for the executors or administrators of Sir-Algernon, for sixty years, receive a rent-charge of £200 per annum; and subject thereto, as to one moiety of the premises, to the use of the said Christopher Calthorpe, and the heirs of his body; and as to the other moiety, to the use of the appellant Reynolds Calthorpe, and the heirs of his body, with divers remainders over. But upon payment to Sir-Algernon, his executors or assigns, of £1000 at one entire payment, the rent-charge was to cease. And a power was reserved to Dame Dorothy, to revoke all the uses of this deed, except those limited to Sir-Algernon and his trustees.

In 1685 Dame Dorothy died; and in 1697 Sir-Algernon May made his will, and thereby devised Ballioquin and other lands in grant to him and his heirs, to his niece the respondent Frances Plowden for life; and after her decease, to the respondent Charles May (his only son by Dame Dorothy) and his heirs; and he gave the rent-charge of £200 per annum, or the £1000 in lieu thereof, to the respondent Mary May, his grand-daughter.

After the making of this will, Sir-Algernon, by deed dated the 3d of March 1698, mortgaged the lands so devised to the respondent Ann Fuller for £200; and by indentures of lease and release, of the 6th and 7th of the said month, in consideration of natural love and affection for his said niece and son, he limited the same lands, subject to the said mortgage, to himself for life; remainder to his same niece Plowden for life; remainder to his said son Charles and his heirs. And, in September 1700, Sir-Algernon sold the wood growing on the lands, granted to him and his wife, and her heirs, to the respondents, Kent, Geraldine, and others, for £1000, but only £200 in part was paid to him.

Christopher Calthorpe having conveyed all his right and interest, for a valuable consideration, to the appellant Batteley; he and the other appellant, in Michaelmas term 1700, exhibited their bill in the court of Chancery in Ireland, against Sir-Algernon May and others, in order to establish the settlement of 1662, and for an account of the

rents and profits of the premises since the death of Dame Dorothy; and to have a perpetual injunction against the purchasers of the woods.

Sir Algernon, by his answer to this bill, denied any notice of the settlement of 1662, and insisted upon his title under the certificates, letters patent, fines, and subsequent settlement; but Sir Algernon dying soon afterwards, the cause was revived against the present respondents, as claiming under him; and on the 8th of November 1706, it came on to be heard: when the Lord Chancellor decreed, that the plaintiffs should have all the lands which [416] had been in patent to Dame Dorothy and her heirs, according to the settlement in 1668; and an account of the profits, over and above the rent-charge of £200 per annum, from Sir Algernon's death, but, that the vendees of the wood should have their bargain; and as to the lands passed in patent to Sir Algernon and his wife, and his heirs, his lordship was pleased to dismiss the bill.

From so much of this decree as related to the dismissal of the bill, and confirmed the sale of the wood, and directed an account of the rents from the death of Sir Algernon only, the plaintiffs appealed, insisting (St. J. Broderick, H. Stevens), that Sir Algernon was only tenant for life, in right of his wife, by the deed of 1662, which was made by her before a contract or treaty of marriage with him; and in order to make a provision for her sons, who were unprovided for by her husband, their father; and that therefore Sir Algernon had no authority to pass the lands in patents, contrary to this deed. That the lands so passed, ought to be liable to the uses of the deed of 1662; since it did not appear that they were passed on any valuable consideration, or even with Dame Dorothy's consent. That the £1130 paid to the Countess of Thomond, for the arrears of her rent-charge, incurred after the death of Commissary Reynolds, was the proper debt of Sir Algernon and his lady, and therefore could be no valuable consideration; and as to Sir Algernon's trouble and charges in passing the patents, he was amply recompensed by the receipts of the rents and profits of the lands for 24 years, during the life of his lady: by the £1000 after her death, by the sale of West-Carberry Lands to Beecher, and by 995 acres given in reprise for deficiencies. That Sir Algernon had no visible estate prior to his marriage, but that he thereby became entitled to Dame Dorothy's jointure, which was upwards of £500 per annum, and about £3000 in money: besides the rents and profits of the estate in question, during her life. That by the deed of 1668, and by his will in 1697, he had pursued the powers of the deeds of 1662 and 1666, and therefore should be presumed to have had notice of both those deeds: consequently, he ought not to have been made dispunishable of waste by the deed of 1668, nor have had power to sell timber, or make any other advantage, contrary to the deed of 1662; and he also ought to account for the profits of the whole estate from the death of his lady, over and above the £1000, and therefore, in these respects, it was hoped the decree would be reversed.

On the other side it was contended (S. Harcourt, S. Cowper), that the decree was just, and ought to be affirmed, for that the deed of 1662 (if duly perfected) was but a voluntary deed: and Dame Dorothy, at the time of making it, had not a legal estate in the lands therein mentioned to be conveyed. That the same was executed, pending the treaty of marriage between her and Sir Algernon, without any notice being given to him thereof before the marriage: nor had he any knowledge of this deed till after he had obtained the decrees, and therefore could only pass patent according to those decrees. That by the deed of 1662, Dame Dorothy was dis-[417]-punishable of waste, and had power to grant a rent-charge of £200 per annum, issuing out of all the premises, and for any number of years whatever: so that by the deed of 1668, Sir Algernon had no more advantage in respect of his being dispunishable of waste, than an enlargement of time after Lady May's death, to cut down the woods, as he might have done in her life-time under the deed of 1662: and as to the £200 per annum limited to his executors, for 60 years after his death; Lady May, even by the deed of 1662, might have granted the same to his executors for any longer term whatsoever. That the purchasers of the woods ought to enjoy their bargains in all events, as they were purchasers for a valuable consideration, without notice of the deed of 1662, and consequently had a good title both in law and equity. That as to the lands of Ballioquin, and other lands granted in reprise, the appellants could have no pretence of title thereto, for those lands might have been given to any deficient person: and Sir Algernon being greatly deficient in the lands of Leek and other lands in the county of Cork, the passing patent of the said

lands in replese for the deficient lands, could be no wrong to the appellants or any other person. Besides, it could not be presumed, that the Commissioners would have given Sir Algernon certificates to pass patent of those repleised lands, if a manifest title in him to the deficient lands, had not appeared to them. That the respondent Ann Fuller was a purchaser for a valuable consideration; she having *bona fide*, lent Sir Algernon £200 upon the security of a mortgage, before any notice was given to her of the appellant's title, and therefore they could have no pretence to defeat her mortgage. That the two acts of Parliament being made for the settlement of Ireland, after a tedious war, it was necessary that the decrees of the commissioners of the court of Claims, and the patents granted thereupon, should be conclusive; and that no trusts should take place, but such as were expressed in the patent, or afterwards declared by the patentee; for otherwise, patents would prove very precarious titles, and liable to be questioned by those who had the original debentures, the assignments of which were in general lost; and by that means the act which was made for the settlement of the kingdom, would turn to its confusion. Inasmuch therefore, as the present suit was an attempt to break in upon certificates and letters patent, granted pursuant to the acts of settlement and explanation; and as so many fines, settlements, and mortgages had been since duly perfected, upon valuable considerations; it was hoped, that after an acquiescence of 34 years from the granting these certificates and patents, and of 16 years after Dame Dorothy's death, at which time the appellant Calthorpe and his brother Christopher, had been several years of full age; such an attempt would not, under these circumstances, receive any countenance.

But, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree of the 8th of November 1706, so far as it related to the dismissal of the appellant's bill in respect of [418] the lands passed to Sir Algernon and Dame Dorothy and his heirs; and as to the woods sold by Sir Algernon, and also as to the appellant's not having an account of the other lands passed to Sir Algernon and Dame Dorothy and her heirs, from the death of Sir Algernon only, should be reversed: And it was further ORDERED and ADJUDGED, that the appellants should have and enjoy all the lands and tenements passed to Sir Algernon May, and the said Dame Dorothy, and his heirs: to hold the same to them, according to their respective interests and claims under the deed of 1662; and that such of the respondents as were liable to pay the same, should be accountable to the appellants for the profits thereof, from the death of the said Dame Dorothy; and also that the several vendees of the woods, should account to the appellants for the woods they had cut down, and taken off the premises, by virtue of the sale made to them by Sir Algernon; and also, that such of the respondents as were liable to pay the same, should account to the appellants for the profits of all the lands, passed to Sir Algernon and Dame Dorothy, and her heirs, from the death of the said Dame Dorothy; subject nevertheless to the payment of the £1000 devised by the last will and testament of Sir Algernon, to the respondent Mary May; in such manner as by the said decree was directed: And it was further ORDERED and ADJUDGED, by and with the consent of the appellants; that the said appellants should discharge and pay off a certain mortgage, charged by Sir Algernon May, on some part of the premises in question for £200 and interest, to the respondent Ann Fuller; she thereupon assigning the said security; and delivering up all the writings relating thereto, in her custody or power; and that the court of Chancery in Ireland should direct the same to be done accordingly.* (Jour. vol. 18, p. 353.)

* This judgment seems to have affected the interest of one Thomas Wise in some part of the premises; for, on the 15th of February 1711, Richard Dalton, as the guardian of Francis Wise, the infant son and heir of Thomas, presented a petition to the House, praying to be relieved against it; and this petition having been referred to a committee, and reported, it was, on the 29th of April 1712, ordered and declared, that the order and judgment of the House on hearing the said appeal, did not extend, nor ought to have been construed to extend, any farther than to conclude or bind the respondents to the said appeal; or any persons who did or might claim under them since the bill in the court of Chancery in Ireland was exhibited; and that therefore, in case the petitioner's father had, under colour of the said order, been turned out of possession of any lands which he was in possession of at the time of exhibiting the said bill, he

being no party to the suit, the petitioner ought to be restored to the possession thereof ; and to the mesne profits received or incurred since the time his father was so put out of possession, in case the petitioner would have been entitled thereto if his father had continued in possession ; and that the court of Chancery in Ireland should order the same to be done accordingly. (Jour. vol. 19, p. 379, 429, 435.)

[419] CASE 3.—ROBERT RYVES FITZ EDWARD,—*Appellant* ; WILLIAM RYVES, and Others,—*Respondents* [13th March 1775].

[A father's voluntary settlement upon his children, otherwise unprovided for by him, may, when neither creditor, purchaser, or any other having claim upon the father's estate is concerned, be carried into execution by a Court of Equity, as answering the father's natural obligation to provide for his children. But this obligation extends not even to the nearest collaterals ; consequently, no such settlement by one brother upon another can be entitled to the aid of a court of Equity.]

[Decree of the Irish Court of Exchequer affirmed.]

[This is a case depending much on its own private circumstances, and little adapted to form a precedent ; nor does it appear to justify the principle as above stated, respecting which see more at length Fonblanque's *Treat. Eq.* lib 1. c. 4. §§ 12, 13.]

William Ryves, esq. being by virtue of a recovery he suffered in 1693, seised in fee of the town and lands of Lyckelly, containing 172 acres, and of 76 acres in the town and lands of Corbally, and 147 acres of profitable, and 50 acres of unprofitable land in Ballylooba and Garrentrumpa, in the county of Limerick, and having issue Robert his eldest, and several other sons : by indenture dated the 24th of June 1698, made between himself and Bridget his wife, and Robert Ryves his eldest son, of the one part ; and Charles Oliver and Abraham Green, of the other part : he conveyed all his estate to Oliver and Green, and their heirs, to the use, as to the particular lands before mentioned, of them and their heirs, until the sum of £473 18s. with interest, should be paid out of the rents and profits thereof to the persons therein named ; and after such payment, to the use of himself for life, *sans* waste ; remainder to Robert Ryves his eldest son for life, *sans* waste ; remainder to his first and every other son successively in tail male, with divers remainders over ; remainder to his own right heirs. And after limiting other estates to his other sons severally in remainder after his death, the deed provided, that Bridget should, after the death of William her husband, receive out of the lands of Lyckelly, an annuity of £40 for her life ; and that Robert Ryves should have power of charging the lands so limited to him, with £500 for daughters portions, if he died without male issue, and of settling £60 a year jointure, on any wife he should marry.

William Ryves died in 1705, whereby Robert his eldest son, became seised for life of the lands so limited to him ; and by lease and release, dated the 1st and 2d of January 1718, between himself of the one part, and Rawlinson Foord of the other part, without taking any notice of the settlement of 1698, but reciting, that William Ryves the father, had by feoffment, dated the 7th of December 1668, conveyed to John Travers and Thomas Coakley and their heirs, the town and lands of Lyckelly, one half of the town [420] and lands of Corbally, and the town and lands of Garrentrumpa, to the use of himself and Sophia his then wife, for their lives and the life of the survivor, for the jointure of Sophia ; and after their deceases, to the heirs male of William with other remainders over ; and also reciting, that William and Sophia were dead, that Robert was the son and heir at law of William by Sophia, that Robert in consideration of £1000 paid to him by Rawlinson Foord, did thereby convey to Foord his heirs and assigns for ever, the last mentioned lands, subject to a proviso of redemption on payment of £1000, with interest at £7 per cent : And Robert Ryves thereby covenanted to levy

one or more fines, and suffer one or more recoveries, in the then next Hilary term, to the use of Foord, his heirs and assigns, for better securing the payment of the £1000, and interest.

Robert Ryves on the 29th of June 1723, (the respondent being then under age,) borrowed of Edward Croker, the respondent's guardian, £198 18s. 2d. of the respondent's money, for securing whereof, he gave bond to Croker, with a warrant of attorney to confess judgment thereon, which was accordingly entered up in the court of Exchequer; and on the 17th of October 1724, he borrowed of Croker £300 more of the respondent's money, for which he gave Croker another bond, with a warrant of attorney to confess judgment thereon, which was likewise entered up in the court of Exchequer; and Croker by indorsements on each of the bonds, declared them and the judgments, to be in trust for the respondent.

Robert Ryves being indebted to several persons in the year 1724, prevailed upon Robert his eldest son, then of age, to join with him in suffering a recovery of the lands settled by the deed of 1698, and soon after the father and son by lease and release, dated the 13th and 15th of February 1724, reciting the recovery, in consideration of £1000, mentioned to be paid to them by Arthur Lord Doneraile, but which was paid to Robert the father only, mortgaged to his Lordship the towns and lands of Lyckelly and Garrentumpa, with a proviso of redemption upon repayment by either father or son, of £1000, and interest, at $6\frac{1}{2}$ per cent. on the 15th of August then next.

Robert Ryves the father, on the 8th of November 1726, borrowed £1000 of Edward Croker, in his own right; for securing whereof, Robert Ryves the father, and Robert his son, together with Kilner Brazier, entered into a bond to Croker, and executed warrants of attorney to confess judgment thereon; and in Michaelmas term 1726, three separate judgments were entered against Robert the father, Robert the son, and Kilner Brazier.

Robert Ryves the father, by thus involving his son, becoming sensible of the power he had over him, prevailed on him to join in a voluntary settlement of his estate; and by lease and release, dated the 16th and 17th of February 1726, between themselves of the one part, and William Ryves, Edward Moore, and Richard Mansell, of the other part, reciting, that Robert Ryves the father, being but tenant for life of the several lands therein mentioned, with remainder to Robert the son, and the heirs male of his body; [421] and having occasion for £1000, had applied to Robert his son, to join with him in securing the same by mortgage on the said lands; that Robert the son had, in compliance with his father's request, joined with him in a fine and recovery for securing the payment of £1000 to Lord Doneraile, but that it was agreed that the lands should only be a security for such £1000, and that the fine and recovery, after payment thereof, should enure to the use of Robert the father for life, remainder to Robert the son for life, remainder to his first and every other son, and the heirs male of their bodies, with several remainders over; subject to a provision for the wife of Robert the father, and portions for his other children: therefore, in execution of that agreement, Robert Ryves the father, and Robert the son, did grant and release the said several lands, and all others wherein Robert Ryves or his said son, had any estate of freehold or inheritance in possession, remainder or expectance, unto the said William Ryves, Edward Moore, and Richard Mansell, and their heirs, to the use of Robert the father, for life *sans waste*: remainder to Robert the son, for life *sans waste*, subject to an annuity or yearly rent of £80 per ann. to Elizabeth his mother, and the charges for younger children therein after expressed; remainder to the first and other sons of Robert the son in tail male successively; remainder to Edward Moore Ryves, second son of Robert the father, for his life, *sans waste*, remainder to the first and other sons of Edward successively in tail male; remainder to Robert Ryves the father, and the heirs male of his body; remainder to his right heirs for ever. This deed then declared, that the recovery should enure to the above uses; and that in farther pursuance of the agreement, the trustees should stand seised of the premises, to the intent, that Elizabeth, the wife of Robert the father, should after his death receive thereout, during her life, a yearly rent of £80, in satisfaction of all dower and jointure; and a power was thereby given to Robert the father, of charging the lands with £800, for the portion or maintenance of his younger child or children by the said Elizabeth: and also a power to Robert the son, and Edward

Moore Ryves, if dying without male issue, to charge the premises respectively with £300 for daughters portions, and to settle £100 jointure on their wives; Robert the father warranting the lands to be free from incumbrances, except the £1000 mortgage to Lord Doneraile, and other debts not exceeding £1500, for payment whereof, Robert the son, and others stood bound with him.

The £1000 debt, for which Robert Ryves the father had procured his son and Brazier to be bound to Croker, remaining unpaid, and one John Ryves being likewise security for him for another debt of £200, Robert the father, to free himself from those and other debts, amounting together to £2500, again exerted his power over his son, prevailing on him to enter into a new agreement, by other indentures of lease and release between them, of the 10th and 11th of March 1728, reciting the former; and farther, that Robert the son, with Kilner Brazier, were [422] security for £1000, that the college lease of Corbally was mortgaged for £300, that John Ryves was security for £200, that the debts of Robert the father amounted in the whole to £2500, that it had been agreed between them, that Robert the son should pay off the said debts of £2500, and save harmless Robert the father, Kilner Brazier, and John Ryves therefrom; that £100 per ann. should be issuing out of the premises to Robert the father, for life; and that in consideration of his son's paying the said £2500, and indemnifying him, and Kilner Brazier and John Ryves, from their said engagements, and to enable the son to pay the £800, to the father's younger child or children, as also the £100 per ann. to the father for his life, Robert the father should convey the said freehold lands to the son, during his the father's life, and assign to him his interest in the college lease, subject to the rents and covenants therein contained: Therefore Robert the father, in consideration of the payment of the said debts of £2500, by Robert the son, and of the yearly rent charge of £100 to Robert the father, during his life, and of the payment of £800 to the younger children of Robert the father, and of the performing all the covenants and agreements in the deed of the 17th of February 1726, did convey all the said freehold lands to Robert the son, and his assigns, during Robert the father's life, without impeachment of waste; subject nevertheless, to the payment of the £1000 mortgage money and the interest due to Lord Doneraile, and subject to the immediate payment of the £800 to the younger child or children of Robert the father, or such of them as he should appoint, and for want of appointment, equally among the daughters of Robert the father, living at his death; and subject to all other the covenants and agreements in the said deed of the 17th of February 1726, and also to the covenants and agreements in this deed; and further reciting a lease from the provost, fellows, and scholars of Trinity college, Dublin, dated the 19th of February 1721, to Robert the father, of the lands of Ballyscadane, containing 24 acres or thereabouts, and one moiety of Corbally containing 72 acres, 3 roods, and 20 perches, or thereabouts, in the barony of Costlea in the county of Limerick, for 21 years from the 1st of November then last; Robert the father, in consideration of 5s. thereby assigned to Robert his son, all his estate, right and interest, in the lands demised by the said lease, for the residue of the said term of 21 years, subject to the rents and covenants of the lease, and to the mortgage of £300 affecting the same: And Robert the son, in consideration of the assignment to him of the said freehold lands, thereby granted £100 per ann. to Robert the father, and his assigns during his life, to be issuing out of those lands by quarterly payments, with power of distress; and Robert the son, for himself, his heirs, executors, administrators, and assigns, covenanted with Robert the father, to pay his said debts, amounting to £2500, and to indemnify him Kilner Brazier and John Ryves therefrom, and also to indemnify him from the rents and covenants in the said lease.

[423] Thus Robert Ryves the son became obliged to pay his father's debts, to the amount of £2500, besides £800 to his father's younger children, which with £422 10s. remaining unpaid of Foord's mortgage, made £3722 10s. in the whole, the yearly interest whereof at £6 10s. per cent. (though part of the debts were at £7 per cent.) amounted to £241 19s. which, added to the annuity of £100 that Robert the son was to pay the father for his life, made £341 19s. a year; whereas the lands, if computed at an average of 12s. an acre, being then a high price for them, would produce but £305 8s. a year, out of which a quit rent of £5 15s. 11d. a year, and £4 a year payable for some glebe land being deducted, the clear rent would be £295 12s. 1d. only, which

was less by £46 6s. 11d. a year, than Robert the father's annuity, and the interest of his debts and incumbrances amounted to.

Robert the father, at the time of executing the deeds of February 1726 and March 1728, was indebted to several other persons by bonds and judgments to a considerable amount, not taken notice of in either of those deeds: the former of which not being registered till the 25th of June 1730, and the latter not till the 22d of April 1730, he contracted farther debts by bonds and judgments, between the executing and registering the deeds, for which Robert his son was a security.

Robert Ryves the father, in pursuance of the power reserved to him by the deed of the 11th of March 1728, charged the premises with £500, part of the £800 therein mentioned, for Catherine Baker his daughter, by Elizabeth his wife, and directed the £500, together with the interest at £7 per cent. to be vested in Kilner Brazier and Edward Moore, in trust for Hugh Baker, and the said Catherine his wife; and by another deed of the 30th of July 1731, he also charged the premises with £300, the remainder of the £800; appointing the £300 to be paid, with the like interest of £7 per cent. to his younger son Edward Moore Ryves, who assigned it to Ambrose Congreve, esq.

Upon Lord Doneraile's death the £1000 mortgage due to him became vested in his son and executor the Honourable Hayes St. Leger; and there being, in the year 1735, £200 for interest due thereon, Mr. St. Leger filed his bill in the court of Chancery to foreclose the mortgage; whereupon Robert Ryves the father, and Robert the son applied to the respondent to advance the £1200 on an assignment of the mortgage, which he agreed to do; and accordingly by lease and release, dated the 16th and 18th of August 1735, Mr. St. Leger, in consideration of £1200, assigned Lord Doneraile's mortgage to Francis Gore, his heirs and assigns, in trust for the respondent.

The mortgage to Foord upon his death became vested in Elinor, his only daughter and heir at law, afterwards the wife of Cornelius Callaghan, who being Foord's administrator, he and his wife, in the year 1736, recovered by ejectment the possession of the mort-[424]-gaged premises; on which Robert Ryves the father, and Robert the son again applied to the respondent to advance £422 10s. then due on that mortgage, which the respondent at their request also agreed to do; and in 1737 took an assignment of the mortgage from Callaghan and his wife in the name of Robert French his trustee. And he afterwards paid John Croker, the executor of Edward Croker his father, the principal and interest due on the several judgments recovered by him against Robert Ryves the father, Robert the son, and Kilner Brazier; in consequence of which, the judgments were assigned to Thomas Mansell in trust for the respondent.

Robert Ryves the son being greatly involved by his engagements for his father, and the debts affecting the estate bearing a very high interest, of which there was a large arrear unpaid: and these with the growing interest, together with the £100 a-year payable to his father for life, and the £80 a-year to his mother, should she survive the father, and the £800 payable to the father's younger children, being more than the estate would bear, whereof Robert the father and Robert the son being fully sensible, they applied to and frequently solicited the respondent to become a purchaser of the estate; whereto he the more readily agreed, from the considerable sums due to him; and accordingly, Robert the son and the respondent entered into articles, dated the 3d of June 1738, reciting that the respondent had two mortgages assigned to him for several considerable sums on the lands of Lyckelly, Corbally, and Garrentrumpa, and had likewise a mortgage of the college lease of the lands of Corbally, which had been perfected to him in trust for Robert Ryves the son; that Alice Craven had obtained several judgments against Robert the son and his father, for large sums of money, and that John Croker had also obtained two judgments against them for considerable sums; that Robert the son had agreed to convey the fee simple and inheritance not only of the lands of Lyckelly, Corbally, and Garrentrumpa, but likewise the lands of Ballinlooba, and to assign over to the respondent the said college lease, in order to discharge the said several debts; and that the remainder of the purchase money, after discharging those debts, should be paid to Robert the son: he therefore covenanted with the respondent, before the 1st of July then next, to execute proper and effectual deeds for conveying the fee simple and inheritance of the lands of Lyckelly, Corbally, Garrentrumpa, and Ballinlooba to the respondent, his heirs and assigns for ever; and likewise

for assigning to the respondent, his the said Robert the son's right and interest in the said lease; in consideration whereof, the respondent covenanted to pay the sum of £7000 in discharge of the several debts in the agreement mentioned, which should affect the lands, and to pay the remainder to Robert the son. But the respondent being afterwards advised to purchase under a decree of a court of equity, he on the 11th of February 1740, filed his bill in the court of Exchequer in Ire-[425]-land, against Robert Ryves the father, and Robert the son, for a foreclosure, and that the lands might be sold for payment of what was due to him.

Edward Moore Ryves, the youngest son of Robert the father, and next remainderman by the deed of February 1726, to Robert the son and his male issue, died in April 1741, leaving the appellant his only son then an infant.

The respondent, at Robert Ryves the son's request, paid £763 9s. 3d. remaining due to Hugh Baker, in right of Catherine his wife, under Robert the father's appointment; whereupon Baker, with Brazier and Moore the trustees, and Robert Ryves the father, and Robert the son, by indenture dated the 3d of October 1743, assigned all their right and interest therein to Robert French, in trust for the respondent, to whom Robert the son proposed soon after to assign his right and interest in the college lease, which had been renewed in the respondent's name, the former leases as to part of the lands demised belonging to him; and accordingly, on the 22d of February 1743, Robert the son, in consideration of £195, released all his right therein to the respondent.

The respondent apprehending his suit for sale of the estate would be expensive, and attended with great delay, declined proceeding therein; but desirous to ascertain what was due to him for principal and interest on his said several securities, he on the 28th of February 1743, filed an amended bill, which Robert the son answered, setting forth the particular sums due to the respondent, and admitting that the same with the interest thereon, including the costs of the judgments, amounted to £5448 15s. 1d. In consequence of which, the respondent proceeded to carry into execution the agreement of the 3d of June 1738, for the purchase of the lands; but Robert Ryves the father insisting on being paid therewith his life annuity of £100, and Elizabeth his wife claiming her life annuity of £80 if she survived him, Robert the son was willing that the lands should be conveyed to the respondent, subject to those annuities to his father and mother; and therefore agreed with the respondent to value the annuities at £950, and to deduct that sum out of the £7000 purchase money, whereby it was reduced to £6050, and accordingly, by lease and release, dated the 28th of February and 1st of March 1743, made between Robert Ryves the son and Richard Hull, as trustee for the respondent, Robert the son, in consideration of £6050, conveyed to Richard Hull, his heirs and assigns for ever, all the town and lands of Lyckelly, and the other freehold lands, and all his estate, right and interest therein; thereby covenanting, that the lands were free from all incumbrances, except the mortgages, judgments, and charges in the schedule thereto annexed mentioned: and that it should be lawful for Richard Hull to apply so much of the consideration money of £6050 in discharge of the mortgages, judgments, and charges in the schedule, as would be sufficient to discharge them; and that the remainder only of such purchase money should be paid to Robert Ryves the son; it being [426] thereby declared to be the intent of the parties, that the premises should be and remain to Richard Hull, his heirs and assigns, free of all incumbrances, save as above; and that it should be lawful for Hull, his heirs and assigns, to take assignments of the said several mortgages, judgments, and charges, as the same should be paid off, and to keep them respectively on foot for the protection of his purchase.

The respondent not only paid the debts mentioned in the schedule, amounting to £5752 11s. 9d. but farther paid, in discharge of several judgments affecting the premises, and to the payment whereof Robert the father and Robert the son were both liable, several sums amounting to £1926 13s. 3d. which being added to the £5752 11s. 9d. the amount of the schedule debts, brought up the whole paid by the respondent to £7679 5s. which was £679 5s. more than the purchase money.

Robert Ryves the father died in 1751, and Robert the son in 1753, without issue male, leaving Elizabeth his widow, and three daughters.

Although the respondent had, at Robert the son's death, been in possession of the lands so purchased, from the time of the sale and conveyance to him, of the 1st of March 1743, yet Robert the son's widow and daughters on the 3d of February 1756,

near three years after his death, filed a bill in the court of Exchequer in Ireland, against the respondent, to which the appellant was also made a defendant, charging that Robert the son, some time before his death, by deeds dated the 18th and 19th of December 1753, had, pursuant to the power reserved to him by the release of February 1726, charged the premises with an annuity of £30 to his widow for life, and with £300 to his daughters; that upon his death without issue male, the lands became vested in the appellant; and praying, that the £30 a year and £300 might be decreed to be paid to them.

On the 22d of May 1756, the respondent put in his answer, thereby insisting that the deeds of February 1726 were voluntary and void as against him, who was a creditor and a purchaser for a valuable consideration; and that the power under which the then plaintiffs claimed the £30 a year, and £300 being created by those voluntary deeds, ought not to be enforced against him.

The appellant at the commencement of this suit was near twenty years old; and then was, and had been for several years before, an articled clerk to Thomas Baker, the attorney employed by the widow and daughters of Robert the son, who conducted and managed the suit against the respondent, whereby the appellant saw, transcribed, and read the bill, answers, and all the proceedings in the cause; in the course of which the respondent, in pursuance of an order made in Easter term 1757, deposited with the proper officer of the court, the deeds of February 1726, and March 1728, and the appellant read them, and obtained copies thereof.

The appellant on the 10th of July 1757, attained his age of 21; and on the 12th of October following, of his own accord, [427] and unexpected by the respondent, he came to the respondent's house, in company with Mr. Augier, a friend of his, and then informed the respondent, that he, the appellant, had been pressed to commence a suit against the respondent, for the estate purchased by him from his uncle Robert Ryves; which the appellant refusing to do, he was then solicited to assist Robert's widow and daughters, in the prosecution of their demands; which having also declined, he was made a defendant to the suit brought by them against the respondent, and at the same time the appellant declared over and over, that he was so well satisfied of the respondent's being a fair and honest purchaser, that if any release or confirmation from him could be required, he would at any time execute it.

About a month after this interview the respondent arrived in Dublin, when the appellant again repeated to him his desire of doing whatever counsel should advise, for the confirmation of his title; whereto the respondent replied, that he would give directions for the purpose; adding, that as the appellant appeared so friendly, and had refused to join the widow Ryves and her daughters against him, and was therefore made a party to their suit, the respondent would not only give him £100, but also indemnify him from all costs that he might be put to on account of that suit; and in consequence of the appellant's proposal, the respondent consulted in what manner his intention could be carried into execution; and being advised that the appellant might by deed, fine, and recovery, confirm the title; the respondent communicated the instructions he had received to the appellant, who approved the mode, and desired the respondent's counsel would prepare the deed accordingly; a draft of which being afterwards delivered to the appellant, he, after keeping it several days, returned it with his approbation, desiring it might be engrossed; and this being done, the appellant, after reading the ingrossment, and examining it with the draft, on the 21st of November 1757, executed the deed; whereby, after reciting the bill filed by the widow Ryves and her daughters against the appellant and respondent, in which was set forth the several above mentioned settlements; and reciting the respondent's answer to that bill, and also that the appellant having considered these matters, in order to prevent future suits or contests relative to the lands, on behalf of him or his issue, or any claiming under him or them, and in order to be indemnified from the costs attending the suits then instituted; had agreed, in consideration of £100 paid to him by the respondent, to release, confirm, and convey to the respondent and his heirs, all his the appellant's estate, right and interest in the premises: The appellant therefore, in consideration of £100 paid him by the respondent, released, confirmed, and conveyed to the respondent, his heirs and assigns, all the said freehold lands, and all his estate, right and interest therein; and

covenanted to levy a fine and suffer a recovery of the premises, for the more effectual extinguishing and barring, to the respondent and his heirs, all the appellant's right or claim thereto, by force of any [428] of the above settlements, or in any other manner whatsoever; the respondent thereby covenanting to indemnify the appellant from all claims and demands of Elizabeth the widow and her daughters against him, and from all costs and expences of suit which he had been or might be put to on account thereof. And accordingly, in Michaelmas term 1757, the appellant, in pursuance of the said covenant, duly levied a fine: and in Hilary term following, which was near three months after the execution of this deed, he suffered a recovery of all the lands; both which were declared to enure, to the use of the respondent and his heirs.

Besides these deliberate acts, the appellant, on the 27th of January 1758, sent a letter from Clonmore, to Mr. Franks, the respondent's attorney in Dublin, inclosing a copy of a subpoena he had been served with at the suit of the widow Ryves, and desiring Mr. Franks to do what was proper therein: who immediately entered an appearance, and prepared a draft of an answer for the appellant; and in March following, the respondent himself received a letter from the appellant, telling him, that he had wrote to Mr. Franks for his answer to Mrs. Ryves's bill, together with a commission: and that he had sent for some things which the respondent had kept for him; concluding that he saw the respondent's sons at Clonmell, who were well, and that he would have waited on him in person, but was obliged to be at the assizes of Kilkenny.

But notwithstanding all this, the appellant thought fit, on the 1st of November 1758, to file a bill against the respondent, and William Ryves and Richard Mansell, the surviving trustees in the deed of February 1726, pretending, that the respondent, by his civility and kindness to him, and by false representations, knowing he had no title to the lands in question, had prevailed on the appellant to execute the deed of confirmation, and levy the fine, and suffer the recovery to the respondent; and praying, that the respondent might account for the rents and profits of the premises, since the death of Robert Ryves the younger: that the fine, recovery, and deed executed by him to the respondent, might be set aside: and that the respondent might reconvey the premises to the appellant, and deliver up to him the possession thereof.

To this bill the respondent put in a plea and answer, pleading in bar to the relief thereby sought, the several matters and deeds above set forth; and insisting, that the deeds of February 1726 and March 1728 were voluntary and void against creditors and purchasers; that the creditors had no notice of them till they were registered in April and June 1730; that the respondent was a purchaser of the premises for a valuable consideration, and that the appellant being fully apprised of the above several facts and transactions, and of the respondent's title to the premises, executed the deed of confirmation thereof to the respondent: which he, by his answer said was done by the appellant, in consequence of his own repeated offers to the respondent for that purpose, and without any means used by the respondent to induce him so to do.

[429] This plea was argued on the 8th of May 1762, when it was ordered, that the benefit thereof should be reserved to the hearing of the cause, and the appellant was to be at liberty to accept the respondent's answer.

Pending this suit, the cause instituted by Elizabeth Ryves the widow and her daughters, was heard on the 23d, 27th, and 28th of April 1763, when the court ordered the bill to be dismissed, as against the respondent.

The appellant's cause being at issue, witnesses were examined on both sides; and the trustees Mansell and Ryves dying, it was revived against Sir William Evan Morres, bart. and Lady Maria Juliana his wife, and Thomas Croker and Ann his wife; Lady Morres and Ann Croker being the heirs at law of Ryves the surviving trustee; and coming on to hearing, the court, on the 2d of March 1772, decreed, that the respondent's plea should be allowed, and the appellant's bill dismissed with costs.

From this decree the present appeal was brought; and on behalf of the appellant it was contended (A. Wedderburn, J. Skynner, W. Selwyn), that the true way of construing the deeds of 1726 and 1728, was to connect them together, they being both relative to the same matter, and executed by the same parties. These deeds contained an agreement for a family settlement, by which every branch of the family was pro-

vided for ; which was immediately carried into execution by a transmutation of possession, and which possession continued for above 14 years under them. In reasonable family settlements, the precise consideration moving the parties, is not nicely examined into in courts of justice. In the present case, there were mutual considerations ; and Robert the father, under both deeds taken together, was clearly to be considered as a purchaser, for a valuable consideration, of the remainders to his second son Edward, the appellant's father, and his issue. It could not with any degree of truth be said, that these deeds were voluntary with respect to Robert the son : inasmuch as he thereby obtained the immediate actual possession of the family estate in his father's lifetime, and a power of charging it with a jointure for his wife, and with portions for his daughters. By virtue of the deed of 1728, he acquired also the college lease of the Corbally estate, to which he had not any title before. But the respondent insists, that Robert the son made an absolute conveyance to him of the estate in question in 1743, pursuant to certain articles of agreement entered into in 1738 ; and that the purchase money was applied by him, in payment of debts due on mortgage and judgment. It did not appear that any account of such debts was ever stated and settled, antecedent to the conveyance in 1743. Had the whole transaction been fair and honest, there could have been little occasion for keeping the agreement of 1738 a secret. It answered no purpose but that of secrecy, that the respondent should take the conveyance afterwards in the name of Hull, and not in his own name, but how secrecy became necessary, if the transaction was such as would bear examining into, still remained [430] to be explained. The truth was, that the conveyance in 1743, could have no other operation or construction than that of a mortgage for securing the sums really advanced by the respondent. It is a general rule, once a mortgage and always a mortgage ; and the respondent could be considered in no other light, than that of a mortgagee in possession, and as a trustee for the judgment creditors : no money having been proved to have been paid by him for the assignments of the judgments. And the manner in which the respondent himself had treated his own case, shewed this sufficiently. In the character of mortgagee of the estate, he filed a bill of foreclosure in 1740. He amended this bill, by making considerable additions to it in 1743, on the very day upon which the conveyance, now set up as an absolute one, was executed. Had it really been a *bona fide* purchase, and an absolute conveyance for a valuable consideration, where was the necessity or occasion of commencing any suit to foreclose ?

But further : The respondent having lain in wait till the appellant attained 21, soon afterwards began to traffic with him, for a confirmation of the respondent's title to this estate ; and by fraud and misrepresentation, the appellant was, in a few months after he came of age, drawn in to execute the deed of November 1757, having no counsel, attorney, or friend then present ; for as to Peter Augier, he was a mere instrument and creature of the respondent's.—Young heirs are peculiarly under the care and protection of courts of equity ; and nothing is more certain than that equity will grant relief against improvident bargains and agreements, entered into by them even when of age, as in Lord Southampton's case (3 Peere Williams, 129, under the title of *Osmond v. Fitzroy*). It is a principle in equity equally clear, that if the party releasing or conveying is ignorant of his right, or if his right is concealed from him by the person to whom the release is made, these are good reasons for setting aside the release (1 Peere Williams, 727). So if the deed contains false suggestions, it is a constant rule in equity to set aside such deed. All these circumstances would be found to concur in the present case. At the time of executing the deed of 1757, the appellant was ignorant of the nature of his title ; he was not informed by the respondent of his having been a mortgagee, or of having filed bills of foreclosure in 1740 and 1743, nor of the value given by him. The appellant was also ignorant of the real value of the estate in 1757, which then produced £600 per ann. And further, he was deceived by the false recitals in the deed ; such as, " That the deeds of 1726 and 1728 were voluntary and fraudulent ; that the respondent was a purchaser for a full and valuable consideration ; and that he had paid the purchase money according to the deed of 1743." In a case so pregnant with fraud and imposition, the deed of November 1757, considering the manner in which it was obtained, and for what consideration, and how made up, did not give any additional strength to the respondent's case. And this deed being improperly obtained, it would follow of course, that the fine

and recovery suffered in consequence thereof, must be set aside. And [431] upon the whole it was apprehended, that the acts done by the appellant in 1757, could not stand in his way, if he would otherwise be entitled to relief; that the whole transaction was iniquitous from beginning to end; and that the original contract being fraudulent, no subsequent act could make it good.

On the other side it was argued (J. Dunning, A. Forrester), that Robert the son was, under the original settlement of 1698, tenant in tail; and by the recovery in 1724, which destroyed the uses of that settlement, but without any deed declaring new ones, he became seised of the fee simple and inheritance, subject only to the life-estate of his father. Thus circumstanced, he joined with his father that same year, in the £1000 mortgage to Lord Doneraile; and in November 1726, joined him again, together with Brazier, in borrowing £1000 of Croker, for which judgments were entered against all three; then came the deed of February 1726, which was evidently calculated for deceiving creditors; for it concealed several other bond and judgment debts of Robert the father, besides those of £1500 therein mentioned; and this deed, after it was executed, lay unregistered till June 1730, a space of between three and four years, during which Robert the father contracted several other debts by bonds and judgments, in which Robert the son joined as his security; another flagrant instance of the intended fraud. Then again the several limitations of the deed itself to Robert the son and others, were all evidently voluntary: Robert the eldest son, out of whose inheritance all the uses must arise, was, without the least consideration, turned into a bare tenant for life; and not only so, but made to provide for all his brothers, born, or to be born. Such limitations were manifestly fraudulent and void against the respondent, both as a creditor and as a purchaser for a full and adequate consideration. That the deed of March 1728, though little applicable to the appellant's claim, stood however on no firmer ground than that of February 1726; and was but an increase of Robert the father's imposition upon his son. For the surrender of his life estate, and the assignment of a college lease, then mortgaged for its full value, he got from his son an annuity for life of £100 and an undertaking to discharge his debts, to the amount of £2500, besides a provision of £800 for his younger children, part whereof was actually paid. Thus was the son, through his filial piety, placed in a much worse situation, by this deed of March 1728, than he was before; and thus would this deed afford the respondent an additional support as a creditor, to the extent of his advance; but in fact, this last deed being equally voluntary with the former, was equally fraudulent and void as against the respondent. A father's voluntary settlement upon his children, otherwise unprovided for by him, may, when neither creditor, purchaser, or other having claim upon the father's estate is concerned, be carried into execution by a court of equity, as answering the father's natural obligation to provide for his descendants. But this obligation extends not even to the nearest collaterals: consequently no such [432] settlement by one brother upon another, can be entitled to the aid of a court of equity; especially, such as that now in question, where among the several impositions put upon Robert the son, by the deeds of 1726 and 1728, the power reserved to him of charging the estate with £300 was restrained to his daughters only, and upon the event too of his having no male issue; thereby excluding all his younger children if he had a son; when the father was empowered at all events to charge it with £800 for his younger children absolutely. But whatever might be the sense of a court of equity, as to enforcing the execution of such an agreement, in a question arising among the family themselves; it clearly could not interpose against the respondent, who had both law and equity on his side; but must leave the appellant to sue at law for his right, if he had any. If however the respondent's title under the purchase from Robert the son, could admit of a doubt, the appellant had, by repeated solemn acts of his own, effectually removed it. By his deed of November 1757, he for £100 confirmed the respondent's title, and conveyed to him all his right and interest in the lands. In Michaelmas 1757, he levied a fine for the like purpose; and in Hilary term following, more than two months after, he suffered a recovery for rendering the respondent's title more perfect. All these acts were done freely and of his own accord, without even a pretence of the least artifice or seduction used by the respondent to induce him thereto, and done at a time when he was fully apprised of his supposed right to the lands in question; and therefore afforded good ground for the court's dismissing the bill with costs.

Accordingly after hearing counsel on this appeal, it was ORDERED and ADJUDGED that the issue should be dismissed; and the decree therein complained of affirmed. (MS. Jour. *sub anno* 1774-5, p. 335.)

[433] WILLS.

CASE 1.—JOHN HUBAND, *alias* POLLEN, an Infant, by Edward Pollen, his Father and next Friend; and the said EDWARD POLLEN, as one of the Executors of Sir John Huband, Bart. deceased,—*Appellants*; SIR JOHN HUBAND, Bart. the only Son and Heir of Sir John Huband, Bart. deceased; and THOMAS HUTTON and JOHN LIMBREY, Esqs. the two other Executors of the said Sir John Huband,—*Respondents* [15th May 1713].

[Mews' Dig. x. 1401.]

[J. H. (having settled his real estate in trust for himself for life, and afterwards to such uses as he might by deed or will appoint, and in default of appointment to the sole use of the heirs of his body,) by his will, noticing the settlement, after giving several legacies, devised all the rest of his real and personal estate to J. P. (who was not his heir,) and the heirs male of his body, etc. By lease and release, bearing date subsequent to the will, J. H. conveyed the real estate to a trustee, to the use of himself for life, and afterwards to such uses as he should by deed or will appoint, with power to the trustee to raise money for payment of debts and legacies; and for default of appointment, in trust for J. H. his heirs and assigns. J. H. died without altering the will, or making any other appointment as to the real estate. Held, that this latter conveyance was a revocation of the will, and let in the heir at law of J. H. under the trusts of that conveyance.]

[Decree of Lord Keeper Harcourt affirmed except as to costs. See *post*, cases 9, 15.] [7 Bro. P. C. 505, 593.]

1 Eq. Ca. Ab. 412. ca. 12. Viner, vol. 6. p. 365. ca. 10; vol. 8. p. 147. ca. 24.

Abrided by the name of Pollen v. Huband.

By indentures of lease and release, dated the 18th and 19th of July 1681, Sir John Huband the father, conveyed the manor of Ipsley and other lands, to Palmer, Walsh, and Littleton, and their heirs, in trust, that he might take the rents and profits during his life; and make such estate, grants, and conveyances, of all or any part of the premises, as he, by any writing under his hand and seal, or by his last will in writing, should direct and appoint; and as to such part of the premises as should not be otherwise appointed, in trust, and for the sole use of the heirs of the body of the said Sir John; and for default of such issue, to the use of his brother Tevery Huband, and the heirs male of his body; remainder to the use of Sir John's right heirs for ever.

[434] This settlement being intended as a provision for Sir John's only son (the respondent) and for the better enabling Sir John, the father, to raise portions for his daughters, continued unaltered, and without any appointment for several years; but, upon the marriage of the appellant Edward with Jane, the eldest daughter of Sir John, part of the premises were conveyed to trustees, by way of mortgage, for securing the payment of £5000, which, according to their marriage articles, was to be laid out in the purchase of lands, and in which lands the appellant Edward was to have an estate or interest for his life only.

On the 12th of February 1708, Sir John, the father, made his will, all of his own hand-writing; and thereby, after taking notice of the settlement, and that his son had forfeited his favour, by marrying against his consent, he gave him an annuity of £100 per annum for his life; and, after charging his estate with the payment of his debts and legacies, the testator devised all his real and personal estate to his grandson, the

appellant John, and the heirs male of his body, on condition that he took upon him the name of Huband; with divers remainders over, and the ultimate remainder in fee to his own right heirs; and he appointed the appellant Edward, together with the respondents Hutton and Limbrey, executors of his said will; but the testator did not publish his will on the day it bore date, or for some months afterwards.

By other indentures of lease and release, dated the 31st of August and 1st of September 1709; Sir John, the father, together with Palmer, the surviving trustee under the former settlement, conveyed the premises to the respondent Hutton, his heirs and assigns, to the use of Sir John himself, for his life, without impeachment of waste; and after his decease upon trust, that Mr. Hutton, his heirs and assigns, should make such grants and leases of all or any part of the premises, as Sir John by any writing, or by his last will and testament in writing, or any codicil thereto should appoint; and also, should raise such sums of money as should be sufficient to pay all his debts, funeral expences, and legacies; and afterwards, that Mr. Hutton should stand seised of the premises, which should not otherwise be appointed, in trust for Sir John, his heirs and assigns, for ever; but a power was reserved to Sir John during his life, by any deed duly executed, or by his last will in writing, to revoke, alter, or change any of the uses before declared, and to limit and appoint such other uses as to him should seem meet.

In February 1710, Sir John Huband died, but it does not appear, at what particular time, he published his will; it having however been duly executed and published, was proved by the appellant Edward alone; who together with the other appellant his son, soon after exhibited their bill in Chancery against the respondents, in order to have the will established and the trusts thereof executed; upon a suggestion, that it was published on the 6th October 1709, and thereby operated as an appointment of the [435] premises conveyed to Hutton. The respondent Sir John also exhibited his cross bill against the appellants and others, insisting on his title to his father's real estate as heir at law, and to his personal estate as next of kin; and therefore praying an account of those estates that he might be at liberty to redeem the £5000 mortgage.

Both these causes were heard before the Lord Keeper Harcourt on the 5th March 1711; when his Lordship was pleased to direct a trial at law upon the following issue, viz. "Whether the will of Sir John Huband dated the 14th of February 1708, was "published, or republished, after the 1st of September 1709?"

On the 15th July 1712, this issue was tried at Guildhall, London, before the Lord Chief Justice Trevor, when the jury found a verdict that the will was published on the 6th of October 1709: But this verdict being contrary to the opinion of the court, the respondent Sir John applied for a new trial; and thereupon a new trial was directed upon the same issue, at the bar of the court of Common Pleas, before a special jury of the county of Middlesex; and on the 21st November 1712, this second trial was had accordingly; when the jury, to the satisfaction of the court, found a verdict that the will was published before the execution of the deed to Hutton.

Soon afterwards, both causes were set down to be heard on the equity reserved; but, upon the appellants applying by petition to enlarge the time for hearing, and that they might, at the hearing, be at liberty to move for a new trial, the court were pleased to enlarge the time, but refused the liberty of moving for a new trial.

On the 6th of December 1712, the causes were finally heard, when the respondents' counsel insisting upon the last verdict, and that the deed to Hutton being subsequent to the will, was a revocation thereof, the court thought proper to dismiss the original bill, with costs; and in the gross cause it was ordered, that the personal estate of Sir John the father, should be first applied in payment of his debts, to exonerate his real estate; and that Hutton, the trustee, should join with the plaintiff Sir John in a sale of so much of the real estate as would be sufficient to satisfy the remaining debts and the trusts in the deed to Hutton; and afterwards convey the residue to the plaintiff and his heirs: And it was further ordered, that the appellant Edward should account before a Master for what had come to his hands of Sir John Huband's real and personal estate; and the costs of the original cause should be taxed by the Master, and go in part satisfaction of the £5000 mortgage; and, upon payment of what should afterwards remain due on that mortgage, the defendant Edward Pollen was to convey the mortgaged premises to the plaintiff and his heirs.

From the decree in both these causes, and also from the order made on the application for a new trial, the present appeal was brought; and, on behalf of the appellant it is said (S. Cowper, N. Lechmere), that the dis[436]-mission of the original bill was founded on supposition that the conveyance to Hutton was made after the publication of the will; whereas that the fact was not, nor could be fully ascertained to the court, because there was verdict against verdict concerning it. That though the deed should be admitted to be made after the publication of the will, yet it was apprehended that the will was not thereby revoked; or if revoked as a will, yet that it ought to enure and operate as an appointment under the power contained in that deed. That the appellant's bill was not only dismissed, but Hutton was decreed to convey to the respondent Sir John, without giving the infant appellant a day to shew cause against the decree, after he should come of age. And, with respect to the appellant Edward, the decree was particularly erroneous in obliging him to pay costs, whereas he ought to have had his costs; because the testator by his own act, had made it a duty incumbent on him, to file a bill for the establishment of his will; that his neglect in doing so, might have been construed into a breach of trust: and that the whole doubt and difficulty which occasioned the suit, arose from the testator's own act and management. And the appellant Edward was further aggrieved, inasmuch as those costs were ordered to go towards satisfaction of the £5000 mortgage; whereas, that mortgage was made to trustees, and the money thereby secured was to be laid out in the purchase of lands, wherein he was to have an interest for his life only; so that it was not either in his power to convey to the respondent Sir John, or to compel the trustees so to do.

On the other side it was argued (T. Powys, J. Jekyll), that the verdict given at the first trial ought, according to the evidence, to have been given for the respondent, and not being so given, was much to the dissatisfaction of the judge who tried the cause: that therefore another trial was had at the bar of the court of Common Pleas, and the verdict then given was agreeable to evidence, and the opinion of the whole court; the consequence whereof was, that the deed of the 1st September 1709, was an express revocation of the will, and also of all the uses and trusts mentioned in the original settlement of July 1681. That the will being now out of the case, the infant appellant had no pretence of title to the lands decreed, and therefore ought not to have any day to shew cause; and as to the other appellant, his entering upon any part of the estate not mortgaged to him, was illegal and unjust: and, in so doing, he acted as a wrong doer, and not in the execution of any trust, and therefore ought to pay costs in such manner as the same were decreed.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED that the decree should be so far reversed, as it ordered payment of costs in law and equity, upon the dismission of the appellant's bill; and it was further ordered, that the said decree as to all the other parts thereof, should be affirmed. (Jour. vol. 19, p. 539.)

[437] CASE 2. —JOHN KERRICH, Doctor of Physic,—Appellant; BRIDGET BRANSBY, and Others,—Respondents [12th March 1727].

[Mews' Dig. xv. 630, 643. Discussed in *Bojee v. Rossborough*, 1854, 23 L. J. Ch. 305.]

[A will cannot be set aside in equity for fraud or imposition; because if it is of personal estate it may be set aside in the ecclesiastical court; and if of real estate, it may be set aside at law on the issue *devisavit vel non*.]

[Decree of the Court of Chancery reversed.]

[See *Webb v. Claverden*, 2 Atk. 424. *Bates v. Graves*, 2 Ves. jun. 287. Fonblanque, *Treat. Eq.* lib. 1. c. 2. §. 3. in n. and Gwillim's edit. of *Bacon's Abridgement*, tit. Wills (G.), 2. as also *post*, ca. 6.] [7 Bro. P. C. 469.]

Viner, vol. 8. p. 169. ca. 14. 2 Eq. Ab. 421. ca. 4. (very short notes).

Robert Bransby, the only son of Thomas Bransby, by Sarah his first wife, being seised in fee of the reversion of several freehold lands, expectant on the death of his

father who was tenant thereof by the curtesy ; and being also seised of some copyhold lands, and of the reversion of some other lands, in all about £65 per annum, and being of sound mind and understanding, duly made his will, dated the 18th of March 1715, and thereby directed, that he should be buried at Harleston in Norfolk ; and as to such worldly estate as it had pleased God to bless him with, he thereby devised and bequeathed the same as follows : viz. To Mrs. Ann Hartshorn twenty guineas to buy her mourning ; and to the appellant by the name of his loving kinsman John Kerrich, all other his personal estate whatsoever and wheresoever : And as to the real estate which he should die possessed of, interested in, or any way entitled unto, either in present, reversion, or expectancy, he devised and bequeathed the same and every part thereof to the appellant, his heirs and assigns for ever ; upon special trust and confidence that he did, within six months after the testator's decease, pay off and discharge all his just debts, and the legacy thereby given. And he made the appellant executor.

This will was drawn pursuant to the testator's own directions, and was twice read over to him before it was executed : and the testator approving thereof, deliberately executed the same, and declared himself very well satisfied therewith, and then delivered it to the appellant : who soon after gave it to the said Mrs. Ann Hartshorn to be kept by her, (the testator and the appellant then lodging at her mother's house in Leicester,) and the same was accordingly so kept till the testator's death, which happened on the 26th of that month.

The appellant, in compliance with the testator's request, was at the expence of carrying his corpse from Leicester, to be buried near that of his mother at Harleston ; and then proved the will in the Prerogative Court of Canterbury, in common form ; and afterwards, upon a contest in that court with Thomas Bransby the testator's father, touching the validity thereof, a sentence was [438] pronounced in the appellant's favour ; and he possessed some part of the testator's personal estate, and paid several of his debts, and intended to have paid them all, and likewise the said legacy.

But in Trinity term 1716, the said Thomas Bransby exhibited his bill in Chancery against the appellant and the respondents Ann Kerrich and Giles Bladwell and Elizabeth his wife ; (the said Ann and Elizabeth being the aunts and coheirs of the testator) thereby *inter alia*, setting forth, that the testator made his will in Ireland, dated the 30th of September 1714, and thereby gave his real and personal estates to the plaintiff his father, whom he appointed sole executor of such will ; that he also made another will at Leicester, dated the 30th of January 1715, prior to that under which the appellant claimed, whereby he likewise gave his real and personal estate to his father, and appointed him sole executor thereof ; of which last will the plaintiff hoped to enjoy the benefit, his son intending it as a satisfaction for the great charges and expences he had sustained in his maintenance and education ; but that the appellant and the other defendants pretended, that the said Robert Bransby made the other will of the 18th of March 1715, which the plaintiff charged was gained by fraud and imposition, and that therefore the same ought to be set aside and cancelled.

The appellant by his answer to this bill, denied that the will of the 18th of March 1715, was gained by any fraud, imposition, or undue means ; and likewise denied the several instances thereof suggested and surmised in the bill ; and insisted on the probate of the will in the Ecclesiastical Court, whereby the personal estate was well disposed of, and that the will was also sufficient to devise the land to the appellant.

The other defendants, the heirs at law, having put in their answers, and issue being joined, and many witnesses on both sides examined, the cause came on to be heard on the 29th of October 1718, before the Lord Chancellor Macclesfield ; when it was pretended by the plaintiff, and endeavoured to be proved, that the testator by his last will intended no other alteration of that of the 30th of January, than that his debts should be paid, and Mrs. Hartshorn have twenty guineas ; that when Mr. Caldecott, who drew the will of the 18th of March, read it to the testator, he read it as if the real estate had been thereby devised to the plaintiff ; and that the appellant assured the testator, that the said will should be burnt as soon as an account came of the plaintiff's having performed a promise of paying £40 in London, to be remitted to Leicester, and applied in satisfaction of the testator's debts.

These facts were chiefly supported by the deposition of the said Mrs. Hartshorn, but were flatly denied by the appellant's answer ; and it appeared by the deposition

of several persons, that the testator himself told Mr. Caldecott, that he had a mind to alter his will, and give what he had to the appellant; that thereupon Mr. Caldecott, in the testator's presence, drew the will of the 18th [439] of March, and read it twice over distinctly to him, in the very words therein contained and no other; that the testator approved of, and executed it. Mr. Caldecott, in his deposition on the part of the plaintiff, swore, that the instructions given by the testator to draw the will, were without any such condition as pretended, and that the same was executed by him without any condition; and Mr. Brent, another of the witnesses to the will, in his deposition for the plaintiff swore, that when the will was executed there was not any proposal or agreement made by the testator, or any other person, for the burning or making the same void, either on payment of money, or on any other account. It was therefore insisted, that the evidence given for the plaintiff was fully answered by the evidence on the other side, but if there was any doubt, it ought to be tried at law, as other matters of this kind constantly are: the frauds alleged by the plaintiff being such, as made it appear not to be the testator's will.

The cause being adjourned from the 29th of October to the 14th of November 1718, the Lord Chancellor then made his decree; and was thereby pleased to declare, that there appeared to be great fraud and imposition used in obtaining the will of the 18th of March 1715, and that the appellant ought not to take any benefit thereby; and therefore decreed the appellant and the other defendants the heirs at law, to join in a surrender of the copyhold, and in a conveyance of the freehold and other estates of which the testator was seised in possession, reversion, or expectancy, to the plaintiff, his heirs and assigns for ever, as the Master should direct; and that the defendants should account before the Master for the testator's personal estate, and that the Master on such account should make them all just allowances; and what upon such account should appear to be in their hands, was to be paid to the plaintiff; who, if there should be occasion, was to be at liberty to make use of the appellant's name to get in any debts, or other personal estate of the testator: and what upon the said account should be coming to the plaintiff, as also such freehold and copyhold estates, so to be conveyed and surrendered, were to be subject to the testator's debts and legacy; and decreed the appellant to pay the plaintiff his costs; and that upon the defendants the heirs at law joining in such conveyances and surrenders as aforesaid, the plaintiff should pay them their costs to be taxed by the Master.

Although the plaintiff Thomas Bransby lived till January 1725, above seven years after the making of this decree, yet he never called for any conveyance or surrender, or took any one step towards carrying it into execution; and as the principal benefit which the defendant Kerrich could reap under the last will, was not to arise till after the plaintiff's death, who was tenant for life of the real estates, he did not immediately appeal from the decree. But soon after that event happened, two appeals were brought; the one by the defendant Kerrich against the decree generally, and the other by the defendants the heirs at law, against [440] so much of it as directed them to join in a conveyance and surrender of the testator's estates.

In support of the first appeal it was insisted (T. Lutwyche, N. Fazakerley), that the court of Chancery ought not to have impeached the will of the 18th of March 1715, so far as it concerned the personal estate, because it had been already established by the proper ecclesiastical court, which has the sole jurisdiction of determining wills, so far as they relate to personal estate; and if there had been any fraud or imposition in obtaining the will, it was properly examinable in that court only. That the validity of the will as to the lands, was properly triable at law; for if it was a fraud and imposition upon the testator, or falsely read to him, or made only upon a condition, it was not his will in point of law, and therefore that question might have been tried in an ejectment; or at least, the court of Chancery ought not to have made any determination in prejudice of the will, before the validity of it had been determined upon a trial at law. That by the decree the appellant and the heirs at law were directed to join in a conveyance to Thomas Bransby, which supposed the estate to be devised to the appellant and his heirs, or at least that it was well devised for the payment of debts and the legacy; but this, it was conceived, would be a revocation of the former will, under which Thomas himself claimed. That there was not a sufficient foundation, either for the declaration in the decree touching the fraud and imposition, or for the several directions thereby

given; for it appeared, that the testator had taken a great displeasure against his father, and that the appellant was one of his nearest relations on the part of his mother, by whom the estate in question came to him; that he made frequent declarations of kindness to the appellant, and particularly, that he would make a disposition of his estate in favour of him: Besides, it was fully proved, that the will was drawn according to the testator's own directions, was twice truly read over to him, and afterwards duly and deliberately executed, and then delivered by the appellant himself to Ann Hartshorn, who was now a witness to prove that it was read contrary to its purport; and though it appeared from her own evidence that she knew of this pretended imposition soon after the making of the will, yet it did not appear that she ever made any discovery of it to the testator, though he lived seven or eight days afterwards, and had his senses all the time. That the appellant was decreed to pay the costs of the suit, which, for the several reasons aforesaid, he ought not to have been decreed to pay; and that it would be of dangerous consequence to defeat a written will upon parol evidence, contrary to the purport of such will.

On the part of the respondents, the widow and infant children, it was said (C. Talbot, J. Willes) to be fully proved in the cause, that Thomas Bransby had been a very kind and indulgent father to the testator, and had, from time to time, furnished him with much larger sums of money than his circumstances would admit of; that in consequence of this kindness, the testator took all occasions of expressing his gratitude, and being of an infirm and sickly constitution, he made several wills in his father's favour: particularly one in September 1714, and another on the 30th of January 1715. That it was also fully proved, that the appellant, taking advantage of the mis-carriage or delay in the return of some money by Thomas Bransby for the testator's use, declared that Thomas was a tricking, scandalous fellow, and that the pretended disappointment of the return was only a sham to evade the payment of his son's debts; and thereby, and by alleging that the testator's debts would not be paid unless a new disposition was made of his estate, he was induced to execute the will in question. The grossness of the fraud and imposition therefore so fully appearing by the proofs, and no doubt remaining as to any fact which could make a trial necessary, it was very consistent with the rules of equity and justice to deprive the appellant of all benefit under a will so unfairly obtained. And as to the probate of the will in the ecclesiastical court, it was not impeached by the decree; though the appellant was restrained, as in justice he ought to be, from taking any beneficial interest under it. That it was but just and reasonable that the creditors and legatee, who were no parties to the fraud, should not be any way prejudiced or affected by it; and it would have been very unjust that they should have been prejudiced by a decree founded merely upon the fraudulent practices of the appellant, to which they were no ways privy. That the appellant not being the testator's heir at law, or entitled as next of kin to any share of his personal estate, it was not material to him whether the writing of the 18th of March 1715 revoked any former will made by the testator or not. But as the appellant appeared to have been guilty of very great fraud, it was consistent with equity that he should reimburse the plaintiff Thomas Bransby the costs and expences which he had been put to in detecting such fraud. And though it might be inconvenient to admit parol evidence to defeat or contradict particular devises in a will, yet it was highly proper and necessary to make use of such evidence to shew fraud and circumvention in obtaining the will; which it would be almost impossible to prove if parol evidence should be rejected; and therefore the admitting such evidence was very consistent with equity and justice.

In support of the other appeal brought by the heirs at law it was argued (P. Yorke, P. Jodrell), that the decree having directed the testator's personal estate to be accounted for and paid over to the plaintiff Thomas Bransby, contrary to the directions of the will of the 18th of March 1715, which was duly proved in the ecclesiastical court, tended to subvert the jurisdiction of that court in testamentary causes, and to render the probates of wills, and all the proceedings relative thereto, entirely useless and of no effect; and if any court, after the granting such probate, should be permitted to add thereto, or to direct the account and disposition of any personal estate, contrary to what appeared therein, and in favour of [442] any person not named therein, or in prejudice of the executor, the same would be of the utmost ill consequence. That the appellants being

decreed to surrender and convey the inheritance of the estates in question to Thomas Bransby and his heirs, contrary to the devise of the will of the 18th of March 1715, and without directing any trial at law upon the validity of that will, and in consequence thereof setting up a pretended former will; was disinheriting the appellants in favour of one who was not even named in the last will, nor had by any trial or act in law made out or established any title in himself to demand such surrender and conveyance, and was therefore not agreeable either to the rule of law or equity, which always shewed heirs at law the greatest favour. That this will of the 18th of March 1715 was duly executed by the testator when he was of sound mind, memory, and understanding: and as to the personal estate, it stood duly proved in the spiritual court; and was so far established, even by the decree, that the legacy thereby given was directed to be paid, and the name of John Kerrieh, as executor thereof, was directed to be made use of in getting in any debts due to the testator's personal estate. And as to his real estate, the same was thereby declared to be subject to his debts, which was never done by any of the former wills; and therefore as this will was allowed to be in force as to these particulars, it ought to stand and be in force in every other respect; and as all former wills were thereby revoked, the will of the 30th of January 1715 ought not nor could be established or set up again in favour of the said Thomas Bransby. That no parol evidence ought to have been admitted or read to destroy the effect and operation of the devises in this will. And as the real estate was devised to John Kerrieh and his heirs, only on a particular trust and confidence, for payment of the testator's debts and legacy within a limited time, the appellants after such payment were well entitled to the residue and remainder of all such real estates, and ought to have a surrender and conveyance thereof to them and their heirs; there being a resulting trust as to such residue for them as the heirs at law of the testator.

Against this appeal it was insisted (T. Lutwyche, N. Fazakerly) on behalf of the original appellant Kerrieh, that the words of the will in question were sufficient in law to devise the freehold and copyhold estates to him and his heirs, subject only to the payment of the testator's debts and legacy; and that there was no resulting trust for the benefit of the heirs at law, the estate being intended only for his benefit, subject to such payment.

And for the respondents the widow and children it was urged (C. Talbot, J. Willes), that the appellant Ann was the mother, and the appellant Elizabeth the aunt of John Kerrieh, and ought not to be benefited by his fraud, circumvention, and management; and the rather, because it was proved in the cause, that the testator meant no other alteration in the disposition which he had made of his estate in favour of his father, than the payment of the debts which he [443] should owe at his death. If therefore, any legal estate passed by the will in question to John Kerrieh, for the particular purpose of paying the testator's debts and legacy, the benefit of the surplus ought to belong to his father, to whom he had before devised his estate, and not result to his heirs at law.

But, after hearing counsel on both these appeals, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the bill exhibited by the said Thomas Bransby should be dismissed. (Jour. vol. 23. p. 209.)

CASE 3.—CONSTANTINE PHIPPS,—*Appellant*; EARL OF ANGLESEY, and Others,
—*Respondents* [18th June 1751].

[Mews' Dig. xv. 391.]

[If a will be made, and afterwards another will, without cancelling the former, and either will is proved to be confirmed after the other will, the whole estate comprised in the will so last confirmed will go according to the limitations in that will.—If there are two inconsistent wills of the same date, neither of which can be proved to be last executed, they are both void by the common law for uncertainty, and will let in the heir at law; unless such wills are explained by some subsequent act of the testator, so as to reconcile such inconsistency.—If two wills appear, and the limitations in both are consistent, and they have both been confirmed by various codicils, the wills and codicils may all be taken together as one testamentary disposition, and such construction made as that the limitations in both wills shall take place, to the disinherison of the heir at law.]

[Order of the court of Exchequer in Ireland affirmed. See *post*, ca. 7.] [7 Bro. P. C. 489.]

Vide [1 Bro. P. C.] p. 289. Anglesey (E.) v. Annesley.

The several contradictory wills and codicils of James Earl of Anglesey, and the history of the proceedings in consequence thereof, prior to the commencement of the present dispute, having been already stated upon a former appeal, the reader is requested to refer to the report of that appeal (vol. I. p. 289).

Pursuant to the decree of the 28th of February 1740, and the affirmance thereof by the House of Lords on the 10th of March 1741, Charles Annesley, the respondent in that appeal, in 1743 suffered six several recoveries in the court of Common Pleas in Ireland, of Earl Arthur's estates in that kingdom; and in the year following, the like number of recoveries were suffered by the present respondent the earl, of the same estates.

Charles Annesley likewise, by lease and release of the 16th and 17th of June 1742, considering himself as the absolute owner of the proportion of Earl Arthur's estates, allotted to him by the agreement thus solemnly established, duly charged the same with [444] £10,000 to the respondent Mark Whyte, in trust for the payment of his debts, and for such other purposes as he should by his will appoint; and further granted a moiety of the yearly value of his proportion of the same estates, as a jointure for the respondent Lady Levyng, his then wife, in case she should survive him.—And by a further deed of two days subsequent date, he vested the woods upon the said estates in the respondent Mark Whyte, in trust for such uses as he should appoint by deed or will; and for want thereof, in trust for his executors.

After these transactions there arose a new claimant to part of Earl Arthur's estates in Ireland, in the person of Francis Annesley of Lincoln's Inn, Esq. who, under the antient family settlements, and the last Earl Arthur's will, laid in his claim to great part of the said earl's estates in the counties of Kildare, Kerry, Clare, and Armagh, and the town of Drogheda, expectant on several leases antiently granted upon lives called the long leases.—But the respondent the earl and Mr. Charles Annesley having so happily accommodated their mutual differences with each other, they, for the prevention of all further controversies in relation to the said earl's estates, immediately submitted to the pretensions of Mr. Francis Annesley; and by a deed of settlement of the 12th of March 1743, conveyed to him the several estates he claimed; and he, in return, by the same deed, conveyed or confirmed to them the residue of the said earl's estates in that kingdom, to hold according to their former agreement and the above decree; with reciprocal covenants to complete their respective titles by fines and recoveries.

The respondent the earl and Mr. Charles Annesley were now proceeding to execute the decree of 1740, and settle the accounts thereby directed, when, to their great surprise, the present appellant set up a new and unexpected claim; and near 50 years after his grandfather's death, and upwards of 40 years after the solemn proof of the wills and codicils, the acquiescence of his mother, the possession under them, the exemplifi-

cation of them by act of parliament, and four years after the agreement between the respondent the earl and Charles Annesley had been established by the supreme judicature of this kingdom, and their judgment carried into execution, and followed by recoveries, the most solemn assurances in the law; he went over to Ireland upon an attempt to unravel all these proceedings, and to separate the family estate from the titles and honours, in order to recover it to the female branch, which had been excluded by so many repeated acts of his own grandfather.

And for this purpose the appellant, in May 1745, exhibited his original bill in the court of Exchequer in Ireland, against the respondent the earl, and Mr. Charles Annesley, and also against Charles Coote father of the respondent Coote, who was then living, as representative of the surviving trustee in his grandfather's wills and codicils, and against the said Francis Annesley (and several other defendants, the tenants of the estate, who were not brought [445] to hearing) stated the due execution of all the several wills and codicils of the testator Earl James, and the act of parliament for exemplifying the same; the marriage of his mother in 1718, and her death in 1735; and that she had always resided in England, as he had done, till lately, not having attained 21, till the 5th of April 1743. -And he particularly charged, that the several wills and codicils were duly executed on the several days on which they respectively bore date: And as a further evidence of their due execution, he alleged, that after the death of Earl John in 1710, the last Earl Arthur had entered and enjoyed the estates thereby devised to him, under the true and clear title of the said wills and codicils, till his death in 1737, when he the appellant became entitled thereto in this manner; viz That upon the death of Earl Arthur without issue, the inheritance of the estates became vested in him, as heir at law of Earl James; the limitations in the wills and codicils, after Earl Arthur's death, being null and void, in regard the two wills, and their respective codicils, were contradictory to, and inconsistent with, each other; nor could it then or ever be proved, which of the two codicils of the 10th of December, or the will or codicil of the 9th of December, were last executed, all the witnesses being long since dead; and that though, upon the bill exhibited in 1704 against Lady Catherine Annesley his mother, and others, to perpetuate the testimony of the witnesses, they were all examined, and proved the due execution of the wills and codicils on the respective days of their dates; yet they did not prove which of the two codicils of the 10th of December, nor whether the will or codicil of the 9th of December, were first or last executed; the uncertainty whereof rendered them all null and void, on account of the repugnant limitations after the death of Earl Arthur without issue. And upon this equity, the bill prayed an account of the rents and profits, and to be quieted in the possession of the estates generally; and to give a colour of equity, an affidavit was annexed to the bill as to the want of deeds.

The Earl and Mr. Charles Annesley severally answered this bill, and both concurred in deriving their title as well under the antient settlements of 1669, as under the wills and codicils, and the agreements, decrees, orders, settlements, and recoveries before stated. They insisted that the will of the 14th of May 1701, ought to be deemed the last will, or at least part of it; and that the will of the 9th of December following, and the codicil thereto, if not revoked, ought only to be deemed as part of the last will. That the appellant's mother, under whom he claimed, and who, when of full age, lived many years after the perfection of the said wills and codicils, and had full notice of the contents thereof, as well by the bill in 1704 as otherwise, never thought proper to bring that matter in question in the lifetime of the witnesses, or afterwards; but on the contrary, suffered the estates to be enjoyed under the wills and codicils; and was a party to some suits concerning the sale thereof, and submitted to such sale.—That it was [446] unnecessary, as well as impossible, to prove by living witnesses, whether the will or codicil of the 9th of December were last executed; as it appeared, on the face of one of the codicils of the 10th of December, that the testator recited the making the will of the 9th of December; and that to that will, he had annexed a codicil of that date. That the witnesses were duly examined as to the due execution of the wills and codicils on the days of their respective dates; and their not being examined to the priority or posteriority, was owing to a full conviction in the parties to that suit, being shortly after the testator's death, that they were regularly executed in point of time, so as to give them their respective force. -And they insisted upon the title before set forth, as also the acquiescence of the appellant's mother for many years

after her attaining 21, and after full notice of the wills and codicils, in bar of the relief sought by the bill.

In February 1746, Mr. Charles Annesley died, having made his will, dated the 28th of December 1739 : and after reciting the articles between him and the respondent the Earl, he directed his proportion of the woods to be sold, and the money applied to the uses of his will ; and also charged his proportion of the estates with £10,000 for the same uses, and with a jointure of one half thereof to the respondent Lady Levynge, his then wife, for life ; and after payment of his debts and legacies, made her residuary devisee and legatee of all his real and personal estate, and sole executrix of his will.

Lady Levynge having proved her husband's will, the appellant, in Easter term 1747, exhibited his bill of revivor against her, charging her husband's death and will ; and that by his death without issue, the appellant was become his heir at law, as he was the grandson and heir at law of Earl James, who was the nephew and heir at law of Charles Annesley, the father of the last named Charles.

The appellant also, in June following, exhibited his amended bill, in order to introduce and put in issue the different rights of the respondent Lady Levynge and Mr. Whyte, under the trusts created by Charles Annesley, by the deeds already stated and the several proceedings and transactions between the respondent the Earl and him, as well previous as subsequent to the agreement of 1737 ; which were thereby charged to have been all calculated to conceal the appellant's right, and to prevent any judicial determination on the contradictory limitations in the wills and codicils, and the impossibility of ascertaining the priority or posteriority of them : And that though the defendants had pretended, that the wills and codicils were consistent and reconcileable with each other, they had avoided affirming or denying in their answers, that they were so in regard to the limitations therein contained, of the Irish estates, after Earl Arthur's death. And the appellant alleged the first notice of his pretended right to have been from the appeal in 1741, and the printed cases delivered on that occasion ; upon which he observed, that the respondent the Earl had, [447] in his case, insisted on the codicil of the 9th of December, as a revocation of the will of the same date, and a republication of the will of the 14th of May : And that Charles Annesley had, in his printed case, stated the several wills and codicils, as containing repugnant and contradictory dispositions, under some of which the Earl, and under others he, would become entitled to the bulk of the Irish estates ; and had particularly insisted upon the will of the 9th of December, as the last subsisting will, and the limitation of the Irish estates, after Earl Arthur's death, as that under which he would be entitled.

The respondents, the Earl, Lady Levynge, and Mr. Whyte, all answered this amended bill, and again insisted, that upon due consideration of the wills and codicils, there would not appear any repugnancy or inconsistency ; but on the contrary, that the testator's intention, from the whole tenor of the wills and codicils, appeared plain and consistent, to dispose of his estates to the heirs male of Arthur, first Earl of Anglesey ; and that the same should never descend to his daughter Lady Catherine, or to the appellant, as his heir at law : And denied, that there was the least imagination of any pretensions of title which the appellant had to any part of the estates, at the time of the articles of 1737. That as the witnesses to the wills and codicils were dead, and they did not know when any of them were made, otherwise than by the dates and contents, the appellant ought to shew, if he could, the pretended inconsistencies ; and as they could not set forth which were first or last executed, otherwise than by the dates and contents, they must refer to the intention of the testator appearing therein, and the construction thereof, whether the appellant had any title ; and that from them it plainly appeared, that no interest was intended for the testator's daughter and heir at law, no mention being made of her in any of the limitations ; and that the several wills and codicils were, according to the rules of law and equity, consistent and reconcileable with each other : And Lady Levynge and Mr. Whyte insisted upon the benefit of the several trusts created by the trust deeds and will of Charles Annesley.

Charles Coote, the representative of the surviving trustee, in the wills and codicils, put in the common answer ; but no answer was ever put in by Mr. Francis Annesley, though his interest in so considerable a part of the Irish estates, under the settlement of 1743, was fully disclosed, and put in issue by the answers of the other defendants, which occasioned his being named a party in the bill.

The appellant replied generally to the answers of the respondents the Earl and Lady Levyng, but as to the respondent Mr. Whyte, who stood in the place of the creditors of Charles Annesley, and of her Ladyship the widow and jointress, to claim the benefit of the trust deeds, executed by him, the cause was heard upon bill and answer only; nor was any evidence offered to be read against him at the hearing before the court below.— And with respect to [448] the respondents, whose answers were replied to, the appellant entered into no new examination of witnesses: but contented himself with reading the act of parliament for exemplifying the several wills and codicils, and the proceedings and proofs in the cause instituted in 1704, for proving the same against his own mother, the then heir at law, upon which evidence he rested his case.

For the respondents, the Earl and Lady Levyng, were given in evidence, the articles between the Earl and Charles Annesley in 1737, and the decree for a specific execution thereof, with the order of the House of Lords, affirming the same, and the several recoveries suffered pursuant thereto—The trust deeds, executed by Charles Annesley in 1742, for the payment of his debts and a provision for his widow—And the settlement in 1743, by which the greatest part of the Irish estates was relinquished to Mr. Francis Annesley.

The cause came to a hearing before the court of Exchequer in Ireland, in February 1748, and continued eleven days in hearing; and after taking time to consider of their opinion, the court, on the 20th of June 1749, dismissed the appellant's bill, but without costs.

From this decree of dismissal the present appeal was brought, and on behalf of the appellant it was argued (W. Murray, P. Jodrell), that though the wills were of different dates, they were by the republication of the first will on the day of executing the second, viz. the 9th of December, and the republication again of both by the two codicils of the 10th of December made, and must be considered in law as if executed on the same day. That though all the witnesses to these wills and codicils were examined in a suit brought to preserve their testimony, when the transaction was recent, and the posteriority of the execution of them might, if ever, have been ascertained, yet every one of the witnesses was silent as to this point, and that notwithstanding it was of great importance (even supposing the validity of either of the wills did not depend upon it) to Lord Altham, the plaintiff in that suit, to establish by proof the posteriority of one of these wills, he being, on the death of Earl Arthur without issue, entitled to an estate for life only under one, and to an estate tail under the other. That posteriority of execution, for being the last will of a testator, is as essential a property to a valid testament, as due execution: and uncertainty as to this point, makes every one of those testamentary acts void, between which such uncertainty exists, as far as the dispositions in each are contrariant to the other; and as a latter will revokes a former, so two contrary wills executed together must revoke each other, and let in the heir, unless one or the other can be proved to be the last executed: the heir being the person on whom the law casts the estate, till a plain intent in favour of a certain devisee in the will duly executed, and having all the essential properties of a legal testament, is made to appear. This principle, that two wills, executed at one and [449] the same time are void for uncertainty, is established by many clear and express authorities, both in the civil and canon law, from whence the common law of England derives its notions as to the property of testaments: with this difference only, that as the common law of England favours the heir more than any other law, so it requires in every respect greater certainty in wills, and will not suffer such heir to be disinherited, even by probable implications or conjectures. That till the fact of posteriority is made to appear, it remains absolutely uncertain to whom the testator has given his estate; and there is no ground to presume, that he intended it more for one person than another: But if any such presumption could be collected from the wills or codicils now in question, it could not alter the case, because whichever of these codicils of the same date was last executed, such codicil must establish that will to which it was a codicil; and consequently the last execution was a mere matter of fact, and could not be made out from any conjectures drawn from the probable intent of the testator in favour of either devisee, such conjectures not tending to prove which was in fact the last will, but only which will the testator would probably execute over again, if he was living; whereas the difficulty arose from the uncertainty of a fact, which, if proved, must give the will that was actually last executed the preference, independent of any intent arising from the wills themselves, and which

fact was absolutely necessary to be proved, to give either will any intent or operation at all. That as all these wills and codicils were consistent in the limitations to Earl Arthur and his issue, the appellant's title as heir at law did not arise till there was a failure of those limitations, immediately after which he prosecuted his right; so that if the facts were grown less capable of proof by the length of time, there was no ground, from any laches in him, to supply such defect by inference or conjecture, it having been always in the power of those claiming under these wills, and who it was plain were long ago apprised of these defects, to have made out this matter by proper proof, in case it ever could have been proved. There was therefore more reason to presume, that the witnesses themselves, before whom such instruments are seldom or never read over, did not know which of the two instruments, executed on the same day, they first or last attested, and consequently, that this fact was originally as uncertain as it was now; than to presume that any advantages to the devisees had been lost by length of time. That every question concerning the execution and validity of a will, under which any legal or equitable estate in land is claimed, is properly and only triable at law; courts of equity do not so much as examine into, or relieve against a will obtained by fraud, nor ever establish a will by which a trust only is devised, without a trial, if desired: Therefore, as the devise, under which the respondents claimed, had never been admitted by the heir of the testator, or tried at law, the appellant had at least a right to such a trial: but which by the present decree he was debarred of. [450] For in order to have a legal trial, the appellant, under the circumstances of this case, was obliged to come into a court of equity: the legal estate being in a third person, all the title deeds in the possession of the respondents, who might set up what satisfied terms they pleased, and the whole doubt arising upon the devise of the trust.

On the part of the respondent the Earl of Anglesey, it was contended (D. Ryder, C. Yorke), that there appeared a clear and uniform intention in the testator, to transmit his estate to the male branches of his family, and to exclude his heir at law, who was a female, and amply provided for by a portion of £12,000 under settlement, and a legacy of £3000 repeatedly given her by the wills of the 14th of May and 9th of December, and which legacy she accepted under those wills in her life-time. That the several wills and codicils were meant only as duplicates of each other, and to be considered as one will to effectuate this intention: For the codicil of the 2d of January referred to one last will only, and the revocation of former wills was inserted in the first will of the 14th of May, and omitted in every one of the subsequent instruments. That the appellant's bill admitted the due execution of all the wills and codicils, and the present impossibility of proving by living evidence, the priority or posteriority of them, was not to be imputed to the respondents, but to the acquiescence of the heir at law for 50 years, till all the witnesses were dead: and which acquiescence was equal to an express admission of the validity of the different wills and codicils. That these instruments all concurred in the appointment of the same objects to take, and in the disinheritance of the heir at law: and the limitations in the will of the 14th of May, were preserved in every one of the subsequent wills and codicils, with this difference only, that Richard Lord Altham having died after the making of that will, the testator, by the will of December following, changed the estate tail limited to the first son of Richard Lord Altham by the will of May, to an estate for life in his first son Arthur, with remainder to his first and other sons, in order the more effectually to secure the remainders to the first and other sons of his father. But having in the will of December omitted the limitations to those other sons, he, to supply that omission, by a codicil of the same date, set up the will of May, that is, set up those limitations, which was the only point in which the two wills differed: and therefore the limitations contained in the will of May, which were omitted in that of December, could not be considered as limitations inconsistent with those contained in the latter will, but as limitations added to them, there being no limitation in the will of December, which was not contained in the will of May, save only the alteration of the estate limited to Arthur Lord Altham. The testator having also an intention, that Lord Arthur should take the lesser estate limited to him by the will of December, and not the greater under the will of May, he, by the codicil of the 10th of December, set up and established both wills, and these codicils were to be con-[451]-sidered as one instrument establishing two wills, in the intention of the testator perfectly consistent, and which might be made so by construction; and the codicils of the 2d of January, reciting that the testator had made his last

will, were an evidence, that he looked on both wills as consistent, and as one will. For if these codicils of the 10th of December, importing an express intention to establish the two wills, were not good for the purpose so expressly intended, they could not be good for a purpose contrary to that intent, but ought rather to be void, and leave the wills and former codicils to stand as they could, independent of those codicils: The rule being, that a subsequent will, not sufficiently executed to operate as such, should not revoke a prior will. That the supposed inconsistency between the two wills, rested only in a single limitation, which was the limitation to Arthur Lord Altham and his issue, intervening between the two limitations to Earl Arthur and his issue, and to Charles Annesley and his issue; and though this intervening limitation might be void on account of the inconsistency, yet the wills would not be void in the whole, but in the limitation only wherein they differed; consequently, the limitation to Charles Annesley in both wills, must take place immediately on the determination of the estate limited to Earl Arthur and his issue. That of necessity one of the two wills must be intended to take effect as the last will of the testator, and the different devisees in each, were the proper and only parties to dispute the question between both, which was prior, or which posterior, in respect of the original execution or subsequent confirmation; either of the wills being sufficient to exclude the heir at law. That if all these wills and codicils were now void, upon the supposed impossibility of proving which was the last, they were so 49 years since, immediately upon the death of Earl James the testator, and Earl Arthur had no more right to enter and enjoy, than the succeeding remainder-men; but the estates must have immediately vested in the heir at law, the appellant's mother; and yet the possession had ever since gone according to the wills and codicils without interruption, till the appellant's original bill in 1745. That his mother had full notice and repeated opportunities to assert the right now insisted on; she resided from her birth till her death in England, where great part of the devised estates lay, and where the devisees principally resided; she survived the testator upwards of thirty years; was a party to the suit instituted for the sole purpose of proving his wills and codicils, and to other suits for the sale of part of the same estates; had again further notice, by the public act of parliament for exemplifying the wills and codicils, and received her legacy given her by the two wills; and both them and the codicils were at different times under the consideration of, and received a sanction as well from the spiritual and temporal courts, as the legislature itself. But if these wills and codicils were void, no decree could have been made between the Earl and [452] Charles Annesley, and yet such a decree had been made, and afterwards established by an order of the House of Lords; recoveries had been suffered, and further settlements made in consequence of that decree, and provisions carved out for families and creditors, of which creditors only one had been made a party to this suit, and his answer not replied to; and as to him, it was neither admitted or proved, that the appellant was the heir at law of the testator.

The same arguments in substance, were urged (T. Clarke, *G.* Hay), on the behalf of the other respondents, Lady Levyng and Mr. Whyte.

After hearing counsel on this appeal upon the 12th, 13th, and 14th of June 1751, it was proposed to ask the opinions of the judges, as to some points of law; and accordingly the judges present were directed to deliver their opinions to the house on the following questions, viz. 1st. "Whether if the will of the 14th of May was proved to be confirmed after the will of the 9th of December, or the will of the 9th of December after the will of the 14th of May, the whole estate would not go according to the limitations in the will so last confirmed? 2d. Whether two inconsistent wills of the same date, neither of which can be proved to be last executed, are or are not, by the common law of England, void for uncertainty, so far as they are inconsistent, and will let in the heir? 3d. Whether the limitations in the wills of the 14th of May and 9th of December, under which the respondents claim, are or are not void for uncertainty?" Whereupon the judges desiring some time might be allowed them for that purpose; it was ORDERED, that the further consideration of this cause should be adjourned to Tuesday then next, and that the judges should then deliver their opinions upon the said questions.

Accordingly, on Tuesday the 18th of June, the Lord Chief Baron of the court of Exchequer delivered the unanimous opinions of the judges, as follows, viz. "As to the first question, If the will of the 14th of May was proved to be confirmed after the

“ will of the 9th of December, without any other circumstance ; or if the will of the
 “ 9th of December was proved to be confirmed after the will of the 14th of May, with-
 “ out any other circumstance ; the whole estate comprised in the will so last confirmed,
 “ would go according to the limitations in that will.—As to the second question, that
 “ two inconsistent wills of the same date, neither of which can be proved to be last
 “ executed, are by the common law of England void for uncertainty so far as they are
 “ inconsistent and will let in the heir, if no act of the testator subsequent to the wills,
 “ has explained them, so as to reconcile what otherwise would appear inconsistent.—
 “ And as to the third question, that the limitations in the wills of the 14th of May and
 “ 9th of December, under which the respondents claim, are not void for uncertainty,
 “ because the wills and codicils are to be taken together as one testamentary disposition,
 “ and that in this light the will of the 9th of December [453] reduced the estate tail
 “ given to the first son of Richard Lord Altham to an estate for life to him by the name
 “ of Arthur Lord Altham, with remainder to the first and every other son of his body,
 “ in tail-male ; with remainder to Charles Annesley in strict settlement ; but the codicil
 “ of the 9th of December establishes the will of the 14th of May, and revives and sets
 “ up the devise to the second and every other son of Richard Lord Altham in tail male.
 “ And upon both wills taken together, construction is to be made in the same manner as
 “ if the devise to Arthur Lord Altham for life, with remainder to his first and every
 “ other son in tail male, had been actually inserted in the will of the 14th of May ; and
 “ this the more clearly appears, inasmuch as the two codicils of the 10th of December
 “ confirm the will of the 14th of May, one of them in express words, the other by con-
 “ firming the codicil of the 9th of December which confirmed the will of the 14th of
 “ May. And that upon the whole, the judges were all of opinion that the trust of the
 “ estate in question was well devised in remainder to the respondent Richard Earl of
 “ Anglesey.”

Whereupon it was ORDERED and ADJUDGED, that the appeal should be dismissed, and
 the decree therein complained of affirmed. (Jour. vol. 27, p. 586–92.)

CASE 4.—THE RIGHT HON. WILLIAM EARL OF CHATHAM,—*Appellant* ; WILLIAM
 DAW TOTHILL and MAXIMILIAN WESTERN, Esqs.—*Respondents* [7th May
 1771].

[Mews' Dig. xv. 1309. S.C. *Tothill v. Pitt*, 1 Madd. 488.]

[A. by will gives the dividends on his Bank Stock, Exchequer Orders, and other
 parts of his personal estate to B. for life, and after B.'s decease he gives the
 said Bank Stock, etc. to the heirs male of B.'s body lawfully begotten, for
 ever ; and for want of such issue to C. for life, etc. B. takes the absolute
 interest, and the devise over to C. is void : for where the words of a will
 could give an express estate tail in a freehold, the same words applied to
 personal estate will give the whole interest, and as by a devise of rents and
 profits lands will pass, by the same rule a devise of the dividends is of equal
 import to that of the stock itself.]

[Decree of the court of Chancery (reversing a decree of the Master of the Rolls),
 reversed.]

[See Fearn's *Cont. Rem.* vol. 2. edit. 1795, by Powell.]

Robert Tothill, esq. by his will, dated the 27th of June 1750, devised and be-
 queathed, *inter alia*, in the words following, viz. “ I give to Sir William Pynsent, of
 “ Burton, in the county of Somerset, bart. the profits and half yearly dividends of
 “ £4000 capital stock in the Bank of England, during his life, with an express condition,
 “ that if any dividend should be [454] made of any part of the capital, the same shall
 “ be immediately laid out in the purchase of more stock, to complete the capital sum
 “ given: I give to Sir William Pynsent the yearly income and payment of the six
 “ following annuities, on the £14 per cent. per ann. payable at the Exchequer, to wit,

“ No. 561, £42 per ann. No. 2370, £50 per ann. No. 2737, £28 per ann. No. 3636, £14 per ann. No. 3891, £14 per ann. in all £148 per ann. now lying in the hands of the officer of the Bank of England, to receive the payments yearly during his life : Also I give and bequeath unto the said Sir William Pynsent, a mortgage of £1000 on lands in the county of Wilts, for ever, the writings thereof being in my strong mahogany box ; also a bond for £600, being in my iron chest. I give to Mary Cartwright, now in my family, my house in Red Lion Street, Clerkenwell, and the use of all the furniture and household linen therein, during her life. To Leonora Ann Pynsent, my dwelling house and estate, at Overy's Green, in Kent, and the use of all the goods, furniture, and linen therein, together with all the cattle and cart horses, and the utensils in husbandry, on or about the premises ; my estate at Knockholt, in Kent, rented by Thomas Stevens ; my house the corner of Cateaton Street, London, rented by John Soaper, packer ; also eight houses in Red Lion Street, lying in a row together, beginning at Samuel Jeacock's, baker, and ending at Michael Kirby, painter ; likewise the leases of four other houses in the same street, now or lately occupied by Martin Harvey, esq. Robert Wilkinson, Robert Jupp, carpenter, and Joshua Russell, gent. during the term of her natural life, upon this express condition, that she does live and dwell in my said house in Kent, three months yearly in every year, and does constantly maintain and keep all the buildings on the premises in substantial and necessary repairs. After the death of Mary Cartwright, I give to the said Leonora Ann Pynsent, my dwelling house in London, and the use of all the goods therein during her life : And after the death of Sir William Pynsent aforesaid, I give to the said Leonora Ann Pynsent, the dividends on £4000 Bank stock ; and all the payments growing due on the above specified annuities, issuing and payable at the Exchequer, during her life : Also, I give to the said Leonora Ann Pynsent, two estates at Patney, rented by Mark Wits and Robert Amor, to keep, sell, or dispose of as she pleases. And after her decease, I give, bequeath, and devise all the aforementioned lands, houses, Bank stock, and Exchequer annuities, to the heirs male of her body lawfully begotten for ever, together with all the furniture in both my houses ; and for want of such issue, I give and bequeath all the said respective estates, Bank stock, and annuities, described more at large as above, unto William Daw, son of William Daw, who married my wife's niece, during his life ; upon condition that he takes and constantly uses the name of Tothill, and resides in my house in Kent four months in every year : [455] And if he marries and has issue, I give, devise, and bequeath all the said several estates to his heirs male lawfully begotten for ever, he taking and using the name of Tothill ; and for want of such issue, I give, devise, and bequeath the said several estates, to Maximilian Western, esq. my wife's nephew and his heirs male for ever. I give to my old servants Catherine Turner and Elizabeth Weston 12 guineas per ann. each during their lives, payable every six months, and to commence from the first quarter after my death, by Sir William Pynsent, or the person that enjoys the benefit of the Bank dividends and annuities at the Exchequer. I give to my intended heir my large diamond ring, repeating chased gold watch, all my plate and books, which I do direct may be packed up in boxes, and kept safe till it is apparent who will by virtue of this my will have a right to enjoy my estates. Lastly, I give all my personal estate, chariot, horses, etc. not herein given or bequeathed, after my funeral expences, and all debts paid, unto my affectionate friend, Sir William Pynsent, and do appoint him sole executor, and residuary legatee, confiding in his honour and integrity to perform all and every article punctually.”

The testator Robert Tothill, who had the most intimate friendship with Sir William Pynsent, and resided at his house in the country several months in every summer, died on the 13th of February 1753 ; and soon afterwards Sir William Pynsent proved his will in the Prerogative Court of Canterbury, and possessed himself of such parts of the testator's personal estate as were not specifically bequeathed, and received the dividends of the £4000 Bank stock and Exchequer annuities, during his life.

Mary Cartwright, named in the testator's will, died in his lifetime ; and upon his death, Leonora Ann Pynsent, the daughter of Sir William Pynsent, by virtue of the will, entered upon all the testator's freehold and leasehold estates thereby devised to her, and took possession of the furniture of the two houses therein mentioned : And being advised that she indisputably took an estate tail in the freehold estates under the words of the will, and also the absolute property in the leasehold estates and furniture,

she in her lifetime suffered a common recovery of the real estates, and sold the same and also the furniture.

Leonora Ann Pynsent afterwards made her will, dated the 9th of April 1757; and after giving some small legacies, devised and bequeathed all her real and personal estate, whatsoever and wheresoever, unto her father Sir William Pynsent, his heirs, executors, and administrators, and appointed him sole executor of her will; and by a codicil, dated the 10th of May 1763, she devised a real estate which she had lately purchased, to her father, and his heirs.

The testatrix died in October 1763; and soon after her death, her father Sir William Pynsent proved her will and codicil, and entered into possession of the four leasehold houses, mentioned in Robert Tothill's will, and continued in the possession and enjoyment thereof, and also of the dividends of the Bank stock and Exchequer annuities left by Mr. Tothill's will, until his death.

Sir William Pynsent died on the 10th of January 1765, having first made his will; and after giving several legacies, annuities, and weekly payments to divers persons, he gave and devised all his real estate, and all the residue of his personal estate to the appellant, his heirs, executors, administrators, and assigns, to and for his and their own absolute use and benefit, and appointed the appellant sole executor; who accordingly proved the will, and entered into possession of the said leasehold houses, and afterwards sold the same for £750, which was the full value thereof; but the appellant never received any rent for the same.

The respondent, who married the testator Robert Tothill's wife's niece, from the time of Miss Pynsent's death, in October 1763, until Sir William Pynsent's death in 1765, never set up any claim either to the freehold or leasehold estates, or to the furniture devised and bequeathed by Mr. Tothill's will, nor ever controverted Miss Pynsent's right of selling the freehold estate mentioned in the will; but after Sir William Pynsent's death, he claimed the Bank stock, Exchequer annuities, and leasehold houses, and insisted that he was well entitled thereto, and also to the immediate possession of Robert Tothill's leasehold estates; and having taken upon himself the name of Tothill, he in Easter term 1765, exhibited his bill in the court of Chancery against the appellant, and the said Maximilian Western, praying, that the appellant might be decreed to assign, transfer, and deliver up to him the Bank stock, and Exchequer annuities, and also the said leasehold premises, and all such other personal rights and things, as he should appear entitled to under the testator Robert Tothill's will; and to account with him as well for the dividends and annual increase and payments of the said Bank stock and annuities, as for the rents and profits of the said leasehold premises, from the respective times the respondent became entitled thereto.

The appellant put in his answer to this bill on the 22d of June 1765, and thereby insisted on his absolute right and title to the property and things claimed by the bill. Mr. Western also put in his answer to the bill, and submitted his right to the court.

The cause being set down on bill and answer, came on to be heard before Sir Thomas Sewell, the Master of the Rolls, on the 27th of June 1766, when his Honour, after a very solemn hearing, was pleased to decree, that the respondent's bill should stand dismissed without costs.

After pronouncing this decree, the respondent in a letter written by him to the appellant, dated the 22d of July 1766, declared, "that to free the appellant from any suspense, as the rights in question had been judicially decided in his favour, he should decline any further contest about them, and wished the appellant a long enjoyment of them." And the appellant concluding from this letter that no appeal was intended to be brought from the decree, did some time after sell the £4000 Bank stock and [457] Exchequer annuities; and as to the large diamond ring mentioned in the testator Tothill's will, none was found after Sir William Pynsent's death above the value of £40, nor any known by inventory, schedule, or otherwise to have belonged to Mr. Tothill; nor was there among several old gold watches of inconsiderable value, any one which could have been distinguished as Mr. Tothill's: Some plate however was found engraved with Mr. Tothill's arms, which was also of little value; and a box with books, which by the report of an old servant were understood to have been Mr. Tothill's.

The respondent, notwithstanding his said declarations, and after three years acquiescence, appealed from the decree; and on the 23d of June 1770, the cause was heard before the Lord Commissioners for the custody of the great seal, when their Lordships

were pleased to decree, that the order of dismissal dated the 27th of June 1766, should be reversed; and that the appellant should transfer the £4000 Bank stock, to the accountant general in trust in the cause, and that the appellant should likewise assign the Exchequer orders and tallies, to the accountant general, in trust in the cause, and deposit the same in the Bank, with the privity of the accountant general on the credit of the cause; and the accountant general was to declare the trust of the said transfer and assignment, subject to the further order of the court; and it was ordered that the Master should take an account of the dividends and annual income of the said Bank stock and Exchequer orders, accrued since the death of said William Pynsent, and to accrue thereon until such transfer and assignment as aforesaid, received by the appellant, or any other person by his order or for his use, and that what should be found due upon such account, should be paid by the appellant to the respondent; and that the dividends and annual income of the said Bank stock and Exchequer orders, after such transfer and assignment thereof, should be paid from time to time to the respondent during his life; and it being admitted on the part of the appellant, that he had sold the leasehold estates in question, and the furniture of the house specifically bequeathed by the will of the said Robert Tothill; it was ordered that the Master should enquire into the value of the said leasehold estate and the furniture; and should compute interest after the rate of £4 per cent. upon what he should find to be such value, from the time of the sale, and that the appellant should pay such interest to the respondent; and the sum which the Master should find to be the value of the said leasehold estate and furniture, should be paid into the Bank, with the privity of the accountant general, on the credit of the cause, and that the same when so paid, shall be laid out in the purchase of £3 per cent. annuities, in the name and with the privity of the accountant general, in trust in the cause, and he was to declare the trust thereof accordingly, and that the interest to accrue on such Bank annuities, should be paid to the respondent during his life; and that the Master should take an account of the rents and profits of the leasehold estate, accrued [458] since the death of Sir William Pynsent, until the sale thereof, received by the appellant, or any other person by his order or for his use, and that what should be found due on that account, should be paid by the appellant to the respondent; and that the Master should enquire into the value of the large diamond ring, repeating gold chased watch, plate, and books, (directed by the will of the testator Robert Tothill, to be kept safe, until it was apparent who would by virtue of his will have a right to enjoy his estates,) and compute interest on what he should find to be the value thereof, from the death of the said testator Robert Tothill, after the rate of £4 per cent. and the appellant admitting assets of Leonora Ann Pynsent and Sir William Pynsent to answer the same, it was ordered, that the appellant should pay the sum which the said ring, plate, watch, and books should be valued at, and the interest thereon, into the Bank, with the privity of the accountant general on the credit of the cause; and that the same, when so paid into the Bank, should be laid out in £3 per cent. annuities, in the name and with the privity of the accountant general, in trust in the cause, for the benefit of the person to whom they should thereafter belong; and the accountant general was to declare the trust thereof accordingly, subject to the further order of the court; and that the interest to accrue on the said Bank annuities should from time to time, as the same should amount to a competent sum, be placed out in like manner; and no costs were to be paid on either side, but any of the parties were to be at liberty to apply to the court for further directions, as there should be occasion.

From this latter decree the Earl appealed, contending (E. Thurlow, J. Madocks) that it is a known, fixed, and established rule of law, that where the words of a will give an express estate tail in a freehold, there the same words applied to personal estate, will give the whole interest: for otherwise it would create a perpetuity, which the law abhors, inasmuch as no recovery can be suffered of, or affect personal property. That though in the present case it had never been questioned, that Miss Pynsent took an estate tail in the freehold, yet the decree of the Lords Commissioners, in reversal of the decree of the Master of the Rolls, made the same words to pass an estate for life only in the stocks and other personal estate; which are transitory, and subject to loss and decay, and in their own nature less capable of limitations over, than real estates are. That formerly the judges of the common law did not admit of devises over even of a chattel real, after an estate for life, and have never allowed of a devise over after an estate tail; and wherever an estate is given to one for life, with remainder to the heirs

of his body, the two estates are united, and the estate for life enlarged by the subsequent words heirs of the body, to an express estate tail, and not by implication, and gives the whole interest in such personal estate. And therefore the giving the real and personal estate to Miss Pynsent for life, remainder to the heirs of her body, gave her an estate tail in the real estate, and an absolute [459] interest in the personal estate; and to put a different construction would be overturning several resolutions, and endangering the property of many persons. It was however objected, that only the dividends of the stock were given to Miss Pynsent for life, and not the stock itself; and from thence it was argued, that the testator did not intend to devise the stock; whereas it is well known, that by a devise of rents and profits of lands, the lands pass, and by the same rule, a devise of the dividends is of equal import to that of the stock itself, the dividends being the only produce and profits of the stock. That from other loose and uncertain expressions in the will, it had been argued, that the testator only intended Miss Pynsent an estate for life, and not an estate tail. But the same reason will hold in every case where an estate is given to one for life, remainder to the heirs of his body, that the testator intended such person should have only an estate for life, because it is given to him expressly for life; and yet it could not be contended, but that in such case the devisee takes an estate tail by the subsequent words. It is therefore safer to adhere to plain certain known rules of law, than to determine property upon strained constructions, and conjectures of intention.

On behalf of the respondent it was argued (A. Wedderburn, J. Dunning), that the whole tenor of the testator's will manifested an intention in him, that Miss Pynsent should, at his death take no more than a life estate either in his leasehold or freehold estates (the two estates at Portney excepted, which were given to her absolutely); and that she should also have the use only of the furniture in his two dwelling-houses for her life: That from the death of her father Sir William Pynsent, she should have and receive the annual income and dividends of the testator's Bank stock and Exchequer annuities, for her life only: That after her death, in case she should leave no male heirs of her body, the said estates and furniture should go to the respondent for his life, with such remainders over as in the will: And that after her death, and the death of her father, and for want of such her issue male as aforesaid, the capital of the Bank stock and long annuities should likewise go to the respondent for life, with such remainders over as in the will. And as Miss Pynsent died unmarried, and consequently without any heirs male of her body, in her father's lifetime, the subsequent devise to the respondent of the testator's leasehold estates and furniture took place upon her death, and the devise to him of the Bank stock and Exchequer annuities, took place upon the death of Sir William Pynsent. That whatever might be contended to be the construction of the devise of the testator's freehold estates after Miss Pynsent's death, to the heirs male of her body, which was a point not in question in the present cause; yet it was apprehended, that the words heirs male of the body in the devise of a leasehold or chattel interest, have been construed to be words of purchase, and not of limitation; in order to comply with the sense in which they are used by the testator himself, and to effectuate his manifest [460] intention appearing upon the face of his will. That the use only of the furniture in the testator's two dwelling houses being connected in the devise of an estate for life in the leasehold houses, and the condition annexed to that devise, of her keeping the buildings in repair, were both inconsistent with the idea of her having the absolute property therein: and plainly denoted an intention of her having a life-interest only in the leasehold houses, as well as the furniture. That as to the Bank stock and long annuities, the testator had distinguished the dividends and yearly income and payment thereof from the capital, by two distinct bequests; viz. In one clause he gave the dividends and yearly payments only to Miss Pynsent for her life, to take effect in remainder after her father's death, having before given the same, and in nearly the same words, to her father for his life, which bequest to the daughter determined by her dying in her father's lifetime, before she came into possession: And in a distinct independent clause, he gave the capital after her death, to the heirs male of her body; it was obvious therefore, that he used the words heirs male of her body, as words of purchase, and not of limitation; for he gave to the heirs something more and different from what he had before given to the ancestor: And if these words should be so construed as to enlarge her interest therein, and give her a title by construction of law to the capital, it would be no less contrary to the express words, than to the manifest

intention of the testator. That the bequest of the testator's diamond ring, plate, and books to his intended heir, with directions to be packed up in boxes and kept safe till it should appear who should have a right by his will to enjoy his estates, shewed clearly, that he never intended Miss Pynsent should take an absolute vested interest in the said estates, Bank stock, etc. on the contrary, his intended heir, according to his own ideas, was not a person *in esse*, but in contingency. And this was a further proof, that the words heirs male of the body were meant by the testator, not as words of limitation, but as words of purchase; descriptive of the person who should eventually become entitled to his estates. And the subsequent words in the will, and for want of such issue, could not be construed to mean an indefinite failure of issue, whenever that event should happen, since the words themselves not only in their natural and common import, but according to the evident intention of the testator in the present case, applied to a failure of issue at the time of the death of Miss Pynsent, the devisee for life.

After hearing counsel on this appeal, the following question was put to the judges, viz. "Whether in the event which has happened, the devise to the respondent William "Dawe Tothill of the Bank stock, Exchequer orders, leasehold estates, and furniture of "the houses specifically bequeathed, is good and effectual, or void?" And the Lord Chief Baron of the court of Exchequer having delivered the unanimous opinion of the judges, that the devise was void, it was thereupon ORDERED and ADJUDGED, that the decree complained of should be reversed. (MS. Jour. *sub anno* 1770-1, p. 851.)

[461] CASE 5.—SIR THOMAS BROUGHTON, and Another,—*Appellants*; HENRY ERRINGTON, and Others,—*Respondents* [8th March 1773].

[Mews' Dig. xii. 883.]

[A. previous to his marriage covenanted to secure to his wife an annuity of £1000 a-year, issuing out of lands, for her jointure, and in bar of dower. The marriage is had, and A. by his will devises to his wife certain parts of his real and personal estate of considerable value. Held, that she was entitled both to the estates devised and to her annuity, and that the one was not intended as a satisfaction for the other.—To make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land; or must at least be of such certain and known value and estimation, and so far of the same nature of the thing to be satisfied therewith, as to appear indisputably to be equivalent or superior, not only in gross value but in annual income, to the debt or demand, or the thing to be performed.]

[Decree of Bathurst, C. affirmed. See Fonblanque's *Treatise of Equity*, lib. 4, part 1. c. 1. § 5, and the notes there.]

By articles entered into previous to the marriage of the respondent Mary with Sir Brian Broughton Delves, dated the 30th of August 1762, and made between Sir Brian of the one part, and the respondent Thomas Hill, and the respondent Mary, then Mary Hill, spinster, his daughter, of the other part; Sir Brian for himself, his heirs, executors, and administrators, covenanted with the respondent Thomas Hill, his executors and administrators, in consideration of the marriage then intended, and of £10,000, the marriage portion of the respondent Mary, that Sir Brian and all others claiming any estate or interest in the manors, messuages, lands, tenements, and hereditaments therein mentioned, would within three months after the marriage, at the costs of Sir Brian, by such conveyances and assurances as the counsel of the respondent Thomas Hill, his executors or administrators, should advise, grant, convey, and assure, free from incumbrances, (except an annuity of £1000 a-year, then issuing and payable out of some part of the premises to Dame Mary, the mother of Sir Brian, and then the wife of Humphry Mackworth Praed, esq. for her life,) to such person and persons and their heirs, as should be nominated by Sir Brian and the respondent Thomas Hill to be trustees, the several manors, messuages, lands, tenements, and hereditaments of Sir

Brian, in the county of Chester, with their appurtenances, to the uses following: viz. As to so much and such part of the premises as should be agreed upon by Sir Brian and the respondent Thomas Hill, and should be of the yearly value of £400, and in default of such agreement, as to the whole of the premises, to the use of such other trustees, their executors and administrators, as should be nominated by the respondent Thomas Hill, for the term of 99 years, to be computed from the [462] marriage, if Sir Brian and the respondent Mary should so long live, upon the trusts after mentioned; and after the determination of the said term, and subject thereto as to the whole of the premises, to the use of Sir Brian and his assigns for life, without impeachment of waste; with remainder to trustees to be nominated by Sir Brian, upon trust to preserve contingent remainders, but to permit Sir Brian to take the rents and profits for his life; and after his death, then to the intent that the respondent Mary and her assigns should, if she survived Sir Brian, receive out of such part of the premises as should be of the yearly value of £1600 at least, and should be agreed on by Sir Brian and the respondent Thomas Hill, and in default of such agreement, out of the whole of the premises, an annuity of £1000 for her jointure, and in bar of dower, payable by two equal payments in every year, on the 29th of September and 25th of March, the first payment to be made on such of those days as should next happen after the death of Sir Brian, clear of all taxes and outgoing, with power of distress and entry for non-payment as usual; and subject thereto, to the use of trustees, their executors and administrators to be nominated by the respondent Thomas Hill, for a term of 100 years upon trust, for better securing the payment of the said annuity of £1000, and after the determination of that term, and in the mean time subject thereto, to the use of trustees, their executors and administrators, to be nominated by Sir Brian and the respondent Hill, for 500 years from the death of Sir Brian, upon the trusts after declared concerning that term; and upon the determination of the last mentioned term, to the use of the first and other sons of Sir Brian, on the body of the respondent Mary to be begotten, successively in tail male; and in default of such issue, to the use of Sir Brian, his heirs and assigns for ever. And it was agreed, that the term of 99 years was to be upon trust, to raise an annual sum of £300 to be paid to the respondent Mary or her assigns for her separate use, during the joint lives of herself and Sir Brian, payable half yearly. And it was declared, that the term of 500 years was to be in trust for raising such portions for the daughters and younger sons of the marriage, and at such times and in such manner as in the articles were mentioned. And it was thereby agreed, that in the intended settlement there should be contained a covenant from Sir Brian for indemnifying the several premises chargeable with the said annuity of £1000 to Dame Mary his mother, from the payment thereof in prejudice to any of the uses or trusts intended to be limited of the premises by the settlement, subsequent to the estate for life to be limited to Sir Brian.

Soon after the execution of these articles the marriage took effect; and the respondent Thomas Hill actually paid Sir Brian the £10,000 agreed to be paid as the marriage portion of the respondent Mary; but no settlement was ever executed pursuant to the articles.

[463] Sir Brian being seised of an estate in the county of Lincoln, did on the 10th of November 1763 enter into an agreement to sell the same to George Forster Tufnell, esq. for £27,000, and Sir Brian did also about the same time enter into a contract with the Honourable Thomas Pitt, to purchase of him the manor of Abbots Ann, in the county of Southampton, and several farms and lands there, for £24,000; and did also enter into another contract with the heirs at law of Maynard Guerin, esq. and the heirs at law of Thomas Gatehouse, esq. for the purchase of the manor of Upp-Clatford, and several messuages, lands, and hereditaments in Upp-Clatford, in the said county of Southampton, for £10,000.

Sir Brian having entered into such several contracts, and the purchases not being completed, and he being seised in fee of several large estates in the counties of Chester and Stafford, of the yearly value of £8000, and being also entitled to a very considerable personal estate, including the purchase money to be paid him for his estate in Lincolnshire, and being desirous of giving some part of his fortune and estate to the respondent Mary, for whom he always expressed a very great affection and regard, over and besides the provision he had made for her by way of jointure by the said articles, and not having any issue, did, while he was of sound and disposing mind and understanding,

duly make his will, bearing date the 21st of May 1764, and thereby devised and bequeathed to the respondent Mary, her heirs, executors, and administrators respectively, his dwelling house (being leasehold) in upper Brook-street, near Grosvenor-square, with the appurtenances; and all such share and interest as at his decease he should be possessed of or entitled to, in the public stocks or funds; and all his jewels, trinkets, plate, linen, pictures, china, household goods, and furniture, and all his horses of every kind, and such three of his carriages as she should choose, and all his estate, right, title, and interest in the same; to hold to the respondent Mary, her heirs, executors, and administrators, for her and their own use and benefit. He also devised to the respondent Mary and her heirs, for her and their own use and benefit, all the manors, messuages, advowsons, farms, lands, tenements, hereditaments, and real estates in the county of Southampton, (for the purchase whereof he had then contracted,) with the appurtenances, and all his right, title, and interest in the same, or in lieu thereof, the whole money arising from the sale of all his real estates in the county of Lincoln, and such further sums of money as, together with the money arising from such sale, should be sufficient to enable her or her heirs to compleat the several contracts he had made for the purchase of the said estates in the county of Southampton, in trust nevertheless to compleat such purchases, and to procure and take conveyances of the same estates to her and their own use and benefit. He then devised to Edward Kynaston, esq. and John Chambre, esq. their heirs and assigns, all his manors, messuages, advowsons, farms, lands, tenements, tithes, hereditaments, and real estates in the counties of Stafford and Chester, and all his estate, right, title, and interest in the same, to hold to the said Edward Kynaston and John Chambre, their heirs and assigns, to the uses following; viz. to the intent that Charles Shrimpton and his assigns should receive for his life the yearly sum of £20 out of the last mentioned premises, clear of all deductions, payable quarterly, in such manner and with such power of distress for recovery thereof, as in the will were mentioned, and subject thereto, to the use of the appellant Sir Thomas, (by his then name and description of Thomas Delves, esq.) and his assigns for life; and after the determination of that estate, to the use of the same trustees and their heirs, during the life of the appellant Sir Thomas, in trust to preserve the contingent uses; and after his decease to the use of the first and other sons of the body of the appellant Sir Thomas successively in tail male; and in default of such issue, to the use of the testator's cousin, John Broughton, and his heirs and assigns for ever. And after giving some pecuniary legacies, he gave and bequeathed all the rest, residue, and remainder of his goods, chattels, and personal estate, subject to the payment of his just debts and funeral expences, to the appellant Sir Thomas, his executors, administrators, and assigns, for his and their own use and benefit; and appointed the said Edward Kynaston and John Chambre executors of his will.

On the 16th of January 1766, the testator died without issue, and without having revoked or altered his will, leaving the respondent Mary his widow, and the appellant Sir Thomas his only brother and heir at law; and soon after his death the executors of his will duly proved the same, and took upon themselves the execution thereof; and the respondent Mary also proved the will in the court of Chancery, by the subscribing witnesses, in a suit instituted for perpetuating their testimony against the appellant Sir Thomas.

In pursuance of this will the appellant Sir Thomas obtained an act of parliament for taking and using the surname of Broughton only, agreeable to the directions of the will, and in other respects submitted to and acted under the will.

Soon after the testator's death the respondent Mary, with the consent of the appellant Sir Thomas and of the executors, entered upon the estates in the county of Southampton devised to her by the will, and possessed herself of the testator's house in upper Brook-street, and the several other specific legacies thereby given to her; and the appellant Sir Thomas also entered upon the testator's estates in the counties of Chester and Stafford, under and by virtue of the will.

The appellant Sir Thomas likewise applied to parliament for an act to enable him to cut down timber from off the estates in the counties of Chester and Stafford, and in his petition for leave to bring in a bill for that purpose stated, that the estates were of the annual value of £8000, and alleged, as a ground for such application, that they were subject to three jointures, meaning, amongst [465] others the said jointure to the respondent Mary, one of which afterwards fell in.

The estates and fortune which Sir Brian died seised and possessed of were very ample, consisting not only of his said real estates in the counties of Chester and Stafford, of the annual value before mentioned, but also of a considerable personal estate, exclusive of what he gave to the respondent Mary, more than sufficient to pay his debts and legacies.

The estates in the county of Southampton, devised to the respondent Mary, were not of more than the gross annual value of £627 12s. subject to very large deductions for land-tax, repairs, and other outgoings, which reduced the same to £550 per ann. clear: and Sir Brian was not at his death entitled to any other stocks or monies in the public funds than £2000 East India stock.

Sir Brian at the time of making his will had not obtained any conveyances of the estates in the county of Southampton, or any of them, nor had he paid the purchase money for the same.

The respondents Henry Errington and Mary his wife intermarried on the 5th of August 1769.

The appellant Sir Thomas paid the respondent Mary her annuity of £1000, pursuant to the articles entered into previous to her marriage with Sir Brian, from the time of his death to Michaelmas 1768; but he afterwards declining to make any further payments of the said annuity, the respondents, in Hilary term 1770, filed their bill in the court of Chancery against the appellants, and also against the said Edward Kynaston, Humphrey Mackworth Praed and Mary his wife, and Charles Shrimpton, stating the several matters abovementioned, and praying that the appellant Sir Thomas might be decreed to pay the respondents Henry Errington and Mary his wife, in her right, the arrears of the said annuity of £1000, and that her marriage articles might be decreed to be specifically performed and carried into execution, so far as the same related to the jointure of the respondent Mary, by all persons claiming under Sir Brian, and that a proper part of the estate in the county of Chester, of the annual value of £1600 at least, might be set apart and conveyed pursuant to the articles, to the respondent Thomas Hill, and such other trustee as the appellant Sir Thomas should appoint, in trust for raising and paying the said annuity of £1000 to the respondent Mary during her life, and that until such conveyance should be made, the appellant Sir Thomas, and such other persons as should be in the possession of the rents and profits of Sir Brian's estates in the county of Chester, might make the growing payments of the said annuity.

The appellant Sir Thomas put in his answer to this bill, and thereby insisted, that what was given by the will to the respondent Mary, was a satisfaction for what she was entitled to under the articles, or that she could not have both provisions: for that it could not be the testator's intention, that the jointure claimed by Mary should remain a charge on the Cheshire estate, or he paid [466] therefrom, or that a conveyance should be made of any part thereof pursuant to the articles.

Issue being joined in the cause, divers witnesses were examined on both sides: and on the 28th of January 1772, the cause came on to be heard before the Lord Chancellor Bathurst, when the deposition of Mr. Francis Chambre, who prepared the will of Sir Brian, was offered by the respondents to be read on their behalf, to prove the declarations of the testator at the time he gave the instructions for the will to Mr. Chambre, with respect to his intention of giving the respondent Mary the several devises and bequests to her mentioned in his will, over and above her jointure; but his lordship did not think fit to admit such evidence to be read: and was pleased to declare, that the respondents were entitled to have the rent charge of £1000 a-year secured, agreeable to the articles dated the 30th of August 1762; and decreed that the appellant Sir Thomas should pay the arrears thereof then incurred, in six months from that time, and should continue the growing payments thereof half yearly, within three months after each half yearly payment should be due; but in default of his paying such arrears, and continuing such growing payments of the said rent charge, the respondents were to be at liberty to apply to the court for further directions relating thereto, as they should be advised; and it was further ordered, that the respondents should pay the defendants Humphrey Mackworth Praed and Dame Mary his wife, and the defendant Edward Kynaston, their costs of the suit, to be taxed by the master; and that the appellant Sir Thomas should repay to the respondents such costs as they should so pay, and should also pay to the respondents their costs of the suit, to be taxed by the master; and

any of the parties were to be at liberty to apply to the court as there should be occasion.

From this decree the present appeal was brought : and on behalf of the appellant it was argued (A. Wedderburn, R. Perryn, W. W. Pepys), that though a devise, when considered by itself, may carry with it the presumption of an intended bounty, yet when a testator has covenanted by articles to make a provision for his wife or children, such a presumption is liable to be controuled by a still stronger presumption that he intended the devise as a satisfaction for the performance of those articles ; and especially where the devise is so great in value as to include both a satisfaction and a bounty. This general presumption, that where two provisions are made for a wife or a child, the testator intended the one to be a satisfaction for the other, (which general presumption is grounded on the known custom of this realm, to give the bulk of the family estate to the eldest son or heir at law, with competent provisions for the wife and younger children,) was peculiarly strong in the present case ; where, from the heavy charges already laid on the family estate, the only brother and heir would otherwise be unable to maintain the ancient figure and credit of the family. That the lands alone devised by the will, were of much greater value than the rent charge claimed under the articles ; and thereby all objections were obviated which [467] might have arisen from the provision under the will, not being of the same nature with that under the articles. That from the testator's having omitted any mention of the articles, although they must have been present to his memory, while he was securing another rent charge of £20 a year to Mr. Shrimpton ; and from the manner in which he devised those estates to the appellant Sir Thomas, subject to that rent charge, a strong presumption arose, that he considered the devise and bequests to his widow, as an ample satisfaction for the articles. Lastly, that the devise of the estate to Sir Thomas for life only, was inconsistent with the claim of the rent charge under the articles ; inasmuch as Sir Thomas, from the nature of his interest, was incapable of making any legal conveyance of the rent charge so claimed.

On the other side it was contended (E. Thurlow, J. Madocks), that every devise or bequest in a will, *prima facie*, imports a bounty : and therefore in order to induce a court of equity to consider the bequests in this will in favour of the lady, as a satisfaction for her jointure of £1000 a year, or as a performance of the marriage articles entered into by Sir Brian, it was incumbent upon the appellants to shew, that it was the testator's intention when he made his will, to give her a satisfaction by that will, for or in lieu of her jointure, or to perform the marriage articles on his part ; and such intention must appear, either from the express words of the will, or the clear and manifest intention of the testator appearing upon the face of it, or be drawn by necessary implication therefrom ; but no such intention or necessary implication appeared in any part of Sir Brian's will, rather the contrary. In order to make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land ; or must at least be of such certain and known value and estimation, and so far of the same nature with the thing to be satisfied therewith, as to appear indisputably to be equivalent, or superior, not only in gross value, but in annual income, to the debt or demand, or the thing to be performed ; but none of these circumstances attended the devises or bequests, which, in the present case, were contended to be a satisfaction for the respondent Mary's jointure, or a performance of Sir Brian's marriage articles. That the annuity of £1000 agreed to be settled on her by those articles, was intended as a jointure for her, and was declared to be in bar and satisfaction of dower ; and therefore ought, in a court of equity, as well as at law, to be considered as coming in the place of dower, and having the same privileges, force and effect, as a right of dower ; and neither courts of law or equity admit an averment of a collateral satisfaction for dower. That Sir Brian, not having obtained any conveyance of the Hampshire estates, or paid the purchase money for them, at the time of making his will, could not devise to the respondent Mary the legal interest therein ; and therefore the devise to her was in fact a devise of the right to compleat the purchase, and a gift of mere personal estate, or of [468] so much money as he had agreed to give for the purchase of the Hampshire estates, and appeared to be so considered by him, from the penning of his will ; but a bequest of personal estate cannot be averred to be, or be considered as a satisfaction for a jointure in lands, or a rent charge upon a real estate. That in order to make Sir Brian's

will a performance of his marriage articles, it must appear upon the face of it, and at all events, a complete and full performance thereof, and to have been so intended by him : But the very reverse appeared ; for the devise of the Cheshire estate in his will, must have been considered by him as subject to the articles, or springing out of the ultimate remainder in fee, reserved to him by the articles ; and if he had had any son by his lady, such son, as well as the mother, would have been entitled to call for a specific performance of the articles ; and the will could not have been set up as a satisfaction thereof against the son, nor could such son have insisted, that the devises and bequests in the will to his mother, were a performance of the articles so far as related to her ; nor if a conveyance and settlement of the estate had been actually made and executed pursuant to the articles, could any person entitled under that settlement have set up such devises and bequests to the respondent Mary in Sir Brian's will, as a discharge or satisfaction of her incumbrance, or rent charge upon his estate. That if Sir Brian had intended to devise his Cheshire estate to his brother, and the other devises in remainder, discharged from his lady's jointure, he would most probably have expressly declared such intention by his will ; as it appeared from many circumstances that at the time of making this will, he had not forgot, but well remembered, that he had before settled such a jointure on her ; and his bequeathing her his house in Brook Street, and his plate, furniture, horses, and carriages proved his intention that she should, after his death, live in a manner and at an expence suitable to her rank as his widow, and therefore he must have intended by the devise in question, to increase her jointure, in order to answer that purpose.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed ; and the decree therein complained of affirmed. (MS. Jour. *sub anno* 1772-3, p. 315.)

[469] CASE 6.—GUSTAVUS ROCHFORD HUME, and Another,—*Appellants* ;
EARL OF ELY, and Others,—*Respondents* [2d May 1775].

[Mews' Dig. vii. 17. See *Hume v. Burton*, 1 Ridg. P. C. 16 ; *Rochfort v. Ely*,
1 Bro. P. C. 450.]

[Where the validity of a will is impeached by a suit in the ecclesiastical court, as to the personal estate, and another in the court of Chancery, as to the real estate, and the will is established by a sentence of the ecclesiastical court, the bill in Chancery ought to be dismissed.]

[Decree of the court of Chancery in Ireland affirmed.]

[This is a case entirely of a private nature, and not adapted to form any precedent.]

Sir Gustavus Hume of Castle Hume in the county of Fermanagh, bart. being seised in fee of the town and lands of Castle Hume, and of several other estates in the counties of Fermanagh, Leitrim, and Mayo in Ireland, of the yearly value of £3000, and having issue two daughters only, Mary and Alice, by indentures of lease and release, dated respectively, the 5th and 6th of August 1729, conveyed his estates to trustees and their heirs, to the use of himself for life, and after his decease (charged with a yearly rent charge of £800 to Lady Alice Hume his wife for life, and a sum of £5000 for his second daughter Alice) to the use of Mary Hume his eldest daughter during her life, remainder to trustees, to preserve contingent remainders ; remainder to her first and other sons in tail male ; remainder to the daughters of Mary, and the heirs of their bodies lawfully issuing ; and in default of such issue, remainder to Alice his second daughter for life, remainder to trustees to preserve contingent remainders ; remainder to her first and other sons in tail male ; remainder to the daughters of Alice, and the heirs of their bodies ; and in default of such issue, then, as to the Leitrim and Mayo estates, to Mary Johnson and Mary Moore his nieces, and their heirs ; and as to the Fermanagh estate, to the Honourable Alexander Hume, second son of Alexander, Earl of Marchmont, for life ; remainder to his first and other sons in tail male ; remainder to the said Alexander, Earl of Marchmont, for life ; remainder to Hugh, Lord Polworth, the Earl's eldest son, and now Earl of Marchmont, for life ; remainder to his first and other sons in tail male, with divers remainders over.

In October 1731, Sir Gustavus died without issue male, leaving Lady Alice Hume his widow, and his two daughters, both then under age, surviving him; and by his will, after several specific legacies to Lady Alice his wife, he bequeathed the residue of his personal estate, amounting to a very considerable sum, to Alice his younger daughter.

In 1736, Nicholas Loftus the elder, afterwards created Lord Viscount Loftus, being seised of Loftus Hall, and of several estates in the counties of Wexford and Queen's county, of the yearly [470] value of £3000, and having two sons, Nicholas, the father of the late Earl of Ely, and the respondent Henry Earl of Ely, entered into a treaty with Lady Alice Hume for a marriage, which was afterwards had, between his eldest son Nicholas, and her eldest daughter Mary; and accordingly, by a settlement made on the 4th of August 1736, reciting, that Mary Hume was seised of or entitled for her life to a considerable real estate in possession, subject to a rent charge of £800 a year to Lady Alice her mother, and that the marriage was intended to be had, in consideration thereof, and of the estates which Nicholas Loftus the son would become entitled to in right of his intended wife, and for providing a present maintenance for them, and a competent jointure for her, and for settling the Loftus estate, Mr. Loftus the father conveyed all the Loftus estates to trustees and their heirs, as to part, to the use of his son for life, and as to the rest to himself for life; remainder to his son for life, with remainder of the whole to the first and other sons of the marriage in tail male; and if there should be no son, a yearly rent charge was provided out of the Loftus estate for the jointure of Mary; and subject thereto, to the first and other sons of Nicholas the son by any other wife in tail male; remainder to the respondent Henry, the second son, for his life; remainder to his first and other sons in tail, reversion in fee to Nicholas the father; with powers for providing portions for younger children and daughters. In consequence of this settlement, Nicholas the son, in right of his wife, entered on the estates comprised in the settlement of 1729, subject to Lady Alice Hume the mother's annuity, and the provision for her younger daughter.

After the marriage, Nicholas Loftus the son took and used the name of Hume, in addition to his own name, and resided chiefly at Castle Hume, having lodgings only in Dublin, at the house of Richard Moore in Capel Street, where, on the 11th of September 1738, Nicholas, the late Earl of Ely was born. About two years afterwards, his mother died, and his father, though no longer entitled to the Hume estates, continued in possession as the natural guardian of his son, and no measures were taken to carry on any account against him for the benefit of the infant, though both Lord Loftus the grandfather, and Lady Alice Hume were then alive.

The care of the infant's person was, by the father's approbation, committed to his grandmother, who with Alice her unmarried daughter lived in Dublin, and had a small country house called Scrubbs in the neighbourhood.

This care she continued during her life with the most doting fondness, and by several letters written by her and her daughter to Loftus Hume, it appeared that his son was constantly mentioned in the warmest terms of affection; they said indeed, that his health required bathing in the sea, that he was backward in his speech, but was playful, and appeared to have apprehension and understanding, though wild and giddy; but no suspicion appeared in his correspondence, of any defect in his faculties. On the contrary, Lady Alice, in one of her letters in 1743, said she hoped he would live to be an honour to his family.

In 1746, Alice the younger daughter married the appellant George Rochfort, who thereupon became entitled to the large provision made for her by her father's settlement and will.

In the year 1748, Lady Alice Hume made her will, and having a long term of years in her house in Dominick Street, she (among other bequests) devised that house, together with all the furniture, plate, and pictures, and all her personal estate and effects whatsoever, not specifically disposed of by the will, to trustees, upon trust to permit her daughter Mrs. Rochfort to enjoy the same, until her grandson Nicholas Hume should attain the age of 27; and then to permit him to possess the same for 99 years, if he should so long live; and after his death, to permit his first and other sons successively to possess the same, and in default of sons, his daughters; and if all his issue should die before 21, without issue, to Mrs. Rochfort and her sons and daughters in like manner, with remainder to a son of the Earl of Drogheda.

Upon the death of Lady Alice Hume, Mr. and Mrs. Rochfort having taken possession of the house in Dominick Street, their nephew, who had continued with his grandmother to the time of her death, being then about 12 years old, was immediately removed to his father's lodgings in Capel Street.

The respondents did not examine any witnesses of this period of the late Earl's life, but it appeared from the appellant's evidence, that the Earl's constitution was sickly, that he had a scorbutic disorder, that he was backward in his speech, that whether from Lady Alice Hume's injudicious management (though it was evident she had the greatest affection for him) or from some natural cause, he had early in life a contraction in the sinews of his hams, so that he could not straighten his knees: his infirmities increased as he grew up, and contributed to give him an awkward appearance, which, with the backwardness of his speech, accounted for the opinions formed of him during this period by some of the appellants' witnesses.

Loftus Hume kept his son from his age of 12 to his age of 18, at Moore's in Capel Street, without much attention either to his health or improvement, and the general proof as to this period was, that the son was in a weak state of health when he came to Moore's; and although he gained strength during his residence there, yet the contraction in his knees rendered him unable and unfit to stir abroad: However the witnesses said, he had memory, that he was good tempered when pleased, but passionate when vexed, and that he stood in great awe of his father, who was a man of a strange disposition, and uncommon violence of temper. In 1756, he was removed to Henrietta Street, his father having purchased a house there, and from thence in 1757, to a house in the county of Wicklow, called Clermont, which his father from thenceforth made his country residence.

[472] On the 29th of April 1758, the appellant George Rochfort and his wife presented their petition to Lord Bowes, then Lord Chancellor of Ireland, grounded on several affidavits, setting forth her interest in the estate of Sir Gustavus Hume, under the settlement of 1729, in case of failure of issue male of the late Earl, the only child of her sister Mary; and stating that he was a minor, and had been from his infancy of unsound mind and understanding, and incapable of conducting his own affairs; and praying a commission to be granted to enquire into the capacity and understanding of the said minor, and whether he had ability sufficient to manage and transact his own affairs. And the court having given leave to Nicholas the father, to answer the several matters in the said affidavits, if he should think fit, the petition came on to be heard on the 5th of June following, and the Lord Chancellor was thereupon pleased to order a commission to issue, to enquire by a jury of the city of Dublin, whether the said Nicholas Loftus Hume the minor, was an idiot, or a person of unsound mind? And if he was, whether he had been so from his nativity, or from any other and what time?

On the 1st of July 1758, the commission issued, returnable the 28th of November following, and on the 4th of July 1758, Loftus Hume the father, was served with notice from the Commissioners, requiring him, upon the 10th of the same month, to produce the minor before them at the Tholsell of the city of Dublin, on the execution of the said commission. When this notice was served, the minor was at Clermont, in the county of Wicklow, in a bad state of health, and therefore could not attend without much danger, of which fact several affidavits were made, and a notice was thereupon given on behalf of the minor, that a petition would be preferred to the Lord Chancellor to set aside the commission, and that if a commission was necessary to issue, it should be executed in the county of Wicklow. And the appellant having at the same time petitioned for a peremptory order on Nicholas the father to produce his son, the matter of both petitions came on to be heard on the 7th of November 1758, when it was ordered, that the said Nicholas Loftus Hume should, on the 15th of the same month, produce the minor before the Commissioners in the city of Dublin.

On the 18th of November 1758, the appellant George Rochfort moved the court upon affidavit, stating, that the service of the former order had been obstructed, and that Nicholas the father intended to carry his son, then a minor, out of the kingdom; and praying, that he might produce the minor in court, on the 27th of that instant November, or that an attachment should be awarded against him without further motion, and that he should not remove the person of the minor out of the kingdom, without leave of the court. Whereupon an order was made by the Lord Chancellor to that effect, which order the said Loftus Hume the father refused to comply with; as

the inquiry was not directed [473] to be had in the county of Wicklow, and therefore an attachment issued against him on the 30th of November.

On the 19th of December 1758, Nicholas the minor, and Nicholas the father presented their petition of appeal to the House of Peers, complaining of the said orders of the 5th of June, and the 18th and 25th of November 1758. But as this appeal complained of orders made on the petty bag side of the court of Chancery, it did not properly lie, and was therefore withdrawn on the 22d of February 1759.

Nicholas the father having refused to produce his son, in obedience to the order of the 7th of November 1758, the appellant George Rochfort and his wife applied to the Chancellor by petition, on the 16th of May 1759, for a receiver; when his Lordship was pleased to appoint George Rochfort, to be receiver of the rents of the estate, pending the inquiry which they proposed to prosecute under a new commission, or till the further order of the court, upon his giving security in the usual manner; and it was also ordered, that all persons should be prohibited from cutting down any trees without leave of the court; whereupon Mr. Rochfort acted as receiver, and received the rents.

On the 25th of the said month of May, a new commission issued, directed to the former commissioners, commanding them to enquire, "Whether the said late Earl was "an idiot, or a person of unsound mind?" Which commission was returnable without delay, but was not executed, as Nicholas the father still persisted in his refusal to produce his son.

On the 14th of July 1759, the appellant George Rochfort and Alice his wife, and the appellant Gustavus Rochfort their son, exhibited their bill in the court of Chancery in Ireland, against Nicholas the father, and Nicholas his son, and Warden Flood, esq. his Majesty's then Attorney General, stating the settlement of 1729, that the minor was born an idiot, and from his nativity had continued to be and then was an idiot, or a person incapable of conducting or managing his affairs; and stating the different commissions issued, and the various orders and proceedings made and had under the first commission, and subsequent thereto; that the minor was near attaining his age of 21, and that Nicholas the father intended to carry into execution a scheme for the said minor's suffering common recoveries of the Hume estate, and to send him out of Ireland, out of the reach of the process of the court; and charging that Nicholas the father, under colour of some authority from the son, intended to cut down and destroy the timber on the estate, and to commit other waste, and exercise other acts of ownership over the estate, and that the minor had not sufficient capacity or understanding to put in an answer to the said bill. And therefore praying, that the court would make a special order for the minor's personal appearance in court, and that in the mean time such order or orders might be made as the court should think fit, for the preventing common recoveries being suffered by or in the name of the minor, and for preventing [474] the issuing any process preparatory to the suffering such common recoveries, until the said minor should appear in person; and that such order might be made, or process granted, as should be fit for preventing the minor's being removed out of the kingdom without leave of the court.

On the 16th of July 1759, Nicholas the father was served with a copy of this bill, and a subpoena to answer the same, and on the 20th of the same month, the plaintiffs in the said cause petitioned the Lord Chancellor, and obtained an order that no common recovery should be suffered by or in the name of the said Nicholas the son, of the lands and premises in the settlement of the 6th of August 1729, or of any of them, and that no process or commission preparatory to the suffering such common recovery or recoveries should issue, without the special order of the court; to be obtained upon motion to be made on previous notice; and that Nicholas the father, or any other person, should not remove the person of Nicholas the son, out of the kingdom, without leave of the court; and that all persons should be restrained from cutting down any woods or timber trees, or committing any waste upon the estate; his Majesty's Attorney General being present, and desiring the same on behalf of the Crown.

On the 22d of September 1759, the late Earl came of age; and on the 8th of March following, an application was made by petition to the Lord Chancellor, praying that the order of the 5th of June 1758, for issuing the commission against him should be set aside, and that if any new commission was necessary, it should go to the county of Wicklow; and praying, that the order of the 16th of May 1759, appointing George Rochfort receiver of the estate, might also be set aside. And upon hearing this peti-

tion, on the 8th of March 1760, the Chancellor was pleased only to vary the order with respect to a receiver, viz. that the said Nicholas Loftus Hume being then of age, should name a proper receiver to be appointed by the court, who was to give security to be accountable for the rents; and that the said Nicholas Loftus Hume should be allowed £1000 per ann. from the time of his coming of age, until further order; and that the said George Rochfort should account for the rents by him received. In consequence of which, by a subsequent order, made on the 14th of August 1762, the Reverend Mr. John Tench was appointed agent and receiver, and continued to act in that capacity until he died in 1764, and from that time the rents of the Hume estate were suffered to run greatly in arrear.

Upon the death of Nicholas Lord Viscount Loftus the grandfather, Nicholas Loftus Hume his son succeeded to the title of Viscount, and entered upon the possession of the Loftus estates, and was afterwards created Earl of Ely, in the kingdom of Ireland.

This change of affairs, however, made no alteration in his disposition towards his son, whom he treated with uncommon [475] barbarity: his bodily infirmities were at this time greatly increased by the scurvy, which broke out on his cheek, and by a fall upon the stairs, which disabled him in such a manner that he could only move about with the assistance of chairs. Mr. Tottenham his uncle, who saw him frequently about this time at Clermont, observed a gradual decrease in the strength of his limbs, which he chiefly attributed to want of air and exercise, neither of which the late Earl could have the benefit of, not being able to walk, and his father having excused himself from keeping a carriage for him, because he was deprived of the rents and profits of his son's estates, and on account of the great expence he was at in defending him against Mr. Rochfort's attacks. This was the situation of the late Earl, when his father Nicholas Lord Loftus and Earl of Ely died, on the 31st of October 1766, intestate, leaving the late Earl, his only son, who succeeded to his father's honours and estates, then consisting of the Loftus and Hume estates, both of about the yearly value of £6000.

Soon after his father's death, the late Earl came up with his uncle the respondent, his nearest relation on his father's side, to his house in Cavendish Street, where he was attended by Dr. Robinson, Dr. Quin, and Mr. Daunt, a surgeon, gentlemen of great eminence, and by the care and attention employed about him, he visibly grew better, and recovered in a great degree his health and spirits.

On the 17th of December 1766, an application was made to the Lord Chancellor, that the present respondent, or such person as the Earl should think proper, should be appointed receiver of the rents of the Castle Hume estate; and on the same day, the appellant George Rochfort, without any previous notice of his purpose, made an application to the court, that a new commission might issue, to try the ideotcy or insanity of the Earl; and the counsel on the part of the Earl, consenting to the issuing such commission, an order was made accordingly; but the Lord Chancellor would make no order on the application for a receiver, declaring, that the Earl was under no legal disability. Whereupon the Earl appointed the following persons agents of his estates in the following counties, viz. Richard Hassard, in the county of Fermanagh; Patrick Cullen, in the county of Leitrim; and his uncle Charles Tottenham, in the county of Wexford.

On the 19th of December 1766, a new commission issued, directed to Hercules Langford Rowley and William Brownlow, esqrs. two of his Majesty's most Honourable Privy Council in Ireland, Charles Walker and Francis Vezey, esqrs. two of the Masters of the High Court of Chancery in Ireland, George Smith and William Henn, esqrs. two of his Majesty's counsel, learned in the law, Arthur Pomeroy, esq. Knt. of the shire for the county of Kildare, Ralph Howard, esq. Knt. of the shire for the county of Wicklow, William Sharman, esq. and Thomas Cooke and Percivall Hunt, esqrs. two of the aldermen of the city of Dublin [476] commanding them or any five or more of them, (whereof the said Walker, Vezey, Smith, or Henn to be one) personally to examine the said Nicholas Earl of Ely, by ways and means whereby they might be fully informed, whether the said Nicholas Earl of Ely was an ideot, or person of unsound mind, and if he was, then whether he had been so from his nativity, or from any other and what time.

On the 9th of January 1767, eight of the commissioners named in the said commission, met in the Chancery Chamber in the four courts in the city of Dublin, to open their commission, and settle the manner of conducting their enquiry; and the said

George Rochfort and the respondent and their agents being present, and the commissioners having fixed the time and place for executing the said commission, they issued out their precept to the sheriffs of Dublin, to return a jury accordingly. And the commissioners among themselves, came to several resolutions, with regard to the manner of examining the said Earl, and their future conduct in the execution of the commission; which resolutions they imparted to George Rochfort, and the respondent the now Earl of Ely and their agents, and which were approved of by all parties.

On the 19th of the said month of January, nine of the commissioners met at the Lying-Inn Hospital, and the sheriffs of the said city of Dublin attended, and returned a jury of 24 persons, for the trial of the question. The commissioners then proceeded to the further execution of the commission, when the counsel who attended on the behalf of Rochfort, and his wife and son, began with opening their case, and insisted on calling and examining evidence of the state of mind of the Earl from his nativity, in order, as it was alleged, that the commissioners and jury might be enabled to point their questions to the proper objects of the enquiry; and thereupon several witnesses were produced and examined on the part of Mr. Rochfort and his wife, and such examination continued for three days and a half. Divers witnesses were then produced and examined on the part of the Earl, and several letters were produced, which had been written by Mr. Rochfort and his wife before her marriage. The commissioners and jury, being possessed of the evidence given on both sides, on the 6th day, being the 24th of January 1767, met and proceeded to the personal examination of the Earl himself, and examined him for a considerable time; the chairman then gave a charge to the jury, and they unanimously agreed on their verdict, and found, that the said Nicholas Hume, Earl of Ely, in the said commission named, was not, at the time of taking that inquisition, an idiot, or a person of unsound mind; and the nine commissioners agreed in opinion with the jurors.

On the 7th of February 1767 an application was made to the court of Chancery by motion, that the order of the 20th of July 1759, restraining the earl from suffering a recovery of his estates, might be discharged; and, after taking up four days in the hearing, the order was discharged. But, on the 11th of the same month a petition of George Rochfort and his wife was heard, praying that the inquisition taken on the said commission might be set aside, and that his lordship would be pleased to examine the earl personally, or that a new commission might issue; when his lordship declared, he saw no reason for making any order on such petition.

On the same day a deed of bargain and sale was executed by the Earl for making a tenant to the precipe for suffering recoveries, and declaring the uses thereof to himself in fee; and attested by Mr. Hellen, one of his Lordship's counsel, and the Reverend Mr. John Nixon. The Earl also signed warrants of attorney for suffering the recoveries, and both the witnesses proved that Mr. Hellen and Mr. Carrol, the Earl's solicitor, explained to him the nature and effect of the deed in familiar terms, and that he comprehended the meaning and intent thereof. In the evening of the same day, the deed, and also the warrants of attorney, were acknowledged by the Earl, in the presence of the Lord Chief Justice Clayton, who came to the Earl, at his request, to take the acknowledgments. And in consequence of this deed, and the warrants of attorney, a recovery was suffered of the Earl's estates, as of Hilary term 1767; and the reason given by one of the witnesses, why they were suffered by warrant of attorney, was, because the Earl being lame, and unable to walk, his being carried into court in the arms of his servants, would have been disagreeable to him.

On the 15th of April 1767, the appellant Rochfort and his wife, and Gustavus their son, appealed to the House of Lords from the order of the 5th of January 1767, relating to the manner of striking a jury under the commission; the order of the 11th of February 1767, discharging the restraining order of the 20th of July 1759, and an order of the 13th of March 1767, refusing a new commission; and by their petition of appeal particularly stated, that recoveries had been suffered by the Earl in consequence of these orders; that the remainders limited to the then appellants by the settlement of 1729 were thereby barred; and that the appellants were remediless if the said orders should stand.

The Earl having heard that the castle of Rathfarnham, built by one of his ancestors, was to be sold, requested his cousin Mr. Ponsonby, then speaker of the House of Commons, Mr. Nixon, and his uncle the respondent, to take a view of it, which they

accordingly did; and having represented it to him as an eligible purchase, the Earl declared he should be glad his uncle would purchase it for him, as it would give him pleasure to have an estate that had formerly been in his family brought back. In consequence of which, his uncle the respondent agreed for the purchase for £17,500, for the payment whereof it was necessary that the Earl should borrow money; and accordingly, on the 26th and 27th of March 1767, Thomas Finley, esq. and company, [478] bankers in Dublin, lent him upon his bonds and warrants of attorney to confess judgment thereon, £8000, and by deeds of lease and release, dated the 1st and 2d of April following, Bellingham Boyle, Esq. in consideration of £17,500 paid or secured to him, conveyed the estate of Rathfarnham to the Earl and his heirs, for the then existing lives (the interest being a lease for lives renewable for ever). At the execution of the deeds £5500 was paid; the estate was subject to a mortgage of £7000, which was to be paid on the 25th of March following, and the Earl, by a separate deed, covenanted to pay the remainder of the purchase money, being £5000, on the 25th of March following, which was accordingly paid by further sums borrowed by the Earl on bond and warrant of attorney.

In Trinity term 1767, the Earl, to prevent any objection that might be made to the former recoveries in point of form, suffered recoveries again in this term; the tenant to the precipe being made by fine, which the Earl acknowledged before the same Chief Justice of the Common Pleas, who since his first interview had dined with the Earl, and by that means had a further opportunity of judging of his capacity.

The Earl being desirous to make some provision for his aunt Loftus, and to settle his estate in his blood and family, by deeds of lease and release, dated the 11th and 12th of November 1767, in consideration of the great care, attention, and affection of his aunt Loftus, and for other considerations therein mentioned, conveyed all his estates to Lord Mount Cashell, John Ponsonby, then speaker of the House of Commons, and Sir James May, of Mayfield, in the county of Waterford, Bart. and their heirs, upon trust, to pay an annuity of £500 per annum to Mrs. Loftus for life, in case she should survive her husband, and subject thereto to himself for life, with remainder to his first and other sons in tail male; with remainder to his daughters in tail general; with remainder to his uncle the respondent in fee. With a power to himself of leasing, making a jointure, and charging portions for his younger children; and a general power of revocation, with the consent of the trustees.

On the 29th of February 1768, the appeal came on to be heard (*vide* VI Br. P. C. p. 329); when their Lordships were pleased to order, that with respect to the order of the 5th of January 1767, refusing the application for a special jury, and the order of the 13th of March 1767, refusing the application for a new commission, the appeal should be dismissed; and with respect to the order of the 11th of February 1767, which discharged the order of the 20th of July 1759, whereby the Earl was restrained from suffering recoveries, that the same should be affirmed.

On the 6th of November 1769 the Earl executed his last will, whereby he gave and bequeathed all his real and personal estate to his uncle the respondent, and made him sole executor; which will was attested by the Right Honourable John Ponsonby, Sir Henry Cavendish, and Sir James May; the two first of whom [479] were examined in this cause. Sir James May, at the time of the examination being dangerously ill, at the distance of 90 miles from Dublin, could not be examined; but he having been before examined to the proof of the will in the prerogative court, it was not thought of sufficient consequence to delay the hearing of the cause, for the sake of a repetition of his evidence; and they both said, that the Earl was of sound mind, memory, and understanding at the time of the execution of his will. They also gave a particular account of what passed at the time of the execution; the substance of which was, "That in consequence of messages received by them, they and Sir James May met in the parlour at the Earl's house, where the present Earl and his lady were, and a message being brought from the late Earl, desiring they would go up to him, they all went up. They found the Earl sitting at a table, and upon their entering he bowed and enquired after their healths, and said he had sent for them to request they would witness his will, which then lay upon the table before him; he appeared weak and faint, and spoke faintly. The will was then read to him; and after it was read, Sir James May asked the Earl, whether that was the will he intended to sign, to which he answered it was, and that he intended to leave all his property to his uncle. Sir James May

"asked him, why he had made such a disposition of his fortune as he had done by his will; when he pointed to his uncle, and said he gave his fortune to him because he had been always a kind and affectionate uncle to him: he then executed duplicates of the will. Immediately after the will was executed Mr. Ponsonby asked him, whether he had any other commands, as he was obliged to go upon business, to which the Earl made no answer, but bowed, and Mr. Ponsonby left the room: when he was got to the head of the stairs he was desired to return into the room; and having gone near the Earl, he said, Mr. Speaker, I request it of you that you will keep my will; to which Mr. Ponsonby answered, that he certainly would comply with his Lordship's request."

On the 8th of November, in the evening, the Earl began to grow worse, and to shew signs of a delirium; and from thence his fever increased until on the 12th, when he died.

Upon the Earl's death a caveat was entered by the appellant in the ecclesiastical court, against the proof of the will; so that it became necessary for the respondent to institute a suit for proving the will in special form of law; and accordingly the will was proved, upon the oaths not only of the subscribing witnesses, but of other witnesses also, to his sanity and capacity of disposing of his property.

On the 30th of May 1770, a bill was filed in the court of Chancery in Ireland by the appellants, against the respondent the Earl of Ely and others; stating the settlement of 1729, and several of the proceedings before mentioned, and charging the general incapacity of the late Earl, arising as well from natural [480] as accidental causes, to manage his affairs, or do any act towards disposing of his estate; and therefore praying, that the deeds declaring the uses of the fines and recoveries might be set aside, and the fines and recoveries declared to enure to the uses of the settlement of 1729, that the respondent might convey the estates to those uses, and might account for the Earl's personal estate; that the leases and grants of annuities made by the Earl might be set aside; and that the respondent might be restrained from receiving the rents and profits.

To this bill the respondent filed two pleas and an answer. And as to that part of the bill which related to the Earl's personal estate, he pleaded, that a suit had been duly instituted by him in the prerogative court of Ireland, for the proof of the Earl's will, whereby he bequeathed to the respondent all his personal estate, and named him his sole executor. That he was proceeding according to the course of that court, to establish the will; and that the said suit was still depending and undetermined. And as to so much of the bill as sought to set aside the deed declaring the uses of the fines and recoveries, and a reconveyance to the uses in the settlement of Sir Gustavus Hume, or that sought any relief touching the Hume estates, or any discovery or relief touching any leases made or annuities granted by the Earl; the respondent pleaded, that the late Earl of Ely, at the time of executing the deed of the 11th of February 1767, and of levying the fines and suffering the recoveries, was of sound mind, memory, and understanding, so as to be capable of executing deeds good and valid in the law, and of levying fines and suffering recoveries good and valid in law. And he then stated particularly, the bill filed in July 1759 by the appellants, the order of the 11th of February 1767, the application of the appellants for a new commission, and the proceedings upon that application; the appeal to the House of Lords, and the proceedings on that appeal; the second application for a new commission, and the refusal of the court to make any order thereon; the two sets of recoveries, and the fines levied by the late Earl. And he further pleaded, that by virtue of the said common recoveries the said Earl became seised in fee, and being so seised, died on the 12th of November 1769, unmarried, and without issue, leaving the respondent his uncle and heir at law, who thereupon became seised in fee of the several estates of which the late Earl was seised in fee. And the respondent by his answer denied that any fraud, imposition, or undue influence had been practised upon the late Earl in obtaining the said fines or recoveries.

These pleas were argued on the 3d of May 1771, and after several days hearing the Lord Chancellor was pleased, on the 25th of June following to order, that so much of the first plea as related to a discovery of the personal estate, and to the relief that might be necessary for the preservation of it, should be over-ruled. And as to the rest of the said first plea, that is to say, with respect to the will, and all the charges of fraud and imposition in [481] obtaining the same, he ordered that the plea should be allowed.

And as to the second plea, which related to the real estates, he ordered that it should stand for an answer, with liberty to except.

In consequence of this order the plaintiff's took exceptions to the answer, which were submitted to, and a full answer was put in by the respondent, upon which issue was joined and witnesses were examined on both sides.

The depositions of the witnesses, to the capacity of the Earl, referred to three different periods: first, during the time he lived with his grandmother: secondly, from her death to the death of his father: thirdly, from thence to his own death. In the first period no witnesses were examined for the respondent, and those examined for the appellants proved in general the infirmity of the Earl's health, the backwardness of his disposition, arising from a sickly constitution and an improper treatment. They also proved fully the extreme fondness and indulgence of his grandmother, and the favourable opinion that both she and her daughter Mrs. Rochfort entertained of him. The depositions in the second period exhibited a very melancholy picture of his father's barbarity and neglect, but they also shewed strongly the sensibility of a mind unimproved, and depressed by harsh usage: though capable of receiving the little instruction afforded him, and of forming very just ideas of the merit and demerit towards him, of the persons with whom he was conversant. In the third period, persons of the greatest integrity and character had frequent access to him, and they proved that his behaviour was rational, and even polite, that he was very sensible of the difference between those who had been kind and those who had been unkind to him; that there was no inconsistency or extravagance in his conduct: and that his affection to his uncle and his family, and disinclination to Mr. Rochfort and his family, were constant: that no imposition or influence was practised upon him, but the greatest attention used that he should be fully apprised of the nature and effect of every act which he did. To this evidence on the part of the respondents nothing was opposed but the testimony of a discarded footman, and a barber who saw him once when he was shaved, and that of two commissioners, and one jurymen upon the inquisition, who saw him only at the time of his examination, when they found him not to be of unsound mind.

On the 11th of January 1773, the cause in the court of prerogative was heard: when the validity of the will was decreed, no counsel appearing on behalf of the appellant to controvert the due execution or the validity thereof: and a probate having been granted in special form to the Earl, it finally determined the claim of the plaintiff to the personal estate of the late Earl.

The cause in Chancery came on to be heard before the Lord Chancellor on the 25th of April 1774, and continued in hearing 21 days, in that and the succeeding term, during which time all the evidence, and the several matters before stated, were fully [482] discussed, and on the 4th of July 1774, his Lordship declared, that as to the personal estate, the decision on the will in the prerogative court had finally determined that claim, and therefore he was pleased to dismiss the appellants' bill, as to the real estate, without costs.

From this decree the present appeal was brought, and on behalf of the appellants it was said (E. Thurlow, A. Forrester), that the relief sought by the bill, as to Sir Gustavus Hume's real estate, was founded on the late Earl's total weakness of mind, and his incapacity of knowing the nature and consequences of the several acts he was drawn into, or of expressing their import, otherwise than by words put into his mouth by the persons placed about him: and unless it could be established, contrary to law and reason, that there can be no weakness or unsoundness of mind but what amounts to ideocy or lunacy, there never yet had been a fair and legal trial of the Earl's sanity: the chairman who presided on the inquest having misdirected the jury, by telling them that the words ideocy and unsoundness of mind were synonymous, which they clearly are not; and here was not only incontestible evidence of the Earl's being a person of the lowest degree of understanding and next to ideocy, but that evidence was strongly confirmed by the whole conduct of his father, and of the respondent his uncle towards him; who certainly best knew the state of his mind, and left no room to doubt their thinking him of unsound mind. Admitting therefore on the one hand, that courts of equity will not measure the degrees of men's understanding, or adopt ideas of an equitable incapacity where there is not a legal one; it must be equally admitted on the other hand, that they always determine upon the acts of weak persons by the strictest rules; keep a close attention to the degree of influence which

they may be under from persons about them, and require full and clear evidence that the deeds of such persons were executed on their own mere motion ; that instructions for preparing such deeds were given by them, and counterparts thereof delivered to them, etc. But in the present case, the respondent had totally failed in proving the several deeds and instruments under which he claimed to have been obtained in such a manner as they ought, from a person of so low an understanding as the late Earl was, if any at all he had. If, however, the several deeds, fines, and recoveries of the late Earl, were proved to have been transacted by his own direction, yet it appeared manifestly, that they were primarily obtruded upon him by his counsel and agent, in breach of their trust and duty, in counteracting the wisdom of courts of equity, who wish rather to restrain than enlarge the dominion of weak persons over their estates : but those gentlemen were in fact the counsel and law agent of the respondent, and appointed by him ; nay one of them on his cross examination acknowledged, that he would not have advised the late Earl to suffer the recoveries, if the suffering them would have diminished the respondent's prospect of enjoying the estates. From this confession it plainly results, that the only [483] person meant to be affected by the recoveries was the appellant Gustavus, while the Earl was under the tutelage, and in the custody of the respondent ; and this improper conduct of the counsel came home to the respondent himself, who had thus beset his nephew with proper instruments for carrying on his own purposes. The late Earl's resentment against the appellant George for suing out the commission, was assigned as the principal incentive to his suffering the recoveries ; but the truth was, and so it appeared from the proofs, that he was incapable of resentment, otherwise than as it was instilled into him. It was therefore a fraud in the Earl's father, and in the respondent and his dependents, to incense and exasperate the Earl against the appellants ; and the respondent could neither be suffered to avail himself of the frauds of others, nor of those committed while the Earl was in his custody, for as to these last, since he was to be thereby benefited, he must be presumed the author and director of them.

But supposing, if it could be supposed, that the late Earl was neither of weak mind nor imposed upon, yet he was avowedly illiterate ; and as there was no proof that the deed of the 11th of February 1767, making the tenant to the precipe in the recoveries suffered in Easter term 1767, or the warrants for those recoveries, or the acknowledgments of the fines levied in Trinity term 1767, or the warrants for the recoveries in that term, were ever read to the Earl, these several fines and recoveries must be considered as nullities. Nay, was the defect of reading confined singly to the deed of February 1767, as it appeared upon inspection to declare the uses not only of the recoveries in Easter 1767, but of all subsequent recoveries between the same parties if that should fall, the recoveries suffered in Trinity 1767 must also fall with it ; and the consequence of the invalidity of these recoveries at law or in equity, for all or any of the above reasons would be, that if they were void at law, the late Earl remained seised, as he originally was, under the settlement of 1729 ; if void in equity, that the uses ought to be declared to enure to that settlement. But the settlement of November 1767, and the will obtained from the late Earl, further evinced the nullity of these recoveries, by pointing out the fraudulent intent in getting him to suffer them ; and that they altogether made but one transaction, and must be taken so, was avowed by the respondent himself, who had consolidated into one title, his claim as heir under the settlement, and as devisee under the will. To this must be added, the late Earl's declaration to the Chief Justice, that he did not mean to cut out his uncle Loftus, as he was a good uncle. But as the uncle could not be effectually secured without a settlement in his favour, therefore this of November 1767 was procured, which was not only fraudulent upon the face of it, but attended with such suspicious circumstances with regard to the time of its being executed, and whether it was not substituted in the place of some other, as merited a farther enquiry. But its being evidently fraudulent, tainted and polluted the whole of the preceding transaction, by [484] demonstrating that the Earl was persuaded to suffer the recoveries, whereby he acquired the dominion over his estates merely to give the respondent an opportunity of instantly taking that dominion from him. This connecting one part of the transaction with the other, was founded upon the strictest legal principles ; the law reasons thus even in the case of capital offences ; and a court of equity will not reason less liberally, but consider the respondent's manifest fraud in November 1767, as conclusive evidence of his fraud in Hilary

term 1767, and make him a wrong doer *ab initio*. As to the will, if the recoveries fell, that would of course fall with them. The appellants' proofs of the late Earl's total weakness and incapacity, and of his absolute submission to the will of those in whose custody he was for the time being, were so strong, as in their apprehension to entitle them to an immediate decree, rescinding all his acts to their prejudice. But admitting doubts to have arisen in the breast of the Chancellor, from the evidence adduced by the respondent, an issue (Wright v. Eynor, 1 Bur. 390) ought certainly to have been directed for enquiring into the degree of the Earl's incapacity, and whether the several deeds, warrants of attorney, fines and recoveries, executed, levied, and suffered by him, were or were not obtained from him by fraud and misrepresentation; and whether he really did or did not know the import and effect of them. But this hasty dismissal of the bill, without such enquiry, seemed totally unwarrantable. And if it was wrong as to the real, it was equally so as to the personal estate; the only difference between them being, that the respondent had obtained probate by sentence of the prerogative court; but that sentence was immediately followed by an extra-judicial appeal, which was still depending; and there could be little doubt, that if the appellants should recover the real estate on account of fraud upon the late Earl, or his want of capacity, the sentence of the prerogative court would be reversed.

But two objections are chiefly relied upon by the respondent; I. That the right of the appellant Gustavus, under the settlement of 1729, is of no consideration, being a remainder after an estate tail. II. That fines and recoveries are of so high a nature, that it is not in the power of a court of Equity to controul their legal operation, or direct the uses of them according to equity and conscience.

To the first objection it was answered, that the appellant Gustavus was not merely a remainder-man, but the grandson and heir of the person from whom the estate moved, and therefore stood in a very favourable light; and even in that of a remainder-man after an estate tail, could in equity oblige an heir general to discover, and bring into court all deeds and writings, and to see whether his remainder had been properly barred or not. A remainder-man, after an estate tail, is so far considered as interested in the estate, that he cannot be a witness in any question concerning it.—When money is agreed to be laid out in land, to be settled on A. in tail, so far does a court of [485] equity regard the remainder-man's interest, that it will not give the money to A. but will lay him under the difficulty of purchasing lands, and suffering a recovery of them, in order to give B. his chance of the death of A. before such acts can be accomplished. (But see now stat. 39 & 40 G. 3. c. 56.) At law also, in case of a recovery to be suffered by Privy Seal, it is never admitted without the consent of the persons in remainder, and without a strict examination into the ends and purposes for which the recovery is to be suffered.*

In answer to the other objection, it was said, that had a tenant in tail, before the statute of uses, been induced by fraud to levy a fine, or suffer a recovery, the person injured by the fraud would certainly have had the subpoena, and the cognizee of the fine, or the recoveror, would have been directed by Chancery to convey and divest himself of the legal estate, so fraudulently acquired. The power of equity is not at all impaired by that statute; and though the judges in courts of law, determine according to equity in cases of usage, yet the power of directing the uses of fines and recoveries unduly obtained, is more extensively and beneficially exercised by a court of equity, than it can be by a court of law; inasmuch as a court of equity can model and direct the uses, so as to render fines and recoveries fraudulently obtained from a weak man, as beneficial to him, his children, and just creditors, as they ought to be; and at the same time deprive the person guilty of the fraud, of any advantage whatsoever under them. A court of equity can say, but a court of law cannot, thus far shall a fine and recovery operate, and no farther; and it is evident, that Lord Hardwicke would never have made an order on the petition of Richard Leigh, in the very remarkable case of Bennet v. Vade (2 Atk. 324), if he had not been clear, that upon the petitioner's proving the allegations of his petition, it was in his Lordship's power, as Chancellor, to direct the

* In support of the doctrine here laid down, were cited the cases of Suffolk v. Howard, 1 Wms. 179. Reeves v. Reeves, 9 Mod. 132. Legatt v. Sewell, 1 Eq. Ab. 394. Cadwell v. Shadwell, 1 Wms. 485. Short v. Wood, *Ibid.* 133. Eyre's case, 3 Wms. 14. Phipps v. Stewart, 1 Atk. 285. Pigot's Recov. c. 3.

uses of the recovery suffered by Sir John Leigh in 1737, to enure to those of the will in 1690, under which the petitioner claimed as remainder-man; and that to the prejudice of the innocent heirs at law of Sir John Leigh, who claimed the estate under the recovery.*

On the part of the respondent, it was said (A. Wedderburn, J. Dunning, J. Madocks) to be not only proved in the cause, that the Earl was of competent understanding, and capable of making a disposition of his property, but it was so found in his lifetime before a respectable commission, and by a jury of distinguished rank and character, upon a personal examination of the Earl, and now stands upon record in [486] the court of Chancery in Ireland: And the several fruitless attempts made by the appellants to encounter this verdict, served only to confirm it. That the order of the court of Chancery, restraining the Earl from suffering recoveries of his estates, founded upon the suggestions of the appellants, was afterwards discharged; and he was left at liberty to suffer recoveries, if he should think proper. This order of discharge was afterwards affirmed upon an appeal; so that the competency of the Earl to dispose of his property, had been affirmed in every jurisdiction through which the question had passed; although it had in every jurisdiction been opposed and controverted by the appellants. That the Earl's competency had not only been thus decided upon, but in the present cause was admitted, even by the appellants; since if he had not been of a capacity to make a valid disposition, the deed on which the recoveries were founded was void at law, and the appellant's suit must have been in a court of law; whereas by seeking relief in equity, the appellants admitted his legal capacity: And therefore there could be no ground in equity to support a different decree from that which was appealed from, or to disturb the acts which the late Earl exercised over his property, unless some proof of fraud practised upon him had appeared in the case, of which there was scarce a suggestion, and much less any proof in the cause.

Where the degree of capacity, which is competent to make dispositions of property valid in law, is once ascertained to belong to the party disposing, all beyond is resolved into a dispute about the several degrees of light and shade, which brighten or obscure the understanding; these are very difficult to be distinguished, and cannot be precisely marked out; and therefore the strength or weakness of understanding, above the degree of competency, serves only as a circumstance of evidence, where the question is a question of fraud; for to give it any other effect, would be of the most dangerous consequence in the transactions of men. The present case was a strong instance of the impossibility of measuring, and precisely defining the size of the understanding of a person competent; and more especially after his death, when the matter is to be ascertained by the opinions of witnesses, whose faculties and degrees of understanding differ among themselves; and who can no otherwise represent a state of the case for the opinion of others, than by relating instances of conduct and conversations, which when stripped of the many circumstances that must necessarily attend them, give but a very imperfect idea of the true state of the fact. And yet the evidence in this cause, immediately applicable to the matter in question between the parties, afforded the clearest and strongest light to prove, that the Earl's suffering recoveries of his estates, proceeded from causes the most natural and probable, and such as would have produced the like effect in any degree of understanding, not divested of resentment and affection. And though this evidence applied to the several periods of the Earl's life, from his birth, to the death [487] of his grandmother, when he was 12 years old: from thence to his removal to Clermont, when he was 18 years old; and from thence to the death of his father, when he was 28 years old; yet as the competency of his understanding was so perfectly established as not to be capable of the least doubt or controversy, it follows, that the material part of the evidence to the present question, was that part of it which more immediately related to his suffering the recoveries, and making the dispositions which the appellants would object to.

It is very remarkable, that in all the Earl's conversations, related by the witnesses on both sides, there were no instances of his expressions or his actions that betrayed a want of understanding in matters in which he was conversant. He appeared to those

* To support this doctrine were cited *Clark v. Ward*, Preced. in Chan. 150. *Goodright v. Brown*, 1 Ch. Ca. 49. *Barnsley v. Powell*, 1 Vezey, 289. *Sir Butler Wentworth's case*, 2 Vezey, 403. *Cookman v. Ferrars*, Skin. 14.

who saw him, and were about him, under great disadvantages from his bodily infirmities: the same infirmities keeping him constantly confined to his chair, and depriving him of those opportunities which conversation and habits with the world produce, narrowed his experience, and deprived him of ordinary improvements; it was not therefore to be wondered at that his appearance furnished impressions to his prejudice: but the evidence demonstrated, that his understanding was equal to the acts he exercised over his property, and that those acts proceeded from natural motives. It was also manifest, that the Earl was subject to passions; and amongst others, to anger; which broke out sometimes to his servants, though in general he had a natural turn to civility and complacency. It was proved beyond a doubt, that he had, at a very early period, conceived a great degree of resentment against the appellant Mr. Rochfort, on account of his proceedings against his father and himself; which occasioned him to use the harsh expressions that appeared in the cause. This resentment continued until his father's death, and was again revived by Mr. Rochfort's subsequent proceedings, and his actually procuring the commission of ideocy to be executed. In the mean time, the respondent, conscious that there was no just foundation for issuing such a commission, met the proceedings, and facilitated the execution of it. This conduct and behaviour towards his nephew, was evidently founded upon an affection for him, and a desire to promote his ease and happiness. It did not consist in indulgence and artful blandishment, but in an attention to, and care of his health in furnishing him with all proper accommodations, and gratifying his wishes, by an attention to his controversy with Mr. Rochfort. That this had an effect upon the Earl, was evident from his declarations; for upon every occasion which offered, he never failed to express his sense of the gratitude he owed his uncle, and the affection he bore for him and his aunt. It was also proved beyond all doubt, that the Earl had formed a resolution of preventing the succession of his mother's estates from taking effect in Mrs. Rochfort's family, and of fixing the succession of all his estates in his uncle, the present Earl, in case he should himself die unmarried, and without issue: of which he [488] did not appear to have wholly despaired, notwithstanding his bodily infirmities. There was likewise evidence in the cause, that he paid attention to the dignity in the Loftus family, but he seemed to have proceeded more immediately upon his personal regard for his uncle: and considering that there were two peerages in the family, to one of which, namely, the Loftus peerage, his uncle must succeed, and might, by favour of the crown, obtain the earldom, which afterwards happened: considering also, that the Loftus estate was unequal alone to the rank of the family, and that the grandfather, Lord Viscount Loftus had purchased the Hume estate by the settlement of his own; it was by no means unreasonable that the estate of an ancient family should be improved, by the accession of another of equal value, brought into it by marriage. And had the Earl been of the first rank of understanding, no one could, without absurdity, have suggested, that under the circumstances of his father's family, his suffering recoveries of both estates, was any other than an act perfectly just and proper. That the Earl perfectly understood the effect of the recoveries which he suffered, was evident, not only from what passed when the Lord Chief Justice Clayton took his acknowledgment of the bargain and sale, but from the concurrent testimony of other declarations made by him.

Under these circumstances, a court of equity could not strip the heir of the Earl of Ely, of any of the estates of which the recoveries were suffered. The Earl having a sufficient capacity in law to do any act over his estates, knowing the effect and consequence of the act he did, it being an act for his own benefit, and to enlarge his interest in his own estates: no evidence of fraud, imposition, misrepresentation, or undue influence appearing in the cause; to have done otherwise than dismiss the appellants' bill, would have been an arbitrary act, not founded upon any principle, and unwarranted by any precedent.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed: and the decree therein complained of, affirmed. (MS. Jour. *sub anno* 1774-5, p. 686.)

[489] CASE 7.—NATHAN GOODRIGHT (on dem. ROLFE, and *Ux*).—*Plaintiff*;
FRANCES HARWOOD,—*Defendant* (in Error) [9th May 1775].

[A. makes a will in 1748, and another in 1756; the first will is produced, but the other cannot be found; upon an issue the jury find that the latter will was different from the former, but in what particulars was unknown to them. Under these circumstances the latter will is not a revocation of the former.]

[The judgment of the court of K. B. (reversing a judgment of the court of C. P.) affirmed.]

3 Wils. 497. 2 Black. 937. Cowp. 87.

In Hilary term 1772, an ejectment was brought in the court of Common Pleas, by the lessors of the plaintiff, against the defendant, for recovering a set of chambers in Lincoln's Inn: And in June following, the cause came on to be tried, when the jury found a special verdict; stating a marriage settlement made in 1688, by John Lacy of Tottenham High Cross, in the county of Middlesex, previous to his marriage with Susannah his wife, of certain lands, to certain uses therein mentioned; and also a private act of Parliament passed in 1708, whereby the freehold lands comprised in that settlement, were vested in trustees upon trust to sell the same, together with other estates, for the several purposes therein expressed; and amongst others, to raise the sum of £10,000 to be laid out in the purchase of lands, to be settled to the uses of the said settlement. That the said settled and other estates were sold, and the said sum of £10,000 thereby raised, but never invested in the purchase of lands. That the said John Lacy died in the year , and the said Susannah his wife, in the year , leaving issue of their bodies two sons, John Lacy of Lincoln's Inn, Esq. their eldest son, and Arthur Lacy, Esq. and three daughters, Susannah, Elizabeth, and Mary. That the said Arthur Lacy, son of the said John and Susannah his wife, died in September 1737, leaving Elizabeth, one of the lessors of the plaintiff, his only surviving child. That the said Elizabeth, in June 1753, intermarried with William Rolfe, the other lessor of the plaintiff. That the said Susannah, the eldest daughter of the said John Lacy, died in the year 1721, unmarried; and the said Elizabeth the second daughter, intermarried in 1727, with John Biscoe, Esq. and died in 1762, leaving issue by him Ann, who, in 1754, intermarried with Robert Goodchild, and was still living. That Mary, the third daughter, in 1733, intermarried with the Reverend Bennet Stevenson, and died in 1760, leaving issue by him one son Bennet Stevenson, who was still living and unmarried; and two daughters, namely, Susannah, who died in 1769 without issue, and Elizabeth, who was still [490] living. That the said John Lacy of Lincoln's Inn, the eldest son of John and Susannah, being on the 16th of April 1748, seised in fee of the chambers and premises in the declaration mentioned, and possessed of a considerable personal estate, and also entitled to the interest of the said sum of £10,000, and to the rents and profits of the lands therewith directed to be purchased, by virtue of the said settlement of the 3d of April 1688, and the said act of Parliament, made his will in writing, duly attested to pass real estates, and did thereby devise as follows; that is to say, "I John Lacy of Lincoln's Inn, in the county of Middlesex, finding within " myself frequent notices of mortality, and not knowing how speedily, suddenly, or in " what manner I may come to my end, and being now in perfect health, mind, and " memory, do make this my last will and testament, with my own hand, as follows; " I give, devise, and bequeath all my real and personal estate, of what nature or kind " soever, or wheresoever it be, unto my dear and well beloved friend Mrs. Frances " Harwood, now of Maiden Lane, in the parish of Covent Garden, Westminster, and " her heirs, executors, administrators, and assigns for ever; desiring her, and accord- " ingly it is my will, that she pay the following gifts and legacies: To my niece, Ann " Biscoe the sum of £100 within six calendar months after my decease; to Mr. John " Westley, of the Temple, attorney at law, £10; to Jonathan Wells, Esq. £10 (these " for mourning); to my servant William Clegg, if living with me at the time of my " death, £20 over and above what may be due and owing to him; and I likewise, in

“ that case, give him all my linen and woollen apparel (I mean apparel only); and to the maid who may be living with me at Iver, two guineas. And I do hereby constitute and appoint the said Mrs. Frances Harwood to be the sole executrix of this my last will and testament, revoking all others by me heretofore made: In witness whereof, I have hereunto set my hand and seal, the 16th day of April, in the year of our Lord 1748.” That in the summer of 1756, the said John Lacy of Lincoln’s Inn, being in like manner seised in fee of the chambers and premises in the said declaration mentioned, and also possessed of a considerable personal estate, and likewise entitled to the interest of the said sum of £10,000, and to the rents and profits of the lands and tenements therewith directed to be purchased, by virtue of the said settlement of the 3d of April 1688, and the said act of Parliament: did make, and duly publish another will and testament in writing, in the presence of three subscribing witnesses, who duly attested the same. That the disposition made by the said John Lacy, by the said will of the year 1756, was different from the disposition in the said will of 1748, but in what particulars was unknown to the jurors: but they did not find that the testator cancelled his said will of the year 1756, or that the defendant destroyed the same; but what was become of the said will, the jurors were altogether ignorant. That the said testator John Lacy [491] died in June 1767, seised in fee of the said premises in the declaration mentioned, without issue, and was never married. And that the said Elizabeth, the wife of the said William Rolfe, the lessor of the plaintiff, was the niece and heiress at law of the said testator John Lacy. And upon these facts, the jury submitted the matter of law to the opinion of the court.

The question upon this verdict was, Whether the devise in the will of 1748, to the defendant, was revoked by the will found to be executed in 1756?

In Easter and Trinity terms 1773, this special verdict was argued in the court of Common Pleas; and in Hilary term 1774, judgment was given for the lessors of the plaintiff, by three of the judges of that court, against the opinion of Mr. Justice Blackstone.

Upon this judgment the defendant, in the same term, brought her writ of error in the court of King’s Bench: when the court being unanimously of opinion, that the devise to the defendant, in the will of 1748, did not appear to be revoked by the will in 1756, reversed the judgment of the court of Common Pleas: Whereupon the lessors of the plaintiff brought their writ of error in Parliament, in order to reverse the judgment of the court of King’s Bench.

On the part of the plaintiff it was argued (G. Hill, J. Lee), that the title of the heir at law being a clear, substantive, independent title, ought not to be defeated, but by a title equally clear and unexceptionable. That the title of a devisee must be founded on that which is clearly known to be the ultimate intention of the testator; and it is not sufficient that the testator did at one time of his life mean to give his estate to the plaintiff, unless he continued in that intention to the time of his death. The jurors had found by the special verdict, that in the summer of the year 1756, Mr. Lacy being in like manner as he was at the time of making his first will in 1748, seised in fee of the chambers and premises in the declaration in ejectment mentioned, and possessed of a considerable personal estate, and entitled also to the interest of the £10,000, (which were the same estates that he was found seised and possessed of in the year 1748,) did make, and duly publish another will, duly attested by three witnesses, and executed according to law: and they then added, that the disposition made by the said John Lacy, by his said will of 1756, was different from the disposition by the said will of 1748. From whence it appeared, that the disposition thereby intended to be described by the jury, referred to the antecedent estates by them before particularised, as the objects under their consideration; namely, the chambers in the declaration mentioned, and the other estates before specified, being the very same estates disposed of by the said will of 1748; and which the jury by the verdict, found Mr. Lacy to have differently disposed of by his said will of 1756. The finding was a general one; and though the jury said they were unable to ascertain the particulars, yet the finding necessarily imported, that [492] they had received sufficient satisfaction as to the general contents, to enable them, upon their oaths, to find that. From whence the court must see, that the testator’s intention was generally changed, and consequently, that the will of 1748 was revoked: and that though he had, by his will of 1748, disposed of the whole bulk of his fortune, consisting of the several estates before

specified, to the defendant Mrs. Harwood, yet he did, by his will of 1756, dispose of them in a different manner. That the jury having found, that Mr. Lacy did, in 1756, duly execute another will, the same must be taken to subsist at the time of his death, unless a subsequent change of intention had appeared. But the jury had excluded the idea of any such change, by declaring, that they did not find that the testator had cancelled his said will of 1756 : and as the jury had not found it cancelled, the court could not say it was so. By establishing then the first will, which the testator did not mean to die with, it would necessarily follow, that the whole of the testator's large fortune would go from his family, to a person for whom, from 1756, he never intended it. Wills disinheriting natural heirs, in favour of persons who are strangers in blood, ought not to receive more countenance than the necessity of the case requires : And whenever there is evidence of a change of intention in the testator, such wills can never be established to the prejudice of the title of an heir. That it being at least rendered doubtful, by the execution of the second will, whether the defendant was entitled to any thing, or if she was, what she was entitled to, it became necessary for her, as claiming under a derivative, and not an original title, to produce the second will, and shew her interest under it. That if ever it should be understood as established law, that from the bare non-production of a latter will, to whatever cause it might be owing, a former will must at all events be established ; it would be an opening to frauds of the most dangerous kind, and be the strongest temptation to devisees in a former will, to exert every artifice to get possession of, and suppress the latter instrument, in order to set up the former revoked will. That the statute of frauds having made a certain solemnity necessary in a will of lands, namely, that it shall be attested by three witnesses, and which is neither necessary or usual in other wills ; it must be understood, that Mr. Lacy, a gentleman of eminence in the law, well knew, that to pass real estate three witnesses were required ; but of no use, and totally unnecessary, where no real estate was intended to be devised ; and he having adopted that mode of devising, the second will must therefore be taken to be a will of real estate, and consequently to include his chambers in Lincoln's Inn. That the case of *Hitchins v. Basset* (Shower's Parl. Cases, 146. by the name of *Hungerford v. Basset*) relative to the two wills of Sir Henry Killigrew, which was relied upon in the courts below, was so far from being a case against the title of the present plaintiff, that the sole grounds on which that case was decided, made it, on the contrary, a case in the plaintiff's favour. For those grounds were, that there was no proof of any change of inten-[493]-tion whatsoever in the testator ; or that the second will was a will in any way relating to or affecting his lands, or that it might not be a confirmation of the former will ; the jury having there found, that what were the contents or import of the second will, they were totally ignorant ; they had nothing to lead them to the least guess, what the contents of the second will were. But in the present case, the jury were so far from being totally ignorant of the contents of the second will, that they were enabled to find, and did find, that Mr. Lacy's disposition in 1756, was different from what it was in 1748. That it concerned lands, was sufficiently found from the mode of devising ; and that it extended to the real estate in question, was inferred from his having no other estate which required the solemnity of the statute of frauds.

On the other side it was said (A. Wedderburn, J. Wallace, C. Fearne), that with regard to the doctrine of revocation of wills, it seems agreed, that the determination of the House of Lords, in the case of *Hitchins v. Basset*, has settled this point at law ; viz. that a subsequent, substantive, independent will of lands, is not, in its own nature, a revocation of a former will, nor will operate as such, unless it contains words expressly revoking the former, or makes a different and incompatible disposition of the same lands. In the present case, the will of 1756 was not to be found ; its contents were not known : therefore no express revocation of the former will appeared in it ; nor could it be shown, that it contained any different or incompatible disposition of the chambers now in question.

But it is objected, that it was found by the verdict, that the disposition made by the latter will, was different from that made by the former. To this it was answered, that it was at the same time found to be unknown, in what particulars that difference consisted ; whether it related to lands, or to personal estate only ; to the appointment of an executor, or to the *quantum* of a legacy. The most trivial alteration in the most inconsiderable legacy might have occasioned that difference ; but there was nothing to

prove that it extended to those particular chambers which were the subject of the present question. The mere existence of a subsequent will, is not of itself a revocation ; nor is any new disposition contained therein a revocation of the former devise of the chambers in question, unless that new disposition affects those very chambers. And therefore, until it could be shewn, that the different disposition found by the verdict extended to those chambers, or that there were express words of revocation of the former will contained in the latter, the devise under which the defendant claimed, stood unrevoked by any thing which could be shewn, and to say it is revoked, but it cannot be shewn by what, sounds repugnant to common sense.

It is however urged on behalf of the plaintiff, that her claim is that of an heir at law, which is always favoured in our courts of justice. But the rule respecting the favour shewn to an heir at law is, that he shall not be disinherited, otherwise than [494] by express words, or necessary implication. Now in the present case there is found an express devise to the defendant in the will of 1748, which takes this case entirely out of the application of the rule now mentioned. The question here is not, Whether the claim of a devisee, under a doubtful uncertain disposition, shall be supported against the hereditary title of an heir at law? but, Whether a clear and express devise in a will, solemnly and duly executed, and forthcoming, is to be revoked by a conjecture, that the unknown contents of an unexisting will did import some unknown disposition, to some unknown person, of chambers, which it is unknown whether that will had any sort of relation to, or not?

But it is still further objected, that the claim of a devisee must be founded on the last will of the testator ; and that in this case there being found to be a will executed subsequent to that in 1748, the will of 1748 was not the last will of the testator, and consequently nobody could claim any lands under it. The proposition, that the claim of a devisee must be founded on the last will of a testator, is fallacious, unless its import be very strictly attended to : it is true, the will under which a devisee claims must be the last will, in respect to the very lands which are the subject of such claim ; but if there be ten subsequent wills, which contain no express revocation of the former will, nor any words which can affect or extend to the subject matter of a devise contained in such former will, that former will, *quoad* the subject of such devise, is the last will of the testator. Now though, in the present case, another will was found to have been executed subsequent to that of 1748, under which the defendant claimed ; yet there was no kind of evidence of any express revocation, or of any disposition whatever, either express or implied, in that subsequent will, relative to or affecting the chambers in question. Therefore, for any thing which could be shewn to the contrary, the will of 1748, under which the defendant claimed, was really so far as respected the subject of her claim, the last will of the testator. Besides, a will has no operation at all, till after the death of the testator ; therefore any will which is not then existing, is, in effect, no will. It did not appear, nor could it be shewn, that the will of 1756 existed at the time of the testator's death, and it is a maxim in law, that *de non apparentibus, et non existentibus, eadem est ratio*.

The circumstances of this case, afforded no ground for any kind of presumption against the defendant ; no spoliation was found, no kind of evidence existed of any thing like it, nor were there any facts which led even to a suspicion of it ; it was expressly not found, that she destroyed the will of 1756 ; it was not found, that any such will ever came into her possession : and to suppose that it did, would be forming a conclusion against probability. That will either contained a virtual or express revocation of the will under which the defendant claimed, or it [495] did not ; if it did, it could not be imagined that the testator would have left it open to the access of a person, to whose prejudice it was to operate : if it did not, then the devisee, was that will in her possession, could not hesitate a moment in removing the present question upon her title, by the immediate production of it. It was not very obvious, upon what principle the will of 1756 could be pronounced a revocation of the devise in that of 1748, whilst that clause of the statute of frauds and perjuries, whereby it is enacted, " that all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, etc. by the devisor, etc. or unless the same be altered by some other will, or codicil in writing, or other writing of the devisor, etc. declaring the same," stands unrepealed. For here was an express devise in the will of 1748, which, by the above clause, the Legislature says shall continue in force, unless the same,

namely, that very identical particular devise, is altered by some other will, etc. declaring the same. Now unless a declaration of this nature was discovered in the contents of a will, not one syllable whereof was known, it is evident the essential circumstance required by the statute, to effect a revocation of the devise in question, was wanting.

Lastly, it was submitted, that should a will which cannot be produced, and the contents, purport, or effect whereof are entirely unknown, be construed as a revocation of a known, subsisting will; such a construction would in effect, not only be overthrowing the statutes of frauds and perjuries, in respect to one of the most material and dangerous species of fraud intended to be provided against by that statute; but would, at the same time, be striking a most fatal blow at the very root of all testamentary power over lands; for of what use to a man is the power of making a will, if he cannot make that will secure? But it is impossible that any will, however deliberately made, and solemnly executed, can be in any degree secure, if it may be set aside by means so very practicable and easy, as only swearing to the execution of an unexisting will, without shewing or proving its contents.

After hearing counsel on this writ of error, the following question was put to the judges; viz. "Whether, on the facts found by the special verdict in this cause, the 'devise of the chambers in Lincoln's Inn, to Frances Harwood, the defendant in error, 'by the will of the 16th of April 1748, be revoked or not?'" Whereupon the Lord Chief Baron of the Court of Exchequer (having taken time to consider) delivered the unanimous opinion of all the judges of that court, except Mr. Baron Perrott, who was ill and could not attend, that the said devise was not revoked. It was therefore ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, reversing the judgment given in the Court of Common Pleas, should be affirmed; and that the record should be remitted, etc. (MS. Jour. *sub anno* 1774-5, p. 743.)

[496] CASE 8. —(GEORGE HEALEY,—*Appellant*; THOMAS COPLEY, and Others,—*Respondents* [10th March 1777].

[Mews' Dig. xv. 278.]

[Where a will recites and refers to a voluntary deed, which does not appear after the testator's death, but is found by the verdict of a jury to have existed at the time of such death, this reference and recital in the will shall establish the deed, and it shall be considered as incorporated with, and constituting part of the will.]

[Decree of Bathurst, C. affirmed.]

Robert Copley, esq. being in his lifetime, and previous to the 9th of July 1765, seised in fee simple of divers freehold estates in the parish of Doncaster, and in several other parishes in the county of York, and being desirous of making a settlement thereof, executed certain indentures of lease and release, dated the 12th and 13th of July 1765, the release being tripartite, and made between the said Robert Copley of the first part; the respondent Thomas Copley (by the name and description of Thomas Newby, otherwise called Thomas Copley, son of Anne Newby deceased) of the second part; and Sir Bryan Cooke, bart. and Christopher Hodgson, doctor of physie, of the third part; whereby the said Robert Copley, in consideration of natural love, and of 10s. and for other good causes and considerations, did grant, alien, release, confirm, limit, and appoint unto Sir Bryan Cooke and Christopher Hodgson, their heirs and assigns, all and singular his freehold estates therein specified and described; to hold to the same, to the said Sir Bryan Cooke and Christopher Hodgson, and their heirs and assigns, to the use of the respondent, Thomas Copley, during the term of his natural life, without impeachment of waste; with remainder to the said Sir Bryan Cooke and Christopher Hodgson, and their heirs, to preserve contingent remainders; with a power therein contained, for the respondent Thomas Copley to make a jointure on any wife he should marry, in the manner and with the restrictions therein expressed; with remainder to the use of the first and other sons of the body of the respondent, Thomas Copley, in tail

male ; remainder to the respondent Henry Cooke, and the heirs male of his body ; remainder to the respondent John Woodyear, and the heirs male of his body ; remainder to the respondent George Cooke, and his heirs for ever. And in the said indenture of release was contained a proviso, that it should be lawful for the said Robert Copley, at any time during his life, by any deed or writing under his hand and seal, attested by three or more credible witnesses, or by his last will and testament in writing, to be by him signed, sealed, and published, in the presence of the like number of witnesses, absolutely to revoke, annul, and make void, or to alter or change all, any, or every of the uses, [497] estates, or trusts therein before created, limited, and appointed, of or concerning the said premises, or any part thereof at his will and pleasure, and by the same deed or writing, to be attested as aforesaid, to limit, declare, or appoint such new or other uses, estates, or trusts thereof, as to him should seem meet.

Robert Copley being also seised in fee of divers copyhold or customary estates, holden of several manors in the said county of York, (all which copyhold or customary estates he had duly surrendered to the uses of his will,) and being desirous of making a settlement or disposition thereof, in like manner as he had already done of his freehold estates, and with a view and intention to confirm the disposition and settlement so made of his freehold estates, by the before mentioned indentures of lease and release ; duly made and published his will, dated the 15th of the said July 1765, and thereby, as to all and singular his copyhold estates therein specified and described, he gave and devised the same to the said Sir Bryan Cooke and Christopher Hodgson, and their heirs, executors, administrators, and assigns, to the use of the respondent Thomas Copley, and his assigns, during the term of his natural life, without impeachment of waste ; with remainder to the said Sir Bryan Cooke and Christopher Hodgson, and their heirs, during the life of the said Thomas Copley, in trust to preserve contingent remainders (with a like power for Thomas Copley to make a jointure on any wife he should marry, with the same restrictions as in the indenture of release) ; remainder to the first and other sons of the respondent Thomas Copley, in tail male ; with remainder to the respondent Henry Cooke, in tail male ; with remainder to the respondent Godfrey Wolley, in tail male ; with remainder to the respondent John Woodyear, in tail male ; with remainder to the respondent George Cooke, in fee. And the testator, after reciting the said indentures of lease and release, of the 12th and 13th of the same July, did order and direct that the respondent Thomas Copley, should immediately after his decease, take upon him the surname of Copley, and write and stile himself by that surname ; and in case he should refuse so to do, or after having taken upon himself such surname, should at any time during his life, take upon himself any other surname than that of Copley only, then and in such case the testator did by virtue of the powers reserved to him by the said recited indentures declare, that such grant and conveyance, so far as related to the respondent Thomas Copley, and his children, should be immediately void ; and he did in that case, give and devise all his freehold messuages, tenements, and hereditaments, and all his copyhold messuages, tenements, and hereditaments, and all his personal estate, unto the first remainder-man who should be entitled to the same, by virtue of the said grant and conveyance, and his said will, and who should take upon himself the surname of Copley only, and during his life write, and stile himself by that name only, and to the first and other sons of his body, taking such and the same estate as the respondent Thomas Copley would have taken, by virtue of the [498] said grant and conveyance : and further, that as often as any of the persons in remainder, who should be entitled to his said freehold, copyhold, and personal estates, should refuse to take upon himself, and write and stile himself by the said surname of Copley only, then that the said grant and devise, as far as related to such persons, should be null and void ; and that his said freehold, copyhold, and personal estates, should go and descend to the next in remainder, by virtue of the said grant and his will, who should take upon himself, and write and stile himself by the surname of Copley only.

Sir Bryan Cooke and Christopher Hodgson, the trustees named in the said settlement and will, both died in the lifetime of the testator, but Christopher Hodgson survived Sir Bryan Cooke : and the respondent Smith was heir at law of the said Christopher Hodgson.

The testator died in October 1771, without lawful issue, and without altering or

revoking his will, leaving the appellant George Healey, his heir at law on the part of his father, and the respondent Robert Deighton, his heir at law on the part of his mother; and upon his death, the respondent Thomas Copley entered into possession of the testator's said freehold and copyhold estates, and as the only surviving executor named in the will, duly proved the same.

After the testator's death, and after the will had been perused, a strict search was made after the deeds therein recited, but they could not be found, and the same were, by accident, either mislaid or lost; but as an evidence of the existence thereof, and of the testator's desire that the same should be preserved and take effect, a paper writing of his own hand writing, was, very soon after his death, found among his papers, in the words and figures following, viz. "To my son Thomas Copley, memorandum 1765, "never keep any writings or papers of consequence in the iron chest, because it is "screwed to the floor, and I would advise my son, by all means, to have my deed of "gift to him, to be inrolled in Chancery. Robert Copley, 1765."

In Hilary term 1772, the respondent Thomas Copley exhibited his bill in the court of Chancery, against the appellant, as the heir at law of Robert Copley, on the part of his father, the respondent Deighton, as the heir at law of Robert Copley, on the part of his mother, the respondent John Silvester Smith, as the heir at law of Christopher Hodgson, the surviving trustee in the settlement and will, and against the respondents Henry Cooke, Godfrey Wolley, John Woodyear, and George Cooke; stating the several facts above mentioned, and praying, that the said indentures of the 12th and 13th of July 1765, and the will of the said Robert Copley might be established, and that the witnesses thereto might be examined, and their testimony recorded, in order that the same might be perpetuated; and that the said George Healey and Robert Deighton might be admitted to the said several copyhold estates, and might, after such admittance, surrender the same to [499] such uses and upon such trusts as in the said will were declared; and that proper trustees might be appointed of the said estates, and that the same might be settled to such uses and on such trusts as were mentioned in the said indenture of release, as far as concerned the respondent, and his issue male.

To this bill the appellant put in his answer, and thereby contested the execution of the said indentures of lease and release, as well as of the will; and insisted that he, as heir at law of Robert Copley, was well entitled to all his freehold and copyhold estates. And the several other defendants put in their answers, and the respondents Henry Cooke, Godfrey Wolley, John Woodyear, and George Cooke, claimed to be entitled, under the indentures of lease and release, as well as under the will of the said Robert Copley, to such estates in remainder in his freehold and copyhold estates, as before stated.

On the 3d of August 1772, the appellant exhibited his cross bill, against the respondent Copley only; praying, that he might be decreed to deliver up to him the possession of all the freehold and copyhold estates of which Robert Copley was seised at the time of his death, and for an account of the rents and profits thereof; suggesting, that under a settlement made on the marriage of the father and mother of the said Robert Copley, he was tenant in tail of all his said freehold estates, and that he had never done any act to bar such entail; and therefore, the appellant claimed to be entitled as heir in tail, under the limitations in the said settlement, or as heir at law of the said Robert Copley.

The respondent Copley, by his answer to this cross bill, stated sundry conveyances executed, and recoveries suffered by Robert Copley, of the said freehold estates, by virtue of which the respondent Copley insisted, that the testator Robert Copley was, at the time of making the said indentures of lease and release, of the 12th and 13th of July 1765, seised in fee simple of the several freehold estates comprised therein, as well as of the copyhold estates devised by the will.

On the part of the plaintiff in the original cause it was proved, that the testator, when he gave instructions for preparing the abovementioned conveyance and will, directed, that after the limitations to his son, the respondent Thomas Copley, and his heirs male, a large blank should be left in the conveyance and will, in order that he might insert limitations to four friends, whom he intended should have the estates, in case his son should die without issue male; that such blanks were accordingly left in the release and will, and that at the time they were executed, the testator with his own hand filled up those blanks, first in the release, and then in the will. And the

attorney who prepared them, proved, that in the blank left in the release, he saw the testator write the word Henry; but that the testator afterwards cautiously held his arm over the parchment, in such a manner as prevented the witness from seeing him write any more than the [500] word Henry. And the said attorney also indentified and proved the draft of the release, in which the blank was left, pursuant to the testator's order.

On the 4th of May 1775, both causes were heard before the Lord Chancellor Bathurst, when upon reading the testator's will, and the depositions taken in the cause, his Lordship ordered, that the parties should proceed to a trial at law at the then next assizes for the county of York, on the following issue, viz. "Whether Robert Copley "deceased, by the paper writing, dated the 15th day of July 1765, devised his freehold and copyhold estates, or either of them?" And gave the usual directions for settling the issue, in case the parties differed about the same. And his Lordship reserved the consideration of costs, and of all further directions, till after the trial should be had, and any of the parties were to be at liberty to apply to the court, as there should be occasion.

In pursuance of this order, the issue was tried by a special jury, at the summer assizes 1775; upon which trial the jury delivered their verdict in the following words, viz. "They say upon their oath, that the within mentioned paper writing was duly executed to pass freehold estates, and that the copyhold estates therein mentioned were well devised thereby; and that the deeds of 1765, mentioned in the said paper writing, were executed by the within named testator, Robert Copley, esq. and existed at his death."

The appellant acquiesced under the verdict, and never made any application to the court for a new trial; and therefore, the cause was set down again to be heard, as to the matter of costs, and for further directions. And was accordingly heard on the 25th of November 1775, when his Lordship was pleased to order and decree, that the testator's will should be established, and the trusts thereof performed and carried into execution; and that the cross bill, so far as it sought to be let into possession of the copyhold premises, should stand dismissed; and that the rest of that bill should be retained for six months; and it was ordered, that the appellant the plaintiff in the cross cause should be at liberty in the mean time to bring an ejectment to recover possession of the freehold estate, and proceed to trial therein; at which trial, by consent, the respondent Copley was to admit the appellant to be the testator's heir at law; and by the like consent the appellant was not to contest the due execution of the will, and to admit, that the respondent was, on the 12th of July 1765, seised in fee simple of the said freehold premises; and in default of the appellant's bringing such ejectment, and proceeding to trial by the time aforesaid, the cross bill was to stand dismissed, with costs to be taxed: And his Lordship reserved the consideration of the costs of those causes, and also the costs at law in respect of the issue then tried, and of all further directions, till after the trial of the said ejectment, or the appellant's default in bringing such [501] ejectment, and proceeding to trial by the time aforesaid: with liberty for any of the parties to apply to the court, as there should be occasion.

In consequence of the liberty given to the appellant by this order, he brought an ejectment; but before the next assizes, viz. on the 23d of January 1776, he moved the court, that the said order of the 25th of November 1775, might be varied, by striking out so much thereof as directed the rest of the cross bill to be retained for six months, and gave liberty to the appellant to bring an ejectment for the recovery of the possession of the freehold premises therein mentioned, together with the directions relating thereto; and also so much thereof as reserved the consideration of further directions and costs; and by inserting, instead thereof, such further directions in the causes as the court should be of opinion ought to be given; whereupon, and upon hearing what was alleged by the counsel for the parties, and the appellant by his counsel then waving so much of the said order as directed the cross bill to be retained, with liberty to bring an ejectment, his Lordship was pleased to order that the said causes should be set down to be heard on the equity reserved, next after the rehearings and appeals then appointed.

In pursuance of this order, on the 18th and 19th of March 1776, the causes came on to be heard, when his Lordship was pleased to order, that the cross bill should be dismissed; and in the original cause his Lordship ordered, that the will of the testator Robert Copley should be established, and the trusts thereof performed and carried into

execution; and as to the freehold estates, his Lordship declared, that the same were, by virtue of the said indentures of the 12th and 13th of July 1765, vested in the respondent Copley, for the term of his natural life, without impeachment of waste, with such powers as in the said indenture of the 13th of July 1765 were mentioned, subject to the proviso mentioned in the will concerning the same; with remainder to trustees, to support contingent remainders; with remainder to his first and other sons in tail male; with such remainders over as were in the testator's will declared concerning the copyhold estates, in favour of the respondents Cooke, Wolley, and Woodyeare, and their respective issue male; with remainder to the respondent George Cooke, his heirs and assigns for ever. And the Master was to tax all parties their costs of the said suits, and also at law on account of the issue, and such costs were directed to be paid to them accordingly, and to be raised by mortgage of a sufficient part of the testator's real estates, with the approbation of the Master; and it was ordered, that the respondent Copley during his life, should keep down the interest of the money to be raised by such mortgage.

From so much of this decree as related to the freehold estates, the present appeal was brought; and on behalf of the appellant it was argued (E. Thurlow, C. Ambler, R. Hollit), that if a person executes a voluntary deed, and does not part with it out of his custody, he may if he pleases [502] destroy it; and if he does, the deed cannot be supported, or have any effect. That it is not absolutely necessary to give proof of the destruction of a deed by the grantor; for such evidence is, in many cases, impossible to be had, but the court will presume his having destroyed it, from circumstances. That it has hitherto been the uniform opinion and rule of courts of equity, that a voluntary deed, especially if made in favour of a stranger, shall not be aided, nor the party claiming under it relieved in a court of equity; and except the decree now complained of, there is no instance of a person claiming under such a voluntary deed, having been favoured, or aided by the court. In this case, the deeds in question were voluntary, in favour of a natural son; and Robert Copley the grantor, the moment they were executed, took them into his own custody, and they were never afterwards for any time out of his possession, or in fact seen by any person; nor had the respondent Copley sworn that they were found in the testator's possession at his death; though it appeared, that he was very careful of his deeds and papers, and that all them, except the deeds in question, were found deposited very safely and regularly. Though the estates lay in a registered county, yet he would not have any memorial of the deeds in question registered; and though by them he was made to convey his estates immediately to the respondent Thomas Copley, yet he continued in possession of all his estates till his death. These circumstances proved, beyond a doubt, that Robert Copley, by executing the deeds in question, never meant to put the estates in the least out of his power, or to give the respondent Copley any interest, which he could not at any moment destroy; and they likewise afforded the strongest presumption that he himself actually destroyed these deeds; a presumption wholly uncontradicted by any evidence on the part of the respondent.

It might possibly be objected, that if Robert Copley destroyed the deeds, he would have destroyed the will also: But this inference by no means follows, for he might have altered his mind as to the extent of the provision he meant for the respondent Copley, and have thought his copyhold and personal estate a sufficient provision for him. Besides, an heir at law is not to be disinherited by presumption or inference. It was unnecessary to take any particular notice of that part of the verdict which found that the deeds in question existed at Robert Copley's death, because that finding was totally foreign to and unsupported by the issue; which was directed only to try the validity of the will, and whether the freehold as well as the copyhold estates passed by it, and in consequence, it was made no part of the ground for the decree complained of. But should it be objected, that the appellant had an opportunity given him of trying his title to the estate by an ejectment, which he declined doing; it might be answered, that the respondent Copley, as the case stood, was not entitled under the deeds to any relief or assistance in a court of equity; but his bill ought to have been dismissed. And as the [503] appellant might at any time, if necessary, have tried his title at law, without the interference of the court of Chancery; it was therefore thought highly improper for him to proceed to try an ejectment, under the direction of that court; and by thus declining the trial of the ejectment, he brought back the causes to the same

state in which they were when the order of the 25th of November 1775 was pronounced.

But admitting for a moment that there was a propriety in the court's declaring, that Robert Copley's freehold estates were, by virtue of the deeds in question, vested in the respondent Thomas Copley for his life, with remainder to the issue male of his body : there was surely no ground for the court to proceed further, and declare the estates to be so vested with such remainders over as were in Robert Copley's will declared concerning the copyhold estates, in favour of the respondents Cooke, Wolley, and Woodyear, and their respective issue male, with remainder to the respondent Cooke, his heirs and assigns for ever. It was not stated by the respondent Copley's bill, that there were in the release of July 1765 any such limitations, or indeed any limitations over in default of issue male of his body : the bill only prayed a conveyance to the respondent and his heirs male. And the evidence given on his part, so far from proving that the names of the other respondents were inserted in the remainders, proved directly, that Robert Copley was so cautious in that particular, that no person whatsoever could see or know what the remainders were : and there was no evidence on the part of the other respondents. But on their behalf it was said, that Robert Copley had by his will, given his copyhold estates to them in remainder, and that he inserted those limitations in the will : and therefore it must be presumed that the limitations in the release were the same. If, however, these respondents could derive any benefit from such a presumption, they would have full opportunity of doing it at law, whenever their claim to the succession of the estates should arise : but it could be no reason for a court of equity to declare them entitled to the estates, even if a suit was instituted by them ; much less so in one, wherein they were defendants, and brought before the court only as devisees under Robert Copley's will, and in which their claim to the freehold estate was not even stated. And should it be objected, that the court could not declare the rights of the parties by halves, and that by having declared the right of the respondent Thomas Copley, and the issue male of his body, it must necessarily proceed to declare the rights of the other respondents as persons in remainder : the objection itself was one of the strongest reasons which could be given, why no decree ought to have been made in favour of the deeds.

On behalf of the respondent Thomas Copley, it was contended (A. Wedderburn, J. Madocks), that it was not competent to the appellant to complain of the decree of the 19th of March 1776, respecting the freehold estates, which as to him, and so far as it varied from the former decree of the 25th of November 1775, was plainly grounded upon his [504] own application, in consequence of a proposal accepted by him to receive his costs, and waive any legal right he might have to contest the respondent's title. The respondent was in possession of the freehold estates : the execution of the will had been established, and was admitted : the execution of the deeds had been proved, and that they existed at the death of Robert Copley. The operation either of the deeds or the will, was sufficient to bar the appellant : and though the verdict of the jury was not a literal answer to the issue, yet it found a fact equally decisive against the appellant : still however, the court thought fit to indulge him with an opportunity of establishing, if he could, a legal title in himself : and more it was impossible for him to expect. This he had thought fit expressly to waive, upon the terms of receiving costs, to which he could not otherwise have been entitled : and therefore it was conceived, he was as much bound by the decree, as he would be by an express consent, or by a release at law.

But if, after all, the appeal was proper, yet by the evidence on the part of the respondent, produced and read at the hearing of the causes, the fact of the execution of the deeds, as well as the effect and contents of them, were established beyond a possibility of doubt. The respondent was also in possession of a verdict, by which those deeds were found not only to have been executed by the testator Robert Copley, but to have existed at the time of his death : and the testator, by his will, manifestly and expressly referred to them, as a disposition of his real estate then subsisting. The appellant did not in any sort impeach that part of the decree which related to the copyhold estates : or of the verdict found on the trial of the issue, whereby the testator's will was established : and it was conceived, that the admission of the will, as duly executed and unrevoked, necessarily inferred the existence of the deeds, as subsisting instruments at the testator's death : because those deeds were not only mentioned and

referred to in the will, as instruments then existing, but were virtually incorporated into it, and ratified by it, and were therefore to be considered in a manner as constituting part of it.

The same reasons, in substance, were offered (J. Wallace, J. Dunning) on the part of the other respondents, the remainder-men.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of affirmed: And it was further ORDERED, that the appellant should pay to the respondents £100 for their costs in respect of the said appeal. (MS. Jour. *sub anno* 1776-7, p. 380.)

[505] CASE 9.—ANNA ELIZA, DUCHESS OF CHANDOS (Widow and Relict of James late Duke of Chandos, deceased),—*Appellant*; LADY ANNA ELIZA BRYDGES, Daughter and only Child and Heir of the said Duke of Chandos, and Others,—*Respondents* [20th November 1795].

[Mews' Dig. xv. 437.]

[Articles to settle estates of the husband, subject to certain uses and trusts, on the first and other sons in tail male; remainder to the husband in fee; the husband, confirming the articles, devised the same estates in case he should die without issue male, or on failure of issue male in the life of his wife; and by a subsequent settlement, in performance of the articles, conveyed to trustees and their heirs, (after certain uses and trusts,) to the use of the first and other sons in tail male; remainder to himself in fee. The whole fee being conveyed, and some of the purposes being inconsistent with the will and the articles, the will is revoked as to the settled estates. See *post*, case 15.] [7 Bro. P. C. 593.]

[Decree of Lord Loughborough, C. affirmed.]

2 Ves. jun. 417.

By articles of agreement of the 20th June 1777, made previous to the marriage of James late Duke of Chandos with the appellant the Duchess of Chandos, the said Duke covenanted and agreed that he would, within six calendar months from the day of the marriage, cause the estates aftermentioned, viz. Several freehold messuages and tenements of him the said Duke in the city of London, the yearly rents of which are therein mentioned to amount to £800 or thereabouts: the manors of Stanmore Magna and Parva, in the county of Middlesex, the manor house or scite of the manor of Stanmore the Great in the same county, and all the freehold and copyhold hereditaments of him the said Duke in Stanmore the Great and Stanmore the Less, and the several parishes of Stanmore the Great, Stanmore the Less, Edgware, Fryern Barnet, Finchley, Hendon, Wilsdon, Acton, Edmonton, and St. Andrew Holbourn, in the county of Middlesex, then in the occupation of different persons, at several yearly rents, amounting together to £3000 or thereabouts; the manor of Avington in the county of Southampton, the manors of Easton and Bighton in the same county, and all the freehold and copyhold hereditaments of him the said Duke in the parishes of Avington, Wonson, and Bishop's Waltham, in the same county; the manors and advowson of East and West Wellowe in the counties of Southampton and Wilts; and all other the freehold and copyhold hereditaments of him the said Duke, in the several parishes or places aforesaid or elsewhere, in the city of London, and counties of Middlesex, Southampton, and Wilts, (except such part of the Wiltshire estate as was formerly the estate of Francis and John Keck, esquires,) and in the county of Somerset (save as thereafter mentioned), and in the county of Derby, and also the manor of Villiers, and all other [506] the hereditaments of him the said Duke in the Queen's County or elsewhere in Ireland; to be conveyed and assured in such manner as that the Duke should be seised thereof for a good legal estate of inheritance in fee simple, or a customary estate of inheritance, to

the intent that, if the marriage should take effect, and the appellant the Dutchess of Chandos, his then intended wife, should survive him, she might become entitled to dower; and would, within twelve calendar months from the marriage, and after such assurance as aforesaid, effectually convey and settle all the said manors, lands, and hereditaments, freehold and copyhold, of him the said Duke, in the said counties of Middlesex and Southampton, and in the kingdom of Ireland thereinbefore described (except such part thereof as was situate in the parish of St. Andrew Holbourn), and all the leasehold estates of him the said Duke in the said counties of Middlesex and Southampton, and his capital messuage called Minchenden House, in the parish of Edmonton, in the said county of Middlesex, and all his lands and grounds in Southgate in the said parish of Edmonton, and all his hereditaments in the parish of Wellowe in the said counties of Wilts and Southampton, then and now in jointure to Elizabeth Dutchess Dowager of Chandos, and all other the lands and tenements, whether freehold, copyhold, or leasehold, then in jointure to the said Dutchess, to the use of the Duke for his life. S. W. Remainder, to trustees for his life in trust to preserve contingent remainders. Remainder, as to Minchenden House with its appurtenances, to the appellant, the Dutchess of Chandos for her life; and, as to all the hereditaments so to be settled (except Minchenden House, with its appurtenances,) subject to the dower of the Dutchess; and also as to Minchenden House, with its appurtenances, from and after the death of the survivor of the Duke and Dutchess, to trustees in such settlement to be named, for the term of 1000 years, upon trusts after mentioned: remainder to the first and other sons of the marriage successively in tail male; remainder to the right heirs of the Duke. And it was thereby declared, that the term of 1000 years should be in trust for raising portions for a child or children of the marriage, (other than and except an eldest or only son,) and, particularly in the case of there being one such child besides an eldest or only son, the sum of £5000 to be paid at such time as the Duke should appoint; and for want of appointment, at 21, if a son; or at 21 or marriage, if a daughter; and in trust to raise maintenance not exceeding interest of the portion at 4 per cent. And the Duke covenanted, that in case the dower of the Dutchess should not produce the yearly sum of £2000 his heirs, executors, or administrators, should make good the deficiency. And it was thereby agreed, that in such settlement there should be contained a power enabling the Duke and his heirs to sell and dispose of any part or parts of the premises in Ireland, which should remain after settling to the uses aforesaid, so much of the said premises as should be of the clear yearly rent or value of £2000 and the [507] fee simple thereof, and to apply the money arising by such sale to his and their own use. And the Duke covenanted, that within 12 calendar months from the marriage he would assign the lease which he then held, for 99 years, of Chandos House near Cavendish square, and the household goods, furniture, and other things therein (except pictures and plate), to trustees, in trust, to permit himself to enjoy the same during his life; and after his death (if the Dutchess should survive him), to assign the said leasehold premises, and the said household goods, etc. to the Dutchess, her executors, administrators, and assigns: except as to the family pictures, which she was to have the use of for her life only. And the Duke thereby further covenanted, that he would, within two years from the day of the marriage, by sale or mortgage of such of his estates as were not thereby agreed to be settled, or a competent part thereof, or by such other ways or means as should be thought most convenient, pay and discharge the principal sum of £20,500 due from him, and secured by mortgages of his said estates in Middlesex and Hants, and cause proper conveyances for answering the purposes aforesaid. And there was contained therein a proviso, declaration, and agreement, that all the estates of him the said Duke, in the county of Somerset, should be conveyed by him in such manner as to become vested in trustees, upon trust, to sell so much thereof as should be necessary to raise money sufficient to discharge all the incumbrances then affecting the same; and after such sale, to re-convey the residue of those estates to the use of the Duke, his heirs and assigns, to the intent the same might become liable to the dower of the Dutchess. The said marriage shortly afterwards took effect.

By indenture dated the 23d February 1778, the lease for 99 years of Chandos House, and the household goods, furniture, and other things therein (except pictures and plate), were, in pursuance of the agreement in the said marriage articles, assigned to the Honourable Edward Willes, Robert Cooper Lee, Gentleman, Henry Howorth, Esquire, and

James Coulthard, Gentleman, in trust, to permit the duke to enjoy the same during his life; and after his death (if the Dutchess should survive him), to assign the said leasehold premises, and the said household goods, etc. to the said Dutchess, her executors, administrators, and assigns, except as to the family pictures, which she was to have the use of for her life only.

The Duke, by his will, dated the 29th of January 1780, attested by three witnesses, confirmed the said articles; and charged his real estates, which he had power to charge, and also his personal estate, with the payment of his debts, funeral expences, legacies, and annuities; and, after taking notice that a power was reserved to him, by his said marriage articles, to dispose of any part of his real estate in Ireland which should remain, after settling to the uses therein mentioned so much of the same estate as should be of the clear yearly value of £2000; and also taking notice of the confidence he placed in his wife, he devised and [508] bequeathed all his real estate in Ireland, which he had power to dispose of by virtue of said marriage articles, and also all other his real estates, whether in possession, reversion, remainder, or expectancy, which he had power to dispose of, charged as aforesaid, and also all his personal estate, to his wife for her life; with remainder to such person or persons, and for such uses and purposes, etc. as she should, by will executed and attested in manner therein mentioned, appoint; and, in default of such appointment, he gave and bequeathed the same to Henry Howorth, esquire, (who died in the testator's lifetime,) and his heirs, in trust, to convey and settle the same on his (the testator's) first and other sons in tail male; with remainder to his daughter or daughters, (if more than one,) as tenants in common in tail general; with remainder to his sister the respondent, Lady Caroline Leigh, for life; with remainder to his nephew the respondent, James Henry Leigh, for life; remainder to his (said nephew's) first and other sons in tail general; remainder to his (said nephew's) first and other daughters, as tenants in common in tail general; with remainder to his, the testator's, own right heirs. And as to such part of his personal estate as his wife should not so dispose of as aforesaid, he bequeathed the same to his (the testator's) younger child or children; and, if he should leave but one child, he gave the whole to such only child; and as to all his real estate, settled or agreed to be settled previous to his marriage, he gave and devised the same (in case he should die without issue male, or in case of failure of issue male in his wife's lifetime,) unto his said wife for her life; with remainder to the said Henry Howorth, and his heirs, in trust, to convey and settle the same on his said wife for her life; with remainder to his first and other daughters, as tenants in common in tail general; with remainder to his said sister for her life; with remainder to his said nephew for his life; with remainder to his said nephew's first and other sons in tail general; with remainder to his said nephew's first and other daughters, as tenants in common, in tail general; with remainder to his, the testator's right heirs. He gave to his daughter the respondent, Lady Anna Eliza Brydges, a legacy of £1000 to be paid at 21, or marriage, which should first happen; and after giving some other legacies, and also some annuities for life, (of which only one, viz. an annuity of £40 to the respondent Hester Johnson, is now subsisting,) he appointed his said wife residuary legatee and executrix of his will.

By lease and release of the 29th and 30th October 1780, in consideration of the marriage and of the fortune and estates of the Dutchess, which were agreed to be settled, and to which the Duke became entitled on his marriage with the Dutchess, and for securing to the Dutchess a yearly rent charge of £2000 for her life for her jointure in lieu of the dower which it had been agreed by the marriage articles she should be entitled to; and for settling the freehold, copyhold, and leasehold manors, lands, and hereditaments, thereafter conveyed to the uses [509] thereafter limited concerning the same; and in consideration of ten shillings, and for divers other good causes and valuable considerations, him the said Duke thereunto moving, and in pursuance and performance of the covenants and agreements of the said Duke in the said articles contained, which related to the charging his own estates with portions for his younger children by the said Dutchess, and settling the same estates on the issue male of their two bodies begotten; the Duke granted, bargained, sold, aliened, released, and confirmed, unto the said Edward Willes and Robert Cooper Lee, in their possession being by the lease for a year, and their heirs, divers freehold manors, lands, and hereditaments in the county of Middlesex therein mentioned and described, being the same freehold hereditaments in that county, which by the articles were agreed to be settled as aforesaid;

and also divers freehold manors and hereditaments in the county of Southampton, being the same freehold hereditaments in that county which by the said marriage articles were agreed to be settled as aforesaid; and also the said manors of East and West Wellowes in the said counties of Southampton and Wilts, and divers lands, etc. which last mentioned manors, lands, and hereditaments stood settled to the use of Elizabeth Dutchess Dowager of Chandos for life, with the immediate remainder or reversion to the Duke in fee: and also the said hereditaments in the kingdom of Ireland; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said premises: and also all the estate, right, title, interest, use, trust, property, possession, inheritance, claim, and demand whatsoever, both at law and in equity, and in possession, reversion, remainder, expectancy, or otherwise howsoever, of him the said Duke of, in, to, or out of the same, and every part or parcel thereof, to hold to said Edward Willes and Robert Cooper Lee, and their heirs, to the following uses, viz. to the use of the said James Duke of Chandos for life, S. W. remainder to the use of trustees and their heirs for his life, in trust, to preserve contingent remainders; remainder, as to Minchenden House, in the county of Middlesex, to the use of the appellant, the Dutchess of Chandos, for life; and as to all the said hereditaments therein before conveyed (except Minchenden House, and except the manors and hereditaments in Ireland,) to the use and intent that the Dutchess, in case of her surviving the Duke, might, during her life, take thereout a yearly rent charge of £2000 in full for her jointure, and in bar of dower: and subject thereto, to the use of the said Edward Willes and Robert Cooper Lee, for the term of 500 years, upon trusts thereafter declared: remainder, as to the said hereditaments so charged with the said jointure and comprised in the said term of 500 years; and as to all other the hereditaments therein before conveyed, to the use of the said Henry Howorth and James Coulthard, for the term of 1000 years, to commence as to the premises comprised in the 500 years term, from the determination of that term: and as to the rest from the death of the said Duke, [510] S. W. upon trusts after declared: remainder to the use of the first and other sons of the marriage successively in tail male; remainder to the use of the said James Duke of Chandos, his heirs and assigns for ever, and to or for no other use, intent, or purpose whatsoever.

The term of 500 years was declared to be in trust for better securing the rent charge of £2000 a year to the Dutchess in manner therein mentioned. The term of 1000 years was declared to be in trust for raising portions for a child or children of the marriage (other than and except an eldest or only son); and particularly in the case of there being but one such child (other than and besides an eldest or only son), were such child a son or daughter, the sum of £5000 to be paid, in case of no appointment, at 21, if a son; or at 21 or marriage if a daughter; and in trust to raise maintenance, not exceeding the interest of the portion at £4 per cent. And there was contained in the said settlement a proviso and declaration that it should be lawful for the Duke and his heirs to sell, dispose of, and convey any part or parts of the said hereditaments in Ireland, over and above the clear yearly rent or value of £2000 to any person or persons whomsoever, and to receive the purchase monies for his and their own use and benefit. And the Duke thereby covenanted to surrender all his copyhold tenements held of the manors of Fryern Barnett and Hendon, in the county of Middlesex, and all other his copyhold tenements in the county of Middlesex, to the same uses as the said freehold hereditaments in that county were thereby limited, or as near thereto as the tenure would admit. And the Duke thereby assigned to the said Edward Willes, Robert Cooper Lee, Henry Howorth, and James Coulthard, the manor of Enfield, in the county of Middlesex, and divers leasehold tenements in Enfield and Edmonton in that county, granted to him by several leases, dated 30th April 1778, under the seal of the Dutchy of Lancaster, for four several terms of 31 years; and all other his leasehold tenements in the said county of Middlesex, held of the said Dutchy of Lancaster, or of All Souls College, Oxford; and also the demesne lands of the said manor of Abbasichen, and divers lands and tenements there, in the county of Southampton, held by lease, dated 30th March 1763, from the Duke of Bolton, for the term of 99 years, determinable on three lives; and all those messuages, lands, and tenements, in the parish of Bishop Waltham, in the said county of Southampton, held by lease, dated 7th June 1773, of the Bishop of Winchester, for 21 years; and all other the leasehold tenements of the Duke in the counties of Southampton and Wilts; to hold to the said trustees, for the residue of the several terms therein, upon trust to permit the Duke to receive the rents

for his life; and after his death to permit the Dutchess, if she should survive him, to receive the rents for her life, towards payment and satisfaction of the said yearly rent charge of £2000, and after her death to apply the same towards raising and paying the portions thereby provided for the child or children of the marriage, [511] not being an eldest or only son, and the maintenance for such child or children; and, after payment and satisfaction thereof, in trust, to permit the person or persons for the time being entitled to the freehold of the hereditaments therein before conveyed to receive the rents of the said leasehold premises. And the Duke thereby covenanted with the said Edward Willes, Robert Cooper Lee, Henry Howorth, and James Coulthard, that he would forthwith convey to them and to their heirs, all his manors, lands, and hereditaments, in the county of Somerset, upon trust, to sell and convey the same, and out of the money arising therefrom to pay the sums of £5500 and £5000 to Henry Hoare, esquire; the sum of £4000 to John Mount, esquire; and the sum of £6000 to William Denne, esquire, (making together £20,500); secured by mortgages of estates in Middlesex and Hants, comprised in the said settlement and the interest thereof, and all debts and incumbrances affecting the said estates in the county of Somerset, so directed to be sold; and to pay the residue of the money arising by such sale to the Duke, his executors, administrators, and assigns.

By lease and release of the 7th and 8th December 1780, the Duke conveyed his Somersetshire estates, consisting of the manor of Keynsham, and divers lands and tenements there, and two third parts of the manor of Rodney Stoke, and other manors, and of lands and tenements there, and at divers other places in the said county of Somerset, unto and to the use of the said Edward Willes, Robert Cooper Lee, Henry Howorth, and James Coulthard, and their heirs, in trust, to sell all the said hereditaments, or any part thereof; and to pay off divers incumbrances affecting those estates, amounting to £22,500, and also to pay off the four mortgages, amounting to £20,500 affecting the estates in Middlesex and Hants, comprised in the settlement; and to pay the surplus to the Duke, his executors, administrators, or assigns; and to apply the rents and profits till sale in keeping down interest, and towards discharging the principal monies.

By indenture of the 7th June 1781, (reciting that the Duke was entitled to an estate in Ireland of the yearly value of £8000, and that the possession thereof having been many years detained from him by James Stephens and others, under a pretended lease renewable for ever, at the yearly rent of £2000, he was proceeding in an ejectment in the court of King's Bench in Ireland to recover the same; that there was a great arrear of rent due, amounting at £8000 a year, to £100,000 and upwards; and, at £2000 a year, to £29,000, and that he was desirous of disposing of the said arrears for the separate use of the Dutchess), the Duke assigned to the said Edward Willes, Robert Cooper Lee, Henry Howorth, and James Coulthard, all the rents and arrears then due, or which should become due, on or before the determination of the said ejectment, upon trust, to pay the same to the Dutchess, for her separate use, or to such persons and for such purposes as she should appoint.

[512] The Duke made a codicil to his will, dated 12th August 1782, attested by two witnesses only; and thereby appointed the Dutchess guardian of his daughter, the respondent, Lady Anna Eliza Brydges, during her minority.

By lease and release dated 4th and 5th September 1785, reciting, that the Duke was seised in fee simple of the manor, lands, and hereditaments thereafter conveyed; (viz. the manor of Keynsham and divers lands and hereditaments in Keynsham; which, though his Grace is here recited to have been seised thereof in fee simple, were parcel of the Somersetshire estate, conveyed by the deeds of the 7th and 8th December 1780, to trustees, in trust, to be sold as above stated,) subject to a charge thereon of £13,000, and that he was desirous to secure the Dutchess an equivalent for the sum of £12,000 therein mentioned; and for that purpose, and from love and affection, had proposed and agreed to settle the same (subject to the said charge of £13,000), to the uses therein after mentioned; the Duke conveyed the manor, capital messuage, impropriate rectory, and advowson of the vicarage of Keynsham, in the said county of Somerset; and all his lands and hereditaments in that parish, to trustees and their heirs, to the use of him the said Duke, during the joint lives of himself and the Dutchess; and, if she should survive him, then to the use of her Grace in fee simple.

By deed dated 31st January 1787, (reciting the recitals in the marriage articles, and a power therein contained of appointing new trustees, and that the said Henry Howorth, James Coulthard, and Edward Willes, were dead,) the said Robert Cooper Lee, with

the consent of the Duke and Dutchess, appointed Edward Hyde East, esquire, to be a trustee in the room of the said Henry Howorth, and Thomas Graham, esquire, in the room of the said James Coulthard, for the purposes in the said articles expressed.

By lease and release dated 21st and 22d May 1787, the Duke conveyed his estate at Rodney Stoke, and divers other places in the said county of Somerset, (other parcel of the hereditaments, which, by the deeds of December 1780, were conveyed, in trust, to be sold as before stated,) unto and to the use of the said Robert Cooper Lee, Edward Hyde East, and Thomas Graham, their heirs and assigns, subject to redemption by the Duke, his heirs, executors, administrators, or assigns, on payment of the sum of £4493 and interest.

By indentures of lease and release, dated the 7th and 8th June 1787, the Duke, for the considerations therein mentioned, conveyed unto Sir William Hillman and James Graham, and their heirs, the manor and estate of Keynsham in the said county of Somerset, comprised in the indentures of the 4th and 5th of September 1785; to hold to the said Sir William Hillman and James Graham, and their heirs, during the joint lives of the Duke and Dutchess, in trust, to pay and apply the rents and profits thereof for the separate use of the Dutchess.

[513] The Duke died on the 29th of September 1789, leaving the appellant the Dutchess, his widow, and the respondent Lady Anna Eliza Brydges, his only child and heir at law, him surviving; and the Dutchess afterwards proved the will and codicil in the prerogative court of Canterbury.

A commission dated the 1st February 1791, in the nature of a writ *de lunatico inquirenda*, having issued, the Dutchess was thereupon duly found a lunatic; and Richard Gamon, esquire, her brother, having been appointed committee of her person, and the said Richard Gamon, and the respondent James Henry Lee, having been appointed committees of her estate, grants of the custody of her person, and of the care and management of her estates, were passed to them accordingly under the great seal.

On the 14th of November 1792, the respondent Lady Anna Eliza Brydges, being an infant, by the Honourable Sir Francis Buller, baronet, her next friend, filed her bill in the high court of Chancery against the appellant the Dutchess, and her committees, and against the several trustees and parties interested, who are respondents in this appeal; thereby stating (among other things) the marriage articles of the 27th of June 1777; the will of the Duke; the settlement of the 29th and 30th of October 1780; the deeds of the 7th and 8th of December 1780; the deeds of the 4th and 5th of September 1780; and those of the 21st and 22d of May 1787; and also stating, that part of the hereditaments comprised in the deeds of December 1780, had been sold; and that other part remained unsold; and that divers of the leases of the leasehold tenements, by the settlement of the 30th of October 1780 assigned, had been renewed; and charging that the will of the Duke was revoked by the settlement of the 29th and 30th of October 1780; and the indentures of the 7th and 8th of December 1780, as to such of the real estates as were comprised in those deeds; and that, upon his Grace's death, the respondent, Lady Anna Eliza Brydges, as his heir at law, became entitled to such of his real estates as did not pass by his will; and praying, among other things, that the settlement of October 1780, and the conveyance of December 1780, might be declared to be a revocation of the will of the said Duke as to all the hereditaments comprised in those deeds; and that the hereditaments conveyed by the settlement, and also such of the hereditaments comprised in the deeds of December 1780, as remained unsold, might be declared to have descended to the respondent, Lady Anna Eliza Brydges, as heir at law of the said Duke; and that consequential directions might be given.

On the 5th of June 1793, the appellant the Dutchess of Chandos, by her committees, and also the committees, put in a joint and several answer to the said bill; in which they said they believed that the Duke, at the time of the articles, was seised or entitled in fee simple in possession or reversion of or to divers estates in London, Middlesex, Hants, Wilts, and Derby, (subject to the life estate of his mother, in part, and to certain mortgages [514] and incumbrances upon various other parts of the said estates;) and also seised or entitled in fee simple of or to a considerable estate in Ireland; and was also seised to him and his heirs of divers copyhold estates, held of different manors in Middlesex. They admitted the settlement of the 29th and 30th of October 1780; the subsequent conveyance of the 7th and 8th of December 1780; and the other deeds

stated in the bill. They insisted that the will was not revoked by the settlement, inasmuch as the settlement was only intended to carry the articles into execution, or not to raise or effectuate any new agreement; for they said that the jointure of £2000 a-year was no real variation; because they alleged, that at the time of the articles, it was thought necessary to secure a right of dower with a covenant (if deficient) to make it up to £2000 a-year, on account of the disability created by the laws against papists; but that the disability being removed before the settlement, it was then thought proper to secure a jointure of £2000 a-year in lieu of dower. They insisted also, that if the settlement was deemed a revocation of the will, the Dutchesse was entitled to her dower in all the Duke's freehold and copyhold estates of which he was seised, of an estate of inheritance, or at least to make her election whether to accept of her jointure or dower.

The several other defendants also put in their answers to the said bill.

The cause having become abated by the death of the said Robert Cooper Lee, the respondent Lady Anna Eliza Brydges, on the 19th of April 1794, filed a bill of revivor against the respondents Richard Lee and John Allen, his executors; and the said cause was thereupon duly revived against them.

Replications were filed to all the answers, and the cause being at issue, witnesses were examined on both sides: and the will and the several deeds and instruments before stated were proved.

On the 19th of July 1794, the cause came on to be heard before the Lord Chancellor (Lord Loughborough); and having been in hearing that day, and on the 21st, 22d, and 23d of that month, his Lordship on the 24th pronounced his decree therein; whereby his Lordship declared, that the will of the testator, James late Duke of Chandos, was well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution (except so far as the said will had been revoked), and decreed the same accordingly; and his Lordship declared, that by the subsequent settlement of the 29th and 30th days of October 1780, the said will was revoked as to the freehold estates in the said settlement comprised; and that, upon the death of the said James Duke of Chandos, those estates descended to the plaintiff, the now respondent, Lady Anna Eliza Brydges, as his heir at law, and gave consequential directions: and he also directed an enquiry, what manors, lands, and hereditaments, were conveyed by the deeds of the 7th and 8th of December 1780, and to whom, and for what estate, and upon what trusts, and which of the said [515] hereditaments had been since sold, and whether all, or any, and which of the incumbrances thereby directed to be discharged, had been satisfied? and when, and whether any, and which of the said estates remained unsold? and whether any and what acts were done by the Duke subsequent to the date of the said conveyance, touching any and which of the estates remaining unsold? and reserved the consideration of all further directions touching the same until after the master should have made his report relating thereto.

The appellant, the Dutchesse of Chandos, by her committee, appealed from so much of the said decree as declared that the will of the said James, late Duke of Chandos, was revoked by the subsequent settlement of the 29th and 30th days of October 1780, as to the freehold estates comprised in the said settlement; and that upon the death of the said James Duke of Chandos, those estates descended to the respondent Lady Anna Eliza Brydges, as his heir at law; and also from so much of the said decree as directed a reference to the said master to appoint a proper person or persons to be receiver or receivers of the rents and profits of the said freehold estates; and to take an account of the rents and profits of the said estates accrued since the death of the said testator, and which had been received by the appellant, or by any other person or persons, by her order or for her use; and that the balance of such account should be paid into the Bank, and laid out in the purchase of Bank 3 per cent. annuities, in trust, in the said cause, and placed to the account of the respondent Lady Anna Eliza.

In support of this appeal the following reasons were assigned (J. Mansfield, R. Graham, C. Thomson): 1st, Because the settlement being executed in consequence of the articles, by which the Duke was bound to make a conveyance of his estates, ought not to be considered as a distinct and independent deed, but as forming part of the same conveyance with the articles which bore date antecedent to the will, and therefore could not be deemed a revocation of it. 2dly, Because, by expressly referring to the articles and professing to carry them into effect, the settlement clearly marks and defines

the object which the parties had in view, and excludes every possible idea of an intention to revoke the will; and though the rule be generally true that any conveyance after the execution of a will, whereby the nature of the estate which the deviser had in him at the time of making the will is altered, operates as a revocation of such prior will, yet it is submitted that such rule does not apply at all to a case circumstanced as the present; or if it does, that there are many exceptions to that rule, grounded on the nature and tendency of the conveyance, with reference to the intention of the testator manifested thereby. If the principle of revocation was founded merely on the alteration in the plight of the estate, it could admit of none of those exceptions which have actually been adopted in the case of conveyances in fee, by way of mort-[516]-gage, or in trust for payment of debts, or particular charges subsequent to the execution of a will, and which have been held only a revocation *pro tanto*. These depend entirely on the nature and design of such conveyances; and if so, the settlement in question appears to fall directly within the same principle. 3dly, Because the Duke's will refers in express terms to the articles, and disposes only of such estates and interests as were not bound thereby; and it seems unreasonable to say, that a deed for carrying those articles into effect, and which the Duke must have had in contemplation at the time of making his will, should totally revoke the dispositions contained in that will, although made with reference to ulterior objects, not within the articles or deed. 4thly, Because the articles and settlement have no essential variance between them, after the explanation given of the appellant's incapacity to take by purchase any estate in lands at the time of executing the articles, and of the removal of that incapacity previous to the settlement. But should that explanation be deemed insufficient to establish the perfect consistency of the two instruments, it is submitted that the Duke's will was only revoked by the settlement *pro tanto*, to the extent of the particular variation, and is therefore still valid in all other respects.

On behalf of the respondents, and in support of the decree, the following were the reasons assigned (J. Scott, J. Mitford): Because the testator, the Duke of Chandos, after making his will, by the deeds of lease and release of the 29th and 30th of October 1780, conveyed and departed with the whole of the estate which he had in the lands comprised in those deeds at the time of making his will, and passed that estate to others in fee, declaring the use to himself for life, with limitations thereon, and limiting the ultimate use to himself in fee simple; and it has now been settled by a series of decisions, which cannot be impeached without destroying all security of title, that the conveyance of the entire fee simple of lands to uses, is a revocation of a prior will of such lands; and that the use limited to the grantor himself by such conveyance will not pass by such will without a republication thereof, but will descend to his heir at law; except in certain cases, bounded by certain rules. The reversion or remainder in fee simple of the estates comprised in the deeds of the 29th and 30th of October 1780, did therefore on the death of the Duke of Chandos descend to Lady Anna Eliza Brydges, his only child and heir at law, unless it can be shewn that the nature of the conveyance made by those deeds was such as to bring their operation within the established exceptions to the general rule before stated.

The excepted cases, it is conceived, are only three: one applying to devises of legal estates, affected by conveyances of such legal estates, upon which no equitable title can arise; another applying to devises of legal estates, affected by conveyances upon such legal estates, but upon which an equitable title, and [517] an equitable title only remains to the grantor; and the third applying to devises of equitable estates, afterwards clothed with the legal title, conveyed to the deviser subsequent to his will.

I. The only case in which a conveyance by a deviser of the fee simple of the lands devised by him has not been deemed a revocation at law of a prior devise of a legal estate, is that of a conveyance by a tenant in common to effect a partition; where the grantor, having before the conveyance an undivided share of lands, takes upon a partition, and, by a conveyance according to the partition, the entirety of a part of those lands, instead of his original undivided share. But this exception from the general rule is founded on the nature of the preceding title of the grantor, which is by law subject to partition; and is confined to cases where the operation of the conveyance is merely to effect by act of the parties that which the law would in like manner have effected by its process. And therefore where the act of the parties has done more, that is, where the conveyance of the parties has operated more than the act of the law would have done, as in Tickner

and Tickner, cited 3 Atk. 742, where, by the introduction of a power of appointment, the conveyance was not according to the original title, and therefore went beyond that which the judgment of law upon a writ of partition would have effected, the case was deemed within the general rule, and the conveyance was determined by a revocation of the prior will.

II. The other cases in which a conveyance by the deviser of the entire fee has been determined not to revoke a prior will, are only two; first, the case of a mortgage in fee; and, secondly, the case of a conveyance for payment of debts, which were cited in argument at the hearing on the part of the appellant, and were relied upon as instances of conveyances for particular purposes, which operated as revocations of the will (as the argument admitted) at law, but which have been held not to be revocations in equity. But in these cases the whole fee simple being limited, to the use of the mortgagee, or trustee, the grantor parted with his whole estate at law, without taking back any legal estate or use to himself; and therefore at law nothing remained upon which the will could operate, or which could descend to the heir; and at law the conveyance at the same time defeated the titles both of the devisee and of the heir. In these cases, therefore, nothing being left to descend at law, the question has been to whom the equitable interest should belong; and the courts of equity have held these cases to be exceptions from the general rule of law which they ordinarily follow, on these grounds, as stated by Lord Hardwicke, in *Sparrow and Harcastle*, 3 Atk. 805; namely, that although the conveyance is of the fee simple of the land, yet in the consideration of a court of equity the interest conveyed is merely a personal interest, having no quality of a real estate; and that therefore the testator is to be deemed in equity to have created only a chattel interest, as if he had created a term for years, which would have been a revocation, *pro tanto*, [518] only at law. All that remained to the grantor was right of redemption, and that right of redemption did not pass by the conveyance.

III. The only other case in which a conveyance of the entire fee has been deemed not to operate as a revocation of a prior will, has been where the testator had an equitable title only at the time of making his will, and has accepted the conveyance of the legal estate, according to that title. In such cases courts of equity have controuled the legal title of the heir, and considering the equitable title as passed by the will, and the conveyance of the legal title as an incident to the equitable title, have deemed the heir on whom the legal title has descended a trustee for the devisee, as the person by whom the conveyance was made would have been, if the conveyance had not been made, and has directed the heir to convey to such devisee. On the same ground, if a devise had been revoked at law by a mortgage in fee, it may be presumed, that upon a reconveyance by the mortgagee to the mortgagor, in consequence of which the legal title would descend upon the death of the latter to his heir; a court of equity would deem the heir a trustee for the devisee, as the mortgagee would have been deemed such trustee, if no conveyance had been made. But these cases are confined to conveyances according to the equitable title: for in *Parsons and Freeman*, 3 Atk. 741, *Ambler* 116, it was determined that a conveyance which differed from the previous equitable title by the introduction of a power of appointment, paramount the limitation of the fee simple, operated as a revocation of the will; and this was expressly decided by analogy to the case of *Tickner and Tickner* before stated, where the introduction of a power of appointment in a conveyance upon a partition was determined to have the same operation.

These three exceptions are the only exceptions hitherto allowed to the general rule, firmly established by a great variety of cases, that a conveyance of lands, parting with or operating on the whole fee, is a revocation of a prior will of such lands, so that the will shall not pass any use limited or resulting to the testator upon the conveyance, but such use shall descend to the heir of the testator.

It has been attempted in argument to assert, that a conveyance of the whole fee simple limiting the ultimate use to the grantor, if made for a particular purpose, is to be deemed a revocation only to serve that purpose. This attempt is in direct contradiction to a variety of cases, particularly *Lord Lincoln's case*, 1 Eq. Ca. Ab. 411, *Show. P. C.* 154; *Pollen or Huband v. Huband*, 1 Eq. Ca. Ab. 412 (and see *ante*, case 1 of this title, [7 Bro. P. C.] p. 433); *Sparrow and Harcastle*, 3 Atk. 798; and *Parsons and Freeman*, 3 Atk. 741, *Ambler* 116; in all of which cases the conveyances may be said to have been made for particular purposes; and *Lord Hardwicke*, in *Parsons and Freeman*,

Ambler, 118, notices and rejects this argument ; and there, and in Sparrow and Hardcastle, 3 Atk. 805, confines [519] the excepted cases to mortgages and securities for money, considering conveyances for payment of debts as securities only, and treats them as creating only a chattel interest in equity in the grantee, the testator parting entirely with his legal fee, but retaining the equitable fee, and having power to redeem on satisfying the chattel interest.

It was also attempted to argue, on the part of the appellant, at the hearing, that the conveyance made by the deeds of lease and release, of the 29th and 30th of October 1780, was a conveyance in pursuance of the obligation which the testator had imposed on himself by his marriage articles ; and that therefore the conveyance was to be deemed an incident to the estate which he had power to devise ; and that as he could only devise subject to that contract, he ought to be deemed to have actually devised, subject to all the consequences of the contract. No case was cited in which it has been determined that such a conveyance would not operate as a revocation, even if it had strictly followed the terms of the prior contract, as it conveyed the entire fee simple, and therefore passed the whole legal estate, limiting the ultimate fee simple to the Duke and his heirs. Making such a conveyance an exception to the general rule would therefore be adding a new exception, even if the terms of the original contract required the actual conveyance of the whole fee to fulfil the contract. But as the terms of the original contract in this case (especially exclusive of the contract respecting the dower which was not executed) did not require a conveyance of the entire fee simple from the Duke, but the creation only of particular interests, which might have been created without conveying the entire fee simple ; and the conveyance itself was in direct contradiction to the contract, so far as it respected the Dutchess's title to dower ; the conveyance of the entire fee simple ought to be deemed a revocation, notwithstanding the prior contract, as much as if no such prior contract had existed. If a man had contracted to grant a lease for years at a rack rent, or to charge his estate with a rent charge for life, he might perform his contract by conveying the fee simple to a third person, to the use of the lessee for years in the first case, and to the use and intent that the rent charge might be received by the grantee in the second ; and subject to such prior use, to the use of himself in fee. The conveyance might in these cases be said to have been made for a particular purpose, namely, to create the term in one case, and the rent charge in the other ; but conveying the whole fee to uses, it must, according to the cases, have been deemed a revocation of a prior will. It can make no difference whether the prior contract was of greater or less extent : so far as it did not exhaust the whole fee, the estate was in the same situation as if the contract had not been made. It is impossible therefore to draw any line within which to bound excepted cases, if they are to be extended to cases of prior contracts, affecting the title of the testator, unless the extension is confined to cases in which the [520] conveyance does not carry the whole fee, and operates nothing which the contract did not require. In the present case the whole fee simple was conveyed to uses, though the contract did not require a conveyance of the whole fee ; and the testator parting with the fee, although he took it back again in part by the limitation of the new use, has gone beyond the exigency of the contract, and taken the new use by such limitation. The original devise was of a legal estate in fee simple, subject to a contract which bound the land in equity to a certain extent. Subsequent to the will, the testator conveyed the entire fee simple, by which he conveyed all that he had devised, as well what the contract did not extend to as what it did extend to ; he conveyed therefore that which was not bound by any contract ; and the conveyance as to so much of the estate cannot be distinguished from a conveyance by a testator, without cause, to the use of himself in fee, which unquestionably will operate as a revocation of a will ; and the safety of titles requires that the decisions on that subject should be strictly adhered to.

But in the present case the testator not only conveyed the whole fee to uses, and therefore conveyed more than the articles required him to convey, but the settlement which he made did not pursue the articles. He was not bound by the articles beyond the giving to the Dutchess a title to dower, providing portions for the younger children, and giving estates tail to the issue male in succession ; subject to all which the devise made by the will was to take place. But no title to dower could be created by the conveyance which he made : and by that conveyance he limited, by way of use, a rent charge of £2000 a-year to the Dutchess instead of dower ; and a term or estate of 500

years for better securing that rent charge; and the whole of the settlement made by that conveyance shews that the Duke had not in contemplation a strict and bare execution of the articles. Leasehold estates, of very considerable value, which, if settled according to the articles, would have vested absolutely in the first-born son upon his birth, and, in case of his death, would have been transmissible to his personal representative, were by the settlement (in direct contradiction to the articles) assigned to trustees, in trust, after the death of the Duke, for the Dutchess during her life towards her jointure, and were afterwards made applicable to the payment of the portions. By the articles also, the debts affecting the estates in Middlesex and Hampshire, agreed to be settled, were provided for, not out of the Somersetshire estate, but out of other estates; and so much only of the Somersetshire estate was to be sold as should be necessary for discharging the incumbrances specially affecting that estate; and so much therefore as should remain unsold was to be limited to the Duke in fee, in order to entitle the Dutchess to dower. The provision therefore intended for her by the articles was to include the Somersetshire estate. But by the settlement the Duke covenanted to convey the whole of the Somersetshire estate, in trust, to be sold, and not only the [521] incumbrances specially affecting it, but all the incumbrances affecting the Middlesex and Hampshire estates were to be paid out of the money arising by such sale; and the surplus was to be paid to the Duke, his executors, administrators, or assigns. It is clear, therefore, the Duke made the settlement, not merely to place his property by conveyance in that situation at law in which it before stood in equity, as bound by the articles; but that he took upon himself to act according to the view he had then formed of the convenience of his family, and as having a power to controul the articles, or at least to put those claiming under the articles to elect whether they would abide by or reject the new arrangement which he had thought proper to make. He cannot, therefore, be said merely to have made a conveyance to vest the legal estate according to the prior equitable interests. The settlement is different from the articles; and the conveyance made by it is not according to the prior equitable title; and whether the variation from the articles be great or small, if it is a variation, it must have the consequences of a variation, or no line can be drawn; and an estate, subject to articles, conveyed in any manner, or to any extent, different from the articles, provided it pursues them in part, must be deemed a conveyance according to the articles. It is observable also, that the covenant in the settlement of the 29th and 30th of October 1780, and the subsequent conveyance of the 7th and 8th of December 1780, respecting the Somersetshire estates, are clear revocations of the devise in the will of those estates; as they not only convey those estates in a manner totally different from the provisions in the articles, but convert the estates into personal estate of the Duke, instead of real estate; and if the Duke had died immediately after the deeds of December 1780, the surplus produce of the Somersetshire estates must have been applied as part of his personal estate.

The settlement also, by limiting a rent charge of £2000 a-year to the Dutchess, may be considered as inconsistent with the will; and, in that point of view, independent of any other circumstances, the conveyance might be deemed a revocation of the lands charged with that rent charge: for the will gives the Dutchess an estate for life in the lands agreed to be settled; and then the deeds of October 1780, give her a less extensive interest in the same lands, viz. a rent charge issuing out of them, or of part of them.

It is also observable, that the will confirms the articles, which would amount to a devise according to the articles; and that the settlement of October 1780, conveying the estates in a manner different from the articles, must be a revocation of the devise confirming the articles.

Under all these circumstances it is apprehended, that at law the settlement is clearly a revocation of the will; and indeed it seemed so to be admitted at the hearing; but then it was contended, that though the settlement was a revocation at law, it was not so in equity; or that in equity the devisees had a right [522] to make the heir a trustee for them. Lord Hardwicke, in *Parsons and Freeman*, 3 Atk. 748, says, And the rule is unquestionably established, that the same conveyance, which would be a revocation of a devise of a legal estate, would be equally a revocation of a devise of an equitable estate; and that it would be very dangerous to property to hold otherwise. If therefore the conveyance in question is a revocation of the devise at law, what equity can there be to set up the revoked legal devise against the heir in favour of the devisee; or

for declaring the heir a trustee for the devisee, which would be in effect to convert what was a legal devise into an equitable devise, merely because it was revoked, and therefore of no force as a legal devise.

After hearing counsel it was accordingly ORDERED and ADJUDGED, that the appeal be dismissed; and that the decree therein complained of be affirmed. (MS. Jour. *sub anno*, 1795.)

CASE 10.—The RIGHT HONOURABLE WILLIAM CHARLES EARL OF ALBEMARLE, and FRANCIS LEIGHTON, Clerk, *Appellants*; GEORGE ROGERS, THOMAS MEYRICK and ELIZABETH his Wife, ROGER BENTLEY, HENRY FOSTER, and JOHN VENN, *Respondents* [12th April 1796].

[Mews' Dig. v. 1230; x. 1590, 1591; xiv. 609; xv. 1235.]

[Under a devise of manors, lands, tenements, and hereditaments to A. his executors and administrators, for a term of 11 years, in trust, to receive the rents, issues, and profits of the premises that should from time to time accrue and become due, and dispose of the same for the benefit of a *cestui que* trust, A. may by the directions of the *cestui que* trust, and for his benefit, assign the advowson of a rectory appendant to a manor, to a purchaser for the said term of 11 years, to the intent that such purchaser may present for the next turn in case of an avoidance, before the expiration of the term: and in case of such avoidance the purchaser may present accordingly.]

[Decree of Lord Loughborough, C. affirmed.]

2 Ves. jun. 477.

The Right Honourable Augustus Lord Keppel, being at the time of making his will and at his death seised in his demesne as of fee of and in the manor of Elveden otherwise Elden in the county of Suffolk, and the advowson of the rectory of the church of Elveden otherwise Elden, and also of and in divers messuages, farms, lands, tenements, and hereditaments in the said county of Suffolk, and elsewhere in the kingdom of England, made his will in writing, dated the 30th day of September 1786, published and attested as the law requires for devising real estates; and thereby gave certain leasehold estates in manner therein mentioned, [523] and gave certain specific and pecuniary legacies to several persons therein named; and as to all and singular his manors, messuages, lands, and hereditaments, situate at Ixworth Thorpe in the county of Suffolk, he gave and devised the same unto George Rogers, esquire, and Timothy Brett, esquire, therein named, and their heirs and assigns, upon trust, to sell and dispose thereof; and out of the money to arise by such sale, to pay to his daughter Elizabeth Keppel the sum of £13,000, to and for her own use, and to apply the residue of the money arising therefrom in discharge of his debts and legacies, as therein mentioned: And the said testator did declare his intention to be, that until such sum of £13,000 should be paid to his said daughter, the said George Rogers and Timothy Brett, and the survivor of them, should, out of the rents and profits arising from the said estate at Ixworth Thorpe, and the money that should arise by sale thereof, pay unto his daughter one annuity of £200 clear of all deductions; and when the said £13,000 should be paid, the annuity was to cease: And as to his capital messuage situate and being at Elveden otherwise Elden aforesaid, with the farms, lands, tenements, and hereditaments thereunto belonging, and all other the manors, messuages, lands, tenements, and hereditaments that he was seised, possessed of, or any way entitled unto, for any estate of inheritance, freehold or copyhold, (which copyhold premises he had surrendered to the use of his will,) in possession, reversion, remainder, or expectancy, with their and every of their appurtenances, situate at Elden and Bardwell, or elsewhere in the said county of Suffolk, or elsewhere in the kingdom of Great

Britain, (other than and except such as were therein before devised to the said George Rogers and Timothy Brett, to be sold as aforesaid,) he thereby willed and declared that the same should be subject and liable to, and stand charged with the payment of such debts as at the time of his decease might be due from him; as also of the legacies and annuities given and bequeathed by his will, and the annuities and legacies given by any codicil or codicils he might make thereto, in aid of such money as should arise by sale of such part of his real estates as was thereinbefore directed to be sold, and of such personal estate as he should be possessed of at the time of his decease, and that was not otherwise particularly disposed of by his said will, and any codicil he might make, and subject thereto; he gave, devised, and bequeathed all those his said manors, messuages, farms, lands, and tenements, both freehold and copyhold, at Elveden otherwise Elden, and Bardwell aforesaid, or elsewhere in the county of Suffolk, or elsewhere in the kingdom of Great Britain, (other than and except such as he had thereinbefore directed to be sold,) unto the said George Rogers, to hold unto the said George Rogers, his executors and administrators, for the term of eleven years, to be computed from his decease, upon the trusts and for the intents and purposes therein and hereinafter mentioned and declared concerning the same; and after the end or other determination of the said term of eleven years, and [524] subject thereto in the mean time to the use of his nephew William Charles Earl of Albemarle for his life, remainder to the use of the said George Rogers and Timothy Brett, and their heirs, during the life of the said Earl, in trust, to preserve contingent remainders; and from and after his decease, to the use of the first and every other son and sons of the said William Charles Earl of Albemarle in tail male, with divers remainders over: And the said testator thereby willed and declared, that the said manors, messuages, lands, and hereditaments given, devised, and bequeathed unto the said George Rogers for the term of eleven years, were so devised to him upon trust, that the said George Rogers, his executors, or administrators, should receive the rents, issues, and profits of the said premises, comprised in the said term, that from time to time should accrue and become due, and thereout pay, apply, and dispose of such sum or sums of money as might be necessary to support and keep the gardens, plantations, and trees planted and to be planted at Elden aforesaid, in such good state and condition as the same then were; and also for finishing the several buildings that had been begun there and that were not then finished, but were intended to be added or made to the capital messuage and out-buildings at Elden aforesaid, and which should be carried on and done in such manner as the said George Rogers should think fit to direct, he being entirely confided in by the testator in respect thereto, and being acquainted with the said testator's intentions concerning the said buildings and plantations: And upon further trust, that he the said George Rogers, his executors, administrators, or assigns, should apply and dispose of the rest of the monies that should arise from the rents, issues, and profits of the said estates comprised in the said term, towards payment of such debts, legacies, and annuities as his said estate at Elden was thereinbefore charged with, and to pay the overplus of such monies (if any) to his said daughter Elizabeth Keppel for her own use and benefit; and he thereby authorised the said George Rogers, his executors and administrators, to manage and improve his said estates comprised in the said term, in such manner as he should think best, or be most for the benefit of his said estate; and he did thereby also empower the said George Rogers, his executors and administrators, during the said term of eleven years, to grant any lease or leases of the said capital messuage, lands, tenements, and hereditaments comprised therein, unto any person or persons, in like manner, and with such and the like conditions, as the said William Charles Earl of Albemarle was therein authorised to grant, when he should be in actual possession of the said premises; but no such lease or leases so to be granted should exceed the time or term which should be then to come before the said William Charles Earl of Albemarle should arrive at the age of 25 years; and the said testator thereby declared his will to be, that in case the said William Charles Earl of Albemarle should live to arrive at his said age of 25 years, then, from such his arrival at 25 years, he willed and directed that [525] the said term of eleven years should determine or otherwise be assigned to and for the benefit of the said William Charles Earl of Albemarle; and, after giving several legacies therein mentioned, he gave and bequeathed all the rest of his personal estate and effects whatsoever unto the said George Rogers and Timothy Brett, upon trust, to convert into money all such parts thereof as should not consist of ready money, and

should pay and apply such monies, together with all other the residuum of his personal estate, for and towards payment of his debts and legacies, so far as the same would extend; and if there should be any overplus of such money, then the same should be paid unto his said daughter Elizabeth Keppel; and if there should be any overplus money to arise by sale of his said estate at Ixworth Thorpe, after payment of what was before directed to be paid thereout, such overplus should be paid to his said daughter Elizabeth Keppel; and he appointed the said George Rogers and Timothy Brett, executors of his said will.

The said testator died on or about the 2d day of October 1786, without altering or revoking his said will, and without lawful issue, leaving the said Elizabeth Keppel his natural daughter, and the said William Charles Earl of Albemarle his nephew and heir at law, him surviving.

George Rogers and Timothy Brett, the executors, duly proved the will; and the said George Rogers took possession of the real estate of the said testator at Elden (the said William Charles Earl of Albemarle being under the age of 25 years).

The said Elizabeth Keppel afterwards intermarried with Thomas Meyrick, esq.

The advowson of the rectory of the church of Elden is appendant to the manor of Elden; and Lord Keppel, at the time of making his will, was seised in fee of the said manor, and so continued to the time of his death.

Mr. and Mrs. Meyrick, being desirous of selling the next presentation to the said rectory of Elden, if it should fall within the eleven years term, created by the said testator's will, contracted with John Thornton, esq. of Clapham in the county of Surrey, with the consent of the said George Rogers, for the sale of such next presentation, at the price or sum of £400, the said church then being full.

In pursuance of such contract, by indenture bearing date the 30th day of March 1790, and made between the said George Rogers of the first part, and the said Thomas Meyrick and Elizabeth his wife of the second part, and the said John Thornton of the third part, the said George Rogers for and in consideration of £400 paid to him by the said John Thornton, did, at the request and by the direction of the said Thomas Meyrick and Elizabeth his wife, grant, bargain, sell, and assign unto the said John Thornton, his executors, administrators, and assigns, all that the said advowson, donation, right of patronage, and presentation of and to the said rectory of Elden aforesaid, with the appurtenances, to [526] hold the same unto the said John Thornton, his executors, administrators, and assigns, for the remainder of the said term of eleven years, determinable as therein mentioned, to the intent that he or they might, for the next turn only, present such fit person to the said rectory as the said John Thornton, his executors, administrators, and assigns, might think proper, in case the said rectory should, before the expiration of the same term, become vacant.

The said John Thornton, being by means of the said assignment possessed of the said advowson, or the right of patronage thereto, made his will the 2d of April 1790, and thereby gave and bequeathed all his advowsons, rights of patronage, and presentation in and to any church or churches whatsoever, unto the respondents Roger Bentley, Henry Foster, and John Venn, upon certain trusts therein mentioned; and the said John Thornton afterwards died without revoking his said will, and his executors have assented to the said bequest.

The Reverend George Burton, the late incumbent of the rectory of Elden, died in the month of October 1791, upon whose death it belonged to the said Roger Bentley, Henry Foster, and John Venn, as trustees as aforesaid, to present a fit person to the said church: notwithstanding which, the said William Charles Earl of Albemarle did, within three weeks after the death of the said George Burton, present the appellant Francis Leighton to the late Bishop of Norwich, within whose diocese the said rectory is situate, in order to his being instituted and inducted into the said church.

The respondents Roger Bentley, Henry Foster, and John Venn, brought their *quare impedit* against the appellants for the purpose of enforcing their right to present a fit and proper person to the said church.

The said William Charles Earl of Albemarle and Francis Leighton, on or about the 25th day of April 1793, filed their bill in the High Court of Chancery against the said George Rogers, Thomas Meyrick, and Elizabeth his wife, Roger Bentley, Henry Foster, and John Venn, insisting, that the said advowson was an advowson in gross, and that it did not pass to the said George Rogers by the will of the said Lord Keppel; and

praying that the right of the said William Charles Earl of Albemarle to present to the said rectory or church of Elveden otherwise Elden aforesaid, on the vacancy which happened on the death of the last incumbent thereof, might be declared, established, and confirmed by the decree of the said court of Chancery; and that the said Roger Bentley, Henry Foster, and John Venn might be restrained by the order and injunction of the same court from proceeding in the said action at law against the appellants, and from disturbing the said Francis Leighton in the peaceable possession of the said church to which he had been presented, instituted, and inducted as aforesaid; and that in case the said court should not declare and establish the right of the said William Charles Earl of Albemarle to present to the said church which became so vacant as [527] aforesaid, then that the money which the said George Rogers received from the said John Thornton as before mentioned, might be applied by him either in payment of the legacies and annuities given by the said testator's will, or in keeping the gardens, buildings, and plantations upon the testator's estate at Elden aforesaid, in good repair, and in finishing the buildings and making improvements there.

The said George Rogers, Thomas Meyrick, and Elizabeth his wife, Roger Bentley, Henry Foster, and John Venn put in their answers to the said bill on or about the 29th day of June 1793, and thereby admitted the several facts hereinbefore stated; but stated, that they had been informed and believed that the said advowson had always been and passed as appendant to the said manor of Elveden otherwise Elden; and that it appeared so to have done from the title of the said estate: and they insisted, that the gift and right of presentation to the said church, whether the same was an advowson appendant or in gross, belonged to the said Roger Bentley, Henry Foster, and John Venn, as trustees in the will of the said John Thornton then deceased: And it was by the said answer further insisted, that the said George Rogers did not become, and was not a trustee of the said advowson for the said William Charles Earl of Albemarle, and was not bound to present his clerk; and the said George Rogers, Thomas Meyrick, and Elizabeth his wife, admitted it was not necessary to sell any of the premises comprised in the said term, to pay the debts of the said testator, and that the said advowson was sold by the said George Rogers for the benefit of the said Elizabeth Meyrick.

The said cause came on to be heard on the 7th day of November 1794, without either party having entered into any evidence, when, after argument at the bar, the Lord Chancellor was pleased to order that the said bill should stand dismissed.

Against this decree the Earl of Albemarle and Mr. Leighton appealed, and assigned (J. Scott, R. Richards) the following reasons for reversing the decree:—Because, as the appellants humbly submit, it is clear that the testator has neither expressly or implicitly given the respondent George Rogers any power to sell or assign any of the premises devised to him for the term of eleven years. He has merely directed the respondent Rogers to receive the rents, issues, and profits of the estates comprised in the term, and to apply the same in the manner in his will expressed, without ever mentioning the advowson. By rents, issues, and profits, annual profits were undoubtedly intended. An advowson yields no annual profit, nor indeed any profit at all. If, therefore, the legal interest in the advowson did pass by the devise for the term, which is not admitted, the trust thereof being undisposed of, resulted to the appellant the Earl of Albemarle, as the testator's heir at law.

Objection. It may perhaps be contended that the respondent, being merely a trustee, and having no beneficial interest, was bound to assign the term, and act by the direction of the respon-[528]-dents Mr. and Mrs. Meyrick, the *cestui que* trusts, and for their benefit.

Answer. The respondent Mrs. Meyrick (who is otherwise amply provided for by the will) is unquestionably the *cestui que* trust of the surplus of the annual rents and profits of the estate during the term; but there is no *cestui que* trust of the advowson—it is not a subject of the trust—it produces no annual profit—nor are any directions given or disposition made by the testator concerning it by his will, and consequently it must result to the heir at law.

In affirmance of the decree the respondents assigned (J. Mansfield, R. Graham) the following reasons:—

I. Because the advowson is appendant to the said manor of Elden, and passed by the devise of the manor to George Rogers, upon the trusts of the eleven years term, which were ultimately for the benefit of Elizabeth Keppel, the testator's daughter.

II. Supposing the advowson to be an advowson in gross (which the respondents

deny, yet they insist that the testator intended to devise the advowson, and has in his will used general words sufficient to pass an advowson in gross. *London v. The Collegiate Church of Southwell*, Hobart, 304. Perk. sec. 116. Dyer 323. b. which are authorities to shew that an advowson will pass by the word tenements.

In the present case, the respondents insist, that it is plain the testator raised the term to assist, if necessary, in the payment of his debts, and also to make a further provision for his daughter Elizabeth Keppel; therefore, if it had been necessary to satisfy creditors, the trustees would, upon a suit instituted for that purpose, have been decreed to sell the next presentation, which could not have been done if the advowson had not passed to the trustees by the will for the term of eleven years, whatever passed by the will to the trustees for the aforesaid term, and was not required for payment of debts and improvement of the estate to be made by Mr. Rogers, belonged of course to Elizabeth Keppel, now Mrs. Meyrick.

III. If the next presentation had not been sold, and the incumbent had died during the term, Miss Keppel, now Mrs. Meyrick, would have been entitled to present; for the trustee cannot himself take any beneficial interest, although not attended with profit, and Lord Albemarle can only claim a resulting trust as heir at law; but there can be no resulting trust, if there is an existing *cestui que* trust, in which character Miss Keppel now Mrs. Meyrick, stood during the eleven years term. The whole equitable interest during the term was in Miss Keppel, now Mrs. Meyrick, subject to the specified trusts. The testator has used general words, carrying this estate to a definite *cestui que* trust capable of exercising the right of presentation, and therefore entitled to do so, which distinguishes this case from *Kinsey v. Langhorne*, Forrester 143, cited by the appellants' counsel on the argument of this cause [529] in the court of Chancery; because, in that case, the *cestui que* trusts, consisting of indefinite and variable objects of charity, were incapable by themselves of exercising the right of patronage; and, as the trustees were merely such without any beneficial interest, they could not as bare trustees exercise a right of patronage, though not attended with profit, and there being no other devisee who could present, the right necessarily devolved upon the heir at law; besides, that question arose upon the right of trustees to present to a church actually void at the time of presentation, (from which no profit can accrue,) and upon which ground the case was decided (if it can be said to have received any decision); the Chancellor (Lord Talbot) relying upon that circumstance as decisive against the trustee's right to present. In the present case the next presentation was disposed of when the church was full, by which, according to law, a profit might be made for the benefit of the *cestui que* trust.

It was therefore submitted, that what the trustee could by law do, he was bound to effectuate for the benefit of the *cestui que* trust; and consequently, that the next presentation of this advowson was rightly sold for the benefit of Mrs. Meyrick, the daughter of the testator.

After hearing counsel for the appellants, and counsel appearing for the respondents, it was ORDERED and ADJUDGED, that the appeal be dismissed, and that the decree therein complained of be affirmed. (MS. Jour. *sub anno*, 1796.)

[530] CASE 11.—WILLIAM PULTENEY, Esq. and HENRIETTA LAURA BARONESS OF BATH, his Daughter,—*Appellants*; The RIGHT HONOURABLE WILLIAM HARRY EARL OF DARLINGTON, MARGARET COUNTESS OF DARLINGTON, Widow and Executrix named in the last Will and Testament of Henry late Earl of Darlington deceased,—*Respondents* [3d May 1796].

[Mews' Dig. iv. 349. See *In re De Lancey*, 1869, L. R. 4 Ex. 359; *In re Gordon*, 1877, 6 Ch. D. 537.]

[Where money, devised to be laid out in land, actually comes into the hands of the person who would be entitled to dispose of the lands if purchased, the money is his absolute property; and will pass by a general devise of his personal estate.]

[Decretal orders of the court of Chancery affirmed.]

[The present case is admitted rather for the sake of the laboured and curious argument for the appellant, than as forming any important precedent; since it depends very much on its own internal circumstances. It may be conjectured that the consideration of this, and the many conflicting cases on the subject of money devised to be laid out in land, gave rise to the statute 39 & 40 G. 3. c. 56. which enables courts of equity to order the money itself to be paid to the person who, by being first taker of the land in tail, might bar the subsequent uses by a recovery.]

1 Bro. C. R. 223.

Henry Guy, esq. made his will, and thereby gave to John Taylour and Arthur Lake, their executors and administrators, all his messuages, lands, tenements, and hereditaments, with their appurtenances, in the parish of Stoke Newington in the county of Middlesex, and the rents, issues, and profits thereof; to hold to them, their executors and administrators, for 99 years, to commence from the 28th December next before the date of the said will, if Harry Pulteney, Edmund Serjeant, and John Mulcaster, or either of them, should so long live; upon trust that the said John Taylour and Arthur Lake, or the survivor of them, his executors and administrators, should out of the rents, issues, and profits thereof, pay unto the said Harry Pulteney, Edmund Serjeant, and John Mulcaster, the several annuities therein mentioned; and if any overplus of the rents and profits should remain, after the said annuities should be satisfied, and all their disbursements, charges, and expences relating thereto, the same should continue in the hands of the said John Taylour and Arthur Lake, for the purposes after mentioned: and as to the remainder, reversion, or inheritance of all the said messuages, lands, tenements, and hereditaments, after the 99 years should be determined, the testator gave the same unto William Pulteney, esq. afterwards Earl of Bath, for his life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the body of the [531] said William Pulteney successively in tail male: remainder to the said Harry Pulteney for his life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the body of the said Harry Pulteney successively in tail male; remainder to Daniel Pulteney, (father of Frances Pulteney, the late wife of the appellant William Pulteney, and mother of the said Henrietta Laura Pulteney, Baroness of Bath,) for his life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the body of the said Daniel Pulteney successively in tail male: and for default of such issue, gave the reversion, remainder, and inheritance of the premises unto William Pulteney, eldest son of Sir William Pulteney deceased, and father of William late Earl of Bath, and to his heirs and assigns for ever: and devised unto the said William Pulteney, afterwards Earl of Bath, John Taylour, and Arthur Lake, their heirs and assigns for ever, all that his capital messuage or mansion-house, with all the stables, yards, gardens, and its appurtenances, and all other his messuages, lands, tenements and hereditaments whatsoever, situate and being at Earl's-court or

elsewhere, in the parish of Newington in the county of Middlesex; and all those freehold and copyhold messuages, lands, tenements, and hereditaments, situate, lying, and being at Muswell Hill, in the several parishes of Hornsey and Clerkenwell, in the said county of Middlesex, within the manor of Hornsey, which was theretofore mortgaged to him, or some person or persons in trust for him, by George Newell and Joseph Newell, and all his right, title, and interest in the said premises; to the intent that they, or the survivor of them or the heirs, executors, or administrators of such survivor, should, as soon as conveniently might be after his decease, sell the same for the best price that could be reasonably got for the same, and lay out the money that should arise thereby as thereafter directed: and the testator thereby directed, after his debts should be paid and funeral expences discharged, and all legacies therein before given, and which he should give by any codicil to his said will, should be satisfied, and his executors should be reimbursed all expences, that then all monies or other personal estate which should remain in their hands, or be raised out of his personal estate, or by sale of his estate at Earl's-court aforesaid, or the estate mortgaged to him by the said George and Joseph Newell, or by any other means by virtue of his will, should be laid out by his executors, or the survivors or survivor of them, in the purchase of lands of inheritance, which should be conveyed to the same persons, or such of them as should be then living, for such estate and estates for life and in tail male, and in such order, manner, and form, as he had therein before devised and settled the remainder and inheritance of the said messuages and hereditaments at Stoke Newington aforementioned: and appointed the said Earl of Bath, John Taylour, and Arthur Lake, executors of his said will.

[532] On the 22d of February 1710, the said testator died without altering his will.

On the 2d of July 1711, the said William Pulteney, afterwards Earl of Bath, Harry Pulteney, and Daniel Pulteney, exhibited their bill in the court of Chancery against Thomas Lake, the heir at law of the said Henry Guy, William Pulteney the elder, and the said John Taylour and Arthur Lake, to compel the defendants to join in a sale of the premises devised by the will of the said Henry Guy to be sold, that the trusts of the said will might be performed; and, in order to ascertain what was to be laid out in the purchase of lands, that an account might be taken of the said Henry Guy's personal estate, and such of the real estate of the said testator, as by his said will was appointed to be sold; and that the money arising thereby might be laid out in the purchasing of lands to be settled according to the said will.

On the 4th of August 1711, the defendants having put in their answers to the said bill, the said cause came on to be heard, when it was decreed, that it should be referred to a master to take an account of the personal estate of the said Henry Guy come to the hands of the said Earl of Bath, and how much the testator's debts, legacies, and charges of his funeral, and proving his will, had come to; and that in taking of such account the said master was to make all just allowances; and it was ordered, that the messuages and premises devised to be sold should be sold, and that the monies arising by such sale, and surplus of the rents and profits of the premises at Stoke Newington, (after payment of the annuities payable thereout,) and the surplus of the testator's personal estate not specifically devised, which should remain after payment of the debts and legacies, funeral charges, and the charges of proving the will, and such allowances made as aforesaid, and the fines and fees payable in respect of the said copyhold estates, and the plaintiffs' and defendants' costs of that suit, all which were to be paid out of the said personal estate, should be laid out in a purchase of lands, tenements, and hereditaments, to be approved of by the master; and that the same when purchased should be conveyed and settled, with the approbation of the master, to such uses and in such manner as were appointed by the will of the said testator; and until a convenient purchase could be found, the same was from time to time to be placed out at interest, with the master's approbation, upon parliamentary funds or real securities, and the interest thereof, and the rents and profits of the messuages and premises devised and appointed to be sold as aforesaid, until the same should be sold, was to be paid to such person or persons as would have been entitled to the rents and profits of the lands and hereditaments appointed to be purchased as aforesaid, if such purchase or purchases had been made, subject in the first place to make good what the rents and profits of the premises in Stoke Newington should fall short of paying the annuities charged thereon; and the deficiency whereof (if any [533] such should happen) was also to stand charged upon and made

good out of such lands and hereditaments to be purchased as aforesaid, when the same should be purchased.

On the 26th August 1713, the master made his report, and thereby certified the balance of the account of the trust monies of the said Henry Guy, in the hands of the said Earl of Bath, to be £15,327 2s. 11d. which was to be placed out as by the order of the 4th of August 1711 was directed.

After making the said report, the said William Pulteney, afterwards Earl of Bath, did, as he was acting executor of the said Henry Guy, continue to receive and get in the personal estate of the testator, and thereout paid all the rest of the said Henry Guy's debts and legacies, and out of the money so by him received, and what was so reported to be due from him, purchased several quantities of South Sea stock, to the amount of £17,600, and the same was transferred into the names of the said Earl of Bath and John Taylour, who survived the said Arthur Lake.

William Pulteney the father of the Earl of Bath died in the year 1715, without having made any disposition of the reversion in fee of the lands directed to be purchased by the will of the said Henry Guy, and thereupon the said Earl of Bath, as his heir at law, became entitled to such reversion.

On the 10th July 1722, the said John Taylour preferred his petition to the Lord Chancellor, setting forth, that part of the monies raised out of the estate of the said Henry Guy, had been invested in capital stock in the South Sea Company, amounting to £17,600, in the names of the said John Taylour and the Earl of Bath, which the said John Taylour was desirous might be transferred to such persons as the court should direct. And the said Earl of Bath being, on the death of his father, become entitled to the remainder in fee in the lands to be purchased as aforesaid, and the said Harry Pulteney and Daniel Pulteney being the only persons who were to take estates in remainder successively on the death of the said Earl of Bath, without issue male, were concerned in interest to have the accounts taken of the said trust estate, and the trust monies invested in lands and settled as aforesaid; and none of them having then any issue male, it was therefore prayed by the said petition, that the said South Sea stock in the names of the said John Taylour and the Earl of Bath, might be transferred to such persons as the said court should direct, subject to the directions of the said decree: and that the said John Taylour might be discharged of the said trust, and allowed his costs, and be indemnified.

The said William Pulteney, afterwards Earl of Bath, Harry Pulteney, and Daniel Pulteney, the same day preferred their petition to the said Lord Chancellor, setting forth that the estate at Muswell Hill remained unsold, and consisted partly of freehold lands and partly of copyhold lands, which were at a fine certain, and that the same estate was as proper to be settled in the family as any other estate that might be purchased with the monies to be [534] raised by sale thereof: it was therefore prayed, that the said John Taylour might join the said Earl of Bath in conveying and surrendering the said estate at Muswell Hill, to the uses directed by the said testator's will concerning the lands so to be purchased.

On the 11th July 1722, the said petitions came on to be heard, and it was ordered, that instead of selling the said estate at Muswell Hill, the said William Pulteney afterwards Earl of Bath, and John Taylour should surrender and convey the said estate to the uses directed by the said testator's will concerning the lands to be purchased with the overplus of the said testator's personal estate, and the money arising by sale of such parts of the real estate as were by his will appointed to be sold: and it was further ordered, by the consent of all parties, that the said William Pulteney, afterwards Earl of Bath, and the said John Taylour should transfer the said £17,600 South Sea stock to Mr. Holford, who thereupon was to transfer the same to the said Earl, then William Pulteney, Harry Pulteney, and Daniel Pulteney, who were to stand possessed thereof, subject to the trusts in the said testator's will, and the directions of the said decree. And the said John Taylour desiring by his said petition to be discharged of his trusts, and the said Earl of Bath, then William Pulteney, admitting that all monies which had been raised and received out of the said testator's estate real or personal, had been received by him, and that no part thereof had been at any time received by the said John Taylour: it was further ordered, that the said John Taylour should be discharged from his said trust, and be indemnified touching the matters aforesaid.

The said estate at Muswell Hill was soon afterwards settled and conveyed to the uses by the said order directed.

After the making of the said order of the 11th July 1722, £6 5s. per cent. in stock was allowed and added by the South Sea company to the said £17,600 stock, and by means thereof the same was increased to £18,700 capital stock of the company: and afterwards, in pursuance of an act of parliament made in the 9th George II. one moiety thereof, being £9350 was converted into annuities of the said company, and the other moiety thereof remained capital stock: and the said William Pulteney, afterwards Earl of Bath, and John Tylour, in pursuance of the said order of the 11th day of July 1722, transferred the said £9350 capital stock, and the said £9350 annuities, to the said Mr. Holford, who afterwards transferred the same stock and annuities to the said William Pulteney, afterwards Earl of Bath, Harry Pulteney, and Daniel Pulteney, pursuant to the directions of the said order.

In February 1725 the said Harry Pulteney and Daniel Pulteney executed letters of attorney, empowering the said William Pulteney, afterwards Earl of Bath, to sell the said £9350 South Sea stock, and £9350 South Sea annuities, which he accordingly did, and raised by sale thereof £19,048 17s. 6d.

The said William Pulteney, afterwards Earl of Bath, afterwards received and paid divers sums of money on account of the estate [535] of the said Henry Guy; and on the settlement of his account the balance which appeared to be in his hands was £36,488 2s. 0½d.

The same year the said Earl of Bath purchased the manors of Wrington, Ubley, and Bathwicke, and divers lands and hereditaments in the county of Somerset for £35,000, under a decree of the court of Chancery, and was soon after let into possession of the same.

On the 6th of September 1731 Daniel Pulteney died without issue male.

In 1732, the said Earl of Bath, then William Pulteney, looking over the said manors of Wrington and Ubley, and not being pleased with his purchase, expressed an inclination to Mr. Yorke his steward to have the same sold, provided he could get for such sale £27,600, and to sell the same in different parcels to the respective tenants thereof being by Mr. Yorke thought most advantageous, he proposed to the said Earl to give him £27,600 for the same, having two years allowed him to complete the purchase; whereupon an agreement was entered into by and between the said Earl of Bath and Mr. Yorke to that effect.

The said Earl of Bath, in Hilary term 1733, filed a bill against the said James Yorke for a specific performance of the agreement, but which was never afterwards prosecuted, on account of the inability of Mr. Yorke for that purpose.

The said Mr. Yorke agreed with several persons for the sale of different parts of the said estates, and a bill was filed in 1733 to compel an execution of such contracts.

By indentures of lease and release, dated 26th and 27th of February 1734, the manors of Wrington, Ubley, and Bathwicke, and the hereditaments purchased by the said Earl of Bath as aforesaid, were conveyed to the said Earl of Bath in fee.

By another indenture dated 9th February 1735, between the said Earl of Bath (then William Pulteney, esq.) of the one part, and the said Harry Pulteney of the other part, after reciting the contract with the said Mr. Yorke, the said Earl of Bath covenanted with the said Harry Pulteney, that the said James Yorke, his heirs and assigns, and all and every purchaser and purchasers under him, should, in the first place, pay into the Bank of England, in the joint names of the said William and Harry Pulteney, £19,048 17s. 6d. to the intents and purposes declared in and by an indenture bearing even date therewith, and the proviso therein contained.

And by another indenture of the same date, between the said Earl of Bath (then William Pulteney) of the one part, and the said Harry Pulteney of the other part, the said Earl demised unto the said Harry Pulteney, his executors, administrators, and assigns, the several manors or lordships, messuages, lands, tenements, and hereditaments so purchased by him as aforesaid, to hold unto the said Harry Pulteney, his executors and administrators, for a term of years, upon condition that if the said Earl of Bath should, [536] (within the space of three years then next, lay out and invest the said £19,048 17s. 6d. with the approbation of the master, to whom the trust affairs of the

said Henry Guy might stand referred, in the purchase of lands and hereditaments to be settled to such uses as were appointed by the will of the said Henry Guy concerning the lands thereby directed to be purchased, the said indenture should be void.

By indentures of lease and release, dated 3d and 4th May 1736, the release being of three parts, and made between the said William Earl of Bath, then William Pulteney, esq. of the first part, Harry Pulteney of the second part, and Sir John Rushout, baronet, and Jasper Blythman, gentleman, of the third part; after reciting the will of the said Henry Guy, and the said decree dated 4th August 1711, the said Master's said report, and other proceedings, and the several other matters and things hereinbefore set forth, or to that effect; and that the said Earl had purchased the fee simple and inheritance of the manor or lordship of Wrington, with the appurtenances thereof, in the county of Somerset, and the advowson and right of patronage of the rectory of the church of Wrington, and the chapel of Burrington to the same annexed, and several messuages, lands, tenements, and hereditaments within the town, fields, precincts, and territories of Wrington and Burrington aforesaid, in the said county of Somerset; and also all that the manor or lordship of Bathwicke in the said county of Somerset, and the advowson and patronage of the parish church of Bathwicke, and chapel of Woolley in the said county of Somerset, and several messuages, lands, tenements, and hereditaments, within the towns, fields, parishes, hamlets, liberties, or precincts of Bathwicke and Woolley aforesaid; that the said several manors, hereditaments, and premises had been conveyed to and to the use of the said Earl and his heirs, in and by indentures of lease and release of the 26th and 27th of February 1734; and that the said Earl had paid the sum of £35,000 for the purchase of all the said manors, hereditaments, and premises; and that in part payment of and towards discharging the said purchase money, he had applied £19,048 17s. 6d. the trust monies received by him by sale of the said stocks as aforesaid; and reciting the said last mentioned indenture of the 9th of February 1735, that the said manor of Bathwicke, and the several messuages, lands, and hereditaments thereafter conveyed and settled, being part of the manors, lands, and hereditaments purchased by the said William Earl of Bath as aforesaid, were of the value of £13,000, and that the said Earl had agreed to convey and settle the same to and for the several uses, intents, and purposes directed and appointed in and by the last will and testament of the said Henry Guy, which were then subsisting, in satisfaction and discharge of £13,000, part of the said £19,048 17s. 6d. and that the said Daniel Pulteney had died without issue male; and that the said Earl had then an only son named William, then an infant: it is thereby witnessed, that towards performance of the before men-[537]-tioned trusts in the said will of the said Henry Guy, and in satisfaction and discharge of £13,000, part of the said £19,048 17s. 6d. received by him as aforesaid, and for conveying and settling the manors, messuages, lands, and hereditaments thereafter mentioned, to the several uses, intents, and purposes directed and appointed in and by the will of the said Henry Guy, concerning the lands and hereditaments thereby directed to be purchased and settled, which were then subsisting, and for other considerations therein mentioned, the said Earl of Bath granted and released the manor of Bathwicke, and the advowson of the church of Bathwicke, and several messuages, lands, and hereditaments lying within the said manor, unto the said Sir John Rushout and Jasper Blythman, and their heirs, to such and so many of the uses, intents, and purposes directed and appointed in and by the said last will of the said Henry Guy, concerning the lands and hereditaments directed to be purchased and settled, as were then subsisting and capable of taking effect.

By indenture dated 4th May 1736, between the said Earl of Bath of the first part, the said Harry Pulteney of the second part, and the said Sir John Rushout and Jasper Blythman of the third part, reciting the said last mentioned indentures of lease and release, it was witnessed, that it should be lawful for the said Earl of Bath, by any deed or writing, deeds or writings, under his hand and seal, attested by two or more credible witnesses, or by his last will in writing, published in the presence of three or more credible witnesses, to revoke, annul, and make void the said recited indentures of lease and release, and all and every or any of the uses and estates therein limited concerning the same; and by the same deed and writing, to limit, appoint, or declare any new use or estate of the said manor and premises as he should think fit.

The cause came on to be heard in Hilary term 1739-40 wherein the several persons contracting under the said James Yorke as aforesaid were plaintiffs, and the said Earl of Bath and others defendants, when the bill was dismissed.

By indenture of bargain and sale of four parts, dated the 2d of January 1753, and inrolled in the court of Chancery, between the said Earl of Bath and Anna Maria Countess of Bath his wife, of the first part, Lord Pulteney of the second part, Thomas Newton and Alexander Rannald of the third part, Sir Thomas Rushout and Sir Thomas Bootle of the fourth part, all the estates of the Earl of Bath and Lord Pulteney his son in the county of Middlesex, which were devised by the will of Sir William Pulteney, and the estates late of Henry Guy at Hornsey and Muswell Hill, were conveyed to and to the use of Thomas Newton and his heirs, in order to make him a tenant to the precipe, for the purpose of suffering a recovery of the same estates, in which the Earl and Countess of Bath and Lord Pulteney were to be vouchees, the uses of which were thereby declared to be to the use of such person or persons, and for such estate and estates, in such manner, [538] and upon such trusts, and subject to such provisoes, powers, and agreements, and for such intents and purposes as the said Earl and Lord Pulteney, by any other deed or deeds, with or without power of revocation, to be by them sealed and delivered in the presence of two or more credible witnesses, should from time to time jointly grant, limit, or appoint; and in case of the death of either of them, then as the survivor of them, by any deed or deeds to be executed as aforesaid, should from time to time grant, direct, limit, or appoint; and in default of such grant, direction, limitation, or appointment as aforesaid, or until the same should be made as aforesaid, to and for such intents and purposes, and upon such trusts, and subject to such covenants, provisoes, and agreements, as the same premises, immediately before the execution of the said bargain and sale, stood limited or subject unto; and to and for no other use, intent, or purpose whatever.

The recovery suffered in pursuance thereof extends only to such estates of the said Henry Guy as lay in the parishes of Hornsey and Clerkenwell. No recovery was ever suffered of the manor of Bathwicke; and the hereditaments so conveyed in satisfaction of the said £13,000 as aforesaid.

The said Lord Pulteney died February 12, 1763, without issue. Upon the death of Lord Pulteney there was no person in being who could take under the will of Mr. Guy but General Pulteney, and who at that time was nearly eighty years of age and a bachelor.

The said Earl of Bath made his will on the 21st January 1763, and thereby gave and devised all his manors, messuages, lands, hereditaments, and real estate whatsoever, and wheresoever situate, and of which he was seised or possessed, or to which he was anyways entitled in possession, reversion, or remainder, or which thereafter should be purchased with any trust monies, except the reversion and remainder of and in the real estate of Henry late Earl of Bradford deceased, thereafter mentioned, and except the piece of ground, messuages or tenements, erections and buildings thereafter mentioned to be in the possession of the Earl of Egremont, unto his brother the Honourable Harry Pulteney, esq. his heirs and assigns for ever; and after taking notice of the power he had of disposing of the Bradford estate, he gave the same estate to, for, and upon such uses, intents, and purposes as his said brother, by any deed or writing, to be by him duly executed in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, to be by him duly signed and published in the presence of and attested by three or more credible witnesses, should direct, limit, devise, or appoint; and in default of such direction, limitation, or appointment, to the use of George Colman of Lincoln's-Inn, in the county of Middlesex, esq. nephew to his said late wife Anna Maria Countess of Bath, deceased, and the heirs male of his body; and for default of such issue, to the use of his own right heirs for ever. And the testator gave all the said piece or parcel [539] of ground, messuages, or tenements and hereditaments thereinbefore mentioned to have been in the possession of the Earl of Egremont, unto his said brother General Harry Pulteney for the term of his natural life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the said General Pulteney in tail male, with divers remainders over; and after bequeathing several legacies, particularly the sum of £4000 for the benefit of Mrs. Frances Pulteney, gave unto his brother the said General Pulteney, all the residue and remainder of his personal estate, of what nature or kind soever or wheresoever, after

payment of his debts, funeral expences, legacies, and annuities; and appointed his said brother sole executor of his said will.

On the 7th July 1764, the said Earl of Bath died without altering his will, and without issue, male or female, leaving the said Harry Pulteney his only brother and heir at law.

On the 14th August 1767, the said Harry Pulteney made and published his will in the presence of three witnesses, and thereby devised all his messuages, grounds, tenements, and hereditaments in the parish of St. Mary Matfellow, otherwise Whitechapel, in the county of Middlesex, to his executors, for 99 years, to commence from his death, and immediately after the determination of the term, to his god-daughter Laura Burrard, and the heirs of her body, and for default of such issue, unto his servant James Livermore, his heirs and assigns for ever: declared, that the term of 99 years was upon trust that the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, should receive and account for and pay the rents and profits of the premises, unto and for the benefit of the said Laura Burrard, until she should be married or die; and willed that immediately after her marriage, the said term should cease. The testator devised all other his messuages, grounds, lands, tenements, and hereditaments, and real estate, in the said county of Middlesex, and also all and every his manors, messuages, lands, tenements, hereditaments, and real estate in the county of Somerset, or any county adjoining the said county of Somerset, and in the counties of Montgomery, Salop, and York, except the reversionary estate and interest expectant on the death of John Newport, esq. a lunatic, without issue of his body, of and in the manors and hereditaments, late the estate of Henry Earl of Bradford deceased, unto William Lord Chetwynd and Harry Burrard, esqrs. and their heirs, to the use of the said Lord Chetwynd and Harry Burrard, their executors, administrators, and assigns, for 500 years, to be computed from the testator's death; and after the determination of the said term, to the use of his dear cousin Frances Pulteney, wife of the said William Pulteney the appellant, for her life, *sans waste*; and immediately after the determination of that estate, to the use of the said trustees and their heirs, during the life of the said Frances Pulteney, upon trust to preserve contingent remainders; and immediately after her decease, to the [540] use of the first and other sons of the said Frances Pulteney successively in tail male; and for default of such issue, to the use of the said Henrietta Laura Pulteney, daughter of the said William Pulteney, by the said Frances his wife, for her life, *sans waste*; and immediately after the determination of that estate, to the said trustees to preserve contingent remainders during her life; and immediately after her decease, to the use of the first and other sons of her body successively in tail male; and for default of such issue male, to the use of Henry Earl of Darlington lately deceased, for his life, *sans waste*; remainder to trustees to preserve contingent remainders, during his life; and immediately after his decease, to the use of his first and other sons successively in tail male; and for default of such issue, the like limitations to the Honourable Frederick Vane and Raby Vane, for their respective lives, and to their first and other sons successively in tail male; and for default of such issue, to the use of the testator's own right heirs: declared the 500 years' term to be in trust, that the said trustees should out of the rents and profits of the premises therein comprised, raise and pay to the several persons after named, for so many years of the said term as they should respectively live, the several annuities therein mentioned, particularly an annuity of £300 to the appellant William Pulteney, and upon trust to permit the residue of the rents and profits to be received and taken by such person or persons as should for the time being be entitled to the reversion expectant on the determination of the said term. And the said testator gave, devised, limited, and appointed the remainder or reversion, and all other his reversionary estate and interest expectant on the death of the said John Newport without issue of his body, of and in all the manors, castles, rectories, advowsons, titles, rents, parks, messuages, lands, tenements, and hereditaments, in the counties of Salop, Northampton, and elsewhere, late the estate of the said Henry Earl of Bradford, and which, by the will of the said late Earl of Bath, were devised unto the testator for life, and after his decease, to the use of his first and other sons successively in tail male; and for default of such issue, to such uses as he, by any deed or writing, or by his last will and testament in writing to be executed and attested as therein mentioned, should direct, limit, devise, or appoint; and all the estate, interest, and property of and in the said manors, castles, lands, and hereditaments vested in and belonging

to the said testator, either in possession or reversion, by virtue of the devises of his said brother's will or otherwise howsoever, subject to the mortgage debt of £38,136 16s. 1d. charged thereon, unto the said Lord Chetwynd and Harry Burrard and their heirs, to the use of the said William Pulteney the appellant and his assigns for life, *sans* waste; and after his decease, to the use of the said Frances Pulteney his wife, for her life, *sans* waste; and after the determination of that estate, to the use of the said trustees and their heirs during the life of the said Frances Pulteney, in trust to preserve contingent remainders; and immediately after her de-[541]-cease, to the use of the first and every other son of her body lawfully to be begotten, successively in tail male; and for default of such issue, to the use of the said late Earl of Darlington for his life, *sans* waste; and after the determination of that estate, to the use of the said trustees during his life, to preserve contingent remainders; and immediately after his decease, to the use of his first and other sons successively in tail male; and for default of such issue, the like limitations for life, and to the first and other sons of the said Frederick Vane and Raby Vane; and for default of such issue, to the use of the said testator's own right heirs for ever.

The will recites, that by virtue of the will of the said Earl of Bath, and as his executor and residuary legatee, he the said General Harry Pulteney was entitled to £38,136 16s. 1d. lent by the said Earl, under a decree of the court of Chancery, to be applied towards payment of the debts of the said Earl of Bradford, and which was secured to the testator's brother, with interest, by a mortgage on the real estate of the said Earl of Bradford, in the counties of Salop and Northampton; that the said George Colman, by virtue of the said will, was entitled to receive one moiety of the interest of the said mortgage money during his life; the testator gave and bequeathed the said £38,136 16s. 1d. and all the interest accruing from the same from the testator's death, and all the estate, right, title, property, and interest, so devised to and vested in the testator, unto his executors, their executors, administrators, and assigns, upon trust that they should, so long as the said principal sum or any part thereof should continue due and charged upon the security, pay the interest thereof, subject to such proportion of the said interest as the said George Colman is entitled to, according to the will of the testator's said brother, unto, or permit the same to be received by the said William Pulteney the appellant, or his assigns, for his life, and after his decease, by the said Frances Pulteney his wife, for her life, and after the death of the survivor of them, by such person or persons as should for the time being be entitled to the estate of the said Earl of Bradford, by virtue of the devises in the said testator's will. Directed, that if the said £38,136 16s. 1d. and the interest attending the same, should be paid to his executors, by or on behalf of the said John Newport, or by order of the court of Chancery, or otherwise, in discharge of the said mortgage, before the real estate of the said Earl of Bradford, whereof the reversion or remainder, expectant on the death of the said John Newport without issue, should, by virtue of the limitations of the testator's will, vest in some of the persons to whom he had given or devised the same respectively, and who would become seised of or entitled to some estate of freehold, or inheritance in possession: then the said principal money so paid should be placed out by his executors, upon the public funds, or parliamentary or real securities, at interest, and from time to time, as should be necessary, call in and place out the same again, on such funds or [542] securities as before mentioned, and should pay the interest and yearly dividends and proceed thereof, for the benefit of George Colman as aforesaid, unto, or permit the same to be received by such person or persons, for the time being, as should be entitled to the estate of the said Earl of Bradford, by virtue of the said testator's will. Willed and declared, that the manors and hereditaments devised to the said William Pulteney the appellant, Frances his wife, and Henrietta Laura Pulteney, as aforesaid, by their then name of Johnson, were so devised upon express condition that they and their issue male respectively should take upon themselves and continue to use the name of Pulteney only, and bear the arms of that family, and in default thereof, or on their discontinuing the use thereof respectively, the devise of the said real estates in favour of them and their respective issue male should cease and be void: gave and bequeathed all his household goods, furniture, linen, plate, and utensils, which should be in his dwelling-house called Bath House, in Piccadilly, at the time of his death; and also all his pictures in the said house, (except such pictures or portraits as afterwards were otherwise disposed of,) unto his executors, in trust to permit them to

be used and enjoyed by the said Frances Pulteney during her life, in case she should enter on and take possession of the said house within three months after his death; and upon her death, and in default of such entry or possession as aforesaid, in trust to permit the same household goods, furniture, linen, plate, pictures, and utensils, (except as aforesaid,) to be used or enjoyed as or in the nature of heir looms, by the person or persons who should be entitled to the said house, under the limitations in his said will; all his pictures in miniature, and all his rings, diamonds, buckles, and jewels whatsoever, unto Miss Wroughton, to be respectively delivered to her as soon as conveniently might be after his death: and after giving several pecuniary legacies to his executors and others, gave all his wardrobe of cloaths and apparel, linen and woollen, unto James Livermore. Gave to the said Frances Pulteney, all bank notes and money that should be found in his house at his death. Bequeathed the following annuities: To the said Frederick Vane, for life, £200; to Mrs. Vane his wife, for life, £100; to the said Raby Vane, for his life, £200; to Lady Mary Carr, for her life, to be paid into her own hands, for her separate use, £100. The said last mentioned annuities to be paid, free of deductions, by quarterly payments. Directed, that his executors should, out of his personal estate, place out such sum or sums of money as they should think sufficient, upon some of the public funds or government securities, in the names of three or more persons by them to be appointed, who should sign and execute a declaration in writing, purporting that the same was vested in them in trust to answer and pay the said annuities last beforementioned. Gave all his money, securities for money, goods, chattels, and personal estate whatsoever, (not otherwise specifically disposed of,) unto his executors, upon trust to pay his funeral expences, all [543] his just debts owing by him at his decease, the several pecuniary legacies, the four last mentioned annuities charged on his personal estate, and such other legacies or sums of money as he should, by any codicil or writing under his hand, thereafter give out of the same; then, upon trust to lay out, apply, and dispose of the residue of his personal estate which should remain after, and should not be issued, paid, and applied in payment of such funeral expences, debts, legacies, sums of money, and last mentioned annuities, in the purchase of messuages, lands, tenements, and hereditaments, situate, lying, and being in the county of Middlesex, or within the distance of 100 miles from the same, in fee simple in possession; and to convey, settle, and assure the lands, tenements, and hereditaments, so to be purchased, to the use of the said Henry Earl of Darlington deceased, for his life, *sans* waste: with such limitations to trustees to preserve contingent remainders as aforesaid; and immediately after the decease of the said earl, to the use of the first and other sons of his body lawfully begotten, or to be begotten, successively in tail male, with like remainders to Frederick Vane and Raby Vane, and their first and other sons successively, with remainder or reversion in fee simple to the testator's own right heirs: and appointed the said Henry Earl of Darlington, Lord Chetwynd, the appellant William Pulteney by his then name of William Johnson, and Harry Burrard, executors of his said will.

The said Harry Pulteney died on the 27th October 1767, without revoking his said will, and without issue, leaving the said Frances Pulteney his heir at law.

The testator at the time of making his will had no landed property in any county except in the counties mentioned in the will.

Soon after the death of the said Harry Pulteney, the said Frances Pulteney claimed not only all the benefit of the devises given to her by his will, but also claimed to be entitled, under the will of Sir William Pulteney, to all the estates devised by his will, as heir in tail under the same, insisting that the will of the Earl of Bath was no good execution of the power reserved by the bargain and sale of the 2d of January 1753, and consequently that the recovery suffered in pursuance thereof enured to the old uses subsisting of the same estate.

In Michaelmas term 1768, the late Earl of Darlington, the present Earl, then Lord Viscount Barnard, and the Honourable Frederick Vane, filed their bill in the court of Chancery against the executors of General Pulteney, Mr. and Mrs. Pulteney, and Henrietta Laura Pulteney their daughter, in order to have the trusts of the said will carried into execution. They prayed particularly by their bill, that it might be determined and declared, that the defendants William Pulteney and Frances his wife had no right to pay any part of the real estates late of Sir William Pulteney; and if the court should be of opinion that they had any right thereto, then that they might make

their election whether they would insist on such right, and wave all benefit under the wills of [544] the said Earl of Bath and Harry Pulteney, or wave such right, and take the benefit of the said wills.

About the same time, the said William Pulteney the appellant, and Frances Pulteney, filed their bill in the court of Chancery against the late Earl of Darlington, the present Earl, then Lord Viscount Barnard, the Honourable Frederick Vane, and Lord Chetwynd and Sir Harry Burrard, two of the executors of General Pulteney, and thereby prayed that an account might be taken from the foot of the Master's report of the 26th day of August 1713 therein stated, of all sums of money received by the late Earl of Bath on account of the trust estate of Henry Guy, and that the clear balance thereof remaining in his hands at his death might be liquidated. That the defendants, the executors of General Pulteney, might admit assets of the Earl of Bath and the said Harry Pulteney sufficient to answer the residue of the trust money which remained in the hands of the Earl of Bath at his decease: or in default thereof, might come to an account concerning the whole personal estate whereof he died possessed. That the money which should appear to be the balance of the said trust account remaining in the hands of the said Earl at his death, might, by the executors of the said Harry Pulteney, be raised out of his said personal estate, and be placed in the hands of proper trustees, in trust to be laid out and disposed of by such trustees in the purchase of lands of inheritance, to be conveyed and assured to and settled upon the said Frances Pulteney and her heirs, or otherwise disposed of for the benefit of the said appellant William Pulteney and the said Frances Pulteney. That the sum of £600 South Sea annuities mentioned in the pleadings of the cause as belonging to the estate of Henry Guy, and as having arisen from fines received by the Earl of Bath on his granting leases for lives of part of the Bathwicke estate, and to have been possessed by the executors of General Pulteney as part of his personal estate, might be transferred to the said Frances Pulteney, or that the same might be sold, and the money arising thereby laid out in lands to be conveyed to the said Frances Pulteney and her heirs. And that interest might be computed by the Master on the balance of such trust account from the death of the said Harry Pulteney, and that what should be found due for such interest might be paid to the said William Pulteney the appellant, in right of his wife; and that the dividends which had arisen from the said £600 South Sea annuities since the death of the said Harry Pulteney, might also be paid to the said William Pulteney.

The defendants, the late and present Earls of Darlington, and the Honourable Frederick Vane, put in their answer to the last mentioned bill, and thereby insisted 1st, That the Earl of Bath, at the time of his purchase of the Manors of Wrington, Ubley, and Bathwicke, for the sum of £35,000, intended that the same should be conveyed to the uses of the will of the said Harry Guy; and although after such purchase he entered into a contract for the sale of part of the same estates with Mr. Yorke, he meant that the [545] money to be received therefrom should be applied to the discharge of so much of the trust money in his hands; but that when the bill filed in the court of Chancery for carrying into execution such contract was dismissed, he resumed his original intention, that such estates should go as a satisfaction for the trust money come to his hands. 2dly, That General Harry Pulteney having in himself the whole interest of Henry Guy's trust money, had a right to consider it as money, and dispose of it as such; and that in fact he considered the same as part of his personal estate, and disposed of it accordingly.

In support of these propositions, besides the several wills and deeds above stated, several exhibits were produced and proved on the hearing of the cause, to shew the intentions of Lord Bath and General Pulteney respecting the trust property, and the estates purchased therewith.

The said cause instituted by the appellants and the late Frances Pulteney, came on to be heard before the Lord Chancellor Bathurst, on the 3d, 4th, 6th, 9th May and 16th July 1744; and on the latter of the said days his Lordship declared, he would take time to consider of the matters in question in the cause.

On the 17th of June 1775, his Lordship gave his judgment, and was pleased to dismiss the bill.

On the 2d of June 1778, the appellants presented their petition for rehearing the said cause, which was accordingly granted; and the said cause came on to be reheard on the 14th and 21st of November and 12th of December 1778, before the Lord Chan-

cellor Thurlow, and his Lordship was pleased to order, that the said cause should stand for judgment; but before the day appointed, the said Frances Pulteney died, to wit, on the 1st of June 1782, whereupon the said cause was revived by the now appellants; and the said Lord Chancellor was pleased, by his order on the 24th of March 1783, to order that the said order of dismissal of the 1st of June 1782, should be affirmed.

On the 10th July 1774, the cause instituted by Lord Darlington, Lord Barnard, and Frederick Vane, for carrying into execution the trusts of the will of General Pulteney, came on to be heard before Lord Bathurst, then the Lord Chancellor, when it was ordered, that a case should be made for the opinion of the court of King's Bench, and that the question therein should be, "Whether so much of the estate comprised in the "indenture of the 2d of January 1753, as was devised by the will of Sir William "Pulteney, passed by the will of the Earl of Bath?" And all proper facts necessary to bring that matter into question were to be stated in the case; and that it should be referred to Master Eames to settle the case if the parties differed about the same; and the judges of the court of King's Bench were to be attended with such case; and his Lordship reserved all further decisions until after the judges of the said court should have made their certificate.

[546] On the 17th May 1775, the judges certified, that they were of opinion that the power given by the declaration of the uses of the recovery suffered in pursuance of the indenture of bargain and sale of the 2d of January 1753, was not duly executed by the will of the late Earl of Bath, and consequently that only the reversion in fee of the premises comprised in the said recovery passed by his will.

On the 17th, 19th, and 20th June 1775, the same cause came on to be heard before the Lord Chancellor Bathurst on the equity reserved; and on the 24th of January following, his Lordship pronounced his decree, and thereby "declared the will of "General Pulteney well proved, and that the same ought to be established, and the "trusts thereof performed and carried into execution; and did order and decree the "same accordingly; and did declare that, agreeable to the certificate of the judges of "his Majesty's court of King's Bench, the uses of the recovery in the pleadings mentioned, were not duly executed by the said late Earl of Bath, and consequently the "premises comprised in the said recoveries enured to the uses mentioned in the will of "Sir William Pulteney; and did order, that the defendant Frances Pulteney should "make her election, to be signified by signing the register's book by her clerk in court, "on or before the 1st day of the then Michaelmas term, whether she would take under "the will of Sir William Pulteney, or under the will of General Pulteney; and in "case she should elect to take an estate tail under the will of Sir William Pulteney, in "the estates devised by his will, his Lordship did declare she would not be entitled to "any estate under the will of General Harry Pulteney."

On a rehearing, the 28th June 1776, before Lord Bathurst, assisted by the Lord Chief Justice of the court of Common Pleas, and Sir James Eyre, then one of the Barons of the court of Exchequer, and hearing the will of Sir William Pulteney, dated 30th of April 1675, the will of the Earl of Bath dated 21st May 1765, the will of General Pulteney, and the said decree of the 24th of July 1775, read, and what was alleged by the counsel on both sides; and Mr. Baron Eyre declaring he was of opinion the said testator General Pulteney intended that the estate of Sir William Pulteney should pass by his will, and that he was of opinion that Frances Pulteney should make her election according to the said decree; and the Lord Chief Justice of the court of King's Bench declaring that he concurred in opinion with Mr. Baron Eyre; his Lordship ordered, that the defendant Frances Pulteney should have further time, till the last day of the then next term, to sign the register's book, signifying her election; and his Lordship reserved the consideration of all directions till after the said defendant should have made her election.

The said Frances Pulteney not having made her election pursuant to the last decree, the time for her so doing was from time [547] to time enlarged; and at length no election having been made by her, and she being a feme covert, an order was made, dated 1st June 1777, to refer it to the Master to enquire, Whether, under all the circumstances of the case it would be most for the benefit of Mrs. Pulteney to elect to take under the will of Sir William Pulteney, or under the will of General Harry Pulteney.

In consequence of this order, various proceedings were had in the court of Chancery,

which ended in Mrs. Pulteney's electing to take the estate of Mr. William Pulteney, and relinquishing every benefit she took under the will of General Harry Pulteney.

A decree was made on the 28th January 1778, whereby every necessary direction was given for carrying into execution the purposes of the said election, and also all other directions for carrying into execution the trusts of the will of General Pulteney; and in particular it was ordered, that the Master should take an account of the personal estate of General Pulteney not specifically bequeathed, and of the interest, profits, and produce thereof accrued since the testator's death, come to the hands of the executors, and an account of the debts, legacies, and funeral expences of the testator: And it was further ordered, that what should be found due for interest of such personal estate, should be paid to, or retained by, the Earl of Darlington: And it was further ordered, that the capital of the personal estate should be applied in payment of the principal of the debts and funeral expences in a course of administration, and then in payment of his legacies and annuities: and that the clear residue of the personal estate of the testator General Pulteney should be laid out in the purchase of lands, and settled according to the testator's will, with the approbation of the Master; and until such purchase could be found, it was further ordered, that the same should be paid into the Bank, with the privy of the accomptant general of the court, to be placed to the credit of the cause, and to the account of the personal estate of General Pulteney, and be, when paid in, laid out in Bank 3 per cent. consol. annuities, in the name of the accomptant general, in trust in the cause to the same account: and it was ordered, that the interest to accrue thereon should be paid to the late Earl of Darlington during his life.

On the 15th July 1780, the Master made a report of the whole of the personal estate of General Pulteney, and therein stated the whole particulars of such personal estate, (which included the whole of the personal estate of Henry Guy possessed by Lord Bath, and also the said sum of £600 Old South Sea annuities,) and the clear residue thereof.

The said John Newport died the 29th April 1783, and thereupon the said William Pulteney, as the first devisee for life under the will of the said Harry Pulteney, entered into possession of the Bradford estate, and has received the rents thereof, which amount to upwards of £20,000 a-year: and has also received by sale of timber from the said estates at least £60,000.

[548] Under different orders of the court of Chancery, of the respective dates of the 19th of July and 8th of November 1787, 15th and 26th January 1788, 9th and 28th February 1788, on notice given to the appellants, the whole of the personal estate of General Pulteney has been laid out in the purchase of lands, and settled to the uses of the will of General Pulteney concerning his personal estate: and the costs of the said William Pulteney the appellants, as one of the executors of General Pulteney, in the proceedings in the court of Chancery, for laying out the money, were paid to him: And the late Earl of Darlington being tenant for life, with remainder to the present Earl in tail, of the estates so purchased with the residue of the personal estate of General Pulteney, and so settled, they suffered recoveries thereof, and afterwards sold the same: and the money arising by the sale, on the marriage of the present Earl of Darlington with Lady Katherine Powlett, was applied for the benefit of the present Earl and Lady Katherine Powlett, and the issue of their marriage, and other branches of their respective families.

After all these proceedings, viz. of the date of the 2d March 1792, the appellants presented their petition of appeal to the House of Lords, stating the several proceedings hereinbefore mentioned respecting the estate of the said Henry Guy; and that the said order of dismissal of the 24th of March 1783, for annulling the said order of dismissal of the 17th of June 1775, was not inrolled till the 3d of August 1786: and that the appellant William Pulteney conceived himself to be aggrieved by the said orders of the 17th of June 1775 and 24th of March 1783, in so far as they deprived him of the interest arising from the said trust money from and after the death of the said Harry Pulteney, for the term of his life; and the said appellant Henrietta Laura Pulteney now Baroness of Bath, conceived herself aggrieved by the said orders, in so far as they deprived her of the reversion of the said trust money.

Henry late Earl of Darlington died in August 1792, having made his will, and thereof appointed Margaret Countess of Darlington executrix, who was made a party respondent in the appeal.

On behalf of the appellants the following reasons were assigned (J. Scott, C. Fearné W. Dundas) for reversing the decrees or orders of dismissal:—

There is not a more settled maxim in equity, than that which says, "What ought to have been done shall be considered as done." Upon which has been founded a long established rule, the regular application of which to the present case is submitted by the appellants to be completely decisive of their right to the property now in question. The rule is, that where money is agreed or directed to be laid out in land, to be settled to particular uses, it shall, whilst uninvested, be considered as land in respect to succession, and accordingly go to the heir of the person intitled to the inheritance in the land to be purchased, just as the land, if purchased, would have done; until some person competent to dispose of the lands, under the limitation of the uses thereof, shall clearly manifest and decide his intention to terminate the realizing trust, and to dispose of, or have, the uninvested fund again considered as mere personal property. The prevalence of this rule is not in question; a uniform train of solemn decisions, during the period of a century and a half has placed that beyond the reach of controversy, and rendered it at this day indisputable. Nor can it be denied that the present case is of that description to which the rule is at first view applicable. The arguments used by the respondents to withhold it from the operation of the rule suppose this, in their attempt at a refined distinction on the particular circumstances of the case, and their ultimate resort to a supposed disposition of the trust money by Lord Bath and General Pulteney, within the terms of the rule itself. Such arguments reduce the question to two points:—First, Whether there exists any distinction between the circumstances of the present case, and those in which the rule has hitherto prevailed, to constitute it an exception to the general doctrine?—Secondly, Whether any thing was done either by Lord Bath or General Pulteney to divest the trust money in question, of the equitable quality of real estate as to succession, impressed on it by Guy's will, and to pass it as personal property?

The appellants hope, in their answers to the objections raised to them by the respondents to substantiate the two following propositions: First, That the circumstances of the present case, so far from affording any distinction to take it out of the rule of former cases, really fall short of some of them, in the very ground of distinction now attempted.—Secondly, That nothing appears to have been done either by Lord Bath or General Pulteney to discharge the money from that trust by which it came bound into their hands, or to pass it as personal rather than real property.

Objection I. The maxim that equity considers that as done which ought to have been done, is improperly applied to a case where the money to be invested in land is not considered as land to all purposes; for money so circumstanced may be disposed of by a will not executed in the manner required for passing of lands. The rule should be pursued throughout all its consequences, or be wholly abandoned.

Answer. This objection is no better calculated for the present case than for the whole train of those which have heretofore been solemnly decided upon the principle objected to. Can the respondents mean to impeach them all in a breath? If such an objection were at all supportable, what would become of the numerous hitherto approved decisions, avowedly founded on a similar application of the same principle? In the case of *Frederick v. Frederick* (1 P. Wil. 710; 1 Stra. 445), Lord Macclesfield drew the line for adoption, when he resorted to the maxim for deciding the beneficial interests of the parties, and expressly denied it, though contended for, to subordinate or collateral purposes. The very principle of resort to it limits the extent of its application. Its intention is to preserve the direction given to the property under [550] the terms of the realizing trust, from being varied by any omission or neglect of those to whom the execution of the trust was committed, and to keep it in the same course of succession, as if the fund had been actually laid out in lands, pursuant to the terms of the trust. When therefore any person has, under the course of succession pointed out by the direction of the trust, and thus secured by the application of the maxim, acquired an absolute property in the fund, the end of resort to it, is satisfied, in thus deciding and ascertaining the proprietor, whom it leaves, when so ascertained, to dispose of the property, in what shape he chuses. (*Vile Scudamore v. Scudamore*, Prec. Chan. 543. *Collingwood v. Wallis*, 1 Eq. Abr. 396. *Davers v. Folkes*, *ibid.* 973.)

How can such an objection face the express judicial opinions of Sir Joseph Jekyll, Lord Talbot, and Lord Hardwicke? The first of whom, in the case of *Lechmere v. Lechmere* (3 P. Wms. 215), founded his decision on the rule, that what ought to have been done shall be taken as done; and a rule so powerful, he said, it was, as to alter the

nature of things, and turn land into money, and money into land. A doctrine affirmed by Lord Talbot, in the same case (*Cas. Tem. Talb.* 92), when he said that money articted to be laid out in land, was to be looked upon as land; and afterwards by Lord Hardwicke, in the case of *Guidot v. Guidot* (3 Atk. 256), when upon the question, Whether money articted to be laid out in land should be considered as land, the court, he said, would call it so, according to the rule in equity, that what is agreed to be done must be considered as done.

And in respect to an inference which the respondents seem to have drawn, from the suspense of Lord Harcourt's opinion in the case of *Fulham v. Jones*, Viner 7. fo. 45, that money so circumstanced is liable to debts by simple contract: it is observable such a doctrine was denied by the decision in the case of *Lawrence v. Beverly*, referred to as law by the Master of the Rolls in *Lechmere v. Lechmere*, 3 P. Wms. 217. And it appears by the register's book, that Lord Parker in 1720, (when the said cause of *Fulham v. Jones* came to be heard, and the master's report had been received,) confined the resort of the simple contract creditors to so much of the trust money only, as the creditors by specialty had exhausted of the personal estate.

Objection II. General Pulteney was both debtor and creditor, and the union of those two characters in the same person extinguished the debt.

Answer. Whatever might have been the foundation for this objection, if besides the union of the two characters in the same person, there had been a perfect coincidence in the rights, under which the claim and duty respectively existed, a commensurateness in their extent, and an identity in their subject, yet these were wanting in the present case; the money was due from General Pulteney as executor of Lord Bath's will, his claim was in his own right as devisee with limitations over, under Guy's will: The trust fund was completely and absolutely due to the performance of the trusts: his claim was partial to a limited or incomplete interest in the produce of that fund: the subject of the duty was money, that of the right was land.

[551] But in *Lechmere v. Lechmere* (3 P. Wms. 224), the like objection was taken to the claim of the heir, for that he being debtor under the covenant, yet claimed as creditor under the same covenant. There, although the confluence of claim and obligation centered not only in the same person, but even in the same capacity of heir, yet it was not admitted to affect the several rights. Indeed such a confusion is effectually withstood by an old maxim in equity, which says, "*Quia duo jura in una persona con-
current aequum est ac si essent in diversis*:" of which Lord King's decision in the case of *Coppin v. Coppin* (2 P. Wms. 291) affords us a very strong and illustrative instance.

Objection III. But here the money was actually in the possession of General Pulteney, the person entitled to call for the investment of it in lands. His right therefore to the benefit of it under the trust being satisfied in his possession of it, its trust quality of real estate was determined, and the claim of his heir of course precluded.

Answer. It is indeed extraordinary, after the judicial repulses which the endeavour at a distinction between the funds continuing in the possession of the *cestui que* trust, and in the hands of trustees has met with, to find it again attempted in the present case.

In *Linguen v. Souray* (as appears from the register's book) none of the securities to be realized were ever delivered to the trustees: and several of them were originally the husband's own, standing in his name, and in his possession at the time of his decease: yet such possession of his own money was not sufficient to prevent or affect the real quality impressed on the fund by the trust, or qualify it to pass by a testamentary gift to his wife of all his personal estate and securities for money: which was held to pass only some part thereof, which the husband had called in, and afterwards placed out in trust for himself, his executors and administrators, negating in that act the real quality which would have carried them to his heirs—So in *Lechmere v. Lechmere* (3 P. Wms. 211), though the money rested merely in covenant: yet it was held to retain its equitable quality of land, and go as real estate to the heir of the covenantor; and upon the distinction now offered being pressed on the court, the Master of the Rolls (Sir Joseph Jekyll) cited several authorities against it (*vide* 3 P. Wms. 216 *et seq.*), and said there was no manner of difference in reason, the nature of the thing being changed by the agreement, of which it was the business of a court of equity to enforce the execution. And Lord Talbot, in answer to what was urged before him upon it, said (*Cas. Tem. Talb.*

90), that none of the cases warranted the distinction enbavoured at : and in reason he was sure there was nothing to warrant it : the intent and agreement of the parties being the same in both cases ; which if effected in the one, he could not see why it should not be so in the other. And in *Guidet v. Guidet* (Atk. 254), Lord Hardwicke actually decided against the distinction in respect to £1000 of the trust monies, which (as appears from the register's book), had been actually invested without any reference to the trust, in the husband's own name, on a mortgage, of which the deeds were kept in his own possession, and the money afterwards received by his executrix, and yet was included [552] in the monies denied by Lord Hardwicke's decree to pass by the husband's testamentary disposition of all his personal estates of what nature or kind soever.

The present case is indeed much stronger against any constructive alteration in the nature of the trust funds, by the *custom que* trust's possession of it, than any of those cited, because General Pulteney was in possession of the fund not as original owner of the monies, nor by any act of his own, as by calling in, retaining or receiving the monies from or against any trustees of it, but strictly in the capacity of a trustee himself, under the act and operation of law, viz. as executor of Lord Bath's will : and it will hardly be denied that *constructio vel actus legis nulli facit injuriam*.

Objection IV. But in the cases cited by the appellants, there was some subsisting use or trust in the lands to be purchased, besides that which resided in the possessor of the fund, as an estate for life in the wife, etc. which distinguishes them from the present case ; and where money is found in the hands of a person, bound by no use but that which absolutely belongs to him, it retains its quality of money, and the heir cannot claim it.

Answer. Is it possible to conceive, that the temporary subsisting use referred to by this objection, should in all the cases that have occurred, have constituted the difference between the qualities of real and personal property, and carried it to the heir, when it would otherwise have gone to the executor, without a syllable of allusion in any one of those cases to such a governing circumstance ?

In the case of *Chichester v. Bickerstaff* (even as reported by Vernon, 2 Vern. 295), there was no subsisting possibility even of any use or trust at all after the wife's decease, but what centered in her surviving husband, and yet both Sir Joseph Jekyll and Lord Talbot, in the case of *Lechmere v. Lechmere* (3 P. Wms. 221 ; Cas. Tem. Talb. 90), denied the decision to be maintainable on the circumstances apparent in the printed report. In *Chaplin v. Horner* (1 P. Wms. 483), the lands to be purchased were to be settled to the use of the covenantor and his heirs : no other use ever attached or could possibly attach on the fund than which absolutely belonged to him ; yet that made no difference, for what he had not actually disposed of in his life-time, was decreed to the heir as real estate.

But even admitting, for argument sake, the possibility of such a distinction, was not its effect utterly precluded, or nullified, in the disclaimer of the subsisting use by the person intitled to it, and who claimed the very fund itself in the shape of money ? as in the cases of *Linguen v. Souray*, and *Lechmere v. Lechmere*, above cited.

This might have been a sufficient answer to the objection, if the present case had really fallen within its extent : but in truth it is not of the description supposed by that objection : it is not a case where there was no subsisting use but what belonged to the possessor of the fund. General Pulteney was only intitled to the immediate use for his life, upon which there was, besides the undetermined use to his possible issue male, a use in remainder in Halsey and his heirs, during the General's life, to preserve contingent remainders, under the very terms of the trust, which were [553] declared by reference to the antecedent limitations of the Newington estate. This was a subsisting vested use, distinct from that use which the General himself was intitled to, and under which, can it be doubted, he was, during his whole life, liable to be called upon by the trustee in whom it resided, for the investment of the monies in a purchase of lands.

In the case of *Edwards v. Earl of Warwick* (2 P. Wms. 171 ; 2 Brown's P.C. 294) there was no trustee appointed to preserve contingent remainders during his life, as in the present case. The Earl of Warwick was absolute tenant in tail male in possession, with reversion or remainder in fee immediately expectant thereon : yet the reversionary interest in the money was held to go to his real, and not to his personal representative. In this case

General Pulteney had an estate for life, remainder in fee, with contingent remainders to his issue male, supported by a vested remainder in a trustee, and shall so much more qualified an interest than that which was decreed in *Edwards v. Earl of Warwick* to be real estate, be deemed personal in *Pulteney v. Darlington*? or in other words, shall the claim be weakened by the strength of the case? Lord Talbot's observation upon the case of *Lechmere v. Lechmere* (Cas. Tem. Talb. 92) strictly applies to the present, viz. that the person possessing the fund had a right to an estate for life, with a remainder in fee; and the estate for life being determined by his death, the right he had to the remainder descended on his heir.

Objection V. But still the case of *Chichester v. Bickerstaff* (2 Vern. 295), as reported by Vernon, is resorted to by the respondents as an unshaken authority, that where all the uses of the land to be purchased with trust money are determined, except that of the person intitled to the fee: the money is thereby discharged of the real quality it had acquired by the trust, and resumes that of personal estate.

Answer. Such a doctrine, if applied generally, is directly and fully contradicted by the cases of *Chaplin v. Horner*, and *Edwards v. Earl of Warwick*, before cited, and if aimed only at cases where the money has not been deposited in the hands of trustees, it receives a complete negative in the cases before referred to, wherein the distinction attempted upon the ground of the money not being deposited in the hands of trustees, was absolutely rejected. Indeed the cases of *Linguen v. Souray*, *Lechmere v. Lechmere*, and *Guidot v. Guidot*, come all of them up to absolute decisions against it; for in all of them the money was found at home, having never been deposited in the hands of trustees; and the right under the subsisting use in the wife to have the realizing trust executed, was as completely laid out of the case by her waiver of it, and claiming the fund in its personal shape, as if it had never existed, or had been then determined. And in the case of *Edwards v. Earl of Warwick* (3 P. Wms. 176), Lord Macclesfield said, he took it to be clear that if one, even without a consideration, covenanted to lay out money in a purchase of land, to be settled to the use of him and his heirs, [554] that court would compel the execution of such contract, though voluntary. Such was Lord Macclesfield's clear opinion on a case wherein the money was supposed in the possession of a person without the existence of any use in the lands to be purchased therewith, distinct from that completely vested in himself under an absolute title to the whole fee simple in the lands so to be purchased.

As to the case of *Chichester v. Bickerstaff*, if its authority had stood impeached, it might have been sufficient to observe, how materially it differs from the present in respect of the intire interest in the trust fund in that case becoming absolutely and completely vested in the husband, on the decease of his wife without issue. After her decease, his title was so absolutely and indefeasibly complete, that he neither was, nor could, in any possible event, be called upon by any body to invest it in lands; and he would have been entitled to have called for, and to have received it from trustees, if vested in any, and to have disposed of it, free of every possible claim: whereas in the present case General Pulteney never acquired such an interest in the fund, as would, supposing it had been in the hands of any other trustees, have intitled him to demand or receive it from them, or dispose of it as his own absolute property: for there was not a period of his life in which the fund was not bound by, and himself liable (as above stated) to be called upon, by the trustee for supporting contingent remainders, to invest it in the purchase of lands, upon the undetermined contingent uses for his possible issue male.

But the authority of *Chichester v. Bickerstaff*, as reported by Vernon, has actually been impeached, and that by no less authorities than Sir Joseph Jekyll and Lord Talbot; who, when that case was cited in *Lechmere v. Lechmere* (3 P. Wms. 221; Cas. Tem. Talb. 90), held the resolution not maintainable in opposition to so many decrees and resolutions, without further explanation of the grounds of it; and indeed the recourse now had to the bills and answers (extant in the Tower), no decree having been entered in the register, evinces how well their suspicion of that case was founded.

Those bills and answers inform us, that Lord Somers decided the case on a ground which supplants the distinction endeavoured to be founded on it, and completely removes all foundation for any influence which the authority of Lord Somers's supposed opinion in that case may probably have had in the decision now appealed from. We find that Sir Charles Bickerstaff, the debtor for the money in question, in that case, had been

appointed executor by Sir John Chichester, who was then the creditor for that money, as having the sole and absolute right to it under the articles. He clearly was capable of realizing or disposing of it as he pleased. His making the debtor his executor, was in itself an unequivocal act, amounting in law to a gift by way of release of the specific debt against all creditors and legatees, and that was the ground (as alleged and admitted in the bills and answers) of [555] Lord Somers's resolution in that case, notwithstanding it actually afforded other circumstances of probable implication noticed in the answer to the next objection.

Thus the case of *Chichester v. Bickerstaff* decidedly comes round to that class of authorities which proves that an unambiguous, decisive act, even where there is no subsisting trust but what centers in the testator himself, is requisite to discharge the trust money from its equitable quality of real estate, and to make it pass under a disposition of personal property.

Objection VI. But the slightest indication of the intent of the *cestui que* trust to continue the uninvested trust fund in its original shape of money, is sufficient (in respect to all claiming under him) to discharge it from the quality of land, and to make it go as personalty, and in the present case the conduct of Lord Bath and General Pulteney, together with their wills, afford sufficient evidence of such intention.

Answer. However slight may be the requisite degree of such indication, it must at least be strong enough to overcome ambiguity, otherwise its aspect remains unascertained. In *Chichester v. Bickerstaff*, it appears from the bills and answers before referred to, that the testator directed Sir Charles Bickerstaff (who was his creditor for the trust money of £1500, and whom he appointed executor because he was best acquainted with his personal estate) to pay £400 for the funeral expences of his wife, then to pay all his debts, and to pay the residue of his estates to his sister. Now as it appears from the same bills and answers, that the testator's debts exceeded £600, whilst his personal estate (not including the £1500 in question) did not amount to half the first mentioned sum of £400, such dispositions seemed to import, at least, some slight indication of his intention to include the £1500 in them, and consequently to have it regarded as personal estate: yet we find that Lord Somers chose to found his decree on the unequivocal, decisive act of the testator's appointing his debtor his executor.

In *Linguen v. Souray* (as appears from the register book) the husband withheld the trust funds from the trustees, because he said he knew better how to use his money; might not this have been urged as some degree of indication of his intent to continue the fund in the quality of money? yet the decision tells us, it was too slight for the purpose. And as to the securities in the same case, which the husband had called in, and placed out in trust for himself, his executors and administrators, it is observable, that besides such implied negative upon the trust for the heir, and the circumstances before noticed of the husband's retaining the possession of the securities, to employ them as money, there occurred another (in all probability co-operative) circumstance, viz. that his personal estate was not sufficient to answer one farthing of the bequest to his wife, unless the securities so called in, and invested in trust for himself, his executors and administrators, had been taken as part of his personal estate.

[556] But in the case of *Guidot v. Guidot*, where such an auxiliary argument of intention was wanting, the husband's receiving and afterwards investing part of the trust money in his own name, indicative, as it might have been termed, of his inclination to continue it in the quality of personal estate, was, as we have already seen, held by Lord Hardwicke, not strong enough to preclude the title of the heir.

Admitting, however, that any clear, unequivocal declaration of either Lord Bath or General Pulteney's intention, would have served the purpose desired by the respondents, still the conduct of them both, so far from affording any such indication, nay so far from being indifferent or even ambiguous in the matter, (which indeed would have been sufficient for the appellants,) evidently warrants the conclusion of a direct contrary intention.

Lord Bath, in 1742, in a bill directed by him to be prepared by his solicitor, after stating the will of Sir William Pulteney and Mr. Guy, and the proceedings thereon, declared himself ready to lay out the balance of Guy's trust money in the purchase of land. The sum of £23,488 was stated in an account made out by his order in 1749, to be delivered to General Pulteney, as the money for which his Lordship was answerable to the trust estate. In 1757 he directed the sum of £600 received on granting leases

beyond his powers, of part of the Bathwick estate, to be laid out in Old South Sea annuities, separate and apart from other funds standing in his own name, but in the same stocks, where another sum of trust money (a fine from Sir William Pulteney's estate) stood in the accomptant general's name. In three successive wills, made respectively in 1757, 1759, and 1762, he devised the Wrington estate in satisfaction of the balance, which, if not accepted, he directed that the balance of the trust money £23,488 should be laid out in the purchase of lands to be settled to the uses of Mr. Guy's will. To this period, therefore, Lord Bath had expressly recognized this money as real estate. In 1763, Lord Bath devised his real estates (except some particularly specified) and also the residue of his personal estate to General Pulteney. After devising his other real estates, his words are, "or which shall hereafter be purchased with any trust monies." The will was to speak when the testator was no more; and therefore its clear intention was, that the lands which might have been purchased with the trust monies after his death, should pass with his other real estates. After some legacies, the residue of his personal estate is bequeathed in general words, subject to the payment of his debts, etc. Did not his former mention of trust monies at least recognize those as debts? It is true it turned out that he had some other trust money arising from Sir William Pulteney's estate, then in his hands, which after his death and the death of General Pulteney, was ascertained to amount to about £1649. But it appears by the bill prepared by his order in 1742, that he did not conceive himself to be debtor to Sir William Pulteney's estate, and if he had thought otherwise, yet this incon-[557]-siderable sum can never be supposed the object of Lord Bath's contemplation, in exclusion of the greater mass of trust money in question, without one syllable of allusion to any such distinction.

Objection VII. But the words wheresoever situate, etc. and of which he was seised or possessed, etc. in the devise of his real estates, confined it to lands of which he was actually seised.

Answer. This objection might be answered by the direct authorities of *Linguen v. Souray*, and *Guidot v. Guidot*, above cited; but the testator himself, distrustful, as it should seem, of the possible strict construction of those words, would not commit his intention to them, but anxiously extended the devise to all possible subjects of his disposition as real estate, and expressly to his equitable real interest in the trust monies, by the words, "or to which I am in any wise entitled, in possession, reversion, or remainder, or which shall hereafter be purchased with any trust money."

The conduct of General Pulteney appears as little favourable to the claim of the respondents as that of Lord Bath. Will his changing into his own name the securities of the personal property of the testator, avail the respondents? he could do no less as executor; without doing so, he could receive no part of the dividends or growing produce thereof, nor otherwise discharge the duty of his office. But has he then, in his will, expressed his intention of altering the nature of the money in question? This seems to be answered by the recourse which the respondents themselves have found occasion for, to extraneous circumstances, and particularly to a dangerous species of explanation, to the evidence (if it will bear that name) of witnesses examined six years after the General's death, upon their own conceptions of the testator's views, and their memory and construction of what passed in his familiar conversation; a testimony which, it is submitted, ought not to be attended to, even were it not inconsistent, which it is, and were it free from suspicion, which it is not.

The evidence of John Garden was allowed to be read, to shew that, in his opinion, General Pulteney did not believe that his heir at law could have any claim against his personal estate for this money as a debt. The counsel for the respondents naturally thought this extraordinary piece of evidence no subject of argument. But abstracted from the probable motives which actuated Mr. Garden, it is sufficient for the appellants to say, that such evidence was too easily admitted, and from the manner in which it is expressed, it baffles all susceptibility of credit.

Two other witnesses were also examined on the part of the respondents, to prove certain expressions of General Pulteney nine days before his death, when he manifested his affection for the appellant Mr. Pulteney and his late wife, by making them a present, but of which it may be enough to observe, that all the persons present when those expressions were used, were not examined by the respondents; that the depositions were taken above [558] six years after the General's death; that the inference

attempted to be drawn from these expressions cannot be supported; and that had those depositions been either complete, or competent, or in any degree material, the appellants could easily account for their complexion.

Objection VIII. The will itself contains a description of the trust monies as personal estate; for General Pulteney having enumerated his several real estates, in terms inapplicable to his interest in the trust monies, they must be referred to his securities for money, in the residuary disposition of his personal estate.

Answer. General Pulteney did not enumerate all his real estates, nor did he use any general words indicative of his intention to pass any more than what he particularly enumerated. This clearly answers one part of the objection; and the other, which refers to the words securities for money, cannot be answered more decisively than by referring the respondents to the successive decisions of two Chancellors, Harcourt and Cowper, in the case of *Linguen v. Souray*, where the bequest of the testator's securities for money, and that too after the description and gift of all his personal estate, which seemed to direct and confine the application of the words to the trust money then in the testator's name and possession, was held insufficient to pass such trust money, though invested in specific appropriated securities, which made the case still stronger.

It might be held sufficient for the appellants to shew that General Pulteney has not used any expression to alter the nature of the trust money, or to strip it of that quality of real property originally annexed to it by the trust: But the circumstances of the present case enable them to go still further, in observing that even the common argument of presumption against intestacy is precluded, by the testator's forbearance of all general words, and actually leaving his London estates, and his share in the Staffordshire canal navigation, to descend to the heir at law.

Objection IX. But General Pulteney might have made a specific disposition of the trust money in question; and the enumeration of the several species of his personal estate in the residuary bequest in the will, amounted to a specific bequest of every article of that enumeration.

Answer. The trust fund in question was not invested, nor consisted in any of the articles enumerated; it was not confined to any appropriated stocks or securities for money, or other specific parts of the testator's personal estate; but existed as a general charge upon and due from the whole blended mass. How then could even a specific disposition of any particular articles of the personal estate be a specific disposition of such a charge affecting the whole? It is a fact, that the enumeration did not comprise every, even considerable article of the personal property; and can it be argued, that the testator used a few common descriptive words, with the view of excluding from one part of the general residuary mass of his personal estate, a claim, from [559] which the same argument must admit he did not intend to exclude the residue? Such would be the answers to the above objection, supposing the doctrine assumed for its ground, were in any degree maintainable; but that is what the appellants can never admit.

They must submit that the position laid down in the latter part of the objection is perfectly inadmissible. A gift of some particular species or articles separately from and not as part of the general mass, is indeed a specific disposition, as distinguished from, and neither amounting to, nor included in, the whole *genus*; but a specific disposition of the whole *genus*, enumerating or not, or by what means soever, seems a contradiction in terms. Could any of the several articles here enumerated have been retained as specific bequests, in exclusion of pecuniary legatees, upon a deficiency of the assets? or would such legatees even have been liable to abate in proportion?

How could any one species of the articles enumerated, be considered as specifically disposed of in a mere residuary gift, wherein every species was equally comprehended, equally subjected to prior charges; and any of them, indiscriminately, might have been applied and exhausted for the purpose; and whereby no more than the aggregate, promiscuous, unexhausted surplus of all the species together, after answering those charges was given, and that unto executors, as a general fund for the purchase of lands.

Objection X. But the length of possession of the trust funds by Lord Bath and General Pulteney is urged by the respondents as material in this case.

Answer. The repeated recognitions of Lord Bath's intention and contemplation of

settling the trust monies, according to Guy's will, quite down to the very close of his life, seems to preclude all solid argument from his length of possession of such funds as personal estate: and as to General Pulteney's subsequent possession, it did not reach the short period of four years, and that too in the capacity of executor of Lord Bath's will, as before observed. In *Frederick v. Frederick* (1 P. Wms. 710; 1 Str. 445), before cited, the non-performance of the contract for near half a century, and its then becoming absolutely impossible, was decreed not to vary the rights of the claimants from what they would have been if it had been actually executed. And when the length of possession was urged in *Cunningham v. Mooly*, 2 Vez. 175, and it was said that the existence of the equitable quality of real property in the money might be mischievous, for it might be difficult to say how long it would continue, Lord Hardwicke stopped the counsel, by saying, "So it might in *Edwards v. Earl of Warwick*." And where indeed can be the inconvenience of such a quality, whilst it is subject to be determined at any time, by any unequivocal act or express declaration of the person intitled to the fund so circumstanced?

A question arose between the same parties upon the construction of the same wills, concerning the trust money which [560] arose out of Sir William Pulteney's estate. That trust money, though Lord Bath thought he owed none, was found on stating the accounts after General Pulteney's death, to amount to £1649 8s. and a point was then made by the respondents: that though Mrs. Pulteney might claim this money, as part of Sir William Pulteney's estate, to which she was entitled as tenant in tail; yet as it was so long mixed with the personal estate of Lord Bath and General Pulteney, of which Lord Bath had made a devise to the General, and the General had made a devise to trustees for Lord Darlington, it was the intention of the testators to pass it as personal estate, by their respective wills; and that therefore, though Mrs. Pulteney might have a right to the money, yet that by taking it against the will and intention of Lord Bath and General Pulteney, she was bound to make a compensation on that account to the persons disappointed by her claim.

Every argument founded on proofs of Lord Bath or General Pulteney's intention with respect to the trust money in question, whether founded on the words of their wills, the length of possession, the transfer of Lord Bath's stocks to General Pulteney's name, the parol evidence, or indeed on almost every circumstance in this cause, were equally applicable to the question concerning General Pulteney's intention to devise the trust money of £1649 as part of his personal estate. The cause was accordingly fully argued; but the Lord Chancellor, on the 23d May 1781, declared, "That as the words of General Pulteney's devise of personal estate were general, Mrs. Pulteney, by claiming the residue of Sir William Pulteney's estate, did not claim against General Pulteney's will, as she claimed only a debt to which every general devise of personal estate is subject; for there was no devise in the will of this residue of Sir William Pulteney's estate, as a part of General Pulteney's personal estate; and that therefore the respondents were not injured by this claim, nor could be entitled to any compensation."—No decree was then made, but the same question came on again to be argued on the 15th July 1785, when the cause stood for further directions, and his Lordship a second time declared his opinion, "That no intention appeared on the part of General Pulteney to devise this money as personal estate;" and the respondents' claim of compensation was rejected. It seems impossible to distinguish upon the question of intention between the trust money arising from Guy's estate, and the trust money due to Sir William Pulteney's estate. This determination therefore of the Lord Chancellor upon the construction of the same wills, being more than two years subsequent to the decree appealed from, seems decisive of the present question.

In addition to the above noticed objections, it has been said, that there are no circumstances adducible on the part of the appellants, to shew that General Pulteney meant the trust fund to go as real estate.

[561] The appellants cannot understand that any thing more is incumbent on them, or requisite to the establishment of their title, than to shew that nothing has been done to disinherit the heir at law, or dispose of the fund as personal property. But it happens that they can go further, and shew a clear proof of the testator's intention not to disturb the trust in any part of Lord Bath's monies, that bore the signature of trust money, and was distinguishable from the general mass as such; which affords a fair inference of his disinclination to alter the subsisting trusts, and that he would, on

the same principle, have left the residue of the trust monies in an equally unaltered state, had they been in the same state of distinction from the general mass of Lord Bath's property.

It appears by the account delivered to the testator by John Garden, immediately after Lord Bath's death, that he there stated £1000 as vested in Old South Sea annuities, and that £400 thereof stood in the accomptant general's name, as being a fine received by Lord Bath on granting a lease of part of Sir William Pulteney's estates, and the remaining £600 stood in Lord Bath's own name, in the same Old South Sea annuities, which £600 is proved by the said John Garden's oath, to have been a fine received for granting another lease contrary to his powers, of part of the Bathwick estate, after that estate was settled. It is proved by the oath of the same person, that when General Pulteney, as executor of his brother, transferred to his own name the various monies of Lord Bath in the public funds, he gave no orders to have the £600 Old South Sea annuities transferred to his own name, nor did he apply to the court to have the £400 transferred to him by the accomptant general, but allowed both to remain as they stood at Lord Bath's death; for which it seems impossible to account otherwise than on the ground of his intention not to disturb or affect the truth of those two funds; for in the account delivered by John Garden, the General was apprized of those two funds in Old South Sea annuities, one in the name of the accomptant general, and the other in the name of Lord Bath; and it appears by Garden's oath, that the General gave no orders for having these transferred to his own name, though the others, which were affected by no special trust, were by his orders transferred. Mr. Garden's evidence appears in every part of it to lean against the appellants, and as to this article of the Old South Sea annuities, although he acknowledges the General gave no orders for the transfer, yet he does not appear to have stated the whole truth; for it is evident that the General must have given express orders to the contrary; his orders must either have been general, to transfer all Lord Bath's funds, in which case the Old South Sea annuities must have been transferred as included in these orders, unless he had made them an express exception; or his orders must have been by an enumeration of what he meant should be transferred, of which the account of Garden contained a full list; and thus too the Old South Sea [562] annuities must have been transferred, unless he had purposely left them out in the enumeration, which amounted in effect to an order not to transfer them.

The testator's general plan appears to have been, to give all the old family property to his heir at law, and to vest in his executors the personal property which had been acquired by his brother and himself, for the purpose of purchasing lands to be settled on Lord Darlington and his brothers, who descended from a female line. The estate at Whitechapel, which he gave to Sir Harry Burrard's daughter, came to the General by a legacy from a friend.

According to this plan, the trust money in question, as well as the £400 and £600 Old South Sea annuities must have been intended to go to the heir at law, at least in the first instance. General Pulteney had been under the most important obligations to the father of Mrs. Pulteney, of which he always entertained the warmest sense of gratitude: (this was proved in the exhibits in another cause, and which were allowed to be read as evidence in this cause.) General Pulteney took nothing under the will of his father, who died in 1715: he took an annuity by Mr. Guy's will of £100 which circumstances of embarrassment obliged him to sell to Lord Bath. The father of Mrs. Pulteney made his will in 1726, leaving to his cousin the General an annuity of £100 and a house in London, which was let for £110 yearly. Of this generosity of his friend, who left no considerable fortune to three daughters, he always expressed himself to be deeply sensible; and in his letters, which were produced in evidence, addressed to Mrs. Pulteney, the widow of his benefactor, and mother of Frances Pulteney, he writes thus:

"I take the liberty of sending to enquire after your health, as well as my little
"cousins, for my good wishes always attend you. I have heard nothing further about
"the trust money, nor will I ever give my consent to anything that shall ever prejudice
"your interest; for I have too great obligations to be ever forgetful of yourself or
"family."

"Sorry I am it is not in my power more effectually to acknowledge the sense I have
"both of your's and my poor cousin's goodness and benefaction: Accept my good

"wishes and civilities, which is all I pretend to; God send I may have a better claim to your friendship."

"I shall accept of the additional stock so soon as I have notice of it, and never relinquish any thing that may be in the least detrimental to you and yours."

"I have assured him (meaning Lord Bath) of my unalterable attachment to you, as I will convince you at our meeting. You may be assured I shall act with the greatest honour and justice in what so nearly concerns you; your own merit claims it of me sufficiently, without that everlasting obligation I owe you, being so nearly allied where I am most indebted. Such is the veneration I have for my poor cousin's memory, that I [563] shall forfeit any claim rather than to your good opinion and friendship."

With these sentiments, can it be supposed, that General Pulteney could intend, contrary to his general plan, to deprive his heir at law of part of the ancient property of the family; that very heir for whom his acknowledged regard, as the daughter of his benefactor, continued strong and unabated to the last period of his life, as appears by the evidence in the cause; and his regard for whom, even impelled him to request her and her husband to take his own name during his own life-time, which the appellant William Pulteney and his said wife accordingly did, under a licence obtained on the General's own petition, as to both, about eight months before his death, and only six months previous to his will?

If he had meant a deviation from his general plan, so far as concerned this trust money, would he not have declared his intention in clear express words? Would he not have particularly mentioned the £600 Old South Sea annuities, and the £400 outstanding in the accomptant general's name, which he had purposely allowed to remain unaltered, on account of its being trust money?

But if it were supposed, that at the time of making the will, General Pulteney had forgotten the circumstances of the trust money, and the £400 and £600 Old South Sea annuities, will the court supply any omission to the prejudice of the heir at law? Or if it should so incline, contrary to all former precedents, will it determine what would have been the testator's mode of devising the trust money, supposing it to have occurred to him? Will it frame the required clause, and say, Thus he would have devised it? According to the general plan of his will, he would naturally have considered it as part of the ancient family property, all of which he intended for his heir at law, the daughter of his benefactor, in the first instance; and whether he would have subjected it to strict limitations, or not, must be a matter of mere conjecture; he certainly has not done so. But that he would not have blended it with the personal estate acquired by himself and his brother, seems to be a direct conclusion from the nature of the plan which he appears to have adopted, as well as from his disposition in regard to the trust monies, so strongly expressed in his letters.

Upon the whole, the appellants cannot but feel a fulness of confidence in the strength of their case, in whatever point of view they consider it. The authority of Lord Somers' decree in *Chichester v. Bickerstaff*, instead of opposing, as from Vernon's report it has been understood to do, is now found to operate decidedly in favour of their claim. Lord Bath, through a succession of formal acts, closing only with his life, clearly evinced his contemplation and treatment of the trust fund in its equitable light of real estate. General Pulteney, in pursuance of the same disposition, studiously declined meddling with an iota of Lord [564] Bath's personal property that bore any ear mark of the trust, and in his will confined the devise of real estates to lands in particular counties there mentioned, and very remarkably forbore the usual general words, and all others in the least indicative of his intention to pass all his real property, or that might reach or affect his equitable real interest in the trust money in question: a very singular restriction of the regular testamentary stile, fairly ascribable to the intention manifested by his letters, of leaving the rules and construction of equity to direct the succession of the lands, to be purchased under the trusts in Guy's will, with old family property, to his heir, pursuant to the original nature and terms of that trust; an heir to whose interest in the trust monies, we have seen from his letters, he paid the most declared attention, in respect of the obligation he had received from her father.

The appellant's claim is founded on established principles, on precedents of the first authority, and well established facts, for their application. In opposition to which, the

respondents have resort to the refinement of unfounded distinctions, strained constructions against positive rules, and precarious parole evidence of conjectural explanations. It behoves them to produce, at least, one decided case, one acknowledged principle, in their favour, or to satisfy your Lordships, that *stare decisis* is a maxim of no account; and that to disturb a doctrine, hitherto deemed established by a uniform system of decisions, during a century and a half, will not afford a dangerous precedent for subjecting the application of the most sacred and established rules of property, to a state of perpetual uncertainty and dispute.—They would do better to bear in mind the reverence due to the maxim, *Minime mutanda sunt, quæ certam habuerunt interpretationem*.

In support of the orders of dismissal the following were the reasons assigned (J. Mitford, J. Mansfield, H. Russell) by the respondents:—Because, that during the life of Lord Pulteney, and so long as Lord Bath considered any of the trusts of Mr. Guy's will as subsisting, he intended that the Wrington estate which he had purchased, should be settled to the uses of Mr. Guy's will, in satisfaction of the debt due from him in respect of Mr. Guy's personal estate: but after the death of Lord Pulteney, he considered those trusts as at an end. And intending to give all his property to General Pulteney, he considered it to be no longer necessary to provide for the satisfaction of that debt, and from that time thought no more of appropriating the Wrington estate, or of taking any other step to satisfy that debt, and afterwards made his will, by which he intended that General Pulteney should take his land as land and his personalty as personalty. That after the death of Lord Bath, an account of all his real and personal estate was, by the direction of General Pulteney, made up by Mr. Garden, who had been Lord Bath's steward, and delivered by him to General Pulteney: in which account no distinction is made between one part of the personal estate and another, and nothing is stated as real estate but what was at that time strictly such. That the far greater part of the said personal [565] estate consisted of money in the funds, which, except two small sums of £600 and £400 South Sea annuities, was transferred by General Pulteney into his own name, and the whole was treated by him as his own: and there could be no reason why he should make any distinction as to any part, because he had the absolute property, both in the real and personal estate, subject only to the possibility of a claim, with respect to this money, by his own issue male, if he should have any, which, on account of his advanced age, was extremely improbable. That by his will General Pulteney clearly shews an intention to dispose of his whole property, having devised all his real estates by local descriptions, and made a general disposition of all his personal estate: that consequently Mrs. Pulteney in her lifetime could not have, nor can the appellants now have, any right to this money, which they claim on the supposition that it is real estate, and descended upon Mrs. Pulteney as his heir, as not having been disposed of by his will; although Mrs. Pulteney took, under the will of General Pulteney, that Wrington estate which Lord Bath, so long as he considered the demand under Mr. Guy's will as subsisting, intended as a satisfaction thereof. That supposing no acts had been done either by Lord Bath or General Pulteney, and they had both died intestate, there would have been no ground for a court of equity to have interposed in favour of the heir against the personal representative; nor has any case ever decided that a court of equity ought so to interfere in a case where the absolute property of the fund in question, whether real or personal, was in the intestate, and the fund itself in his possession as personal estate, although the particular facts in this case do not make it necessary to dispute that point. That if this claim could be supported, it would have this ridiculous effect, that General Pulteney would be a debtor to himself, and in consequence of that his executor a debtor to his heir. That with respect to the £600 South Sea annuities there can be no pretence for the claim of the present appellants. General Pulteney, or the issue in tail of Lord Bath, or of himself, might have avoided the leases granted in consideration of the fines with which the South Sea annuities were purchased, or might have accepted the £600 South Sea annuities in satisfaction of that claim. As there were no issue in tail, General Pulteney was the only person who could have impeached these leases: and if he can be deemed to have accepted the annuities in satisfaction of that right, he must have taken them as personal property.

It was accordingly ORDERED and ADJUDGED, that the appeal be dismissed, and that the orders therein complained of be affirmed. (MS. Jour. sub anno 1796.)

[566] CASE 12.—The RIGHT HONOURABLE WILLIAM LORD VISCOUNT DUDLEY and WARD,—*Appellant* : ANNA MARIA WARD, and Others,—*Respondents*
[4th May 1796].

[Mews' Dig. vi. 1474.]

[There being a provision in a marriage settlement to raise £5000 for a child at 21, the father by will adds £5000 more, and charges the whole specifically on a residuary real fund, which he had also by the same will made liable to debts and legacies, in aid of his personal estate : the charged estate shall not be exonerated by the personal estate ; for the charge is to be considered as a real devise, and cannot fall on the personalty.]
[Decree of Lord Loughborough, C. affirmed.]

2 Bro. C. R. 316.

Upon the marriage of John Lord Viscount Dudley and Ward, deceased, (who was the father of the last and present Lord Dudley and Ward) with Mary Carver his second wife, a settlement was made by indentures, bearing date the 29th and 31st days of December 1744, whereby a messuage called Willingsworth Farm, and other real estates of the appellant's late father, situate in the county of Stafford, were conveyed to trustees, to the use of the appellant's late father for life, with remainder to trustees, to preserve contingent remainders, with remainder to secure to Lady Dudley and Ward, deceased, the late mother of the appellant, a yearly rent-charge of £800 during her life, for her jointure, in lieu of dower, with remainder to trustees, for a term of 200 years, to commence from the death of the appellant's said late father, for securing the payment of the said yearly rent-charge, and also for raising portions for the child and children of the said marriage ; in virtue of which term, if there was but one child, (which was the case, the appellant being the only child of that marriage) to raise £5000 for the portion of such only child, to be paid at the age of 21 years, if under that age at the time of the appellant's late father's death ; and if such child should attain that age in his life, and survive him, then to be paid within 12 calendar months from his death, with remainder to the appellant's late father in fee.

The appellant's late father, at the making of his will and death, was seised of the reversion in fee of the several estates mentioned in the said deeds of settlement. He was also seised in fee of real estates described in his will, and many other estates not specified therein ; and by his last will, dated the 10th day of June 1765, properly executed and attested, he devised the messuage called Willingsworth Farm, and several other real estates, being part of the estates comprised in the said deeds of settlement, to John late Lord Dudley and Ward (the son of the appellant's late father by a former marriage), and his heirs in tail male, with [567] remainder to the uses of his will, with remainder to the appellant and his heirs in tail male, with remainder to the uses of his will, and also devised to the appellant divers lands, tenements, and hereditaments (being other part of the estates comprised in the said deeds of settlement) with remainder to the first and other sons of the appellant and their heirs in tail male, with remainder to the late Lord Dudley and Ward, for his wife, with remainder to his first and other sons and their heirs in tail male, with remainders over ; and reciting, that part of the lands and tenements thereby devised, might be included in the marriage settlement, and subject to the rent-charge of £800 a-year, settled on his wife for her jointure, or that the premises charged therewith might be insufficient to pay the said yearly sum, the said testator directed that his farms and lands called the Old Park, which are not comprised in the said settlement, should be subject to and chargeable with the payment of the £800, and be a security to indemnify the lands and premises devised from and against the payment of any part of the said yearly sum ; and the said testator charged all the residue of his real estate with the payment of his debts, legacies, and sums of money, which in that his will or any codicil thereto, he should give, bequeath, or direct to be paid, in case his personal estate should not be sufficient to discharge the same, and

which the said testator directed should be first applied for that purpose, and subject thereto, and to Lady Dudley's jointure the said testator gave and devised all other his manors, lordships, messuages, lands, tenements, and hereditaments whatsoever, unto the late Lord Dudley and Ward for life, remainder to his first and other sons and their heirs in tail male, with remainder to the appellant for life, with remainder to his first and other sons and their heirs in tail male, with remainders over; and reciting that by the marriage settlement the said testator had agreed to settle £10,000 as a provision for his younger children by her; and in case there should be only one child, then the sum of £5000. He thereby subjected and charged the last-mentioned estates with the payment as well of the said £5000 as of the further sum of £5000 to the appellant, to make up his portion in the whole sum of £10,000 to be paid at his age of 25 years, with interest from the testator's death, at the rate of £4 per cent. And the said testator gave several legacies, and after payment of his debts and legacies, gave and bequeathed the residue of his personal estate unto his eldest son, the late Lord Dudley and Ward, for his absolute use. And the said testator appointed the appellant's mother, who died before the appellant's bill was filed, and his son, the late Lord Dudley and Ward, executors of his will.

The testator died on the 6th of May 1774, leaving John, the late Lord Dudley and Ward, his eldest son, and the appellant his only child by Mary Carver his second wife.

The testator's son John, late Lord Dudley and Ward, who was the surviving executor and residuary legatee of the testator, possessed the personal estate of the testator sufficient to pay his debts, [568] funeral expences and legacies, including the two sums of £5000 and £5000 directed to be paid to the appellant, and he took possession of the Willingsworth Farm and other lands in the marriage settlement charged with one of the £5000 for the appellant, and also of the estates in the residuary clause devised to him by the will.

The appellant having attained his age of 25 years, in Trinity term 1786, filed his bill in Chancery, against the late Lord Dudley and Ward, and all proper parties, praying payment of the two sums of £5000 and £5000; and that the personal estate of the said testator might in the first place be applicable to the payment thereof; and that the deficiency, if any, might be raised by mortgage or sale of the testator's real estates, devised by the residuary clause in the will.

On the 11th of July 1787, the cause was heard before the Lord Chancellor, when his Lordship directed that the two sums of £5000 and £5000 should be raised by sale or mortgage of the residuary real estates of the testator devised by his will or a sufficient part thereof, and gave the necessary directions for that purpose.

On the 3d of March 1788, upon the application of the appellant, the cause was reheard, when the Lord Chancellor affirmed the decree.

The late Lord Dudley and Ward is since dead, and William Humble Ward is his cousin and heir at law.

The defendant, the late Lord Dudley and Ward by his will, dated the 16th of July 1788, properly executed and attested, directed that such of his debts and legacies as his personal estate should not be sufficient to pay, should be paid by mortgage or sale of the real estates, whereof he was seised, and appointed Joseph Cartwright and John Vernon the younger, together with Thomas Burne the younger, since deceased, executors of his will; said Joseph Cartwright and John Vernon the younger, the surviving executors aforesaid, have possessed the personal estate of the last testator sufficient to pay all his debts, and especially to pay what was possessed by the last testator of the personal estate of the former testator, and remaining unaccounted for at his death, together with the appellant's demands in respect of the two sums of £5000 and £5000 of the interest thereof, and the defendants to the bill of revivor and supplement hereafter mentioned, to be filed by the appellant since the death of the last testator, have been and are in the possession and receipt of the several real estates whereof he died seised.

On the 22d day of December 1792, the appellant filed his bill of revivor and supplement in Chancery, against the executors of the late Lord Dudley and Ward, and all proper parties, praying payment of the two sums of £5000 and £5000 with interest, and insisting that the same funds ought to be made applicable to the payment thereof, as prayed by the original bill, and that [569] the directions which have become necessary by subsequent events might be given for the purpose.

By order of 26th January 1793, the suit and proceedings which abated by the death of the late Lord Dudley and Ward, stand revived against his heir at law, executors, and all proper parties.

From the decree made on the hearing, and also the order made on the re-hearing of the cause, the appellant appealed and prayed, that the two sums of £5000 and £5000, or at least one of them, should be directed to be paid in the first place out of the personal estate of the first testator as far as the same would extend, and in case of a deficiency, that the same shall be directed to be raised by sale or mortgage of the residuary real estates devised by the will; and in support of this appeal the following reasons were assigned (J. Mansfield, T. Plumer, R. Richards):—

I. In the exposition of wills one rule is, that the intention of the testator shall govern. The intention disclosed by the will of this testator, as to its principal object, was to perpetuate his general residuary real estates in the name and blood of the Dudley family, consequently he leaves them to different branches of that family in strict settlement; namely, to his eldest son the late Lord Dudley for life, with remainder to his first and other sons in tail, with remainder to his younger son the appellant in like manner, with remainders over. Another object was to make a provision for the payment of his debts, legacies, and sums of money which he should direct to be paid by his will, consisting of two funds,—First his personal estate or the primary fund,—the second his residuary real estates as an auxiliary fund. The last and most inconsiderable object was, an absolute disposition to his eldest son of the residue of his personal estate (if any should remain) after satisfying the burthen imposed upon it. An intention so peremptorily devoting the entire personal estate to the discharge of all sums directed to be paid by the will—so scrupulously preserving the residuary real estates to the family in perpetuity, free from any alienation, unless to supply the deficiency in the personal estate, will evidently be disappointed, if in the amplitude of the personal estate any application shall be made of the residuary real estates to discharge either of the two sums in question.

II. Another rule of exposition is, that every word in a will shall have its effect and not one is to be rejected which can have any construction put upon it. If the sums of £5000 and £5000 are to be paid at all, is it not because they are legacies or sums directed to be paid by the will? Does not the will in express words direct, that his personal estate shall be first applied to discharge not only all legacies, but also all sums which by his will he should direct to be paid, and that the residue of his real estates should be charged only with the deficiency? The reason with the testator for expressing both legacies and also sums of money directed to be paid by his will, it is to be presumed was, that he annexed different ideas to the different terms, conceiving some of the sums he should direct to be paid, might not come within the [570] strict definition of a legacy. In that point of view, the two sums of £5000 and £5000 are the only ones he could contemplate as contra-distinguished from legacies; all sums of money directed to be paid by the will, are words that can have no effect, unless referred to the £5000 and £5000; words so peculiarly descriptive of them, cannot possibly be rejected as too uncertain or indefinite to have any construction put upon them. A rule of construction the most universal must be violated, if the personal estate is not first applied to discharge the two sums in question.

III. The personal estate is the proper and natural fund, liable in the first instance to the payment of debts and general legacies. The two sums of £5000 and £5000 are both general legacies, they are directed to be paid to the appellant at his age of 25 years, and must be different from the £5000 charged by the marriage settlement for the appellant, to be paid at 21 years or marriage, being a satisfaction for it. The testator must have intended them so, especially the additional £5000 which is a direct legacy. By recognising the residuary real estate, which happened to be the more ample fund, as applicable to the payment of these two sums in the very instance of making the gift, it may be conjectured the testator meant, if necessity should require such auxiliary fund to be resorted to, by reason of the personal estate or primary fund being insufficient to discharge the burthens imposed upon it, that those sums specifically charged should have a priority to legacies charged in general terms. It indicates a solicitude to constitute a better security for these two sums than for the general legacies. Unless the personal estate is in the first instance liable to the payment there would be a worse security for them than for the general legacies. As to these two sums, the personal estate must be liable in the

first instance, or be exonerated in every event; and should the residuary real estate fail, they must fail, whatever might be the magnitude of the personal estate. Besides, where general or particular legacies are charged upon a real estate, or a real estate is subjected to the payment of them, the personal estate is always primarily liable, notwithstanding the real estate is charged or subjected to the payment; and whether legacies are given in a sentence distinct from the charge, subjecting the real estates to the payment of them, or whether the same sentence, charging or subjecting the real estates to the payment, is accompanied with the gift of the legacies, the rule for application of the funds to discharge them, it is submitted, must be the same. Here the two sums in question are a mere charge, and can operate no further than a charge affecting the residuary real estates, on failure of the personal estate, which must be liable to those sums, as according to the general rule it always is primarily liable to the payment of a legacy, notwithstanding its being charged on a real estate.

IV. Whether the charge or incumbrance is in its nature real, the real estate is the primary fund to exonerate it. Whether it consist of real or personal estate, the primary fund may be ex-[571]-empted, and another substituted. The rules for exemption and substitution are common to both species of property. These rules are first by express words, secondly by declaration plain, or manifestation clear upon the face of the will; when the testator's intention is, that the primary fund shall be exempted and another fund substituted, it must be so. In this exemption and substitution of funds, the real estate shall have the same measure of equity against the personal, as the personal estate is entitled to against the real, when the charge happens to be in its nature personal and the real is substituted as the primary fund. Attending to the rules which constitute a charge real, or that make the real estate the primary fund to exonerate a charge, it will be difficult to discover anything in this will to determine these two sums of a nature or in circumstances of that description. Supposing they were so. The residuary real estate is exonerated; the personal estate, as the primary fund, is substituted for it both by express words and plain intention.

Objection I. The charge of the two sums of £5000 and £5000 is a real devise. It is purely a gift out of the real estate, and cannot fall on the personalty, for there are not any phrases in the will which direct it to be paid out of the personalty.

Answer. A gift or a legacy out of a real estate, or a devise of a real estate to a devisee on condition of his paying, or with a direction to pay a gift or a legacy, or a gift or a legacy accompanied by a direction to be paid out of a real estate, or for sale or mortgage to pay the proposed gift or legacy, in which cases the payment is directly out of and inseparable from the real fund, are gifts or legacies which may be considered as real incumbrances or real devises. When the payment is not inseparably attached to, but the gift or legacy is only charged upon, a real fund—settled too in strict settlement,—the taker a mere tenant for life,—to whom no power of sale or mortgage for payment nor any direction to pay is expressly given,—such gift or charge ought to be considered as a general legacy. Therefore, and for the reasons in the third article, the charge of these sums is not a real devise or a gift purely out of the real estate, but a general legacy which the personal estate is primarily liable to discharge. Was it a charge in its nature real which the real estate was the primary fund to exonerate, for the reasons in the fourth article, it is exempted, and the personal estate is substituted and ought to bear the burthen in the first instance. And for the reasons in the first and second articles, the intention disclosed by the testator's will must be disappointed, and significant words in the will on which a construction necessarily must be put, be rejected, and have no effect unless the personal estate is first applied to discharge those sums.

Objection II. By the latter part of the will the testator gives the residue of his personal estate, after payment of his debts and legacies, to the late Lord, which shews an intention that the two sums should not be charged upon it, for if they were, the [572] whole might be exhausted and the late Lord take nothing by the gift of the residue.

Answer. A gift of all the personal estate has been considered as specific, and therefore exempt from burthens; the rule is different when of the residue only. No man at the time of making his will can tell how his personal estate or the burthens to be exonerated by it may be increased or diminished. A gift of the residue does not mean that something must pass in all events; notwithstanding such gift the personal estate must bear the burthens imposed upon it, whether any residue remains or not. The intent of

the testator is to be collected from the words of the will and from no circumstances out of it. By the principles and rules established, an examination of the amount of the testator's personal estate and quantum of the burthens imposed upon it cannot be gone into. A gift of the residue, whatever may be the amount, is not sufficient to shew the testator's intention to pass it exempt from burthens in one case, to which it would be liable in another, as that would be to establish a rule which cannot be adhered to.

To this it was shortly answered (J. Scott, S. Romilly, J. P. Heywood) on the part of the respondents:—

I. That John Viscount Dudley and Ward, the father, hath not, by his said will, subjected his personal estate to the payment of the said two sums of £5000 each, or either of them; but they are a gift out of the real estates, comprised in the residuary devise.

II. That with respect to one of the sums of £5000 (that which is a charge created by the settlement) it cannot, upon any construction of the will, be payable out of the personal estate, it not being either a debt of the testator's, or a legacy, or a sum by his will directed to be paid, but a sum directed to be paid by another instrument (namely the settlement), out of a particular estate.

III. That it appears to have been the intention of the testator, that both the sums of £5000 should be paid in the same manner, and out of the same fund; and that, when the testator made his real estates an auxiliary fund to pay certain charges, which his personal estate should be insufficient to pay, he must have meant that it should be an auxiliary fund to pay such demands, to which his personal estate was primarily liable; whereas the sum of £5000, which was to be raised under the settlement, was not a demand to which his personal estate was ever liable.

It was accordingly ORDERED and ADJUDGED, that the appeal be dismissed, and that the decree therein complained of be affirmed. And it was further ordered, that the costs of all parties to the appeal, be taxed by the Master to whom the cause stands referred in the court of Chancery, and that the same be raised and paid in the manner directed by the original decree of the 11th July 1787. (MS. Jour. *sub anno* 1796.)

[573] CASE 13.—CHRISTIAN KIDNEY, Spinster, *-Appellant*; LANNY RICHARD COUSSMAKER, ELIZABETH KIDNEY, Widow, ROBERT WILLIAMS, and JOHN HALLIFAX, Clerk,—*Respondents* [23d June 1797].

[Mews' Dig. iv. 326, 327; vi. 1465. See *Dillon v. Parker*, 1818, 1 Sw. 381 n.]

[A. by will devises his real estates to trustees, in trust, to sell the same in order to pay off the incumbrances and to apply the residue as he directed with respect to the residue of his personal estates: He devises the residue of his personal estates, after payment of debts and legacies, to his executors, upon certain trusts—On the implied intention of the testator, taken from the whole context of the will, the surplus of the money produced by the sale of the real estates was charged with the payment of simple contract debts.]

[Decrees of Thurlow and Loughborough, C. affirmed.]

1 Ves. jun. 436. 2 Ves. jun. 267.

Benjamin Kidney, esq. deceased, the appellant's late father, being seised or well intitled in fee simple of or to divers freehold messuages, lands, tenements, and hereditaments, with their appurtenances, situate in several places and counties in his will described, of a considerable yearly value, subject as to parts thereof to incumbrances by way of mortgage; and being seised or well intitled to him and his heirs of or to divers copyholds, messuages, lands, tenements, and hereditaments (but which were not surrendered by him to the use of his will), and possessed of considerable personal estate,

duly made his will, dated 19th May 1787, in the words or to the effect following, viz.

"THIS IS THE LAST WILL AND TESTAMENT of me Benjamin Kidney, of Lawrence
 "Poultney Hill, London, esquire. First, I direct to be interred in the parish church
 "of St. John, Southwark, in the county of Surrey, as near as may be to the monument
 "of my late honoured uncle Sir Robert Kite, knight, and late one of the aldermen of
 "the city of London; and I direct a neat and not expensive monument to be erected,
 "at the discretion of my wife and executors hereinafter named. I give, devise, and
 "bequeath all that my capital message or mansion-house, lands, tenements, and heredita-
 "ments, with their and every of their appurtenances, situate and being at Knuston or
 "elsewhere, in the parish of Irchester, in the county of Northampton; and all my
 "messuages, lands, tenements, and hereditaments, with their and every of their appur-
 "tenances, situate and being in the several parishes of Rushden, in the said county of
 "Northampton; Hinwick, in the county of Bedford; Brampton, in the county of
 "Huntingdon; Lubnam *alias* Lubenham, Gumley, (Great Stretton and Little Stretton,
 "in the county of Leicester: And also, all that my message or tenement and heredita-
 "ment in Cannon Street, London, in the occupation of Thomas Norman: [574] and all
 "other my messuages, lands, tenements, and hereditaments in the said several counties
 "of Northampton, Bedford, Huntingdon, and Leicester, or elsewhere, in the kingdom
 "of Great Britain (except the estates hereinafter by this my will given and devised
 "to my wife for life, unto Sir Thomas Hallifax, knight, one of the aldermen of the said
 "city; Henry Hanson of Miles Lane, London, merchant: and Richard Lannoy Couss-
 "maker, of Throgmorton Street, London, merchant, their heirs and assigns, to the use
 "of them, the said Sir Thomas Hallifax, Henry Hanson, and Richard Lannoy Couss-
 "maker, their heirs and assigns, for ever: upon such trusts, nevertheless, and to and
 "for such intents and purposes, as are hereinafter mentioned and declared of and con-
 "cerning the same: (that is to say,) UPON TRUST, that they the said Sir Thomas Hallifax,
 "Henry Hanson, and Richard Lannoy Coussmaker, or the survivors or survivor of them,
 "or the heirs of such survivor, shall and do, as soon as conveniently may be after my
 "decease, absolutely sell and dispose of the said messuages, lands, tenements, heredi-
 "taments, and premises (except as aforesaid), in such parcels and in such manner as to
 "them shall seem best and most eligible, to the best purchasers and for the most
 "value they can get for the same: And I hereby declare, that the receipt or receipts
 "of the said Sir Thomas Hallifax, Henry Hanson, and Lannoy Richard Coussmaker,
 "or the survivors or survivor of them, or the heirs of such survivor, shall be good
 "and sufficient releases and discharges to all and every the purchaser or purchasers
 "of my said estates, for his or their purchase monies for all and so much money for
 "which such receipt or receipts shall be given, without such purchaser or purchasers
 "being either obliged to see to the application, or being answerable for the misap-
 "plication or non-application of the said purchase monies, or any part thereof. AND
 "UPON THIS FURTHER TRUST, that they the said Sir Thomas Hallifax, Henry Hanson,
 "and Richard Lannoy Coussmaker, or the survivors or survivor of them, or the
 "heirs of such survivor, shall and do forthwith, after such sale or sales, pay, apply,
 "and dispose of the monies arising therefrom, to such person and persons, and in
 "such manner as hereinafter is mentioned concerning the same: (that is to say,) shall
 "and do, in the first place, pay off and discharge out of the purchase money to be had
 "and received by the sale of any or either of the said estates, all principal money and
 "interest due and owing to any person or persons, for and upon any mortgages or incum-
 "brances subsisting upon, or particularly affecting the same estates at the time of my
 "decease, as the same estates are thereby severally charged and chargeable: and shall
 "and do place out and invest all the overplus of the monies arising by such sale
 "or sales as aforesaid (after deducting their charges in execution of the aforesaid trusts)
 "in government securities, or in any of the public funds, in their names, or in the names
 "or name of the survivors or survivor of them my said trustees; in trust for [575]
 "such person and persons, in such proportions and in such manner and form, in all re-
 "spects, as I have hereinafter directed, of and concerning the residue of my personal
 "estate; it being my intent and meaning, that such overplus money shall go with and
 "be considered as part of the residue and surplus of my personal estate. AND WHEREAS
 "the said Robert Kite did, by his last will, dated the thirteenth day of August one
 "thousand seven hundred and seventy-two, (amongst other things) give unto me and

" Mr. William Nutt one thousand pounds, to be laid out and invested in government
 " securities, and to pay and apply the dividends, interest, and proceed thereof to his the
 " testator's sister, Susannah Hart, for the term of her life, and to be paid her in such
 " manner as therein mentioned; and likewise gave to me and the said William Nutt,
 " the further sum of seven hundred pounds, in trust, to be laid out and invested in
 " government securities, and to pay the interest thereof to Mary Palmer: and likewise
 " gave to me and the said William Nutt, the further sum of five hundred pounds, in
 " trust, to be laid out and invested in government securities, and to pay the interest
 " and dividends thereof to Susannah, the wife of Cornwall, in such manner as
 " in such will is also mentioned; and, after the decease of the said annuitants, the said
 " testator ordered and declared the said several sums of money, or the funds and secur-
 " ities in which the same should be invested, to be considered as part of his personal
 " estate: AND WHEREAS the said several sums of money have not, nor hath any part
 " of them been invested pursuant to the aforesaid will; but I have paid to the said
 " annuitants respectively, at their request, interest on the said several sums of money
 " at the rate of four pounds per centum per annum, in lieu of the dividends and in-
 " come which would have arisen for the same, in case the said sums of money had been so
 " invested. Now I DIRECT, that my executors do, as soon as conveniently may be after
 " my decease, raise out of my personal estate the said several sums of one thousand
 " pounds, seven hundred pounds, and five hundred pounds, and invest the same in
 " government securities, in the names of the said William Nutt and themselves, to and
 " for the several uses, upon such trusts, and for the intents and purposes mentioned in
 " the aforesaid will. I DO HEREBY CONFIRM the settlement made on my marriage with
 " my wife Elizabeth Kidney, and do ratify and confirm unto her all sum and sums of
 " money given or bequeathed by relations or friends, which is, are, or shall be invested
 " in the public funds, or laid out upon any security in her own name, or in the names or
 " name of me and my said wife, or of any person or persons in trust for her. I ALSO
 " give and devise unto my said wife all my messuages, tenements, and warehouses, with
 " their several appurtenances, situate in or upon Lawrence Poultney Hill, Ducksfield
 " Lane, Lawrence Poultney Lane, and Thames Street, London, for the term of her
 " natural life. AND I order and direct, that in case [576] the rents and profits of the
 " said messuages, or tenements, and warehouses in or upon Lawrence Poultney Hill,
 " Ducksfield Lane, Lawrence Poultney Lane, and Thames Street, should, at any time
 " or times during the life of my wife, fall short of producing the annual sum of four
 " hundred pounds, clear of taxes and deductions, the deficiency (if any) shall be made
 " up to her out of the interest, dividends, and produce of my personal estate: It being
 " my will and meaning, that my wife shall always have and be intitled unto an annual
 " income of not less than four hundred pounds for her life, to be issuing and payable as
 " aforesaid. But in case the rents and profits of the same messuages or tenements,
 " warehouses and premises, shall, at any time or times during the life of my wife ex-
 " ceed the clear annual sum of four hundred pounds, it is my will and meaning, that
 " my wife shall have and be intitled to the full benefit and income thereof. And I give
 " and bequeath to my said wife, all my household goods and furniture, linen, books,
 " wines, and provisions for housekeeping, which may be in or about my residing or
 " dwelling-house in London, at the time of my decease, and all her jewels and ornaments
 " of her person which she usually wears or has in her custody. And I give to my said
 " wife the use of all my plate and china for the term of her natural life; and I order
 " and direct that an inventory may be taken thereof within two months after my decease,
 " and copies thereof, signed by my said wife and executors, be kept by them respec-
 " tively. And after the decease of my said wife, I give and bequeath the same plate
 " and china to my daughters Christian and Elizabeth Kidney, to be equally divided
 " between them. And my will is, that the provision in my said marriage settlement,
 " and by this my will made for my said wife, shall be in lieu, bar, and full recompence
 " and satisfaction of and for all dower or thirds, free-bench, or other customary estate
 " whatsoever, which my said wife can claim, or may be intitled to, out of any part of
 " my freehold, copyhold, or customary estates, by virtue of any law, usage, or custom
 " whatsoever; and that unless my said wife shall, within three months next after my
 " decease, release to my executors, in due form of law, all her dower, right, and title of
 " dower, and thirds, free-bench, and customary estates whatsoever, in my freehold, copy-
 " hold, and customary estates, all the provision hereby intended to be made for her shall

"cease and be void (except only the legacy of two hundred guineas). I give, devise,
 "and bequeath all and every part of my said messuages, tenements, warehouses, and
 "hereditaments, with their appurtenances, situate in or upon Lawrence Poultney Hill,
 "Ducksfield Lane, Lawrence Poultney Lane, and Thames Street, as are freehold (after
 "my wife's decease, and subject to my marriage settlement, so far as the same estates,
 "or any part thereof, are affected thereby), and also all other my freehold, copyhold,
 "and customary messuages, lands, tenements, and hereditaments elsewhere, wheresoever
 "in the kingdom of Great Britain, not [577] hereinbefore mentioned and devised in and
 "by this my will, whereof or wherein I have any estate of inheritance in possession,
 "reversion, remainder, or expectancy, and which I have a right and title to dispose of
 "(which copyhold premises I have surrendered to the use of my will), unto and to the
 "use of my said daughters Christian Kidney and Elizabeth Kidney, to be equally
 "divided between them, share and share alike, to take as tenants in common and not
 "as joint tenants; and of the several and respective heirs of the bodies of my said
 "daughters lawfully issuing. And in case either of them my said daughters should
 "happen to die without issue of her body, then to the use of the survivor of them my
 "said daughters, and the heirs of the body of such survivor lawfully issuing. And for
 "default of all such issue, then to the use of my own right heirs for ever. And I give,
 "devise, and bequeath all and every part of the said messuages, or tenements and ware-
 "houses, with the appurtenances, situate in or upon Lawrence Poultney Hill, Ducks-
 "field Lane, Lawrence Poultney Lane, and Thames Street, as are leasehold (after my
 "wife's decease, and subject to my marriage settlement, so far as the same estate, or any
 "part thereof, is or are affected thereby), unto my said daughters Christian and Eliza-
 "beth Kidney, their executors, administrators, and assigns, equally between them, for
 "all the term and number of years in the lease or leases whereby I hold the same
 "respectively contained, to come and unexpired therein at the time of my said wife's
 "decease, and subject to the rents and covenants contained in the same lease or leases.
 "And I do hereby authorize and empower my said wife, by and with the consent of my
 "executors hereinafter named, by indenture or indentures under their hands and seals,
 "to demise or lease all or any part of the said messuages, lands, tenements, and heredi-
 "taments hereinbefore devised to her for life, to any person or persons, for any term of
 "years not exceeding twenty-one years, to commence in possession and not in reversion,
 "so as upon every such lease there be reserved during the continuance thereof, the best
 "and most improved yearly rent that can be reasonably obtained for the same, without
 "taking any sum or sums of money, or other thing, by way of fine or income for the
 "same; and so as no lessee in any such lease be made dispunishable of waste, and so as
 "there be contained in every such lease a clause of re-entry for non-payment of the
 "rent and reasonable and usual covenants as in like cases; and so as every such lessee
 "execute a counterpart of the lease. I give and bequeath to the said Sir Thomas
 "Hallifax, Henry Hanson, and Richard Lannoy Coussmaker, the sum of one hundred
 "and fifty pounds each, on condition they prove this my will, and act in the execution
 "of the trust thereof. I give and bequeath to my clerk, Charles Crane (if he shall
 "continue with me to the time of my death) the sum of fifty pounds; and to the
 "minister and churchwardens of the said parish of [578] St. John, Southwark, for the
 "use of the poor of the same parish, the sum of fifty guineas, provided the said minister
 "and churchwardens do permit a monument to be erected for me in such manner as I
 "have hereinbefore mentioned and described, and without requiring any further sum of
 "money on behalf of themselves or the parishioners of the said parish of St. John, South-
 "wark, as a gratuity or benefaction for the same; and unless the said ministers and
 "churchwardens do comply or consent to the aforesaid condition, my will and meaning
 "is, that the said legacy of fifty guineas shall not be paid but become void. I give and
 "bequeath to Miss Nancy Shephard (if she lives in my family at the time of my de-
 "cease), and to Mr. Nathaniel Andrews and Mr. William Sprigg, the sum of ten guineas
 "each for mourning; and to each of them a ring. I give rings of one guinea value
 "each, to the Reverend Mr. Keighly, Reverend Samuel Bishop, the minister of St.
 "John, Southwark, Reverend Mr. James Gibbs, Reverend Stephen Eaton, the said
 "Mrs. Susannah Hart, Mary Palmer, and Susannah, the wife of Cornwall (the
 "annuitants mentioned in the said recited will of the said Sir Robert Kite), Mr.
 "Morley (the widower of the late Mrs. Christian Morley, another annuitant named in
 "the said will), George Hart, esquire (son of the said Susannah Hart), Mr. John

" William Benson, Mr. Daniel Eaton, my godson, Stephen Eaton, Mr. Richard Broome,
 " Mr. William Cotton, junior, the said Charles Crane, and to such other friends as my wife
 " shall think proper. ALL THE REST, RESIDUE and surplus of my personal estate, after pay-
 " ment of my debts, funeral charges, the expences of proving this my will, the expence of
 " a monument and legacies aforesaid, I give and bequeath unto the said Sir Thomas
 " Hallifax, Henry Hanson, and Richard Lannoy Coussmaker, in trust, to place out and
 " invest the same in government securities, or in any of the public funds, in their names ;
 " in trust, that they and the survivors and survivor of them, and the executors and ad-
 " ministrators of such survivor, do and shall, out of the interest, dividends, and produce
 " of my residuary trust estate, pay unto my wife, Elizabeth Kidney, yearly and every
 " year, during her life, such an annual sum of money, as will, in addition to the yearly
 " rents and profits of the said messuages or tenements and warehouses in or upon
 " Lawrence Poultney Hill, Duckfield Lane, Lawrence Poultney Lane, and Thames
 " Street aforesaid, make up the sum of four hundred pounds, clear of taxes or deduc-
 " tions; such annual sum to be paid to her during her life, by quarterly payments,
 " on the fifth day of January, fifth day of April, fifth day of July, and fifth day of
 " October, in every year. And upon this further trust, to pay out of the interest,
 " dividends, and produce of my said residuary estate, such yearly sum or sums
 " of money as they shall think proper for the maintenance and education of my two
 " daughters, not exceeding, one year with another, the sum of two hundred [579]
 " pounds for each of them, until they shall severally attain the age of twenty-one years.
 " AND UPON THIS FURTHER TRUST, to transfer and pay all and every part of my said
 " residuary estate (subject to such annual payment or allowance out of the same, or the
 " produce thereof, to my wife for her life,) unto my said two daughters, Christian
 " and Elizabeth Kidney, in manner following; (that is to say,) one equal moiety or
 " half part thereof unto my said daughter Christian, at her age of twenty-one years or
 " day of marriage, provided she marries with the consent of my wife and of them the
 " said Sir Thomas Henry Hallifax, Henry Hanson, and Richard Lannoy Coussmaker ;
 " and the other moiety or half part thereof unto my said daughter Elizabeth, at her age
 " of twenty-one years or day of marriage, provided my said daughter Elizabeth marries
 " with the consent of my wife and of them the said Sir Thomas Hallifax, Henry
 " Hanson, and Richard Lannoy Coussmaker, with benefit of survivorship in case either
 " of them my said daughters should happen to die under age and unmarried. And in
 " case both my said daughters should happen to die under age and unmarried, IT IS MY
 " WILL, and I direct that my said residuary estate (subject to such annual payment or
 " allowance as aforesaid to my wife for her life) shall go and be distributed unto and
 " among such person and persons who will be then intitled to the same, according to
 " the statute of distribution of intestate estates: AND I DECLARE, that in the mean
 " time, and until the messuages, lands, tenements, hereditaments, in the counties of
 " Northampton, Bedford, Huntingdon, and Leicester, and the messuage or tenement
 " in Cannon Street, London, hereinbefore mentioned and directed to be sold, shall be
 " respectively sold and disposed of, the rents and profits of the same estates shall be
 " applied, in the first place, in discharge of the interest due and to grow due upon the
 " respective mortgages thereof : and that the overplus of such rents and profits shall,
 " from time to time, be paid and applied for such persons, and for such uses, intents,
 " and purposes, as hereinbefore mentioned and directed of and concerning the interests,
 " dividends, and produce of my residuary personal estate: PROVIDED always, that it
 " shall be lawful for my said trustees and executors, and the survivors and survivor of
 " them and the executors and administrators of the survivor of them, at their or his
 " discretion, from time to time, as often as they shall respectively think fit, to sell and
 " dispose of the stocks and securities upon which all or any of the aforesaid trust
 " monies shall have been invested, and to place out the monies by such sale or sales,
 " with the produce and accumulations thereof, in or upon such other stocks or real or
 " government securities as they shall think fit, all which new or other stocks, funds,
 " and securities, and the interest and dividends thereof, shall be upon the same trusts
 " in all respects as hereinbefore is declared touching the securities sold or disposed of.
 " AND I DECLARE that my executors shall not be answer-[580]-able for any loss that
 " may happen to any part of my estate, by reason of their placing out or investing the
 " same, or any part thereof, in or upon such securities as aforesaid, or by changing the
 " said securities and reinvesting the monies to be raised by sale thereof as aforesaid, or

“ for any other involuntary loss, nor shall they be answerable for each other, or for
 “ the acts, receipts, payments, or defaults of each other, but each of them for his own
 “ acts, receipts, payments, and wilful defaults only. And that it shall be lawful for
 “ them, and each of them, to reimburse him and themselves out of my residuary estate,
 “ all such costs and expences as they or either of them shall or may sustain, expend,
 “ or be put unto in or about the execution of this my will; and of all or any of the
 “ trusts hereby reposed in them or any matter or thing relating thereto. And I do
 “ hereby nominate, constitute, and appoint the said Sir Thomas Hallifax, Henry
 “ Hanson, and Richard Lannoy Coussmaker, executors of this my will. And I
 “ appoint my wife, Elizabeth Kidney, the said Sir Thomas Hallifax, Henry Hanson,
 “ and Richard Lannoy Coussmaker, guardians of my said two daughters during their
 “ respective minorities. AND LASTLY, I do revoke all former and other will and wills
 “ by me at any time or times heretofore made, and declare and publish this to be
 “ my last will and testament, IN WITNESS, etc.” (Attested by three witnesses.)

The testator afterwards made a codicil to his said will, bearing date August 7, 1787, which was attested by two witnesses only, and by which he gave a legacy of 200 guineas to his wife, and made an alteration in the bequest of his books, and took notice of the death of Henry Hanson, one of the executors and trustees named in his will, and confirmed the powers by his will given to his two other executors, and revoked all bequests in favour of the said Henry Hanson, and gave a specific legacy of some diamonds to his daughter Elizabeth Kidney, since deceased.

The said testator died soon afterwards, seized of or intitled to the several estates devised by his will, leaving the appellant and her sister Elizabeth Kidney his own children and co-heirs at law. Sir Thomas Hallifax and the respondent Lannoy Richard Coussmaker, as the surviving executors and trustees named in the said will, duly proved it and took possession of the several freehold estates devised by the will, upon the trusts therein mentioned, and possessed themselves of the said testator's personal estate.

The testator was at his death indebted to divers persons, as well on specialties as on simple contract, to a considerable amount, exclusively of the mortgages and incumbrances upon parts of his freehold estates which were devised to his trustees. And Sir Thomas Hallifax and the respondent Lannoy Richard Coussmaker, after the said testator's death, having paid his funeral expences and testamentary charges out of his personal estate, applied part of his personal estate towards payment of the debts by simple contract. They also, in the lifetime of Sir Thomas Hallifax, put up to sale and contracted to sell, all the said testator's [581] said freehold estates devised by his will, in trust, to be sold; and the sale of some small parts of the estates was compleated in the lifetime of Sir Thomas Hallifax. The sales of all the rest of the estates were afterwards compleated by the respondent Lannoy Richard Coussmaker, who, out of the money which arose by the sale of the estates, and the rents and profits accrued due before the sale, satisfied the several incumbrances upon the estates, and the testator's other unsatisfied debts by specialty (except an annuity of £20, which was payable to one Edward Morden and Jane his wife, during their joint lives; and a further annuity of £15, which would be payable to the survivor of them from the death of the other of them, during the life of such survivor; which annuities were secured by the said testator's bond); and also paid all the costs and expences attending the sales of the estates, and the carrying of the trusts of the will into execution. After these payments were made, there remained (as it was understood) in the hands of the respondent Lannoy Richard Coussmaker, as surviving trustee, the sum of £9703 2s. 9½d. which had arisen from the sale of the freehold estates devised to be sold as aforesaid, and from the rents and profits.

Elizabeth Kidney, the appellant's sister, died about February 1791, under the age of 21 years, unmarried and intestate; and after her death the respondent Elizabeth Kidney, her mother, obtained letters of administration of her goods and chattels.

Elizabeth Kidney, the appellant's sister, having died before she attained the age of 21 years, and unmarried, and the appellant conceiving herself intitled, by virtue of the testator's will, to the clear money which had arisen from the sale of the said freehold estates which were devised to be sold, and the rents and profits thereof, subject to the payment of the said annuities of £20 and £15; in February 1792, filed her bill in the court of Chancery against the respondent Lannoy Richard Coussmaker and Elizabeth Kidney, stating the testator's will and the several circumstances

already mentioned; and that she was willing to make provision for the payment of the said annuities, and had applied to the respondent Lannoy Richard Coussmaker, upon her giving her such securities to pay her the said sum of £9703 2s. 9½d. to which he had objected, alleging, that the whole of the personal estate and effects of the said testator not being nearly sufficient to answer and satisfy the debts that were due and owing from him on simple contract, at the time of his death; the money which had arisen from the sale of his freehold estates, which were directed to be sold, and from the rents and profits thereof, were, according to the true construction of the testator's will, applicable to the payment of so much of the testator's debts, by simple contract, as his personal estate would not extend to pay. And the appellant, by her said bill prayed, that it might be declared by the court, that according to the true construction of the testator's will, the money which had arisen from the sale of the said freehold estates devised to be sold, or any part thereof, or from the rents and profits [582] thereof, was not liable to the payment of any of the testator's debts by simple contract. And that upon the appellant's giving sufficient security for the said present annuity of £20 and the said reversionary annuity of £15, and also giving security to the respondent Elizabeth Kidney, to make good any deficiency in the income of the estates which were devised to her for her life, in case she was intitled thereto; the respondent Lannoy Richard Coussmaker might be decreed to pay over to the appellant the said sum of £9703 2s. 9½d. which remained in his hands.

The defendants to this bill appeared and put in their answers.

The respondent Robert Williams, on the behalf of himself and the other creditors, afterwards exhibited his bill in the said court of Chancery against the respondents Lannoy Richard Coussmaker, John Hallifax, the personal representative of Sir Thomas Hallifax, and Elizabeth Kidney; and the said respondent thereby after stating himself to be a creditor of the testator, and stating the testator's will and other circumstances, prayed that an account might be taken of the debts of the testator, as well by simple contract as specialty; and that so much of the balance then in the hands of the respondent Lannoy Richard Coussmaker, as had arisen by the sale of the said testator's real estate devised to be sold, or a sufficient part thereof, might be applied in payment of all the specialty debts of the testator; and that the personal estate of the said testator might be applied in payment of all the debts of the testator by simple contract, as far as the same would extend. And that in case such personal estate should be insufficient for the payment of all such simple contract debts, then that such insufficiency might be made good out of the money which had arisen from the sale of the said real estates, after the payment of the specialty debts.

The appellant, and the other defendants in the same cause, put in their answers thereto.

The said two causes came on to be heard before the late Lord Chancellor Lord Thurlow; when his Lordship, in both causes, ordered that it should be referred to Mr. Montague, one of the masters of the court, to take an account of the personal estate of the testator Benjamin Kidney, come to the hands of the respondent Lannoy Richard Coussmaker, and of his debts, legacies, arrears of annuities, and funeral expences, with directions to compute interest and advertise for creditors, and for the application of the said testator's personal estate in the usual way. And the Master was also to take an account of the money produced by sale of the testator's real estates devised by his will, in trust, to be sold, and of the rents and profits of the said estates. And in case the said testator's creditors should not be satisfied their debts out of his personal estate, then his Lordship declared, that the money raised by such sale, and what should be coming on the said account of rents and profits, was to be considered as equitable assets, and liable to answer the deficiency of his personal estate, to pay all the testator's creditors what should be reported due to [583] them for their debts *pari passu*; and it was ordered, that the same should be applied to make good such deficiency accordingly: But in case the testator's personal estate, and money raised by his said real estates, and the rents and profits thereof, should not be sufficient to pay all the creditors what should be reported due to them for their debts; and in case the testator's specialty creditors should exhaust any part of the said testator's personal estate in payment of their debts, his Lordship declared, that the specialty creditors of the testator were not to receive any part of their debts out of the money so raised by sale of the real estates, and of the rents and profits thereof, until all the testator's creditors were paid up equal with them. And in case the funds before mentioned should not be suffi-

cient to pay all the testator's creditors the whole of their debts, his Lordship declared, that they ought to abate in proportion; and the Master was to settle the proportion in which they ought to abate. And it was ordered, that the Master should enquire, what other real estates the said testator died seised of, and what charges there were affecting these estates; and the usual directions were given for taking the accounts, and all parties were to be paid their costs of the suits to be taxed by the said Master, out of the testator's estate. And the consideration of further directions was reserved, with liberty for any of the parties to apply.

The appellant (conceiving herself to be aggrieved by this decree, so far as the same tended in any manner to subject or render liable the testator's freehold estates, by his will devised to be sold, or the money raised by the sale thereof, or the rents and profits thereof accrued after the testator's death, to the payment of the testator's debts by simple contract or any of them, and that the decree was so far erroneous, that she ought to have had a decree in the cause to the effect of the prayer of her said bill: And that the respondent, Robert Williams' bill, so far as the same sought to subject the said devised estates, and the rents and profits thereof to the payment of any of the testator's debts by simple contract, ought to have been dismissed as against the appellant, with costs to be taxed), on October 26, 1792, presented her petition to the then Lords Commissioners of the Great Seal, praying that the said causes might be re-heard, and the decree varied accordingly.

The said causes came on to be re-heard before the Right Honourable the present Lord Chancellor, when his Lordship was pleased to order that the decree of March 6, 1792, should be affirmed.

From this decretal order the appellant appealed to the House of Lords, praying that so much of the said first-mentioned decree as tended to subject or render liable the testator's said freehold estates, by his said will devised to be sold, or the money raised by the sale thereof, and the rents and profits thereof accrued due, after the said testator's death, to the payment of the said testator's [584] debts by simple contract, or any of them, might be reversed; and on her behalf the following reasons were assigned (J. Scott, J. Mitford):—

I. These decrees are founded on the supposed fact that the testator has, by his will, subjected to the payment of all his debts the several freehold estates which he has by his will devised to Sir Thomas Hallifax and the other trustees, and by giving the legal estate to them, has made these estates equitable assets; but the fact, it is submitted, is that the testator has not made these estates subject to any of his debts, except those which were owing on mortgages or incumbrances affecting those estates. Those debts, and those only, he has directed to be paid out of the money to arise by the sale of those estates; and it is conceived to be perfectly clear, that the devise, in that respect, is entirely within the exception of the statute of fraudulent devises, and that those specific incumbrances, if there were any defect in the securities which would otherwise defeat them at law, would still be entitled, under this trust in the will, to be paid their debts in preference to all the other creditors by specialty. If any of these trust-estates were not subject to mortgages in fee, and the trustees had by the sale of other parts of the trust-estates discharged all the incumbrances, together with their own costs of executing the trusts, the trust respecting the sale of these remaining estates, and laying out the money in government securities would have been void, as against the bond-creditors under the statute, and any of the bond-creditors might have brought actions at law under the statute against the heirs and devisees, and recovered. By the decrees not only the creditors by simple contract are let in upon the freehold estates, but they are put on a level with the creditors by bond, and both sets are put on a level with the specific-incumbrancers for the payment of whose debts the estates are devised in trust.

II. The testator, with respect to his daughters, has turned these trust-estates, subject to the payment of the specific incumbrances, into money. But if the appellant and her sister had both died in his lifetime, and he had not given over the money, in that event his heir at law would have been intitled to the surplus of the produce of the estates, after payment of the specific incumbrances, or might have called for a conveyance of the estate on payment of the incumbrances.

III. The specific incumbrances, as it has been already observed, are the only debts to the payment of which the testator has made his trust-estates liable. As to his debts in general, he has carefully avoided charging his freehold estates with them, or saying

any thing about the payment of his debts in general, except in disposing of the residue of his personal estate, and the reason is obvious. The testator, as appears by the whole tenor of his will, thought his personal estate (exclusively of what he bequeathed specifically) sufficient, after payment of all his debts (except the specific incumbrances) to pay for a monument, and to answer the legacies which he has given, and yet to leave a [585] surplus for his children, and therefore it was probably in his idea unnecessary to charge his real estates with his debts in general, and the doing it might have created more legal expences on his property. As he has not made the charge, it is humbly conceived that a court of equity ought not by its decree to create such a charge.

IV. But it will be contended that the testator, by directing the trustees to invest the overplus of the monies arising by the sales, after deducting their charges, in government securities, in trust for such persons and in such proportions and manner as he thereafter directed concerning the residue of his personal estate, it being his intent and meaning that such overplus money should go with and be considered as part of the residue and surplus of his personal estate, has charged these trust-estates with the payment of his debts in general. Whatever perplexity there may be from the form of the will, this, it is conceived, was not the intent of the testator, and ought not to be the construction of his will. He was satisfied at the time, that his personal estate (exclusively of certain specific effects) was adequate not only to pay all his debts, except the particular incumbrances on his trust-estates, and to answer all the charges of his executors, but also to provide a monument and to answer the legacies which he has given; and was also satisfied, that, after all this was done, there would be a surplus to be disposed of, and he has given that surplus to his two daughters, in moieties, subject to the contingencies of their dying under 21, and not married with consent, and with benefit of survivorship. This residue so given, is the residue and surplus of which he speaks in the prior part of his will, and which the overplus of the money to arise by the sale of the trust-estates, was to go with and be considered as part of; and this overplus of the trust money was not to be blended with the personal estate, but was to be kept in the funds, separate and apart from it, till the clear residue of the personal estate was ascertained by paying out of it every thing that was to be paid out of it. The pecuniary legatees might as well say that they are entitled to be paid their legacies out of the money raised by the sale of the trust-estates; because, till the legacies are paid, the daughters could have no part of the personal estate.

V. If the testator, instead of referring the application of the surplus of the trust-monies to the disposition of the residue of his personal estate, had begun with disposing of the surplus of the trust-money, there would have been no perplexity in the business. For instance, if he had, after directing the specific incumbrances, and the trustees charges to be paid, ordered the trustees to lay out the surplus of the monies to arise by the sale of his trust-estates in the funds, and out of the income to provide maintenances for his daughters till 21, and then given the capital between them, in moieties subject to the contingencies mentioned in the will, and had afterwards, in disposing of the residue of his personal estate, directed the executors to pay and apply the same in the like [586] manner, and upon the like trusts as he had therein before expressed touching the surplus of the monies to arise by the sale of his trust-estates; in this case there would have been no foundation whatever for saying that he had subjected his trust-estates to the payment of any of his debts, except the specific incumbrances; and though the arrangement of the will is different, yet still the meaning is the same.

On the part of the creditors the following reasons were assigned (G. Hardinge, T. Plumer, R. Dallas) for the affirmance of the decree by the respondent Robert Williams:

First, the testator has expressly declared, that whatever may be the surplus, after specific deductions of the money arising from the sale of his real estate, shall be applied, "In trust, for such persons, in such proportions, and in such manner, as he has thereafter directed, concerning the residue of his personal estate," adding these words, "It being my intent and meaning, that such overplus money shall go with, and be considered as part of the residue and surplus of my personal estate."

To apply these words, it becomes necessary to ascertain two facts in the testator's will. First, what is that residue and surplus of his personal estate which is to govern the application of this overplus money, arising from the sale of his real estate. And secondly, what he has directed concerning that personal residue.

The will having provided for legacies alone to a certain extent, has these words

"All the rest, residue and surplus, of my personal estate." It is, therefore, into that residue and surplus, that all the overplus money, arising from the sale of his real estate, is incorporated.

The direction how to apply that personal residue, appears to be this: It is to pay debts in the first place, or, in other words, after the payment of debts, it is to operate beneficially in favour of the legatees: consequently, the overplus monies, thus incorporated into that residue, and made part of it, are to abide the same process. They are to pay the debts, and then (but not before) to co-operate in a secondary application of the mixt fund, viz. in the legatory payments.

Second. It is evident, according to the general scope of the testator's will, that his debts are to be paid; and that all his property is to be an indivisible fund considered as personal estate; consequently, no legatee can take any part of it but after payment of debts. The heir is disinherited as to all claim upon the real estate, and can take only under the will her share of the overplus money, arising from the sale of the land, and thrown into the personal estate, so as to become an inseparable part of it.

It was accordingly ORDERED and ADJUDGED, that the appeal be dismissed, and that the decrees complained of be affirmed, with £100 costs. (MS. Jour. *sub anno* 1797.)

[587] CASE 14.—THOMAS ADAIR,—*Appellant*; The Reverend GARLIES MAITLAND, and Others,—*Respondents* [29th March 1798].

[Mews' Dig. xv. 806, 1206, 1404.]

[Under the devise of personal residue to relations "in such proportion as the "testator had given the other part of his fortune," pecuniary legatees only are entitled; and not a devisee of real estate.]

[Decree of Loughborough, C. affirmed.]

3 Ves. jun. 231.

John Adair, esq. deceased, the testator, by his will, appointed the respondents Alexander Adair and Sir Hugh Dalrymple his executors, and did thereby devise and bequeath to the father of the appellant, who died in the lifetime of the testator, by the name and addition of his brother, the Reverend Mr. Adair, £2000. He also returned him his bond for £400, with interest due thereon, which he owed him. To his son Thomas Adair, the appellant, he bequeathed his estate of Tregare, in Brecknockshire, to him and his heirs for ever, with what rents might be due at the time of his death. To his (the testator's) nieces, Sarah Adair, (then married to the Reverend Mr. Lermont) £1500; to Jean Adair, £1500; and to Mary Adair, (meaning Helen Adair) £1500. To his sister, Mrs. Maitland, he bequeathed £1000; to her son, the Reverend Garlies Maitland, £9000; to his sister Agnes Maitland, £1000; to Jane Maitland Heron, £1000. To his nephew Mr. Tweddale, £8000. To his sister Mrs. Risken, married to Mr. Risken, at Edinburgh, £1000; to his brother-in-law, James Hannah, £500; to his three nephews, John Murdoch Hannah, Andrew Hannah, and James Hannah, £2000 each. To their sisters, Jean, who was then married to Peter Warwick; Jannet Hannah, who was then married to Andrew Douglas, esq.; Eleonora, who was then married to Alexander Rumball, he gave and bequeathed £1000 to each. Their sister Sarah, then married to Anthony Park, had left five children unprovided for, viz. James, Margaret, Euphemia, Emilia, and Catherine, he bequeathed £500 to each of them, to be paid by his executors in trust to the respondent, the Reverend Mr. Maitland, his nephew, to give the interest annually to their father, Mr. Park, for their maintenance and education; and the whole sum he directed was to be paid to them when of age, or married: and if either of them died before they arrived at age, his or her part was to be divided amongst the others. To his niece Margaret Maitland, spinster, he bequeathed £1000; to the children of his niece, Helen Maitland, then married to Mr. Robert Henderson, viz. James and Johanna, he bequeathed £500 each, to be paid in trust to their uncle, the respondent, the Reverend [588] Mr. Maitland, for their maintenance and education till they became of

age, or married, at which time their money was to be paid to themselves. To prevent trouble, he bequeathed all his cloaths, and other effects that were in his lodgings at his death, to the appellant, by the name and addition of his nephew Thomas Adair; and he bequeathed some other legacies to persons not his relations.

The testator afterwards made a codicil to his will, without date, and thereby declared that the same should be considered as part of his will, and after giving some small pecuniary legacies, concludes the said codicil with the following words, "And farther, my will and intention is, that whatever money, over and above what I have already bequeathed, I may be possessed of at my decease may be divided among my said relations, by my executors, in the proportions I have bequeathed the other part of my fortune; and in case any of them shall die, my will is, that the share of any so dying shall descend amongst the survivors."

The testator died in the month of September 1794, whereupon his executors proved the said will and codicil, both of which are in the testator's own hand-writing.

The fortune of the testator consisted partly of the real estate at Tregare in Brecknockshire, given by his will to the appellant, and the residue of personal property.

The testator's relations, provided for by his will, were his said brother and his children, of whom the appellant is one, his sister Maitland and her children, the children and grandchildren of his deceased sister Hannah, and the children and grandchildren of his deceased sister Tweddale.

Amongst these relations the division of his fortune, made by his will, was in the proportions following: To his said brother and his family, valuing the real estate at Tregare, given to the appellant by his will, at £7000, which it was really worth to be sold, £13,900; to his sister Maitland and her family, £14,000; to the family of his deceased sister Tweddale, £9500; and to the family of his deceased sister Hannah, £12,000. In this division the appellant, the son of the testator's only brother, takes £7000; and the sons of the two eldest sisters, viz. the respondent the Reverend Mr. Maitland, £9000, and Mr. Tweddale, £8000. And the clear residue of the testator's personal estate, the particulars and value whereof appear by the report of the 8th of July 1796, hereafter set forth according to the codicil, is to be divided amongst his said relations in the proportions he bequeathed the other part of his fortune by his will.

The respondents, the Reverend Garlies Maitland, Mary Maitland widow, Jane Maitland Heron, Agnes Maitland, and Margaret Maitland, in or about Hilary term 1795, filed their bill in Chancery against the executors, praying that the clear residue of the testator's personal estate might be ascertained, and that it might be declared to whom, and in what proportion, the same [589] belonged, upon the true construction of the said will and codicil; and that the same might be apportioned and decreed to be paid accordingly.

On the 23d of April 1795, the cause was heard before the Master of the Rolls, when his Honour directed, that it should be referred to a Master of that court, to inquire and state of what the clear residue of the said testator's personal estate consisted: and any persons, not parties to the suit, were to be at liberty to come in before the Master, and claim any share in the clear residue of the testator's personal estate, as they should be advised: and the consideration to whom, and in what proportions, such clear residue of the said testator's personal estate belonged, and of all further directions, were reserved until after the Master should have made his report.

In pursuance of the said decree the Master made his report, dated the 8th of July 1796, which stands absolutely confirmed by order of court: whereby he certified that the clear residue of the testator's personal estate consisted of the particulars following, viz. £15,905 0s. 4d. Bank 3 per cent. consolidated annuities, standing in the name of the accountant general of the court in trust in this cause: the sum of £1132 19s. 3d. cash also standing in the name of the said accountant general in trust in this cause: the sum of £2281 7s. 6d. being a balance remaining in the hands of the executors; and the sum of £400 and the interest thereof due on the bond from the said testator's said brother, and the appellant, his son, to the said testator, therein mentioned, if such bond should, as the same hath been determined to be subsisting and not released or given up: And further certified, that in pursuance of the said decree, several persons, as well parties as not parties to the suit, had come in before him and claimed shares in the clear residue of the personal estate of the said testator: and particularly that the appellant, the nephew of the said testator, had claimed a share of the residue of the

testator's personal estate in proportion to the value of the Tregare estate given to him by the testator's will; and in support of such claim, an affidavit of Hugh Bold, esq. sworn by him on the 13th day of April last, had been laid before the Master, that the said testator's estate at Tregare, by his will devised to the appellant, his nephew, at the respective times of making the said testator's will, and at his death was worth to be sold £7000.

The said cause came on again to be heard for further directions upon the said report, the 22d of July 1796, before the Lord Chancellor, when his Lordship, as to the clear residue of the said testator's personal estate, consisting of the aforesaid particulars, declared that the appellant was not, according to the construction and true meaning of the will and codicil of the said testator, intitled to a share thereof: but that the same was divisible between the several legatees named in the will of the said testator, who were his relations, in proportion to the legacies thereby given to them; and thereby ordered, that it should be referred to the [590] Master to apportion the same: and upon the Master's report the parties were to be at liberty to apply to the court to have the respective apportionments transferred and paid to them.

From this decree the appellant appealed, praying that the same might be reversed, and that it might be declared, that according to the construction and true meaning of the said testator's will and codicil, the appellant was intitled to a share of the clear residue of the said testator's personal estate, in proportion to the value of the Tregare estate, given to him by the said will: and that the same might be apportioned, transferred, and paid to him; and on his behalf the following reasons were assigned (J. Scott, W. Adam):—

I. In the codicil to the testator's will, upon which the question in this case arises, there are no technical words to which the law gives a positive and precise meaning: the question is purely a question of intention, and it is humbly submitted, that it appears, by comparing the bequests in the will, with those in the codicil, that the manifest intention of the testator was, to give the appellant a share of the residue with those relations who are mentioned along with him in the will. By the will he gives some small legacies to persons not his relations. He provides for his brothers and sisters, and their children, and numerous relations. But there is nothing in the will which can by construction establish that it was the intention of the testator to draw a distinction between the appellant, who was his nephew and relation, and the other relations, who were the objects of his bounty. But, on the contrary, he includes the appellant among them, as an object of his general bounty, without any distinction whatever.

II. The appellant is the object of his bounty in two distinct parts of the will; for he leaves to him all his cloaths and effects in his lodgings at the time of his death, by the description of his nephew. Thus he gives to him, in the character of a relation, by his will, both real and personal property; and consequently marks him as the particular object of his care and favour: and describes him as a relation, when he so marks him.

III. The codicil disposes generally of the testator's residue to his said relations. Under that general unqualified term, the appellant, as a relation, must take his share; and it is contended, that there are no words in the codicil which can restrain this construction, or which can be expounded so as to limit this clear intention. The word *fortune*, in its obvious and ordinary sense, cannot be restricted to mean only personal estate or money, much less can it mean money only, excluding other personalty: on the contrary, it is a general term, expressing every species of property of which a man can be possessed. And, being so understood in common parlance, it must be ruled to be used in that general sense in construing a will, unless a contrary construction be necessary. The appellant takes two parts of the testator's fortune: a real estate and a personal legacy. If the testator had made no codicil, and the question had been asked, "to what relations he had by his will given his fortune?" it is impossible [591] to deny that he had given part of his fortune to the appellant, by his will, though he had not given him a money legacy. To whom then has the testator given his residue by his codicil? To those relations to whom he had given his fortune by his will, one of which relations the appellant is. It is humbly contended, that the construction of the codicil, which excludes him, is not its natural construction, and is too conjectural.

IV. No conclusion, as to the intention of the testator, can be drawn from the word "bequeathed" being used in the codicil. It seems clearly to have been made without professional advice. The terms *devised* and *bequeathed* are used synonymously, any

distinction, therefore, founded in the phrase used, can never be relied on to explain the intention of the testator; because it is evident that he did not apprehend that such a distinction existed; and if "bequeathed" is admitted to apply only to personal fortune given by will, the appellant is a relation, to whom under the will, a part of the testator's fortune is bequeathed.

On behalf of the respondents, and in affirmance of the said decree, the following were the reasons assigned (J. Mansfield, W. Alexander):—

First, The testator, in describing the persons for whom he intended the residue, has described them as the persons to whom he had bequeathed the other part of his "fortune." The appellant, Thomas Adair, relying upon the word "fortune," as comprehending every species of property, insists that he, as the devisee of the real estate, is one of the persons described.

It is true that the word fortune may comprehend real estate, but it may be also used very naturally in a more limited sense; and the question is, Whether, considering the subject of which the testator was disposing, the general nature of the disposition made, and the context, the testator, when he mentions his relations to whom he had bequeathed the other part of his fortune, is to be understood to have meant his relations, being pecuniary legatees only, or all relations taking any benefit whatever under his will?

Secondly. In the clause in question the testator is disposing of a pecuniary residue, therefore that was the sort of property which at the moment he had in view. The words are, "My will is, that whatever money, over and above what I have already bequeathed, I may be possessed of at my decease, may be divided among my said relations."—The question is, Who are described by the words "said relations?" These are words of reference, and evidently refer to the phrase he had just used, viz. "I have already bequeathed;" that is, to my relations to whom I have already bequeathed. Now what is it which he had already bequeathed to those relations? The context affords the answer, "money." So that the testator has, in effect, said the same thing as if he had expressed himself thus—"Whatever money I shall have, over and above the money I have already bequeathed to my relations, I give to my said relations." Here no violence is done to the phrase, nor any variation made, except that in one place what is evidently understood is supplied, [592] and in another, the antecedent is substituted for the relative. This being clear, it follows that the word fortune in the clause respecting the proportions, should not extend the description of the legatees, but should be construed with reference to it.

Thirdly. A very strong argument in favour of the construction put by the respondents, arises from the reasonableness of it. When a testator directs his executors to divide a pecuniary residue among his pecuniary legatees, in the proportion of their respective legacies, he affords a clear and distinct standard by which to measure the proportions; but it is quite otherwise with the construction urged by the appellant. Besides the devise of the real estate, the will contains a bequest to the appellant of "all his (the testator's) clothes and other effects in his lodgings." And again: "To his executors, to be divided as they choose, his two gold watches, his diamond ring, and his onyx ring." All these bequests give the same right with the devise of the real estate, and have, like the real estate, an uncertain and arbitrary value. How did the testator intend that the executors should ascertain the value of these things? Did he mean that they should cause a survey to be made of the estate in Brecknockshire? Is it not much more probable, that the testator, when he gave the rule of distribution, supposed that he was pointing out one of easy application? It is impossible, therefore, to give a reasonable meaning to the testator's words, without adopting the construction put upon the clause in question by the decretal order under review.

Accordingly it was ORDERED and ADJUDGED, that the appeal be dismissed, and that the decree therein complained of be affirmed. (MS. Jour. *sub anno* 1798.)

[593] CASE 15.—SIR CHARLES CAVE, Baronet, Uncle and Devisee of Sir Thomas Cave, Baronet, deceased: ELIZABETH DOWAGER COUNTESS OF HARBOROUGH: THOMAS ROBINSON, Esquire, and MARGARET his Wife; SIR HENRY ETHERINGTON, Baronet, and MARIA CONSTANTIA his Wife; ANN MARRIOTT, Widow; ISABELLA CAVE, Spinster; (which said Countess of Harborough, Margaret Robinson, Lady Etherington, Ann Marriott, and Isabella Cave, were Paternal Aunts of the said Sir Thomas Cave;) and HENRY OTWAY the Younger, an Infant, the Son of Henry Otway the Elder and Sarah his Wife, (which said Sarah was the Sister and Heiress at Law of the said Sir Thomas Cave,) by the said Sir Charles Cave, his next Friend,—*Appellants*; ROBERT HOLFORD, Esquire, THOMAS CLARKE JERVOISE, Esquire, Executors and Trustees of the Will of the said Sir Thomas Cave; JOHN CAVE BROWNE the Elder, Esquire; WILLIAM CAVE BROWNE, Esquire; JOHN CAVE BROWNE the Younger, Clerk; CHARLES CAVE BROWNE, THOMAS CAVE BROWNE, and EDWARD CAVE BROWNE, Infants, by the said John Cave Browne their Father; all of whom are Devisees in Remainder under the Will of the said Sir Thomas Cave; FRANCES FREEMANTLE, Widow, and MARY PRESTON, Widow, who were the Maternal Aunts of the said Sir Thomas Cave; the said HENRY OTWAY the Elder, and SARAH his Wife, MARIA OTWAY and ROBERT OTWAY, their Younger Son and Daughter, Infants,—*Respondents* [5th February 1799].

[Mews' Dig. xv. 436, 442.]

[A. seised in fee, agreed by marriage articles to settle his several estates, so as to secure his intended wife's jointure, and the portions of younger children, and subject thereto upon his eldest son in strict settlement: he afterwards devised those estates (in case he should happen to die without [594] issue, and subject to such jointure as he might make,) to trustees, for 500 years upon certain trusts; afterwards by separate deeds of lease and release he conveyed the estates to trustees and their heirs, in pursuance of the articles, in trust for himself in fee, till the marriage, and afterwards for the various purposes of the marriage articles, and for default of issue of the marriage, and subject to a term for securing the jointure, to the use of himself in fee; he afterwards married, and died without issue. Held that the deed of settlement, whereby he departed with the whole estate devised, operated as a revocation of the will, though he took back a fee by the same instrument, and though it was consistent with the provisions of the will: and that it made no difference, that with respect to one of the estates, the conveyance in fee to the trustees was merely for the purpose of creating a term to secure his wife's jointure, and that the settler took back the fee again subject to that term.]

[Decree of Lord Loughborough C. affirmed.] [3 Ves. 684.]

On or about the 13th of December 1790, a paper appears to have been signed by Sir Thomas Cave, of which the tenor follows, viz.

“HEADS of an Agreement entered into between the Right Honourable ROBERT EARL OF HARBOROUGH and SIR THOMAS CAVE, Baronet, respecting the intended marriage

" between the said Sir Thomas Cave and Lady Lucy Sherard, Daughter of the
 " said Earl of Harborough.

" The said Earl of Harborough agrees,
 " That he will make such addi-
 " tion to Lady Lucy Sherard's
 " present fortune as will make } £30,000
 " her marriage portion amount
 " to

" And that the same shall be paid and
 " secured as undermentioned, viz.

" That he will pay down upon the mar-
 " riage the sum of twenty thousand pounds,
 " and will secure upon some adequate part
 " of his real estate the remaining sum of
 " ten thousand pounds, to be paid upon
 " the decease of him the said Earl of
 " Harborough.—Witness my hand this
 " thirteenth day of December, one thou-
 " sand seven hundred and ninety.

" HARBOROUGH."

" Sir Thomas Cave agrees on his part
 " to apply a sufficient part of the fortune
 " which he receives upon the marriage, in
 " discharging the mortgage debt of fourteen
 " thousand five hundred pounds which is
 " owing to Sir Francis Drake, bart. upon
 " his estates at South Kilworth and Swin-
 " ford, and to settle the said estates so as
 " to secure to Lady Lucy Sherard a jointure
 " thereof of one thousand four hundred
 " pounds per annum for her life, to com-
 " mence from Sir Thomas Cave's decease,
 " clear of all deductions.

" Also to secure to Lady Lucy out of his
 " Stanford estate an additional jointure of
 " six hundred pounds per annum, to com-
 " mence from the death of the survivor of
 " Sir Thomas Cave and of Dame Sarah
 " Cave his mother, also clear of all deduc-
 " tions.

" Also to make a provision out of the
 " said estate at Stanford for securing to
 " the youn-[595]-ger children of the mar-
 " riage the under-mentioned portions, viz.
 " if only one, the sum of fifteen thousand
 " pounds; if two or more, the sum of
 " twenty thousand pounds in equal shares.
 " And in case Lord Harborough pays down
 " more than nineteen thousand pounds,
 " Sir Thomas Cave agrees to apply all the
 " overplus towards discharging the incum-
 " brance of eleven thousand pounds which
 " is owing upon his Stanford estate to
 " Robert Gosling, esquire; and also agrees,
 " that the remainder of the said thirty
 " thousand pounds shall whenever it is
 " paid be applied for the like purpose.

" Sir Thomas Cave also agrees to settle
 " his Stanford estate, subject to the present
 " Lady Cave's jointure and the reversionary
 " jointure to Lady Lucy, and the portions
 " to younger children as above-mentioned,
 " upon his eldest son and his heirs male
 " in strict settlement. Witness my hand
 " this thirteenth day of December, one
 " thousand seven hundred and ninety.

" THO. CAVE."

In Hilary term 1791, Sir Thomas Cave duly suffered a common recovery in the court of Common Pleas of the manors of Stanford, Westerhill, and Stormsworth, and of premises situated at Stanford, Down-town, Westerhill, and Stormsworth, and declared the uses of such recovery to himself and his heirs, whereby he became seised in fee simple of the said premises.

The said Sir Thomas Cave, when seised of the premises hereafter mentioned, made his will in writing, dated the 13th day of March 1791, and executed the same so as to pass real estates as follows, viz.

" This is the last Will and Testament of me Sir Thomas Cave, of Stanford-hall, in
 " the county of Leicester, baronet, as follows, viz. In case I should happen to die with-

“out leaving any issue of my body living at my decease, then I do give and devise all that my mansion-house called Stanford-hall, with the park [596] thereto belonging, and all my manors of Stanford, Westerhill, and Stormsworth; and also my rectory of Stanford, and advowson of the church of Stanford, and all my messuages, or tenements, tithes, lands, and hereditaments, situate at Stanford, Down-town, Westerhill, and Stormsworth aforesaid, in the counties of Northampton and Leicester; and also, all those my manors of Swinford and South Kilworth, with the advowson of the church of Swinford, and also, my impropriate rectory of Swinford, and all my messuages, or tenements, farms, lands, tithes, and hereditaments whatsoever, situate at Swinford and South Kilworth aforesaid, in the said county of Leicester; and also all that my manor at Husbands Bosworth, in the said county, and my advowson of the vicarage of Thedingworth, in the said county; and all other my real estate whatsoever and wheresoever (subject, nevertheless, to such jointure or jointures as I may hereafter make upon the woman I may happen to marry), unto Robert Holford, of Lincoln's-Inn, in the county of Middlesex, esquire, and Thomas Clarke Jervoise, of Belmont, in the county of Hants, esquire, and to their executors, administrators, and assigns, for the term of five hundred years, upon such trusts nevertheless, and to and for such intents and purposes as are hereinafter expressed and declared of and concerning the said term. And from and after the expiration, or other sooner determination, of the said term of five hundred years, and subject thereto, I give and devise all my said manors, messuages, rectory, tithes, advowsons, lands, tenements, hereditaments, and real estate whatsoever, unto my uncle the Reverend Charles Cave, for and during the term of his natural life.”

Then the will contains limitations to the first and other sons of the said Charles Cave in tail male in the usual way, with divers remainders over in favour of John Cave Browne, esquire, and others, and the reversion to his own right heirs.

And as to the term of 500 years the testator proceeded as follows:—

“And as to the said term of five hundred years, so as aforesaid hereinbefore limited to the said Robert Holford and Thomas Clarke Jervoise, their executors, administrators, and assigns, my mind and will is, and I do hereby declare, that the said term is so given to them upon trust, that they the said Robert Holford and Thomas Clarke Jervoise, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall, by mortgage, sale, or other disposition, of all or any part of the manors, lands, and hereditaments comprised in the said term of five hundred years, within twelve months next after my decease, raise and take up at interest the sum of twenty thousand pounds, together with such further monies as will satisfy and pay all the costs and charges that may attend the raising of the said monies: And upon further trust, to pay, apply, and dispose of the said monies in manner following, viz. upon trust, to pay the sum of ten thousand pounds, part [597] thereof unto and amongst all my uncles and aunts that shall be living at the time of my decease, equally to be divided amongst them, share and share alike: And upon further trust, that the said Robert Holford and Thomas Clarke Jervoise, and the survivor of them, and the executors and administrators of such survivor, shall and do place out and continue at interest, in their names, upon government or good real security, the sum of ten thousand pounds, being the remaining part of the said twenty thousand pounds, during the life of my sister, Sarah Otway, and to pay all the dividends and interest arising therefrom unto her my said sister, to and for her own sole use and disposal: And my will is, that her receipts alone shall, notwithstanding her coverture, be sufficient discharges for the same: And from and after my said sister's decease, then, upon trust, to pay and divide all the said sum of ten thousand pounds equally unto and amongst all and such of her children as shall be then living, share and share alike; but in case she shall happen to die without leaving any such children then living, then, upon trust, to pay the said principal sum of ten thousand pounds unto the person or persons who, for the time being, shall be possessed of and entitled, under the limitations in this my will, to my said manors and real estate, to and for his own use and benefit; and I do hereby nominate and appoint the said Robert Holford and Thomas Clarke Jervoise joint executors of this my last will and testament, hereby bequeathing to each of them the sum of one hundred guineas for their trouble in the execution of the trusts hereby in them reposed.”

By indentures of lease and release, bearing date respectively the 25th and 26th

May 1791, the release being of four parts, and made between the said Sir Thomas Cave of the first part, the said Earl of Harborough, and the said Lady Lucy Sherard of the second part: the Right Honourable Philip Sherard, esquire, commonly called Lord Sherard, and the said Robert Holford, of the third part; and James Torkington, esquire, and the said Sir Charles Cave, (then the Reverend Charles Cave, clerk,) of the fourth part: after reciting that the said Sir Thomas Cave was seised of a good estate of inheritance in fee simple of the several manors and hereditaments at Stanford, therein-after mentioned, subject to an annuity or rent-charge of £1400, payable thereout to Dame Sarah Cave, his mother, during her life, and subject to two several terms of 200 years and 1000 years, created by indenture of settlement of the 9th day of November 1765, and which terms were then vested in Robert Gosling, esquire, for securing to him two principal sums of £6000 and £5000, and interest: and reciting, that the said marriage was intended shortly after to be had and solemnized, and that the said Lady Lucy Sherard was possessed of £4500 in her own right, and that the said Earl of Harborough had agreed upon the treaty for the said marriage to add thereto, on or before the said marriage, £14,500, and also to secure the payment of the two several sums of £6000 and £5000 within six [598] months next after his decease, to be applied as thereinafter mentioned, so as to make the said Lady Lucy's portion £30,000: and further reciting, upon the said marriage treaty, that the said Sir Thomas Cave did agree, that, in consideration of the portion of the said Lady Lucy, he would charge certain freehold estates of him the said Sir Thomas, in the parishes of Swinford and South Kilworth, with the payment of a clear annuity of £1400 unto the said Lady Lucy for her life, to commence after the death of the said Sir Thomas, and that he would also charge certain parts of his said lands and hereditaments at Stanford with the payment of a further clear annuity of £600 unto the said Lady Lucy for her life, to commence immediately after the death of the survivor of the said Sir Thomas and Dame Sarah Cave, his mother: and that he would also settle all the said manors, rectory, impropriate advowson, lands, tithes, and hereditaments in Stanford to the several uses thereinafter expressed. It is witnessed, that the said Sir Thomas Cave in consideration of the said marriage, and for other the considerations therein mentioned, by proper words conveyed unto the said Lord Sherard and Robert Holford, their heirs and assigns, the manor of Stanford aforesaid, the mansion-house called Stanford Hall, the park called Stanford Park, the rectory or parsonage impropriate of Stanford, and the advowson of the vicarage of Stanford: and all those the manors of Stanford, Down-town, Westerhill, and Stormsworth, and certain messuages, lands, tenements, tithes, and hereditaments, therein particularly mentioned and described: at Stanford, Westerhill, and Stormsworth, in the counties of Northampton and Leicester, and all other the messuages, lands, tenements, and hereditaments of the said Sir Thomas Cave in Stanford, Down-town, Westerhill, and Stormsworth, to hold unto the said Philip Lord Sherard and Robert Holford, and their heirs, subject to certain charges therein mentioned, to the use of the said Sir Thomas Cave, his heirs and assigns, until the marriage, and, after the solemnization thereof, to the use of the said Lord Sherard and Robert Holford, their executors, administrators, and assigns, for 99 years, upon the trusts after mentioned: and after the expiration or other sooner determination thereof, and subject thereto, to the use of the said Sir Thomas Cave for life, *sans* waste, with remainder to the use of the said James Torkington and Sir Charles Cave, upon trust, to preserve contingent remainders, remainder as to certain closes, pieces or parcels of land (part of the aforesaid premises,) containing together 581 acres and 83 perches or thereabouts, to the use, intent, and purpose, that the said Lady Lucy Sherard, in case she should survive the said Sir Thomas Cave and Dame Sarah Cave his mother, might yearly, during her life, receive a clear annuity of £600 with usual remedies for the recovery thereof, and the provision thereby made and agreed to be made for her to be in bar of dower: And as to the said hereditaments charged with the said annuity of £600 after the decease of Sir Thomas Cave, to the use of the said Lord Sherard and Robert Holford, their executors, administrators, and [599] assigns, for 500 years, *sans* waste, upon the trusts after mentioned: and as to all and singular other the manors, messuages, rectory impropriate, advowson, lands, tenements, tithes, hereditaments, and premises thereinbefore granted and released, and not comprised in the said term of 500 years, to the use of the said Lord Sherard and Robert Holford, their executors, administrators, and assigns, for the term of 1000 years, upon the trusts after mentioned, and subject thereto as to all the

hereditaments and premises in both the said terms, to the use of the first son and other sons of the said Sir Thomas Cave, by the said Lady Lucy Sherard, in tail male, with remainder to the use of the said Sir Thomas Cave, his heirs and assigns, for ever: and (after declaring the trusts of the said term of 99 years, 500 years, and 1000 years,) in the said indenture of release is contained a proviso, enabling the said Sir Thomas Cave, in the event of his surviving the said Lady Lucy, to assign, limit, and appoint, any part of the lands, hereditaments, and premises, thereinbefore limited "to the said Lord " Sherard and Robert Holford, their executors, administrators, and assigns, for 500 " years, for securing to the said Lady Lucy her said annuity of £600, to any woman or " women which he should afterwards marry, by way of jointure, so as not to exceed in " the whole the yearly value of £500."

By other indentures of lease and release, bearing date respectively the said 25th and 26th May 1791, the release being of three parts, and made between the said Sir Thomas Cave, of the first part: the said Earl of Harborough and Lady Lucy Sherard, of the second part: and the said Lord Sherard and Robert Holford, of the third part: reciting to the effect in the last-mentioned indenture of release recited: it is witnessed, that, for the considerations therein mentioned, the said Sir Thomas Cave by proper words conveyed unto the said Lord Sherard and Robert Holford, and their heirs and assigns, the manors or royalties of Swinford and South Kilworth, and certain lands and hereditaments in Swinford and South Kilworth, in the county of Leicester, therein particularly described; and all other his messuages or tenements, lands and hereditaments, within the liberties and parishes of Swinford and South Kilworth aforesaid, to the use of the said Sir Thomas Cave, his heirs and assigns, till the marriage; and after the solemnization thereof, to the use, intent, and purpose, that the said Lady Lucy, in case she should survive the said Sir Thomas Cave, might, out of the rents of the said premises, receive an annuity of £1400 for her life, payable as therein mentioned; such provision to be in bar of dower, with usual powers of entry and distress, and a term of 500 years, limited to the said Lord Sherard and Robert Holford, their executors, administrators, and assigns, for better securing the said annuity; and after the determination of the said term, and subject thereto, to the use of Sir Thomas Cave, his heirs and assigns, for ever.

Sir Thomas Cave, on June 2, 1791, and after the execution of the above settlements, intermarried with the said Lady Lucy Sherard.

[600] Sir Thomas Cave died on the 15th January 1792, and the respondent Sarah Otway was and is his heir at law.

The appellants exhibited their bill in Chancery on the 5th November 1792, against the above-named respondents Henry Otway and wife, and others, praying that the will of the said Sir Thomas Cave might be declared to be well proved and established, and the trusts thereof performed and carried into execution; and that the said Robert Holford and Thomas Clarke Jervoise might be decreed to raise the sum of £20,000 pursuant to the trusts of the said will, and pay the same amongst the persons to whom the said £20,000 is given by the said will, and that the term of 500 years might be sold or mortgaged for that purpose, and that all proper parties might join therein.

The appellants afterwards, by supplemental bill, brought before the court Maria Otway, another of the respondents, the daughter of the respondents Henry Otway and wife, who was born after the filing of the original bill.

John Cave Browne, the elder, esquire, and his sons, the next persons in remainder to the appellant Sir Charles Cave, and his issue, under the limitations of Sir Thomas Cave's will, also exhibited their bill against the respondents Henry Otway and wife, and others, for purposes similar to those mentioned in the appellant's bill.

On the 23d February 1795, the causes came on to be heard before the Lord High Chancellor, when his Lordship was pleased to order, that the parties should proceed to a trial at bar in his Majesty's court of Common Pleas, in Easter term then next, or at such other time as that court should appoint, by a special jury on an ejectment: And his Lordship reserved the consideration of costs, and of all further directions until after the said trial; and any of the parties were to be at liberty to apply to the court as there should be occasion. (2 Ves. jun. 604. n.)

In pursuance of the above order, the appellant, Sir Charles Cave, brought his ejectment in the court of Common Pleas, for all the estates comprized in the settlements to which the respondent Henry Otway was made defendant; and on or about the 15th

May 1795, the cause came on to be tried at bar before a special jury, and a verdict was given, whereby the jurors found: That Sir Thomas Cave deceased, was seised of the premises in the declaration mentioned in fee, and being so seised, that Sir Thomas Cave and Lord Harborough signed a paper writing in contemplation of the intended marriage between Sir Thomas and Lady Lucy, on the 30th day of December 1790, and then stated the above paper in the words thereof. That after making the said agreement Sir Thomas Cave duly made his will, dated the 30th day of March 1791, to the purport herein before stated. That the said Sir Thomas Cave, by bargain and sale and release of the 25th and 26th days of May 1791, settled the premises in the first and second counts of the declaration mentioned to the uses therein mentioned. That the said Sir Thomas Cave, by bargain and sale and release of the same [601] dates, settled the premises in the third and last counts of the declaration mentioned to the uses therein mentioned. That the marriage between Sir Thomas Cave and Lady Lucy took effect the 2d day of June 1791. That the said Sir Thomas Cave died the 15th day of January 1792, and that Sarah Otway, wife of the defendant Henry Otway, was his heir at law. (2 H. Blackst. 516.)

This special verdict was argued (3 Ves. jun. 650-682) on the 22d of June 1795, and the 22d of May 1796, and on the 25th of November following, the court delivered their opinion, and directed judgment to be entered for the said respondent Henry Otway. (1 Bos. & Pull. 576. 625. Goodtitle d. Holford v. Otway.)

A writ of error was afterwards brought by the appellant Sir Charles Cave, returnable in the court of King's Bench (7 Term Rep. K. B. 399-420), and in Easter term 1797, the matter was argued on the part of the said appellant, and stood over for further argument, and in Michaelmas term 1797 was again argued, when the court of King's Bench was of opinion, that the judgment pronounced in the court of Common Pleas ought to be affirmed, and the same was affirmed accordingly.

On the 9th of March 1798 (3 Ves. jun. 682), the causes in the court of Chancery came on before the Lord Chancellor on the equity reserved, when his Lordship was pleased to order and decree: That the bill of the said John Cave Browne and others, should stand dismissed out of that court without costs, except as to the trustees and executors: and in the other cause it was ordered and decreed, that it should be referred to the master to enquire what estates and premises of which the testator died seised were not included in the said several indentures of settlement, dated the 26th of May 1791, and that such estates as the said master should find not to be included in the said settlement, should be sold with his approbation under the trusts of the term of 500 years, created by the will of the said Sir Thomas Cave, dated the 13th day of March 1791, to the best purchaser or purchasers that could be got for the same, to be allowed of by the said master, and that all proper parties should join in such sale as the said master should direct, with other usual directions. And his Lordship ordered the master to tax the defendants, Robert Holford and Thomas Clarke Jervoise, their costs of the said suits: but reserved the consideration out of what fund they should be paid.

From this decretal order the appellants appealed, and in their petition of appeal prayed, that inasmuch as it had not been decreed that the trusts of the said will should be established and performed as to the estates contained in the said settlements, or at least as to the Swinford and South Kilworth estates, and directions had not been given consequential thereon, the House would be pleased to reverse the said decretal order: and for this reversal the following reasons were assigned (J. Scott, R. Graham):

First, Because the settlement of the 26th of May 1791, being executed merely for the purpose of securing a jointure, and making a settlement pursuant to a contract which Sir Thomas Cave had [602] entered into previous to making his will, with a view to which contract, and the affirmance of the same, the will is evidently framed, makes no substantial alteration in the disposition of his property made by the will.

Secondly, A court of equity regards what is contracted or agreed to have been done as actually done; and when several things are requisite in point of legal form to the performance of a contract, as soon as the contract is so perfected, the several acts requisite for the completion of it must have relation to the time when the contract was entered into. When a man enters into an agreement for the sale of an estate, from the moment of executing such agreement he is considered in equity as a trustee for the person to whom he has agreed to sell such estate; and from that time the person who has agreed to sell is considered in equity to have no estate in the premises agreed

to be sold : his creditors, who, after the execution of the articles, with notice thereof, have obtained judgment against him before the estate contracted to be sold is conveyed, cannot affect such estates by their judgments, the estates being considered as no longer his.

Thirdly, The agreement and settlement must be considered in equity as the same transaction, as the latter only takes its operation from the former, proceeding expressly on the foot of it, and is no further valid in equity than as it secures the same or more beneficial interests to the wife and issue of the marriage. Before the execution of the settlement Sir Thomas Cave was a trustee for the equitable interests under the agreement, and by the deed he merely transferred those trusts. The settlement in the view of a court of equity leaves the Kilworth and Swinford estate precisely in the same state as they were in at the date of the will, with merely a change of trustees ; and the insertion of a term in nature of a pledge for a particular purpose, specified in the articles and the limitations of the Stanford estate, by the settlement, may be considered as the same, being good only so far as they are warranted by an equitable construction of the agreement.

If the settlements, as is alleged by the respondents, have not been drawn strictly conformable to the heads of agreement, by reason of the clause enabling Sir Thomas, in case of Lady Lucy's death, to charge a part of her jointure estate with a jointure for a second wife ; it is to be observed, that this is not a variation working any alteration or new modification of the estates agreed to be settled by the articles, but is merely a power reserved for Sir Thomas, which the articles being silent about, could only occasion a question in equity hereafter, whether it could be legally exercised or not, without affecting the limitations of the estates provided by that settlement.

As the heads of agreement are not destroyed, but are proved and found by the special verdict, and no other agreement proved or found to have been made ; it is submitted, that if the deeds have not been drawn according to the agreement of the parties, the [603] parts of such deeds which have been inserted by misapprehension of the purport of the heads of agreement ought to be rectified, agreeable to the contract and intention of the parties.

If the marriage had taken place before the settlements were executed, and a bill had been filed in equity to carry the heads of agreement into execution, it is submitted, that the court would have caused the same limitations, powers, and conditions, to have been inserted in the settlements as are inserted in the present ones, except, perhaps, the power of settling a jointure for a second wife upon the small part of the Stanford estate, limited to trustees for the term of 500 years.

If a court of equity had caused such settlements to be prepared in pursuance of the heads of agreement, it is conceived the settlements would not have been a revocation of the will : therefore Sir Thomas Cave having, at a time when part of the consideration was paid, executed only such settlements in effect as a court of equity would have compelled him afterwards to have executed, it is submitted that such settlements are not a revocation of any part of the estates devised by his will.

On behalf of the respondents, and in affirmance of the decretal order, the following were the reasons assigned (J. Mitford, J. Mansfield, W. Alexander, G. P. Holford) in the case printed by the respondents Henry Otway and his wife :

I. The proceeding in the ejectment and the two judgments for the defendant have decided, that, upon the death of Sir Thomas Cave, not only the Stanford, but the Swinford and South Kilworth estates descended upon the respondent Mrs. Otway, his sister and heir at law : in other words, that Sir Thomas Cave's will was legally revoked as to the estates comprised in the instruments mentioned in the special verdict. That point is now at rest. The present question is, Whether the appellants are entitled, by the rules and practice of courts of equity, to a decree, taking from the heir the rights which the law gives her, and which the courts of law have actually ascertained. That is, Whether they have an equity sufficiently strong to control the law ?—The proposition which the appellants must prove is, that they have such an equity. Such is the burthen imposed upon them.

II. It is extremely material to the certainty of the law, the security of property, and to maintain the limits between the legal and equitable jurisdictions, that the same rules should prevail in both courts, respecting the creation and transmission of estates. This is an object which judges both of law and in equity have perpetually kept in view,

and which in all questions of this sort, with few exceptions, hath governed the determination. Your Lordships, therefore, will not, upon so important a point as the revocation of wills, the undoubted subject of legal cognizance, declare a different rule for courts of equity, without conclusive reasons, or clear, precise, and binding authorities.

III. There is no such reason. What alone assumes the appearance of it is, the feeling of hardship upon the devisee, who is [604] disappointed, and of regret for the failure of a testator's supposed intention by ignorance or accident.

The answer is—That the argument proves too much, and if it could prevail in any one case, would long ago have overturned rules at this very time the most settled. That any blunder in the formal execution of a will of freehold lands shall disappoint it: that a father shall never be heir to his son; that a fee simple shall escheat rather than descend upon the brother of the half blood; are cases which, more than the present, shock the ordinary prejudices of mankind: yet in these cases, and many other of the same nature, equity has never interposed against the law. It is quite established, that a court of equity will not act upon this sort of feeling.

IV. The argument of the appellants is not supported by any binding authorities: it is evident that no case can have even the appearance of authority upon the present occasion, where the transaction, working the revocation at law, prevents any estate whatever from descending upon the heir. In such a case there is no danger of different rules in the different courts, since by no possibility can a court of law have jurisdiction of the subject.

It is urged on the part of the appellants as a general rule, that wherever a conveyance entirely revoking a will at law is for a particular purpose only, the courts of equity, notwithstanding the legal revocations, give effect to the will, and bestow the estate upon the devisee after the particular purpose is satisfied. In order to prove this proposition they cite those cases in which it has been held that a will is only partially revoked in equity, though entirely revoked at law by a mortgage in fee, and a conveyance to trustees for payment of debts: and then it is added, that this rule applies to the present case: that the conveyances were for a particular purpose only, and therefore that as, in the cases referred to, the devisees are entitled in equity, after the particular purpose is satisfied, though the will be entirely revoked at law.

To this the respondents answer, that there is no such rule, that the cases cited do not establish it, and that it is disproved by solemn and conclusive authorities. If there were such a rule, wills would have been enforced in equity, though revoked at law, wherever the purpose of the conveyance was particular, yet it has been often decided otherwise. *Parsons v. Freeman* (3 Atk. 741), occurred in a court of equity, and before Lord Hardwicke. The object of the conveyance went no further than to let in a power of appointment to the husband and wife, yet the will being revoked at law, Lord Hardwicke refused to set it up in equity. In *Lord Lincoln's case* (1 Eq. Ab. 411, Show. P. C. 154) the purpose was particular, and besides that the uses which were to effectuate the purpose never sprung, yet the will being revoked at law, the bill of the devisee was dismissed in equity. The late case of *Brydges v. The Dutchess of Chandos* (*ante*, ca. 9 of this title, p. 505), in your Lordship's House, is a case of the same sort.

[605] The cases of mortgages in fee and conveyances to pay debts have prevailed for other reasons. In them the descent is entirely broken; nothing descends upon the heir: he takes no estate of any description. A court of law cannot dispose of an equity of redemption, nor of a surplus after payment of debts; there is therefore no danger of different rules prevailing in the two courts, since there can be no rule at all upon the subject in a court of law. The judges in equity might have adopted any practice without hazarding this mischief: But in truth they have followed the law: they have applied the rule which prevails at law in the cases most similar to those now under examination; where a mortgage is made by conveyance for years, the will is revoked at law, only to that extent, that is, to the extent of the mortgagee's interest. All mortgages are viewed in equity as of that description: in equity the mortgagee has only a chattel interest: therefore the courts of equity have held, that in these the will is revoked only to the same extent, that is, to the extent of the mortgagee's interest; and in this they decide by analogy to the law, and do not controul it.

There is therefore no such general rule as stated by the appellants, since many cases

of acknowledged authority stand in direct contradiction to it, and since the cases that are cited to prove it rest upon other principles.

V. It is said for the appellants, that where an estate is bound by articles, so that the deviser has the legal interest, but subject to an equity, and then he devises, and afterwards conveys the legal estate according to the articles; that the devise, though revoked at law is not revoked in equity; and it is added, that the present is a case of that kind, there being here first articles, and next a will, and lastly, a conveyance according to the articles.

It is answered for the respondents, that the proposition is not true, and if true, would not aid the argument, because the present is not a case of the same description.

The proposition rests upon a single authority, *Williams v. Owens*, 2 Vez. jun. 595.* It will be sufficient to remark upon that case, that it is in direct contradiction to the opinion stated in *Brydges v. The Dutchess of Chandos*, finally decided by your [606] Lordships on appeal, and seems inconsistent with the authorities upon which *Brydges v. Chandos* (see *ante*, ca. 9. of this title, p. 505), was decided; but it is immaterial to consider the authority of *Williams v. Owens*, for the circumstances which ruled it do not exist in the present case. In that case the deviser had married upon the articles, and made his will afterwards, and therefore at the time the will was made, was bound by the equitable obligation which the marriage, together with the articles imposed upon him. The conveyance which operated the legal revocation was merely in obedience to this equitable obligation and according to it. These circumstances were distinctly declared by the court to be the gift of that case, and the ground of the determination. These circumstances do not exist in this case. Sir Thomas Cave did not marry upon the articles; he was not, at the time of the will, bound by any equity whatever, and the deeds which operate the legal revocation, were not in compliance with any binding obligation. All the circumstances therefore which ruled *Williams v. Owens* are wanting in this case—so it is expressly declared by the Master of the Rolls, in deciding *Williams v. Owens*. In the judgment on that case, *Cave v. Otway* is stated and declared to be quite different from it, and the difference pointed out is, that the articles, will, and deeds were all anterior to the marriage, 2 Vez. jun. 599. Therefore it is not clear that courts of equity establish a will made of an estate, subject to an agreement, even where the subsequent conveyance working the legal revocation is merely to execute that agreement; but it is extremely clear, that if this were true, it would not avail the appellants in this argument, because this will was not made of an estate bound by articles, and the deeds were not an execution of any prior agreement.

It seems hardly necessary to strengthen this argument as to part of the estates in question, by observing the variation between the deeds, and what is called the articles in the settlement of the Stanford estate.

VI. It is also stated on the part of the appellants, that a court of equity interposes where a will is made of an equitable interest, and after the will the legal estate is taken.

This is true. But how can this be used in a question about revoking a will, by parting with the estate devised? The two cases are the converse of each other. That case only proves, that a court of equity does not consider the equitable interest the sub-

* The following were the circumstances of that case, which was decided by the Master of the Rolls; as to the grounds of whose opinion see what was said by the Lord Chancellor in this case of *Cave v. Holford*, 3 Vez. jun. 684. "A. by articles previous to marriage, covenanted to convey to the use of himself for life; remainder in trust to secure an annuity to his intended wife for life in bar of dower; remainder to trustees for years to raise portions; remainder to the sons and daughters successively in tail; remainder to his own right heirs. The marriage took place. Afterwards A. by will charged his estates with payment of debts, and after payment thereof, after his wife's death and in case he should leave no issue, he devised the same for the purposes in the will mentioned. After the will A. in pursuance of the articles conveyed to trustees and their heirs, to the uses and trusts of the articles. Upon a bill brought by creditors, after the wife's death, against the wife's executor and the testator's sisters, his co-heiresses, his Honour held that the will was not revoked by the settlement."

ject of the devise as annihilated by the accession of the legal estate, and considers, as the truth is, the testator up to his death, as entitled to the interest devised or appointed, though another be added to it. In this construction equity has decided in exact conformity to the law—for where a man possessed of a use devised it, and afterwards by the operation of a feoffment, and the statute of uses became seised, a court of law held, that the will should operate, because he had the same use. 1 Roll. Ab. 616. pl. 3.

[607] Upon the whole, therefore, there is no equity in favour of the appellants to controul the law.

It was accordingly ORDERED and ADJUDGED, that the appeal be dismissed, and that the decree therein complained of be affirmed. (MS. Jour. *sub. ann.* 1799.)

CASE 16.—JOHN MOORE,—*Plaintiff* (in Error): JOHN DENN, on the Demise of NATHANIEL MELLOR. —*Defendant* (in Error) [7th July 1800].

[Mews' Dig. xv. 1273, 1276 (*Denn v. Moor*). See *Tomkins v. Jones*, 1889, 22 Q. B. D. 602.]

[A. possessed of real and personal property, devises in manner following: "All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, and also all my goods, chattels, and personal estate, after payment of my just debts and funeral expences, I give, devise, and bequeath the same to my wife B." and appoints B. sole executrix. The Court of K. B. held that these words gave B. only an estate for life in the realty. This judgment was reversed in the Exchequer Chamber on the ground that there was a clear intent to convey the fee. But the House of Lords on appeal reversed the judgment of the Exchequer Chamber, and affirmed that of the Court of King's Bench.—See *Doe d. Small & al. v. Allen*, 8 Term Rep. B. R. 497. 504. and the opinion of Lord Kenyon there on the reversal of the judgment in this case in the Exchequer Chamber.]

5 Term Rep. K. B. 558. 6 Term Rep. K. B. 175. 1 Bos. & Pull. 558. 3 Anstr. 781.

The defendant in error, in Trinity term, 34 Geo. 3. brought his bill of trespass and ejectment in the court of King's Bench against the plaintiff in error, thereby declaring, that whereas Nathaniel Mellor on the 3d day of June, in the 34th year of the reign of the present king, at Sheffield in the county of York, had demised, granted, and to farm let to the said John Denn six messuages, six cottages, four barns, four stables, 30 acres of land, 30 acres of arable land, 30 acres of meadow land, and 30 acres of pasture land, with the appurtenances, in Ecclesfield and in the said county, to hold the said tenements, with the appurtenances, to the said John Denn and his assigns, from the 2d day of the same month of June, in the 34th year aforesaid, to the full end and term of seven years from thence next ensuing and fully to be complete and ended: by virtue of which demise the same John Denn entered upon the same tenements with the appurtenances, and was possessed thereof, until the said John Moore afterwards, to wit, on the same 3d day of June in the 34th year aforesaid, entered with force and arms upon the said tenements with the appurtenances, in and upon the possession of him the said John Denn, and ejected, drove out, and removed the said John Denn from his said farm, his said term therein being not expired: and him the said John Denn so ejected, driven [608] out, and removed, kept out and did keep out from his possession thereof, and other injuries, etc. to the damage of him the said John Denn of £10; and therefore he brought his suit, etc.

The defendant pleaded the general issue, whereupon issue was joined, and the same coming on to be tried at the assizes holden for the county of York, on the 2d day of August, in the 34th year aforesaid, the jury found a special verdict as follows, viz. "That one John Carr, long before the time of the making of the said lease in the said declaration mentioned, was seised in his demesne as of fee, at the will of the lord of

“ the manor of Ecclesfield in the said county of York, according to the custom of the
 “ same manor, of and in the tenements in the said declaration mentioned, (amongst
 “ others) being customary tenements, parcel of the said manor, and held of the lord of
 “ the same manor, and demised and demiseable by the lord of the said manor, or his
 “ steward thereof for the time being, by copy of the court rolls of the said manor, to
 “ any person or persons willing to take the same in fee simple or otherwise, at the will
 “ of the lord, according to the custom of the said manor. That the said John Carr
 “ being so seised as aforesaid, afterwards and long before the said time when, etc. to
 “ wit, on the 13th day of July in the year of our Lord 1753, at a court of the said
 “ manor then held within the said manor, personally and in open court surrendered into
 “ the hands of the lord of the said manor, by the hands of the then steward thereof,
 “ according to the custom of the said manor, all his customary messuages, lands, and
 “ tenements whatsoever, within the said manor, holden of the said manor by copy of
 “ the court rolls of the said manor, to such use, intents, and purposes, as he by his last
 “ will and testament in writing should give or devise the same, and that the said John
 “ Carr afterwards, and before the said time when, etc. to wit, on the day and year last
 “ abovementioned, made his last will and testament in writing, in the words following,
 “ that is to say : This is the last will and testament of me John Carr, of Ecclesfield,
 “ in the county of York, yeoman, made this 13th day of July, in the year of our Lord
 “ 1753 : First, I give and devise unto my kinsman Nicholas Lister, of Creswick Greave,
 “ in the parish of Ecclesfield aforesaid, yeoman, all that my customary or copyhold
 “ messuage or tenement with the appurtenances, situate and being in Ecclesfield afore-
 “ said, as the same is now in the tenure or occupation of Valentine Sykes ; all the rest
 “ of my lands, tenements, and hereditaments, either freehold or copyhold whatsoever
 “ or wheresoever, and also all my goods, chattels, and personal estate, of what nature
 “ or kind soever, after payment of my just debts and funeral expences, I give, devise,
 “ and bequeath the same unto my loving wife Sissily Carr : And I do hereby nominate
 “ and appoint her my said wife sole executrix of this my last will and testament, hereby
 “ revoking all wills by me heretofore made : In witness whereof I the said John Carr
 “ have hereunto set my hand and [609] seal the day and year above written, as by the
 “ said will produced and read in evidence to the jurors aforesaid more fully appear—
 “ that the said tenements in the said declaration mentioned are part of the said tene-
 “ ments so devised to the said Sissily Carr as aforesaid ; and that the said John Carr
 “ afterwards, and before the said time, when, etc. to wit, on the 30th day of July, in
 “ the year of our Lord 1753, died so seised as aforesaid, without revoking or altering
 “ his said will, leaving the said Sissily his wife him surviving.

“ That afterwards and before the said time when, etc. to wit, on the 3d day of
 “ October, in the year of our Lord 1755, at a court of the said manor, then held within
 “ the said manor, the said Sissily personally came into the said court, and then pro-
 “ duced the said last will and testament in writing of the said John Carr, and prayed
 “ of the lord of the said manor to be admitted, and was by him then and there admitted
 “ tenant of the said tenements in the said declaration mentioned, with the appurten-
 “ ances, to hold to her, according to the custom of the said manor, and according to the
 “ form and effect of the said surrender and will : whereupon the said Sissily entered
 “ into the said tenements with the appurtenances, and became and was seised thereof
 “ as the law requires : and being so seised thereof, she the said Sissily afterwards, and
 “ before the said time when, etc. to wit, on the 29th day of January, in the year of our
 “ Lord 1760, at a court of the said manor then held within the said manor, personally
 “ and in open court surrendered into the hands of the lord of the said manor, by the
 “ hands of the then steward thereof, according to the custom of the said manor, all her
 “ customary messuages, lands, and tenements whatsoever within the said manor, holden
 “ of the said manor by copy of the court rolls of the said manor, to the use of her the
 “ said Sissily and her heirs, until a marriage should be had and solemnized between
 “ her and the said Nathaniel Mellor ; and from and after the solemnization thereof,
 “ then to the use of the said Nathaniel Mellor, his heirs and assigns for ever, according
 “ to the custom of the said manor : That the said Nathaniel Mellor afterwards, and
 “ before the said time, when, etc. to wit, on the 1st of February, in the said year of our
 “ Lord 1760, intermarried with and took to wife the said Sissily : That afterwards and
 “ before the said time, when, etc. to wit, on the 11th day of April, in the year of our
 “ Lord 1760, at a court of the said manor then held within the said manor, the said

“Nathaniel Mellor, and the said Sissily then his wife, personally came into the said court, and then produced the said last mentioned surrender, and thereupon the said Nathaniel Mellor then prayed of the lord of the said manor to be admitted, and was by him then and there admitted tenant of the said tenements in the said declaration mentioned, with the appurtenances, to hold the same to him, his heirs and assigns, according to the form and effect of the said last-mentioned surrender, and according [610] to the custom of the said manor: whereupon the said Nathaniel Mellor entered into the said tenements, with the appurtenances, and became and was seised thereof as the law requires: That the said Sissily afterwards, and before the said time, when, etc. to wit, on the 21st day of November, in the year of our Lord 1793, died, leaving as well the said Nathaniel Mellor as the said John Moore the defendant her surviving, the said John Moore then and yet being the nephew and heir of the said John Carr. The jurors then found the demise, entry, and ouster as stated in the declaration, and submit the facts found to the consideration of the court.”

Upon this special verdict the court of King's Bench in Hilary term, in the 35th year of the reign of the present king, gave judgment for the plaintiff in error. See 6 Term Rep. 175. It is to be observed that Moore, (the plaintiff in error,) upon the death of Sissily Carr, in Easter, 34 Geo. 3. brought his ejectment to recover the premises from Mellor, (the defendant in error,) in which ejectment a special case, the same as the above special verdict, was reserved for the opinion of the court of King's Bench, which court upon argument decided in favour of Moore, the plaintiff in error, holding that Sissily Carr only took an estate for life under John Carr's will, and that upon her death the premises descended to Moore the plaintiff in error, as the heir at law of John Carr. See 5 Term Rep. 558.

In Easter term, 35 Geo. 3. the defendant in error prosecuted a writ of error upon the said judgment, upon the said special verdict, returnable in the court of Exchequer Chamber, and the judgment of the court of King's Bench was in Michaelmas term following reversed. The plaintiff in error then prosecuted the present writ of error returnable in Parliament, and assigned general errors, praying that the judgment of the court of Exchequer Chamber might be reversed, and that the judgment of the court of King's Bench might be affirmed. The reasons for this reversal were thus concisely stated (E. Law, G. Wood):—

Because there are no words in the will of John Carr which can pass any more than an estate for life to Sissily Carr: consequently upon her death the estate of the defendant in error ceased, and the premises in question descended to the plaintiff in error, as the heir of John Carr.

On behalf of the plaintiff in error the following reasons were assigned (V. Gibbs, W. Lambe), for the affirmance of the judgment of the court of Exchequer Chamber:—

I. Because by the known and established rules of law in the construction of devises, the intention of the testator, as far as the same can be collected from the whole of his will, is to be carried into effect, although the words used by him in his will would not be sufficient, if used in a deed, to pass such estate as it appears to have been his intention to devise.

II. Because it was evidently the intention of the testator to give every thing absolutely to his wife which he had a power to dispose [611] of, and which he had not before given to his kinsman Nicholas Lister. This intention is manifest from the general words used by him in the residuary clause, which to a person unacquainted with the strict rules of law must have appeared as comprehensive as possible; which do pass the absolute property in the testator's personal estate, and must have been supposed by him to operate in the same manner on the real.

III. Because it appears, that considering the said Sissily Carr as the great object of his bounty, and therefore best able to bear the burthen of paying his debts and funeral expences, the testator imposed on her the duty of paying the same, as the condition annexed to the enjoyment of the property devised to her. In consequence of which the said Sissily Carr either could not take the estate devised to her without discharging the testator's debts and funeral expences; or, by accepting the same estate, became liable to the payment of those debts and funeral expences: a burthen which, if she only took an estate for her life in the premises devised to her, might by possibility have been greater than the benefit to be derived from such devise: whereas the law

always presumes, that by the devise of property the testator intends a benefit and not an injury to his devisee.

IV. Because the present case is not to be distinguished in principle from the case of Doe on the demises of Palmer and others, against Richards, 3 Term Rep. K. B. 356 ; in which it was held, that a devisee under a residuary bequest, similar in effect to the present, took a fee simple in the lands devised.—The words in that will, were “all the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expences being thereout paid, I give, devise, and bequeath unto my sister Jane Dewdney ; and do hereby constitute and appoint her whole and sole executrix, and residuary legatee of this my will.” Every argument of intention drawn from the expressions which are used in that will, arises also out of the will in question, and may be applied at least with equal force to the present case. No material distinction can be taken between the form of the charge found in that will, viz. “my legacies and funeral expences being thereout paid,” and in the present, viz. “after payment of my just debts and funeral expences.” In both cases according to the strict grammatical construction, the payment of the charge should precede the estate. The word thereout, which is used in the charge in Doe against Richards, must be implied in the present case, and then it ought to bear the same construction, or if some such word is not to be implied, the payment of the debts and legacies must be a precedent condition to the devisee’s taking any estate, and the argument from it will be still stronger, that she takes a fee, as she might otherwise pay more than she would receive.

Counsel having been heard in the cause, the following question was put to the judges:—“What estate the devisee Sissily [612] Carr took in the premises in question ?” And the judges having taken time to consider the said question, the Lord Chief Baron of the court of Exchequer delivered their unanimous opinion, that Sissily Carr took an estate for life in the premises in question.

Whereupon it was ORDERED and ADJUDGED, that the judgment given in the court of Exchequer Chamber be reversed, and the judgment given in the court of King’s Bench be affirmed, and that the record be remitted, etc. (MS. Jour. *sub anno* 1800.)

WITNESS.

Mrs. ROSE ANDERSON, Wife of Thomas Hay Marshall, Merchant in Perth,—
Appellant ; The said THOMAS HAY MARSHALL,—*Respondent* [8th April 1799].

[See now 37 & 38 Vict. c. 64, s. 2, and (as regards England) 32 & 33 Vict. c. 68, s. 3.]

[A. institutes a suit (in Scotland) against his wife for adultery, and produces very strong circumstantial evidence of her guilt with B. and C. These persons are notwithstanding admissible as witnesses on the part of the wife, to swear that they did not commit adultery with her.]

[Interlocutors of the Court of Session reversed.]

The appellant at the early age of sixteen was, in the year 1792, married to the respondent. On her part (as was alleged in her printed case) the connexion was formed merely in obedience to her parents ; and she suggested that from the conduct of the respondent after marriage, it was fair to conclude that motives of interest or convenience must chiefly have induced him to form the relation.

The parties lived in the town of Perth, where the appellant’s father and mother also resided ; and both families were in use of seeing a good deal of company.

Amongst others who were often received and on habits of intimacy in the family of the appellant’s parents, and to whom the respondent himself at all times opened his

doors, were the Earl of Elgin, and Doctor Harrison, surgeon of the Durham Rangers, then quartered with their regiments in the town of Perth.

[613] In the year 1796, the respondent brought his action before the Commissary Court of Edinburgh for a divorce on the head of adultery: to which the appellant pleaded in defence, that though married upwards of four years, she was still a virgin, and to insist for an *inspectio corporis*; but the court, by repeated judgments, before answer as to the relevancy and competency of the mode of proof offered, found, that at all events, it could only be admitted *omnium ultima*.

The respondent, by order of the court, named the persons with whom he undertook to prove that the appellant had been guilty: and these were the Earl of Elgin and Doctor Harrison. He was then allowed to prove his libel, and a conjunct probation granted to the appellant. It was proved that the noble Lord, when quartered with his regiment at Perth, formed an acquaintance with this lady: that his lodging was directly opposite to the respondent's house, and in his absence they were in the constant habit of corresponding or sending notes to one another; that they used private signals; that his Lordship visited her very frequently, and at times the most improper for her admitting such a visitor; that they were together by themselves for hours together, and in the dark; that upon one occasion a servant having brought candles into the room where they were, was ordered to take them away; that suspecting what passed might be observed through the key hole, they took care to prevent it; that they used to walk arm in arm together in remote places, retire into thickets, and remain so concealed for a considerable time as to defy search: that their intercourse was remarked by all the neighbourhood; that particularly the appellant's mother suspected and believed the worst; that she caused the house to be watched and intelligence brought her when the Earl was with her daughter; that she made the noble Lord, on one occasion late at night, leave the lady and see her home: he accompanied the mother, said he was going to his own lodgings, and complained of illness; and yet he immediately went back to the appellant, and remained with her alone till near one o'clock in the morning.

With respect to Dr. Harrison, some of her letters to that gentleman were produced, expressing love and attachment in the strongest terms, which, indeed she did not scruple to avow, even in the judicial proceedings. The terms of one of her letters are sworn to; "That she had been dreaming all night of the doctor, and when she awaked she was disappointed at not finding him beside her." A witness who was much in her confidence, after mentioning that she had taken the liberty in the course of conversation to find fault with her conduct both with Lord Elgin and Doctor Harrison, swears that the appellant said, "The affair with Lord Elgin was too serious to speak about; that Lord Elgin had betrayed her, but that it was she who had betrayed Doctor Harrison;" and then desired the witness not to mention that she had so expressed herself. Her making valuable presents to the doctor, and her bribing servants to carry messages to him, [614] to conceal their interviews, and to bring him to the house in disguise, were all proved. And further it was proved, that upon one occasion they were seen pent up in a gateway at night, standing face to face as close together as possible; and that when they separated on being discovered, the lady's dress was very much disordered, and she herself in extreme confusion. On another occasion they were in a public staircase together, and from words and motions that were heard, the witnesses had no doubt (to use their own expression) that they had been bad together.

When it came to the appellant's turn to produce proof in exculpation, she proposed to examine the Earl of Elgin and Doctor Harrison, avowing that the question she had to put to them was, Whether they had committed the act of adultery with her? The respondent objected to their admissibility; and Whether they are admissible witnesses so to prove the negative? was the only question brought before the house by this appeal.

The commissaries, on March 23, 1797, pronounced the following interlocutor:— "Having considered these objections, with the answers thereto, in respect of the proof already adduced, sustain the objections, and find the Earl of Elgin and Doctor Harrison inadmissible as witnesses for the defender in this cause."

The appellant having presented a bill of advocacy to the Court of Session, the Lord Cullen, Ordinary, on the 16th of February 1798, reported the case upon memorials to the whole Lords, and then pronounced this interlocutor:—"The Lord Ordinary having considered this bill, answers, replies, and whole proceedings, with the memo-

“rials for the parties, and having advised with the Lords, refuses this bill, and remits “to the commissaries with this instruction, that they sustain the objection to the “admissibility of the Earl of Elgin and Doctor Harrison.”

And the appellant having put in her petition reclaiming against the said interlocutor, which the respondent answered, the court, on June 26, 1798, pronounced the following: —“The Lords having advised this petition, with the answers thereto, they adhere “to their former interlocutor reclaimed against, and refuse the desire of the petition.”

In her information to the Court of Session, and in her reclaiming petition, the appellant supported her right to have these two witnesses examined, on the following grounds:

1st, That though witnesses called upon to prove facts involving a criminal charge against themselves were not bound to give evidence, yet where they made no objection, there was nothing in the general principles of the law of evidence, nothing in expedience, and nothing in material justice, to prevent them from being examined as witnesses, either for the pursuer or defender.

2dly, That supposing, though not granting, that the alleged *socius criminis* is in general excluded from bearing testimony for the person accused, it can only be in such cases where his own [615] guilt has been previously established by direct evidence. But that in a case where there was no direct evidence of the guilt of such witness, but merely a proof of such circumstances as, though leading to suspicion against them, were perfectly consistent with the possibility of his innocence, he must be admitted; 1st, because there is no evidence of his being *socius criminis*; and the mere averment of the party that he is so cannot fix that character upon him to support the objection; 2dly, because in the present case the testimony of the alleged *socii criminis*, though favourable to the appellant, may be perfectly consistent with all that has been sworn by the other witnesses for the respondent; and, lastly, because in cases of circumstantiate evidence, creating only a presumption of guilt, if the evidence of the *socius criminis* were to be rejected when brought to explain the suspicious circumstances, and to remove the presumption of guilt, consequences the most injurious to justice might ensue.

On the first and general ground the appellant observed, that in every question on the law of evidence, in so far as it regards the admissibility of witnesses, there are two things which it is very usual to confound, but which never ought to be confounded: objections which go to the admissibility, and objections which only go to affect the credibility of the witness. Lord Bankton, in his *Institute*, (vol. 2. p. 647,) after stating the general rule in the law of Scotland respecting the admissibility of witnesses, adds, “Some cases require that all persons capable of observation be admitted witnesses, “as above hinted. Thus, in occult and domestic crimes all persons are receivable that “are supposed capable of knowing what happened, though in other cases incompetent, “because from the nature of the thing there is difficulty in the proof, and otherwise “these crimes might pass unpunished; and in other cases, where from the nature of “them there is a penury of witnesses presumed. Thus, likewise, infamous whores are “admitted to prove criminal conversation in those houses where it is presumed people “of better character do not frequent. And the evidence of brothers and sisters is “admitted in a proof of a clandestine marriage, such near relations being generally the “only persons called thereto; and, which is more extraordinary, sometimes the party “injured may be called as a witness to prove the fact where the prosecution is at the “instance of the public; as in an indictment for robbery on the highway, rape, or “forcible marriage: because otherwise the crime might escape punishment, and the “party is not to gain or lose by the event of the trial. It is likewise to be observed, “that incompetent witnesses, even in civil causes, are sometimes examined by the “Court of Session *ex officio ad informandum conscientiam judicis*, in some intricate, “obscure transactions, reserving to themselves the import of the objections.”

And Mr. Erskine says: “In occult or more private facts, where (B. 4. Tit. 2. § 26. “Erskine’s *Institutes*) there must in most cases be a penury of unexceptionable wit-[616]- “nesses, some of the disqualifications above-mentioned are overlooked. Thus domestic “servants are received as witnesses in transactions that are managed within doors. “December 31, 1708. New Col. ii. 70. And even brothers and sisters may be produced “in clandestine marriages, when frequently no other witness is called to attest them. “July 31, 1732. Barber Home, 107. Such witnesses are said to be admitted *cum “nota*; and their testimony, though it be not totally rejected, is not so credible as that

"of other witnesses, but is to have such a degree of weight given to it as the judge shall think it deserves."

From the same considerations of justice, expediency, and even of necessity, the Court of Session have of late, in reductions of deeds on the head of forgery, fraud, or the incapacity of the granter, admitted the instrumentary witnesses, or the other persons concerned in the execution of the deed, to be examined as witnesses, either for the party challenging or the party supporting the deed, though ever so nearly related to such party; such witnesses, though otherwise inadmissible, being necessary *ad rimandam veritatem*; and the degree of credit to be given to them being open to the consideration of the judge; and, on this ground, even the objection to the agent for the party supporting the deed has been admitted when he chanced to be one of the instrumentary witnesses, or employed by the testator in executing the deed.

The appellant contended that the precise same reason, and the like considerations of justice, expedience, and necessity, required the admission of the alleged *socius criminis* in crimes of an occult nature, where circumstances exciting suspicion could only be explained by the person supposed to be concerned in the fact with the party accused. It appears, indeed, that the strictness of the law of Scotland, with respect to witnesses, at an early period, excluded them, whether adduced by the pursuer or defendant (Sir George M'Kenzie's *Criminal Law*, Tit. 26. § 10); but so did it at that time the testimony of women, of menial servants, of tenants, and of near relations, in every case without exception. If it could be shewn, therefore, that the same reasons which induced the above alteration in the practice, with regard to other inadmissible witnesses, applied to the case of the *socius criminis*, it was contended that the *socius criminis* must be admissible; for while the other objections were inherent in the witnesses, and existed independently of the allegation of the party objecting, the objection that the party was *socius criminis* was a mere matter of averment on the part of the objector; and which, therefore, could have no effect unless his guilt were established by such decisive evidence as would render his testimony, though admitted and favourable to the party adducing him, of no weight in the scale of proof. And it was pressed on the court that if the bare averment in the libel of adultery, that a particular person had been guilty with the appellant, was not merely to affect the credibility of such a witness, but totally to exclude his testimony, the most innocent of women might be convicted of adultery upon circum-[617]-stances of strong suspicion, while the alleged *socius criminis* might, if admitted, have proved her innocence and circumstances exclusive of guilt.

The appellant referred to various cases in which it had been of late expressly found, that the alleged *socius criminis* might be adduced by the husband pursuing a divorce, from which she contended, that it must be equally competent to the defender to adduce them. The cases referred to were those of *Stewart Nicolson v. Margaret Porterfield* (determined in the House of Lords, 18th Feb. 1771) his wife, where the Court of Session having admitted William Graham, who was alleged by the pursuer to have been guilty of adultery with his wife, as a witness for the pursuer, the judgment was affirmed on an appeal; and judgments to the same effect had been pronounced in various other cases,* and it is now held as settled law.

The appellant maintained, that not a single argument or consideration could be pointed out as supporting these judgments, that did not as strongly conclude in support of her present plea; and it being settled that the alleged *socius criminis* may be examined by the pursuer, it follows by the strongest analogy that he must be equally admissible on the part of the defender: during a long period the Court of Session was extremely shy of holding adultery to be proved, except where direct evidence was brought of the actual *copula*, or facts totally exclusive of innocence in the ordinary nature of things, such as the parties being found in bed together, or the like. Of late the court indeed has allowed slighter circumstances to make out the crime, and even those which though creative of strong suspicion are consistent with innocence, such as *solus cum sola in loco suspecto*, etc. where nothing is proved on the other side to account for such situations. And to make them consistent with innocence, the appellant disputes not the justice of this practice, if the party accused be allowed the benefit of

* Mrs. Campbell of Edderline against her husband, in 1726; Thomas Tulloch against Margaret Falconer his wife, in 1756; and in the case of Carruthers against his wife, in 1742.

the evidence of the alleged *socius* to explain the circumstances of suspicion and to redargue the mere presumption from thence arising. But if she is to be denied the benefit of such evidence, the appellant is unable to conceive a practice more repugnant to justice, or more destructive to the honour and happiness of the sex, or the peace of families, as it would be to turn a mere *presumptio hominis* into a *presumptio juris et de jure*, not to be redargued by contrary proof.

The appellant maintained, that in every case of divorce, and whatever might be the nature and extent of the pursuer's proof, the defender is entitled to the evidence of the alleged *socius criminis*. But supposing the rule to be otherwise, it could not be general and without exceptions, and must depend on the circumstances of the particular case, and the proof adduced by the pursuer. No lawyer can say that it would be sufficient to preclude the Earl of [618] Elgin and Dr. Harrison from being examined, that the respondent had been pleased in his libel to state them as the *socii criminis*, though not a single fact or circumstance had been proved to fix guilt or even suspicion upon them. Here then is one case in which the alleged *socii criminis* would not only be admissible, but would receive equal credit with any other witness of the same respectability. The respondent must therefore admit, that the alleged rule of law on which he founds his objection is not general. On the other hand, the appellant, without injuring her argument, might admit, that, if by the proof already adduced, the guilt of the Earl of Elgin and Dr. Harrison with the appellant had been clearly proved by the direct testimony of a number of unexceptionable witnesses, there might be room to doubt how far these gentlemen could be admitted as witnesses. But from the proof which has already been taken either with regard to Lord Elgin or Dr. Harrison, no witness swears to any circumstance directly importing guilt, or to any one fact which would necessarily stand contradicted, though both his Lordship and the Doctor should be examined, and depone, that they had no illicit connection with the appellant; on the contrary, their evidence would only prove, that supposing every thing sworn to by the other witnesses to be true, the suspicions and presumptions of the appellant's guilt that may perhaps be created by that proof, taken as it stands, are fallacious, and that the grossest injustice would have been done to the appellant had the evidence been there closed, and she precluded from that testimony, which by removing the delusion occasioned by the partial and limited evidence would otherwise have led to an unjust decision.

The proof is annexed to the respondent's case; and from the perusal of it, without argument, it must be obvious that the view which the appellant gave of it to the court was just. Lord Elgin and Dr. Harrison have no interest in the issue of the suit, because no evidence that can there be adduced, and least of all their own depositions, could be founded on in any action for damages against them, at the respondent's instance. And though it were otherwise, they can have no temptation to swear falsely, because they may refuse, and cannot be compelled to swear. Justice, therefore, urgently required that they should be examined; and neither law nor practice could warrant the rejection of their testimony. When they are examined the proof will then be complete, while every objection to their credibility will remain entire, and their evidence, whatever it may be, will receive no more credit from the court than it may appear to be entitled to, considering the situation in which they stand, and when connected with the depositions of the other witnesses.

These arguments the appellant enforced (T. Erskine, W. Grant, H. Erskine) in the present appeal to the House of Lords, against the judgment of the Lord Ordinary of February 16, and of the whole court of June 26, 1798, by the following reasons:—

I. The only objection to the examining the witnesses in question is, that they are alleged by the respondent to be *socii criminis*; [619] but the objection proceeds upon a fallacy, by taking for granted the question *de quo queritur*, viz. Whether the witnesses were guilty with the appellant or not? And it is obvious, that if the mere averment of the pursuer in a process of divorce, that certain persons had been guilty with his wife, were to be sufficient to debar her from their testimony as *socii criminis*, a pursuer might deprive a defender of the evidence of every man who could bear testimony to any circumstances in her favour, by placing him in the list of her alleged paramours.

II. Though the bare allegation of the respondent could have the effect to place

these two witnesses, in the eye of the law, in the light of *socii criminis*, it would not support the objection: for there is nothing in the reason of the thing, and nothing in the law or practice of Scotland, to shew that the alleged *socius criminis* is an incompetent witness. The charge of guilt against the witness lays him under no restraint, because he cannot be compelled to swear. And though, with this power of declining, he should choose (being really guilty) to come forward and criminate himself, his evidence could not affect him in any action of damages that might be brought against him at the husband's instance. He is, therefore, under less temptation to swear falsely, than a witness who is liable to be compelled to swear.

It is a point settled by repeated decisions, and which was assumed as law in this case by the Court of Session in pronouncing the judgment appealed from that the *socius criminis* is a competent witness when adduced by the pursuer. But there is no distinction between the two cases. In either case the witness may refuse to swear; if innocent, he can have no hesitation to allow himself to be examined, whether adduced for the one party or the other: if guilty, whichever of the two parties adduces him, it is to be presumed that, for his own sake, he will avail himself of the legal privilege and refuse to swear: and common sense, as well as charity, reprobates the idea that persons who are under no necessity to make oath will do so for the sake of committing perjury: though it may be a reasonable presumption that persons, unless strongly endowed with a moral sense, will, when compelled to swear, rather deviate from truth than criminate themselves. In one case the Court of Session virtually expressed their opinion as to the competency of the witness, that it makes no difference whether he is adduced by the pursuer or defender. In that case Carruthers, having sued an action of divorce against his wife, specified James Bell, a servant in the family, as having been guilty with her, she offered Bell as a witness to prove objections to other witnesses, and also to swear with regard to the alleged acts of adultery with himself. The Court of Session remitted to the commissaries with this instruction, "to allow the defender a proof of the hail articles in the additional condensation, except that article with regard to Bell's oath," and with this instruction, "that he Bell be not admitted as a witness, either for or against the defender, as to the facts [620] charged against him by the other witnesses." This decision has been departed from in every subsequent case, and the *socius criminis* in questions of adultery has uniformly been admitted for the pursuer: And as the court in that case made no distinction between the witness being adduced by the pursuer and his being adduced by the defender, thus recognizing the two cases as precisely similar, the repeated subsequent decisions, though they occurred in cases where the witness was adduced by the pursuer, may fairly be held as equally in point to a case where he is adduced by the defender.

III. Supposing, in the general case, that the alleged *socius criminis* were an incompetent witness for the defendant, the principle would not apply to a case like the present: It is essential to material justice, and particularly where a criminal charge is brought against any person on a fact which, if proved, must issue in a judgment destructive of his fortune, fame, and happiness, that the defender shall be allowed a proof of every fact tending to exculpate him from the guilt with which he is charged: and as it is in vain that the law allows a proof of such facts, if at the same time it rejects the only evidence by which such facts can be established, it follows as an irresistible consequence, that where the only witness or witnesses by whom such facts can be proved are liable to such legal objections as would, in the ordinary case where the same facts could be otherwise proved, render them inadmissible, they must be received, leaving it to the judges or jury who are to determine on the evidence to judge of their credibility. That such is the law of Scotland is established by the authority of Lord Bankton and Mr. Erskine, and by the decisions to which they refer; and the civil law (which is the law of Scotland, when not contrary to positive regulation or practice) expressly points out the crime of adultery as one of those which, from its nature, requires that the objections which lie to witnesses in ordinary cases should be dispensed with. (Mascardus Concl. 1318, No. 33.—Concl. 65, No. 14. Voet de Testibus.)

IV. The present case is not only one where the facts (if really committed) must have been secret and occult, but it is one where material justice calls loudly for the examination of the alleged *socii criminis*. Had the direct fact been established by the pursuer's witnesses, or had even circumstances been proved totally inconsistent with the possibility of innocence, it might have been in vain for the appellant to have

insisted for the examination of Lord Elgin and Dr. Harrison; and it was upon this ground that, in the case of Bell against King, founded on by the respondent, that the Court of Session refused to allow a defender in an action of divorce to examine the *socius criminis*, against whom the adultery with the defender had been proved by the direct testimony of at least one witness. But that is not the case in the present instance; it is impossible to read the proof without perceiving that all the circumstances deposed to, whatever suspicions they may suggest, and whatever degree of imprudence they may fix upon the appellant, neither amount to a direct proof of guilt, nor exclude the [621] possibility of innocence. And it is evident, that were Lord Elgin and Dr. Harrison to swear, that their attentions to the appellant did not terminate in guilt, their testimony would not be inconsistent with the truth of any one fact sworn to by any of the other witnesses. That the appellant should call for the evidence of two persons who it is impossible to conceive would perjure themselves on her account, and who, if she be guilty, must at once convict her, is of itself a circumstance creating a stronger presumption of innocence than the whole facts proved by the respondent are of guilt. It is impossible, therefore, to figure a case on which the call of justice can be stronger for getting over a legal objection (if such there be,) to the witnesses proposed to be examined by the defender, as the consequence of rejecting them may be a judgment depriving an innocent woman of fortune, fame, and happiness, on a presumptive proof arising from circumstances which she has been disabled from explaining by the only means by which they are capable of explanation.

On behalf of the respondents it was strongly urged (J. Scott, W. Adam) that the interlocutors ought to be affirmed; and the following were the reasons assigned:

I. There can be no necessity in any case of a divorce, sued for on the head of adultery, to resort to the evidence of the alleged *particeps criminis*, to exculpate the defender, by swearing that the crime was not committed. According to the established course of proceeding, the proof on the part of the prosecutor must be completed before the defender enters upon exculpatory evidence. If the proof adduced by the prosecutor is not sufficient to convict the defender, there is no occasion for any exculpatory proof: If it is sufficient, such evidence as that tendered in the present case can never weigh against it.

II. It were nugatory to admit a testimony, which, however favourable in its terms to the party who brings it forward, is not entitled to credit in one view of the case, and for which there can be no occasion, in the only other view of it. The appellant allows, that the witnesses must be received *cum nota*, or reserving the consideration of their credibility; but the respondent maintains, that no credit whatever can be paid to their testimony, in opposition to, or when brought to refute a proof, which, in this state of the argument, must be held as complete and satisfactory, but for the contradiction of those witnesses.

III. The proposed witnesses have a strong interest to conceal the truth, if it should be against the appellant: If they were to confess her guilt and their own, their confession might, by the law of Scotland, be the foundation of a separate action of damages at the respondent's instance, and would be sufficient to convict them, without the necessity of producing other evidence. It is very true, that the witnesses may refuse to swear at all, on the rule, *Quod nemo tenetur jurare in suam turpitudinem*; but this does not remove the objection of their having an interest to swear one way. If they are to refuse to swear, then it is nugatory to call upon [622] them; if they waive their objection against being examined, they have a clear and palpable interest to conceal the defender's guilt, which is their own.

IV. Independently of the last reason, the proposed witnesses must be strongly biassed, and under temptation to perjure themselves. A man is induced to commit the crime of adultery from love conceived towards the paramour, and the same affection will induce him to screen her: He is interested to save his own character, as well as to shun an action of damages. The law of Scotland rejects the testimony of near relations in favour of one another, from the presumption of undue bias: it rejects the testimony of *socii criminis*, in actions at the suit of private persons *ob metum perjurii*.

V. The decisions of the courts of Scotland in other cases are in unison with that in the present case. Thus in the case of Bell against King, (December 18, 1794,) precisely in point to this, the judges unanimously refused to admit the testimony of the alleged *socius criminis*, though the proof was much weaker than that which has

been adduced in the present cause, and indeed so insufficient, that the court afterwards, with the same unanimity, acquitted the defendant from the action of divorce. The same judgment had been pronounced in the case of Carruthers in 1742.

VI. No argument, as from analogy, arises from the testimony of the alleged adulterer being received against the defendant. There the bias must be against the party who recurs to the testimony; and there too the witness must speak to facts and circumstances, laying him open to contradiction and refutation. A deposition, merely stating that the witness had committed adultery with the person accused, would be of no signification. The prosecutor is entitled to make out his case by the evidence of every person conusant; and though no person can be obliged to criminate himself, yet that is an objection which lies in the mouth of the witness alone.

Objection. The appellant admitting, that if there were direct or conclusive proof against her, she could not examine persons upon whom guilt is fixed, to swear singly and flatly that they were not guilty; and allowing at the same time that the evidence affords violent suspicion, argues, that it is still but suspicion; that allowing every circumstance proved to be true, it is still possible that her crime may not have been complete; and therefore, that she ought to be allowed to bring the persons accused as having been guilty with her to swear in the negative, if they are at liberty to do so, leaving it then with the court to weigh their evidence in the scale against the circumstantiate proof.

Answer. The proof cannot with propriety be called circumstantiate; it is conclusive, though not so direct as occurs in some cases, where the parties are altogether unguarded and surprised in the very act. If the proof is not conclusive, the appellant has nothing to fear, and nothing to guard against, by the exculpation proposed. It is perfectly evident that the appellant's [623] argument would apply with equal force to the case of a married woman found in bed naked with a man who was not her husband. There is still a possibility that the last act of criminality may not have been committed, and there seems to be no drawing a line. If the oath of the paramour is to be admitted in all cases, it would be an encouragement to immorality, vice, and perjury.—"Let it be supposed (said one of the learned judges) that the wife is the prosecutor, and that the person with whom the husband is accused is a young woman previously of unblemished character; a greater temptation to perjury cannot be conceived than such a person is under, if adduced as a witness. Is it possible to suppose that she would speak out, when her doing so must bring upon her inevitable ruin and disgrace? Her silence would have the same effect: so that if adduced and guilty, she must perjure herself, or stand self-convicted. The law of Scotland will not suffer a person to be placed in such a predicament."

VII. Though the single question agitated before the commissaries, and brought before the Court of Session by the appellant's bill of advocacy, was, Whether she could be permitted to examine Lord Elgin and Doctor Harrison as to their having committed adultery with her on any occasion, or upon the different occasions stated in the proof, when from situation and circumstances guilt was to be inferred or presumed?—Yet, in her reclaiming petition to the Court of Session, she affected to say, there might be circumstances which their evidence would explain or establish so as to take off the force of the evidence on the respondent's part, without making the proposed witnesses speak directly to their own innocence or guilt, and without contradicting facts ascertained by the testimonies of the witnesses adduced against her. But it was answered, and this was not the point at issue; she had never till then insinuated that she had occasion for Lord Elgin's or Doctor Harrison's evidence upon collateral circumstances; when she did, and stated what the precise circumstances were, she would receive an answer. But it is perfectly evident that no such circumstances which were material could exist. It is not pretended that any one of the circumstances established by the respondent's evidence is false, except that of the appellant's being pent up in the gateway with Doctor Harrison, which she feels herself at liberty to dispute the truth of, because of the character of the witness, though his testimony is strongly corroborated by that of another witness. Every thing else is broadly admitted, and therefore Lord Elgin and Doctor Harrison, however much disposed or at liberty to favour the appellant, can go no farther, upon her own hypothesis, than to swear that, notwithstanding all appearances and all the opportunities afforded them, they nevertheless abstained from the last act of criminality. And if they should so swear, who would

believe them? The question still recurs, Whether they are to be admitted to falsify convincing [624] evidence by a blunt denial! It is impossible that either the one or the other can venture to say he has not done what was very unjustifiable, and men who stand so far convicted cannot find fault with those who must refuse them credit, though they should add that they stopped short of completing what appears to have been their object, and which they certainly had every opportunity to complete.

But it was ORDERED, that the several interlocutors of the commissaries of Edinburgh, and of the Lords of Session complained of in the amended appeal, be reversed; and it is further ordered, that the same be remitted back to the said commissioners with instructions to repel the objection to the admissibility of the Earl of Elgin, and Doctor Harrison, as witnesses on the part of the defender in the said cause. (MS. Jour. *sub anno* 1799.)

VOLUME VIII.

APPENDIX I.

CONSISTING OF

MODERN CASES;

Viz. Such as are subsequent to the year 1778. (the Period when the first Edition of Mr. BROWN'S Parliament Cases concluded,) and which did not reach the Hand of the Editor in Time to be inserted in the Order prescribed by Mr. BROWN'S Arrangement of the Cases for the present Edition.—They are inserted in this Appendix in Chronological Order.

CASE 1.—The Honourable BASIL WILLIAM DOUGLAS, commonly called LORD DAER, eldest Son of Dunbar Earl of Selkirk, *Appellant*; The Honourable KEITH STEWART, and Others, Freeholders of the Stewartry of Kirkcudbright,—*Respondents* [26th March 1793].

[Disability referred to in this case removed by 2 & 3 Will. IV. c. 65. s. 37.]

[The eldest son of a peer of Scotland is not eligible to represent a Scotch county in the commons house of parliament.]

[Interlocutor of the Court of Session affirmed.]

The case on which this appeal arose was stated by the respondents to be exceedingly important, as it involved a question affecting the constitution of parliament, namely, "Whether the eldest son of a peer of Scotland can represent a Scotch county in the British house of commons?"—In support of the negative of this proposition the respondents entered into the following historical deduction.

The first authentic record from which the constituent members of the king's great council or parliament can be traced [2] with any degree of certainty, are the statutes of William I. commonly called William the Lion, who began to reign in 1165: they are thus titled: "*Statuta sive assissa regis Willielmi regis Scotia facta apud Perth coram episcopis, abbatibus, baronibus et aliis probis hominibus terre sue*:" and the first chapter begins with these remarkable words. "*Placuit regi et consilio suo.*" The *episcopi*, the *abbates*, and the *barones*, are well known. The term *alii probi homines terre sue*, which is likewise to be found in the 2d chapter of the statutes of Alexander II. is indeed both comprehensive and vague. It appears, however, to have been applicable to the *liberi tenentes*, or smaller barons, who held of the Crown; for, in the 32d chapter of the *Statuta Willielmi*, there is an enumera-

tion of the members of the great council, which is more particularly described as consisting of the *prelati, comites, barones*, and *liberi tenentes*; the words are, "*Statuit rex Willielmus apud Sconam de communi concilio et deliberatione prelatorum comitum et baronum ac libere tenentium, quod ecclesia sancta Scoticana et sancta religio et universus clerus in suis juribus libertatibus ac privilegiis omnibus manum teneantur in quiete pace, et semper sub protectione regis.*" And that the *liberi tenentes* here mentioned were the same with the *alii probi homines terrarum*, seems to be confirmed by the 3d chapter of the statutes of Alexander II. which enacted "*Quod de cetero non fiat sacramentum de amissione vite vel membrorum hominis seu terre nisi per fideles homines et per probos libere tenentes per cartas.*" Indeed the word *homo* was the usual term in barbarous Latin to denote a feudal vassal. Hence the king's vassals were with propriety called *homines sui*.

Hence there is reason to believe that in those days, agreeably to the general plan of the feudal system, which had been by that time introduced in Scotland, every person who held his lands immediately of the Crown, was bound to attend in parliament. There, however, even then appears the dawn of a distinction between the prelates and nobles, and the ordinary *libere tenentes* or freeholders, who came afterwards to be more particularly described under the appellation of the small barons or freeholders.

Whether the prelates or dignified churchmen, such as archbishops, bishops, and abbots, originally sat in parliament in consequence of their ecclesiastical dignities, and as representing the body of the clergy, or as holding for themselves and their successors, lands immediately of the Crown, is at least a problematical question. It is an agreed point, that those abbots only who were termed Mitred, enjoyed that right. The former seems therefore to be the more probable opinion. This point is however of little consequence to the present question.

With regard to the peers, or *barones majores*, it is well known, that in ancient times all honours and dignities, were annexed either to lands or to offices; and that earldoms and lordships in Scotland were for a long time territorial, and passed [3] with the lands erected into a *comitatus* or *dominium*, is indisputable. While matters remained in that state, it is not unreasonable to suppose that the peers gave their attendance in parliament not in respect of their dignities, but in consequence of their holding their earldoms or lordships immediately of the Crown; but although in those days they were not in that respect to be distinguished from other freeholders, yet after the introduction of personal honours or dignities independent of lands, which happened in Scotland at least as early as the reign of James I. a considerable alteration in the model of parliament must of necessity have taken place. The sovereign could be under no obligation to confer such personal dignity except upon those who were possessed of landed property; but even supposing none to have been created lords of parliament who were not possessed of landed estates at the time, there is no ground for concluding that their heirs were to be deprived either of the title or of any of the privileges attending it, upon their disposing of the estate which their ancestor held when he was ennobled. Those who were in this situation would therefore sit in virtue of their personal honours alone, and hence all the other peers, although their dignities were at first territorial, would in time come to be blended with the lords of parliament, and to be considered as fitting in respect of their dignities, which there is some reason to believe was always the case with the dignified clergy. This idea must indeed have been most palatable to themselves, and would therefore be cherished by them as calculated to create a more marked distinction between them and the smaller barons, who sat only in respect of their lands.

The eldest sons of peers, connected as they were with their fathers' dignities, would of course cease to be ranked as part of the small barons, *libere tenentes*, or freeholders; and it would be reckoned sufficient, that parliament was attended by their fathers, who were in immediate possession of the honours, and of course would answer for them. This seems indeed highly probable, from a passage of a small tract published at Paris in the year 1579, intituled, "*La Recherche des Singularitez plus Remarquables, concernant l'Estat d'Escosse, vove a tres auguste & tres clemente Princesse Marie, Royne d'Escosse, & Douairiere de France. Par David Chambre, Escossois, Conseiller en la Cour de Parlement à Edinbourg, Ville capitale d'Es-*

"cosse."—This author, who must have been well acquainted with the constitution of Scotland (of the supreme court whereof he was one of the judges), in giving an account of the noblesse, after speaking of the lords and knights, and likewise of those who were called lairds, proceeds thus: "*La plus grande force pour resister les ennemis au temps de guerre, consiste is gentils hommes, freres, puisnez, desdicts nobles & des seigneurs, suisdicts Lards, & eneux de leur posterité, lesquels s'entretiennent tant des revenus qu'ils ont eu en don de leurs parents, que [4] des acquis pour leur service & industrie, sans avoir autre particulier tiltre de honneur, sinon qu'ils sont appelléz de nom du village ou possession ou ils demeurēt. Entre ceux de ce degré il y a beaucoup plus riches & plus estimez que quelques uns de ceux appellez Lards. Et combien que en parlant ou escrivant precisement de la noblesse Escossoise, on l'entend comprendre seulement ceux dictz ducs, comtes, & seigneurs, dictz my Lords; avec leur fils aînez (appellé en Escossois, Masters), excepté le fils aîné de Côte, de Huntly, nommé my Lord Gordon, & le fils aîné du comte d'Argil, dit my Lord Lorne; toutes fois leur freres puisnez; & les autres barons avec tous descendus d'iceux s'ils sont vertueux & ayant suffisamment pour s'entretenir, sont appellez du commun peuple en Escossois, noble Gentilmen; en Francois, nobles Gentils-hommes."*

It is true that, prior to the introduction of representatives from the different counties, there are to be found in the rolls of parliament the names of a few masters, some of them the eldest sons of peers; of these more particular notice will be taken in the sequel; at present it will suffice to observe, that there is no evidence of their sitting in the character of freeholders, and that it is more probable they were specially summoned by the King, who had it in his power in this way to call to his great council, persons who were not otherwise bound to attend it.

While the lesser barons who held lands immediately of the crown, were but few in number, and those few were possessed of considerable estates, their occasional attendance for a few days in parliament would not be felt as a grievous burden; but when, in process of time, the larger estates came to be split amongst several owners, the burden grew more severe: It accordingly appears to have been customary for many of those who were bound to personal attendance, to name procurators or deputies to act for them. This practice was however checked to a certain degree by the statute 1425, cap. 52, which enacted, "That all prelates, erles, baronnes, and freeholders of the king, within the realme, sen they are halden to give presence in the kinge's parliament and general council fra thinefoorth be halden, to compeir in proper persone, and not be a procuratour, but gif the procuratour alledge there and prove a lauchfull cause of their absence."

It was soon after perceived, that, as there was great hardship in compelling the attendance of the lesser barons from every part of the kingdom, and as it was next to impossible to enforce it, so a meeting composed in that manner would be too numerous for expediting business; an act therefore passed in 1427, cap. 101, "That the small barons, and free tenants (the old *libere tenentes*), need not come to parliament or general councils provided that they sent two or more wise men, chosen at the head court of the sheriffdom, and to be called commissaries of the shire, from each shire, according to its size, except the two shires of Clackmannan and Kinross, which being very [5] small, were only to send each of them one commissioner." This act, further directed, that, out of these commissioners, "a wise and expert man should be chosen, who should be called the common speaker of parliament, and propose all things pertaining to the commons in parliament;" and that all the commissioners should have costage (*i.e.* their expences) from those of their respective shires who owed attendance in parliament.

It is highly probable that, in passing this act, James I. (of Scotland) who had received his education in England, intended to put the parliament of Scotland upon the same footing with the English parliament, and to render the commons a separate house. This however did not take effect, and the statute seems to have been intirely disregarded: the small barons neglected to elect commissioners, and were of course still bound to give personal attendance. A new act accordingly passed about thirty years after, (A.D. 1457. c. 75.) providing, "That no freeholder, under £20 should be constrained to come to parliament as for presence, except he were a baron, or were especially called by the king's officer or by writ." And in the

reign of James IV. another act (A.D. 1503. c. 78.) passed, relieving all barons and freeholders, whose estates were within 100 merks of new extent, unless specially written for by the king, but enjoining all those of a higher extent to come to the Parliament, under the pain of the old fine.

Notwithstanding these statutes, the small barons continued very remiss in their attendance: during the reign of James III. the number of those who went to parliament never but once exceeded thirty, and was often much less: In the reign of James IV. ten was the highest number, and in some of the parliaments of that prince not one appeared: In the time of James V. we find six or seven, and still fewer during the reign of Mary. These it is likely attended in consequence of special writs from the crown.

It accordingly appears, that when the zeal, with which the country was in general then actuated, towards establishing a reformation in matters of a religious concern, produced a convention of all the different orders of the state, a doubt was entertained with regard to the lesser barons having a right to sit in that national assembly; and from a letter written by Thomas Randolph to Sir William Cecil, the minister of Queen Elizabeth, upon the 10th of August 1560, it appears, that they on that occasion presented a petition to the lords, of the following tenor: "My lords, unto your lordships humbly means and shews we the barons and freeholders of this realm, your brethren in Christ, that whereas the causes of true religion and commonwell of this realm are in this present parliament to be treated, ordered, and established, to the glory of God, and maintenance of the commonwealth: and we being the greatest number in portion where the said causes concern, and has been, and yet [6] are, ready to bear the greatest part of the charges thereuntil as well in peace as in war, both with our bodies and with our goods: and seeing there is no place where we may do better service now, than in general councils and parliaments, in giving our best advice and reason, vote and counsel, for the furtherance thereof, for the maintenance of virtue and punishment of vice, as use and custom had been of old, by ancient acts of parliament observed in this realm, whereby we understand, that we ought to be heard to reason, and vote in all cases concerning the commonwealth, as well in councils as in parliaments: otherwise we think that whatsoever ordinances and statutes be made concerning us and our estate, we not being required and suffered to reason and vote at the making thereof, that the same should not oblige us to stand thereto: Therefore it will please your lordships to take consideration thereof, and of the charge borne and to be borne by us, since we are willing to serve truly to the commonwealth of this realm after our estate, that ye will, in this present parliament, and all councils where the commonwell of the realm is to be treated, take our advice, counsel, and vote; so that, without the same, your lordships would suffer nothing to be passed and concluded in parliament or councils aforesaid: and that all acts of parliament made in time past, concerning us, for our place and estate, and in our favour, be at this present parliament confirmed, approved, and ratified, and act of parliament made thereupon: and your lordships' answer humbly beseeches."

In a subsequent letter, Randolph gives the following account of the success of the petition: "The matters concluded and past by common consent on Saturday last in such solemn sort as the first day they assembled, are these: First, That the barons, according to an old act of parliament made in the time of James I. in the year of God 1427, should have a free voice in parliament. This passed without contradiction."

But although a very great number of the lesser barons attended this convention, which was held without the authority of the Sovereign, they seem to have been afterwards as remiss as ever. It became therefore necessary again to try the plan of a representation of their body, which was accordingly fully established by the act of James VI. 1587. cap. 114. "Our Sovereign Lord considering the acts of his heinisse parliament halden at Linlithgow the tenth day of December, the zeir of God 1585 zeires, mak and mention how necessar it is to his heinisse and his estaites to be truly informed of the needes and causes pertaining to his loving subjectes in all estaites, especially the commones of the realm: and remembering of ane gude and loveable acte made by his heinisse progenitour King James Ist, of worthy memory, in the parliament halden at Perth, the 1st day of March, the zeir of God 1427 zeires,

"anent the commissioners of small baronnes in parliament, that [7] his Majesty
 "and his said estates would ratify and apreeve the same to have full effect, and to be
 "put to execution in time cumming, and of new statute and ordaine for the mair
 "full explanation of the same acte and certaine execution thairof, that preceptisuld
 "be directed furth of the chancellary to an baron of ilk shire, first, to convene the
 "freeholders within the same schire for chusing of the commissioners as is contained
 "in the same acte, quhilkis commissioners being anes chosen and send to parliament,
 "the precepts of parliament be convening of freeholders to the effect foresaid, to
 "be directed to the last commissioners of ilk schire, quhilkis sall cause cheise twa
 "wise men, being the King's freeholders, resident indwellers of the schire, of gude
 "rent and weel esteemed, as commissioners of the same schire, to have power and
 "to be authorised as the acte proports, under the commissioners seale in the place
 "of the schirriffis, and that all freeholders of the King under the degree of prelates
 "and lords of parliament be warned be proclamation to be present at the choosing
 "of the saids commissioners, and name to have voit in their election but sick as hes
 "fourtie shilling land in free tenendry halden of the King, and hes their actual dwell-
 "ing and residence within the same schire: quhilk matter being remitted be the
 "said estaites convened in the said parliament at Linlithgow to the will and good
 "consideration of our said sovereign lord, to doe and ordaine therein as his heinesse
 "should think maist expedient and requisite betwixt and his next parliament. And
 "now his majesty intending, God willing, to take ordour for the final settling and
 "establishing of that gude form and ordour maist meet and expedient to stand in
 "perpetuity in this behalfe, according to the effete of the said act of parliament made
 "at Linlithgow, in consideration of the great decay of the ecclesiastical estait, and
 "uthers maist necessary and weighty considerations moving his heinesse: Therefore
 "his majesty, now after his lawfull and periete age of 21 zeirs compleit, sittand in
 "plane parliament, declaris and discernis the said act made be King James the First
 "to take full effect and execution, and ratifies and apreeves the same be thir presents:
 "and for the better execution thereof, ordains the commissioners of all the schirreff-
 "domes of this realm according to the number prescribed in the said acte of parliament
 "to be elected by the freeholders foresaid at the first head court after Michaelmas
 "zeirly, or failzing thereof at any uther time quhen the said freeholders please convene
 "to that effect, or that his majesty shall require them thereto, quhilkis convention
 "his majestie declaris and decernis to be lawfull: and the said commissioners being
 "chosen as said is for ilk schirreffdome, their names to be notified zeirly in writte to
 "the director of the chancellary be the commissioners of the zeir preceeding: and
 "thereafter quhen any parliament or general convention is to be halden, that the
 "said commissioners be warned at the first be vertew of precepts furth of the chan-
 "cellary, or be his [8] heinesse missive letters or charges, and in all time thereafter
 "be precepts of the chancellary as sall be directed to the uther estaites: and that
 "all freeholders be taxt for the expences of the commissioners of the schires passing to
 "parliament or general councelles, and letters of poiding or horning to be direct
 "for payment of the summes taxt to that effect upon an simple charge of six days
 "warning allenarly: and that the said commissioners, authorised with sufficient
 "commissions of the schirreffdome fra quhilk they come, sealed and subscribed with
 "six at least of the barrones and freeholders thairof, sall be equal in number with the
 "commissioners of burrowes on the articles, and have vote in parliament and general
 "councelles in time cumming: and that his majesty's missives before general coun-
 "selles sall be directed to the saids commissioners, or certain of the maist ewest of
 "them, as to the commissioners of burrowes in time cumming: and that his majesties
 "missives before general counselle, sal be directed to the saids commissioners or certain
 "of the maist ewest of them, as to the commissioners of burrowes in time cumming:
 "and that the lords of council and session sall zeirly direct letters at the instance of
 "the saids commissioners for convening of the freeholders to chuse the commissioners
 "for the next zeir, and making of taxation to the effect above written: and that the
 "compeirance of the saids commissioners of the schires in parliament or general
 "counselles, sall relieve the hail remanent small barrones and freeholders of the
 "schires of their suites and presence ought [due] in the saids parliaments: providing
 "always, that the saids small barrones observe their promises and conditions maid
 "to his majesty. Upon the quilk declaration and ordainance made and pronounced

" be our sovereign lord sittand in plaine parliament as said is, John Murray of Tullibardin askt acts and instruments, and David Earl of Crawford, Lord Lindsay, for himself, and in name and behalf of others of the nobility, protesting in the contrair."

It appears that several questions had arisen with regard to the right of voting, or being elected : and to prevent such questions in time to come, it was declared by an act of Charles II. (Parl. 1. A.D. 1661. cap. 35.) " That beside all heretors who hold a fourty shillings land of the king's majesty *in capite*, that also all heretors, liferenters, and wadsetters, holding of the king, and others who held their lands formerly of the bishops and abbots, and now hold of the king, and whose yearly rent doth amount to ten chalders of victual, or one thousand pounds (all feu duties being deducted), shall be, and are capable to vote in the election of commissioners of parliaments, and to be elected commissioners to parliaments, excepting alwayes " from this act all noblemen and their vassals."

To discover whether a person was truly possessed of ten chalders of victual, or £1000 Scots of free rent, might often be a matter of some difficulty : of course many questions would still arise [9] with regard to the right of voting, and much time would be consumed in parliament by trying the merits of controverted elections. A new statute was therefore made about twenty years after (Charles II. Parl. 3. 1681. cap. 21.) by which a variety of rules were laid down for regulating the elections of commissioners from shires.

By this statute, which in a great measure regulates the elections for the counties of Scotland at this day, it was ordained, that " none shall have vote in the election of commissioners for shires or stewartries which have been in use to be represented in parliament and conventions, but those who at that time shall be publicly infeft in property or superiority, and in possession of a fourty shilling land of old extent, holden of the king or prince distinct from the feu duties in feu lands, or where the said old extent appears not, shall be infeft in lands liable in public burden for his majesty's supplies for four hundred pounds [Scots] of valued rent, whether kirklands now holden of the king, or other lands holding feu, waird or blench off his majesty as king or prince of Scotland." It likewise ordains, " the whole freeholders of each shire and stewartry, having election of commissioners, to meet and convene at the head burghs thereof, and to make up a roll of all the freeholders within the same, whether lying within stewartries not having commissioners or bailliaries of royalty or regality, or without the same, upon the first Tuesday of May next to come, according as the same shall be instructed, to be of the holding, extent or valuation foresaid, containing the names and designations of the fiars, life-renters, and husbands having right to vote for the same."* And in the conclusion it further ordained, " the whole heretors, life-renters, and wadsetters within each shire and stewartry, to contribute for the charges of the commissioners thereof according to their valuation, except only those who hold of noblemen or bishops, or lands belonging to " burrows royal in burgage, and also to the expences of the foot-mantles."

During the whole period from the year 1587 downwards, not a single instance appears of the eldest son of a peer sitting in the parliament of Scotland : and that it was well understood they were ineligible, there is most complete evidence.

Sir George Mackenzie was created Viscount of Tarbat by letters patent, bearing date the 15th April 1685. His eldest son had been returned one of the commissioners for the county of Ross : but it was determined, that he was now incapable of sitting : and the following resolution appears in the records : " In respect the Viscount of Tarbat's eldest son, elected one of [10] the commissioners for the shire of Ross, " by reason that his father is nobilitate, cannot now represent that shire, warrant " was given to the freeholders of that shire to meet and elect another person in his " place." Accordingly his name does not appear in the roll, and the commissioners for the shire of Ross are Sir George Munro of Culcairn, and Sir Donald Bayne of Tulloch.

On occasion of the memorable convention of estates which convened in 1689,

* And expressing the extent or valuation of the said freeholders : and to meet at the head burghs of the said shires or stewartries respective, at the Michaelmas head court yearly thereafter, to revise the roll, and make such alterations therein, as should have occurred since the last meeting.—*Appellant's case.*

to settle the government of the kingdom, and found that James had, by his invading the fundamental constitution, altering it from a legal limited monarchy to an arbitrary and despotic power, and exercising the same to the subversion of the protestant religion and violation of the laws and liberties of the kingdom, forfeited the right to the crown, an attempt was made by Lord Livingstone, the eldest son of a peer, to be chosen as the representative of the burgh of Linlithgow. It accordingly appears, that after William Higgins had been chosen and declared duly elected, his lordship prevailed with the common clerk of that burgh to call a new meeting for election, and to return him also; but the merits of the election were decided in favour of Higgins: And it is remarkable, that although he omitted to state his antagonist's disqualification, contenting himself with averring that he had a majority of legal votes in his favour; and that the clerk had been guilty of an egregious irregularity, not only in admitting bad votes for the noble lord, but also in holding a second election after he (Higgins) had been chosen to represent the burgh; yet the committee of controverted elections, unwilling to allow the ineligibility of the eldest son of a peer to pass unnoticed on March 18th, 1689, came to the following resolution: "In the controverted elections for the burgh of Linlithgow, in favour of the Lord Livingstone and William Higgins, it is the opinion of the committee, that William Higgins's petition should be preferred, 1st. In regard of the Lord Livingstone's incapacity to represent a burgh, being the eldest son of a peer; and, 2dly, In respect William Higgins was more legally and formally elected by the plurality of the votes of the burgesses." This resolution was approved of and signed the same day. "The meeting of the estates having heard and considered the report of the committee, they approve of the same in both heads thereof."

No other attempt was made by the eldest son of a peer to obtain a seat in the parliament in Scotland; and by the act (*Annæ* 1707, cap. 8, intituled, "Act settling the manner of electing the sixteen peers and forty-five commoners to represent Scotland in the parliament of Great Britain;" and containing the exemplification of the treaty of union, it is declared, "That none shall be capable to elect or be elected to represent a shire or burgh in the parliament of Great Britain, for this part of the united kingdom, except such as are now capable, by the laws of this kingdom, to elect or be elected as commissioners for shires or burghs to the parliament of Scotland."

[11] An early opportunity occurred for explaining this enactment. In the first British parliament no fewer than four eldest sons of peers were returned; *videlicet*, Lord Strathnaver, the eldest son of the Earl of Sutherland, for the district consisting of the burghs of Tain, Dingwall, Dornock, Wick, and Kirkwall; John, Master of Sinclair, the eldest son of Lord Sinclair, for the district of Dysart, Kirkaldy, Bruntisland, and Kinghorn; Lord Johnston, the eldest son of the Marquis of Annandale, for the county of Dumfries and the county of Linlithgow; and Lord Haddo, the eldest son of the Earl of Aberdeen, for the county of Aberdeen. Petitions were presented by other candidates, or by freeholders of each of these counties and districts, and in each of the cases it was decided in the house of commons, that the eldest sons of peers were incapable to elect or be elected. It will suffice to state from the journals the proceedings in the case of Lord Haddo. Two petitions were preferred against his lordship, in the names of different freeholders in the county of Aberdeen, objecting to his eligibility in respect of his being the eldest son of a peer of Scotland; and on December 3, 1708, the following procedure took place: "The house, according to order, proceeded to take into consideration that part of the act for uniting the two kingdoms, which relates to the election of members to serve in this House for that part of Great Britain called Scotland; and the counsel were called in, and the petitions and representations relating to the matter were again read; and after the counsel had been heard they withdrew: And a motion being made, and the question being put, that the eldest sons of peers of Scotland were capable, by the laws of Scotland at the time of the union, to elect or be elected as commissioners for shires or burghs to the parliament of Scotland, and therefore, by the treaty of union, are capable to elect or be elected to represent any shire or borough in Scotland, to sit in the house of commons of Great Britain; it passed in the negative." And on the 6th of the same month, the House ordered, "That Mr. Speaker do issue his warrant to the clerk of the Crown to make out a new writ for the electing of a com-

"missioner to serve in this present parliament for the shire of Aberdeen, in the room of the Honourable William Lord Haddo, who, being the eldest son of a peer of that part of Great Britain called Scotland, is declared to be incapable to sit in this house." Similar orders were given in the other cases.

In 1755, on November 18, it was ordered, "That Mr. Speaker do issue his warrant to the clerk of the Crown to make out a new writ for the electing of a commissioner to serve in this present parliament for the shire of Dumfries, in the room of the Right Honourable Charles Douglas Esquire, commonly called Lord Charles Douglas, now become the eldest son of a peer of that part of Great Britain called Scotland." And on May 25, 1737, it was in like manner ordered, "That Mr. Speaker do issue his warrant to the clerk of the Crown to make out a new writ for the electing of a commissioner to serve in this present parliament for the district of boroughs of Lauder, Haddington, Dunbar, North Berwick, and Jedburgh, in the room of Francis Charteris Esquire, junior, of Amisfield, now become the eldest son of a peer of Scotland, and thereby incapable of representing the said district of boroughs in this House."

It was scarcely to be imagined that, in opposition to so constant an usage for a period of upwards of two centuries, and to so many repeated resolutions of the Scottish parliament, and of the British house of commons, an attempt would still be seriously made by the eldest son of a peer to get himself admitted to the roll of freeholders for any county in Scotland with the view, (for it could serve no other good purpose,) of standing a candidate for such county. The appellant was, however, pleased to present a claim to the freeholders of the stewartry of Kirkcudbright, at their Michaelmas meeting Anno 1789, for being admitted to the roll in virtue of certain title deeds then produced.

The minutes of the freeholders on this occasion bear, "that Peter Johnston of Carnsallock objected, though he admits the qualification produced as being sufficient to entitle a person capable of being enrolled, to be added to the roll of freeholders. Yet it cannot avail the claimant in respect, he is the eldest son of the Earl of Selkirk, a peer of Scotland, and as such cannot be added to the roll of freeholders for any county in Scotland. To which the claimant made answer, *viva voce*, and the Court having considered the claim, objection, and answer, they sustained the objection, and refused to inrol the claimant."

The appellant, about the same time, claimed to be put upon the roll for the county of Wigton; but this claim was, in like manner, refused by the freeholders.

Of these judgments the appellant complained to the court of session by two different complaints; and as the question was precisely the same in both, it was agreed, that the complaint from the stewartry of Kirkcudbright should lie over till the merits of the other should be determined.

Answers were accordingly put in on the part of the freeholders of the county of Wigton, and on February 12, 1790, this order was pronounced by the Court: "The lords allow the complainer to give in replies to the answers for colonel Alexander Stewart, and others, and allow the respondents to give in duplies to the replies if they think fit: and appoint the replies to be printed and put into the boxes, and a sufficient number of copies thereof furnished to the respondents, on or before the 29th day of March next; and appoint the duplies to be printed and put into the boxes, and copies of them to be furnished to the complainer, on or before the box day in the vacation, with certification: Neither replies nor duplies will be received after the respective days abovementioned, but upon payment of an amand of forty shillings sterling for each." But notwithstanding several subsequent orders of court, the appellant's reply did not make its appearance till the 30th of June last, when the freeholders were ordered to lodge their duply (which was accordingly done) upon the 8th of September last.

The matter being thus so far prepared for the judgment of the court, it was not to be supposed that the appellant would in the *interim* resort again to the freeholders of either county. He was however pleased to present a new claim to the freeholders of the stewartry of Kirkcudbright, at the Michaelmas meeting, held the 7th of October last, when it was objected by one of the freeholders, "That the claimant being the eldest son of a peer of the realm, is incapable of being inrolled as a freeholder, or of electing or being elected a member of parliament. 2dly,

"The court is barred from judging upon his lordship's claim, in respect that it is notour, and known to every member of court, that his lordship's claim upon the very titles now before the court, to be inrolled, a freeholder of this stewartry, has formerly been rejected by the freeholders, of which his lordship has complained to the court of session, the supreme court of this kingdom, before which court his lordship's right to be inrolled, and the present question is now depending; and therefore it would be acting in contempt of the authority of that supreme court, for this meeting, to interpose: And the objector protested, That if any freeholder shall vote for his lordship's inrolment, that they may be answerable for such vote, and the contempt thereby shown to the supreme court, and for all consequences, and that none might pretend ignorance and therefore he took instruments in the hands of the clerk to the meeting." The majority of the meeting (which was a very thin one, no business of any consequence being expected) overruled these objections, and to order the appellant's name to be added to the roll.

Against this judgment a complaint was preferred on November 12, 1791, the very first day of the meeting of the court of session, in the name of Peter Johnston of Carnsallock, Esquire, evidently in concert with the appellant, and without any previous communication with the other freeholders. The other respondents therefore sisted themselves in court, and gave in a reply to the answers that were lodged on the part of the appellant.

The question being thus brought before the Court in three different complaints, they ordered the merits thereof to be argued at the bar: counsel were accordingly heard on both sides at great length, and on January 24, 1792, the Court pronounced the following interlocutor in the original complaint brought by the appellant in 1789, against the judgment of the freeholders of the county of Wigton: "The lords having resumed consideration of this petition and complaint of the Right Honourable [14] Basil William Douglas, commonly called Lord Daer, and having advised the same, with the answers thereto by the Honourable Keith Stewart Esquire, and others, freeholders of the county of Wigton, replies for the complainer, duplies for the respondents, and writings produced; and having heard parties procurators upon the whole, they sustain the objection to the complainer's claim to be inrolled: Find the freeholders of the said county of Wigton did right in refusing to inrol him, and therefore dismiss the complaint, assoilzie the respondents, and decern: Find the complainer liable to the respondents in the statutory penalty of £30 sterling, and decern against him: Therefore find him also liable in full costs of suit, and appoint an accompt thereof to be given into Court."

Of the same date the following interlocutor was pronounced in the complaint brought by the appellant in 1789, against the freeholders of the stewartry of Kirkcudbright: "The lords having resumed consideration of this petition and complaint of the Right Honourable Basil William Douglas, commonly called Lord Daer, and having advised the same at the same time with a similar question between the complainer and the freeholders of Wigton, they sustain the objection to the complainer's claim to be inrolled in the roll of freeholders of the stewartry of Kirkcudbright: Find the freeholders of said stewartry did right in refusing to inrol him, and therefore dismiss the complaint, assoilzie the respondents, and decern: Find the complainer liable to the respondents in the statutory penalty of £30 sterling, and decern against him: Therefore find him also liable in full costs of suit, and appoint an accompt thereof to be given into Court."

And in the third complaint brought in the name of Mr. Johnston, but prosecuted by the respondents, this other interlocutor was at the same time pronounced: "The lords having resumed consideration of this petition and complaint, and advised the same, with the answers, replies, duplies, petition for the Honourable Keith Stewart and others, minute and papers therein referred to, they sustain the objection to the respondent's claim for inrolment: Find the freeholders did wrong in inrolling him in the roll of freeholders of the stewartry of Kirkcudbright; therefore grant warrant to, and ordain the steward clerk of the said stewartry to expunge the name of the said Basil William Douglas, commonly called Lord Daer, from the roll, and decern, but find no expences due."

From this last recited interlocutor the appellant lodged the present appeal: in support of which he relied on the following statement of facts and circumstances:

By the law and constitution of Scotland, anciently, every person who held lands immediately of the king was entitled, or more properly, was obliged to attend parliament. It was a necessary consequence of the tenure, for parliament was the court of the sovereign as lord paramount, and his vassals were the *patres* [15] *curia* composing it. This duty was enforced by a statute of James I. [of Scotland] made, not from any doubt of its being incumbent on the vassals by law, but because a practice had prevailed of their sending procurators or attornies in their stead. The act A.D. 1425, c. 52, is in these words: "It is ordained and statute, that all prelates, earls, barons, and freeholders of the king, within the realm, sen (since) they are halden to give presence in the king's parliament and general council, fra thineforth (from this time) be halden to compeir in proper person, and not by a procurator, but gif the procurator allege there and prove a lauchful cause of their absence."

The appellants then quoted the act of James I. 1427, (c. 101.) alluded to in the respondents' case: on the terms of which act they observed, That the term freeholder in the law of Scotland is descriptive only of one who is the immediate tenant of the king, and that the term baron is used in different senses, and with modifications. It was anciently, and is at the present day, often used as synonymous with freeholder; thus they say, the barons of the shire, meaning the electors. The great barons were the peers of parliament contradistinguished from the lesser barons, or king's tenants under the degree of peers. Baron-Banrent is synonymous with lord of parliament;—and again, baron is often used as descriptive of one possessed of lands held of the king, erected into a barony with certain privileges, which, however, did not make the grantee or holder a lord of parliament. This last is the most correct signification of the term baron, *baronia* being inferior, or opposed to *dominium*, *Baro* to *dominus*, as a baron was in rank superior to a tenant of the king whose lands did not form a barony. Thus by act 1457, c. 75, (cited also by the respondents), it was declared, That no freeholder of the king under the sum of £20 (that is, whose lands were not so much by the ancient valuation, called the old extent), should be constrained to attend parliament, unless he be a baron, or be specially warned by the king's command. All these distinctions vanished when the king's tenants assembled in parliament, where they formed but one order or estate, called that of the temporal barons, including both the greater and lesser.

The following are the words of the act of James IV. (A.D. 1503, c. 78.) shortly noticed by the respondents: "It is statute and ordained, That fra thineforth no baronne, freeholder, nor vassal quhilk are within an hundred marks of this extent that now is, be compelled to come personally to the parliament, but gif it be that our sovereign lord write specially for them, and sa not to be unlawed for their presence; and (if) they send their procurators to answer for them, with the baronnes of the shire, or the maist famous persons, and all that are abone (above) the extent of an hundred marks to come to the parliament, under the paine of the old unlaw."

[16] This and other statutes plainly show, (as the appellants contended) that attending parliament was accounted a burden, and it undoubtedly was a great one; but a remedy was not applied till the act of James VI. 1587, cap. 114, the purpose of which was stated by the appellants to be for reviving, or carrying into effect the statute of James I. (1427) noticed above, and enacting, "That precepts should be directed forth of the chancery to a baron of each shire, first to convene the freeholders within the same shire for chusing the commissioners as is contained in the said act; which commissioners, being once chosen and sent to parliament, the precepts of parliament for convening of freeholders to the effect foresaid to be directed to the last commissioners of each shire, who shall cause chuse two wise men, being the king's freeholders, as commissioners of the same shire, to have power and to be authorized as the act directs; and that all freeholders of the king under the degree of prelates and lords of parliament, be warned by proclamation to be present at the chusing of the said commissioners, and none to have vote in their election, but such as have forty shilling land in free tenandry holden of the king; and the compearance of the said commissioners of the shires in parliament, or general councils, shall relieve the whole remanent small barons and freeholders of their suits and presence due in the said parliament."

From the period of passing this act the small barons ceased to attend personally in parliament, and commissioners or representatives for them were regularly chosen.

The following were stated by the appellants to be the terms of the act Charles II. parl. 1. 1661. c. 35. already noticed by the respondents: "The king's majesty considering that diverse debates have formerly occurred concerning the persons who ought and should have vote in the election of commissioners from the several shires of this kingdom to parliament, and who are capable to be commissioners to parliament, and that it is necessary for the good of his service that the same be cleared for the future, doth therefore, with advice and consent of his estates of parliament, statute, enact, and declare, That besides all heritors who hold a forty shilling land of the king's majesty in capite, that also all heritors, liferenters, and wadsetters holding of the king, and others who held their lands formerly of the bishops or abbots, and now hold of the king, and whose yearly rent doth amount to ten chalders of victual, or £1000 (all feu duties being deducted), shall be and are capable to vote in the election of commissioners of parliaments, and to be elected commissioners to parliaments, excepting always from this act all noblemen and their vassals." The act then settles the sum to be allowed for the charges of the commissioners, and ordains, "That the whole freeholders, heritors, and liferenters, holding of the king and prince, shall, according to the proportion of their lands and rents lying within the shire, be liable and obliged in the pay-[17]-ment of the said allowance, excepting noblemen and their vassals."

The statute Charles II. parl. 3. 1681. c. 21. noticed in the appellant's case, was the last statute on the subject before the union, and so the law stood with respect to the electors of the representatives for the counties when that treaty was entered into. Every tenant of the king, whose property was of the extent specified, was, by the clear and express terms of the acts which have been recited, entitled to vote in the election, and, for that end, to be put on the roll of freeholders, provided he was under the degree of a prelate or lord of parliament, according to the act 1587, or, excepting noblemen and their vassals, according to that of 1661.

The treaty of union was attended by an act of the Scots legislature, (declared to be of the same force and effect as if it had been engrossed in it,) for settling the manner of electing the sixteen peers, and forty-five commoners, to represent Scotland in the parliament of Great Britain. And it was thereby enacted, "That none shall be capable to elect or be elected to represent a shire or burgh in the parliament of Great Britain for this part of the united kingdom, except such as are now capable, by the law of this kingdom, to elect or to be elected as commissioners for shires or burghs to the parliament of Scotland."

Accordingly the qualifications of those entitled to elect or to be elected into the house of commons for Scotland, remain, at this day, exactly as settled by the Scots acts of 1587, 1661, and 1681. The acts passed since, respecting the elections for Scotland, have been mere regulations for the better keeping of the rolls of electors in the several counties, and more orderly conduct of the elections and returns. By that made in the 16 Geo. II. c. 11. persons alleging themselves to be qualified, and wishing to be enrolled, were required to give notice of their claims two months before the head courts held annually at Michaelmas; the freeholders on the roll were constituted judges in the first instance, and proceedings in the nature of an appeal to the court of session were authorised at the suit of any claimant, in case his claim to be enrolled was rejected; and at the suit of any freeholder on the roll, in case he apprehended that a claimant was improperly admitted.

The appellants then shortly stated the proceedings in the present cause: and after alluding to the determination of the respective parliaments in 1685, 1689, 1708, 1755, and 1787, proceeded to observe, that when the subject was debated before the court of session, the respondents, in addition to these determinations of parliament, also relied on the want of positive evidence on the appellant's part that any instance had occurred since the passing of the act 1587, of the eldest son of a peer voting or attempting to vote in the elections of the commons, or being elected, except in Lord Livingstone's case, 1689, and the cases in 1708, just mentioned; and that, from this silence or [18] defect of proof, the respondents attempted to

infer, 1st, That the law must have been understood to be adverse to the peers sons ; and 2dly, That if they ever had the right, it was lost by disuse. In answer to which, the appellant before the said court, pleaded the statutes of 1587, 1661, and 1681, as bestowing in express and clear terms the right of being enrolled and voting at elections for the shires upon the eldest sons of peers, in common with all other persons possessed of lands of the tenure and extent therein-mentioned, not being lords of parliament or noblemen. And to show that the term nobleman, used in the act 1661, was synonymous with lord of parliament, which is the term used in that of 1587, and was not considered as applicable to, but on the contrary was used as exclusive of the eldest sons of peers, the appellant gave in evidence an act or regulation of parliament, made the 12th of May 1662, which declares, "That none shall be admitted to stay in parliament but the ordinary members of parliament, viz. the archbishops, bishops, noblemen, officers of state, commissioners from shires and burghs, and the clerk, register, deputy, and servants employed by him to serve in the house ; and besides these, admittance is allowed to the eldest sons and apparent heirs of noblemen ; to the senators of the college of justice, etc. and it is ordained, that none presume to sit on the benches save the nobility and clergy—that noblemen's eldest sons, and heirs foresaid, sit on the lower benches of the throne," etc. Another act or regulation of the 13th May 1662, proving the same thing, was also referred to.

The appellant next maintained his title according to the spirit as well as the letter of the statutes. If the eldest sons of peers were entitled and were in use to attend parliament as lesser barons or freeholders before the act 1587, it follows, that after it they were electors and eligible, for that act had no other object but to introduce representation in the stead of personal attendance. In evidence that they were anteriorly entitled to sit, and, in many instances, exercised the right or discharged the duty, the appellant produced extracts or certified copies of the rolls of parliament 1478, 1481, 1488, 1503, 1525, 1526, 1546, d. 2d d. 3d. 1567, and 1568. That there are no rolls extant before 1466, and that the rolls of many of the parliaments held between that time and the restoration of Charles II. are lost or amissing, were facts admitted. (See note, p. 430.)

[19] To prove that many of the eldest sons of peers thus sitting in parliament, and styled in the rolls *Magistri* or Masters, with the addition of their father's title (according to the custom of those [20] times,) were seised of lands and estates which qualified them as lesser barons, the appellant produced authentic copies of the royal charters in favour of fifteen of them—And he submitted to the Court whether the well known chasms and imperfections in the records of such grants did not make it more a matter of surprise that he had discovered so many than that he should have traced so few ?

These charters were relied on by the appellant as important evidence in another view, as proving that the persons mentioned in the rolls of parliament by the title of masters, were, so far as the instances went, all eldest sons of peers, and a doubt was thus removed which might otherwise have been started as to their real quality, because it does appear that the title of master was, in ancient times, given on some occasions to members of the family not precisely in that relation ; to the grandson of the peer for example, or to his next brother and heir presumptive.

The appellant also referred to the acts imposing taxes in 1597 and 1633 to prove that the eldest sons of peers, holding estates in their own right, were taxed under the appellation of barons and freeholders.

He likewise gave evidence of the eldest sons of peers sitting frequently as jurymen on trials in the judiciary, which could only be as king's tenants, and also of their sitting in conventions of the estates at a period so late as 1596. The similarity of these conventions, in all respects, to parliaments, is well [21] known, and was so great that the best historians often confound them.

As to the entries in the minutes or journals of the Scots parliament 1685, of the convention of 1689, (which respect the right of being elected only,) and of the British house of commons 1708, (which goes likewise to the right of electing,) relied on by the respondents, the appellant denied that they were competent or admissible evidence in the present cause. Parliament or the commons, on such occasions, not acting as a court, their resolutions are not authorities in a court of law : But if they were

to be received, they must be taken with all concomitant circumstances and explanations, and therefore the appellant stated in general, that to the resolutions of the parliament of Scotland in matters of election, very little attention was paid even by parliament itself : thus in 1681 it was resolved, That none but residing trafficking merchants were eligible to represent the burghs ; and yet, in that very parliament, Sir George Skene, a country gentleman, sat as member for the town of Aberdeen ; and John Dempster of Petliver, for Inverkeithing ; and in four years after, that resolution was so much forgotten or so little regarded, that Lord Fountainhall, an eminent lawyer, and a member of the parliament 1686, enumerates, amongst the grievous and tyrannical acts of James, " the offering to remove Mr. John Dempster, " Sir Patrick Murray, etc. as not actual burgesses, and so incapable." The appellant stated more particularly,

1st, That little weight was due to the entry of 1685. It passed without debate, and no writer of the period (neither Lord Stair, nor Sir George Mackenzie, nor Lord Fountainhall) takes the least notice of the occurrence. It was impossible, therefore, for the appellant to state the secret history of it. It may have passed *per incuriam*. At that period the members of the Scots parliament were allowed to resign or vacate their seats at pleasure, or at least upon assigning the most frivolous reasons, of which the appellant referred to many instances. Some years after a committee was appointed for revising the minutes, evidently on account of the improper manner in which they had been kept. As an instance, the appellant gave evidence from the journals, That about this time a tax act had been entered in the minutes without the knowledge of the commissioners of the burghs. The proceedings of these times are stigmatised even by the historians most friendly to arbitrary power. An act of indemnity was passed in favour of the officers of state, " of all complaints against them ; " and at the revolution the convention declared the proceedings of the parliament 1685 intolerable grievances.

2d, With respect to the entry of 1689. The case which gave occasion to it shews that the doctrine now inferred from the transaction of 1685 was within four years forgotten, or rather had never been heard of.—Lord Livingstone, though the [22] eldest son of a peer, stood candidate for the burgh of Linlithgow, and was elected without objection on that score : Nay more, the appellant gave the original case or information which the other candidate Higgins exhibited to parliament, in evidence, to shew that even at that stage the objection had not occurred to him or his counsel. It seems first to have occurred to the committee, who are accused of partiality by all the annalists of the period. Two other remarkable circumstances in this case are proved by the proceedings of parliament. Lord Livingstone, while the question depended before the convention, was in arms against their authority within a few miles of the city of Edinburgh : And Higgins, his opponent, was allowed to take his seat before the merits of his petition were heard, as appears by the act of 16th March 1689, declaring the meeting lawful.

Between this time and the date of the resolution of the British house of commons, which the respondents rely on, there occurred a transaction of the last importance, the union between England and Scotland ; and the appellant gave in evidence (as bearing strongly on the present question) the minutes of what passed in the parliament of Scotland in settling who were to be the electors of the Scots representatives for the commons, and who were to be accounted eligible. An overture or motion was made to declare, " That no peer, nor the eldest son of any peer, can be chosen " to represent either shire or burgh in this part of the united kingdom in the house " of commons." A great debate ensued, which occupied two days ; and it being moved in place of the words above mentioned, to adopt the following, " That none shall elect " or be elected to represent a shire or burgh in the parliament of Great Britain, except " such as are now capable by the laws of this kingdom to elect or be elected as com- " missioners for shires or burghs to the said parliament ; " it was put to the vote. Whether the first or second clause should stand part of the law, which was the constant mode of determining between two opposite or different propositions in the Scots legislature, and the majority decided for the second ; the whole body of the nobility, with only one exception, voting for it, and forty-seven out of fifty-two representatives of counties voting for the first. Defoe, in his history of the union, says, that in the debate on the first clause, the principal argument on one side was, " That

"it had been always allowed in Scotland before that the eldest sons of peers might "be elected:" And he states that this was not contradicted; but the arguments on the other side were expedience, the great influence of the nobility, and the small number of members to be thereafter chosen to the house of commons. The most natural interpretation of the transaction, as supported by the history of the times, is, that the peers contended that those of their order who should not be elected of the sixteen to sit in the house of peers, ought to be eligible to sit in the house of commons; that the landed gentlemen, on the other hand, wished to exclude both the peers and [23] their eldest sons, and with that view proposed the first clause, which would have done it effectually; and that the clause finally adopted was proposed as a conciliatory or middle course, by which the peers would be excluded and their eldest sons admitted.

3d. With respect to the resolution of the British house of commons in 1708, the appellant submitted to the court, that though it professed to declare what was the law of Scotland, there was neither evidence nor probability of a proper enquiry being made to ascertain that law. The petitions on that occasion, against the election of the peers' eldest sons, were filled with declamation against the influence of the peers of Scotland, and topics of expediency. The determination was probably swayed by popular opinion, and a wish to please the people of Scotland then extremely agitated. From the little that appears there is reason to think that for law and precedent the house went upon nothing but the entries of 1685 and 1689.

The appellant lastly gave evidence, That notwithstanding this resolution, Lord Strathnaver, the grandson and heir apparent of a peer of Scotland, was allowed to sit in the British house of commons as representative elected for the county of Sutherland: as was Lord James Murray for Perthshire, though the descent of the honours of Atholl was, by act of parliament, cast upon him, as if his elder brother had been naturally dead, and the eldest son of Lord Lovat, the attainder of the father being held to take off the disability of the son.

To the respondents' argument from the alleged non-exercise of the privilege contended to remain with the peers' eldest sons after the act 1587, the appellant answered; 1st, That the disuse was not fully proved: 2dly, That though it were established, it did not imply that the law must have been understood as adverse to the peers' eldest sons, because the disuse could be accounted for otherwise: And 3dly, That though it were established, it could not avail in point of law.

1st, As to the proofs of disuse, the appellant observed, that from 1587 to 1661, though a great many parliaments were held, yet the rolls of only four are extant; and that from the restoration till the union of the kingdoms, though there are a great many rolls of the different sessions of parliament, there were but six new parliaments or general elections, which he apprehended were too few to afford sufficient proof of a negative practice. That betwixt the year 1587 and the restoration the peers' eldest sons may have sat without proof of it now remaining: That the rolls were not accurately kept, and names sometimes were omitted; in proof of which the appellant gave evidence, that in the year 1526 a lesser baron appears on the committee of articles, though no lesser baron is in the roll of that parliament. The appellant also gave in evidence, that at an earlier period several eldest sons of peers are mentioned in history and ancient documents as having attended parliament who are not noticed in [24] the rolls. During the dependance of this cause the rolls of the parliament 1568 were recovered, and proved the attendance of the eldest sons of peers at a later period than was known to either party at the commencement of it.

2dly, The disuse, instead of implying that the law was understood to be adverse to the peers' sons, is otherwise accounted for in various ways. Had the inducement to attend after 1587 been equal to that before, the aristocratic pride of the peers' eldest sons was alone a sufficient reason to have prevented them: Previous to that act they, like all other king's tenants, might attend in their own right; after that, they must have solicited the vote of every freeholder: Of men who envied them their family honours, and to have classed themselves with those who were paid for their attendance. In those days pride had as powerful an influence as the love of wealth has now. To counterbalance this there was no motive to induce their attendance: even previous to this it may be observed, that the lesser barons, and, at the same

periods, the eldest sons of peers often relaxed their attendance in parliament : It was only in turbulent interesting times that they attended in numbers. From about the year 1587, till the troubles in the reign of Charles I. there was nothing interesting in the parliament of Scotland ; and after the union of the crowns the situation of Scotland was deplorably depressed. A proud and numerous, but corrupt nobility, lesser barons of mean fortune, a poor clergy, and representatives from wretched burghs, joined in one house, formed the parliament : Their sittings were but of a few days : The business already prepared by the lords of the articles was voted with dispatch, and without freedom of debate : Parliament was a mere cypher ; and it was particularly so about the period of those four parliaments, of which alone in that period we have rolls. Even after the restoration a seat in parliament was so little desirable, that the borough of Cromarty petitioned to resign their privilege ; and their right to send members was accordingly annulled by act of parliament.— If any law had ever passed to prevent the peers' eldest sons to elect and be elected, it was too important a change, and too violent an attack upon the powerful aristocracy of Scotland, not to have been taken notice of by historians ; whereas none of them, nor any writer upon the law and constitution of Scotland previous to this century, mentions that the peers' eldest sons were excluded : a silence inconceivable if they had been excluded either by statute or by common law. The absurdity of the reasons given for the exclusion by all the writers after the union who support the doctrine (reasons so ridiculous, that the respondents, rather than adopt them, chose to say they were not bound to assign any), was urged as an additional presumption, that the doctrine was not founded in law.

3dly. As to the legal effect of disuse, in which, amongst other things, the respondents had alleged, that use formed all the parliamentary law, and that there was no other authority, except [25] custom, which allowed non-residents to be elected ; nor any other, except disuse, which prevented all lesser freeholders from yet attending if they chose, as the act 1587 seems optional ; the appellant answered by quoting an unprinted act 1587, in which it was declared, " That non-residence shall not be " an exception why any, otherwise capable, may not vote in the election, or be elected " commissioners ;" and by quoting the act 1597, c. 276, " That no baronnes be " received as commissioners for any sheriffdome within this realme, at any parlia- " ment to be holden hereafter, except the said baronnes bring and produce with them " sufficient commissions granted to them in one full convention of the haill baronnes " of the said sheriffdome." The appellant further maintained, that rights relative to sending members for the commons, were as capable of being lost by disuse, as rights of peerage. That in the case of Cromarty, an act was necessary to take away the right, which could not otherwise have been annihilated. That in England, several burghs, and in Scotland, one county, had, after a great many years of disuse, claimed again, with success, their right of sending members ; though that could not now be done, as the union of the kingdoms had fixed the numbers of the respective representatives. The appellant in general maintained, that, by the law of Scotland, mere non-usage, without some contrary positive usage, cannot alter a law ; that disuse can only affect statute law, not ancient custom ; and that its effect is restricted to private rights, and does not extend to public rights.

The appellant, in answer to the plea of non-user, as applicable to this case, also stated to the court this material fact, that no rolls of freeholders were kept prior to 1681, and very few before the union ; so that the eldest sons of peers, for aught that appears, may have voted in the election of commissioners for shires to the parliament of Scotland.

The appellant having thus stated at length the arguments used by him before the court of session, concluded his printed case with the following reasons for reversing the interlocutor of that court, which found that the freeholders of Kirkcudbright had done wrong in enrolling him in the roll of freeholders. (J. Scott, G. Hardinge, T. Erskine, F. Hargrave, W. Adam.)

The only question in this cause (as the appellant apprehends) is, Whether his being the eldest son of a peer of Scotland was in law a bar to his claim to be enrolled in the roll of freeholders of the stewartry of Kirkcudbright, as in every other respect his title was allowed to be unexceptionable ? To that precise question the freeholders and the court of session ought to have confined themselves ; and the appellant

imagines your lordships will think yourselves confined. What are to be the consequences if he is enrolled. Whether he will be entitled to vote in the election of the county representative, or may himself be elected if the choice of the freeholders shall ever fall upon him? The courts of law are not the proper judges:—These questions, if ever agitated, must be determined in another place.

[26] Whether the appellant is entitled to be enrolled, although he be the eldest son of a peer of Scotland, is a question to which the statutes 1587, 1661, and 1681, afford a decisive answer. It is allowed that they are subsisting laws, and it is not pretended that any subsequent statute has made the smallest alteration in what they enact upon the present point. The first of these statutes introduced election and representation, and enacts in the most explicit terms, "That all freeholders of the king under the degree of prelates and lords of parliament shall be summoned to attend the election of the commissioners for the shire, and have voices, provided they are possessed of a forty shilling land:—"The appellant is possessed of a forty shilling land held of the king, and he is a person under the degree of prelates and lords of parliament. The second, in terms as clear and positive, enacts, "That all heritors who hold a forty shilling land of the king *in capite*, shall be and are capable to vote in the election of commissioners to parliament, excepting noblemen and their vassals:—"The appellant has the qualification as already mentioned, and he is not a nobleman, or the vassal of a nobleman. The third authorised and required the making rolls of the freeholders in the several counties, referring to the former statutes for the description of those whose names were to be inserted in the rolls, viz. The whole freeholders having election of commissioners. Whoever therefore are by the statutes 1587, 1661, 1681, entitled to elect, are by the last, entitled to be put on the roll of freeholders. It has no exception of prelates, lords of parliament, or noblemen: because, being excepted by the former acts, they could acquire nothing by the terms used in this.—Again, the act of the 16th of his late majesty, under the directions of which the freeholders at their head courts more immediately act in matters of enrolment, and under which alone the court of session has a right to interfere, does not contain a syllable to countenance the idea that a peer's eldest son is not entitled to be put on the roll if otherwise qualified: and it may be added, that there is not one author who lays down such a doctrine in any work or treatise on the law of Scotland, before the period of the union, nor is there a single decision of the court of session till the present, to support it.

The appellant therefore relies on the unequivocal terms of the statutes as insurmountable.

But the respondents say, The question of enrolment hinges upon another, Whether the eldest son of a peer of Scotland is eligible to represent the commons of that country in parliament? Admitting that the courts of law cannot entertain the direct question as to eligibility, which belongs to the house of commons; and that there is no mode by which that question can be brought before the courts of law singly or directly; the respondents contend that it must necessarily be considered by the courts of law when it comes before them incidentally or collaterally: that the right to elect, and the right to be elected, are in Scotland correlative and convertible terms; and as no person can [27] either elect or be elected for a county, unless his name is upon the roll of the freeholders of that county: the court of freeholders, who have jurisdiction over that roll in the first instance, and the court of session in the second, are entitled to consider, Whether a person claiming to be enrolled is eligible to parliament, when it depends on that, whether his claim ought or ought not to be sustained: And in the present case they undertake to show, That by the law and constitution of Scotland the appellant, as the eldest son of a peer, could not be elected; from whence the inference will be, That he ought not to be enrolled.

The appellant allows there are cases where the courts of law must incidentally and collaterally decide questions cognizable strictly in the houses of parliament only, as respecting the seats, rights, and privileges of their own members. But the courts of law will never go out of their province and trench on the privileges of the house of commons without absolute necessity; and therefore, if the right to be enrolled can be discussed independent of the right to be elected, they will not listen to an argument on the latter, in order from thence to deduce an inference against the former.—For instance: As it is a matter of doubt whether a clergyman can be elected in

Scotland, while it is settled by practice that he may be enrolled, it is presumed that your lordships would not suffer an argument to be held before you upon a clergyman's eligibility, as collateral matter, when the direct question did, and only could, regard his right to be enrolled.

If, however, it is your lordships' pleasure, the appellant has no hesitation to combat the abstract proposition which the respondents maintain. That the eldest son of a peer of Scotland is ineligible to represent a Scots county in parliament, as raising the inference in the present cause, that he is not entitled to be enrolled a freeholder, though possessed of a qualification in land which would entitle any other commoner.

And, in the first place, your lordships will attend to the acts of parliament which have been stated. In the general description which they give of the persons in whom the right both to elect and to be elected shall vest, the eldest sons of peers are comprehended, and in the exception to the general rule they are not included. When enacting in 1587, "That all freeholders of the king, under the degree of prelates and "lords of parliament, shall be entitled;" and again, when declaring by the act of 1661, (made for the express purpose of removing all doubts,) that "all heritors" holding property by a certain tenure, and of a certain extent, "shall be, and are "capable to vote, and to be elected," and anxiously and repeatedly excepting noblemen, lest the general words "all heritors" should be understood to comprehend even the peers, is it possible to conceive that the legislature had forgot that such an order of men as the eldest sons of peers existed, or could mean by the terms so used, to exclude them? If it shall be said, that it was unnecessary, because by common law or custom they stood already excluded, the appellant asks, if they were more excluded than their fathers, [28] whom it seems to have been thought necessary or right, clearly and pointedly to except?

It has indeed been insinuated by the respondents, that the eldest sons of peers are comprehended in the exception of the act 1661, as noblemen; but that term never was applied to them in the language of the law; it never was applied to them with propriety even in common language; and farther, the appellant has shewn, that in the acts and resolutions of the Scots parliament, made almost in the same breath with the statute 1661, the terms noblemen and nobility are used as descriptive of the peers only, in express contradistinction to their eldest sons. To maintain then, that an act of parliament, bestowing a right upon "all heritors except noble-men," meant to withhold that right from "some heritors though not noblemen," is the grossest perversion of all the rules of construction.

The appellant therefore thinks himself entitled to contend, That under the words of the statutes, the eldest sons of peers would have become capable both of electing and being elected, whatever their condition was before; and at any rate he maintains with confidence, That their condition was not made worse; that the argument of the respondents derives no aid from the statutes, and that they are driven to shew that the proposition they lay down, is founded on common law, and the principles of the Scottish constitution. The burden lies on them, but the appellant will take upon him to demonstrate the contrary.

It is not to be denied, that prior to the passing of the act 1587, every tenant of the king was by his tenure obliged to attend in parliament; and the only exception which can be pointed out, is the leave of absence granted to those whose property was of small extent by the statutes 1457 and 1503: Even as to them it was an indulgence, not an exclusion, for they might have attended if they chose. To say, therefore, that the eldest sons of peers were incapable of sitting in parliament, is tantamount to maintaining that they were incapable of being king's vassals, and that they could not either by grant or descent take lands to be held immediately of the sovereign: a proposition monstrous upon the bare statement of it. If there were no evidence one way or the other, to ascertain whether the eldest sons of peers were in use to sit in parliament before 1587, the presumption certainly would be that they did sit (because they must have sat), if they enjoyed lands held of the king. If there were evidence that none of them ever sat, the only conclusion would be that none of them were qualified as king's tenants. But it is proved beyond contradiction, by the rolls which have been preserved, that in almost every parliament there were eldest sons of peers attending and reckoned constituent and efficient members. If they sat or were entitled to sit as lesser barons by virtue or in consequence of their properties

before the passing of the act 1587, the conclusion is irresistible, that from and after the passing of that act, they were entitled, when possessed of freeholds, to elect or to be elected representatives of the shires where these freeholds lay. [29] That act was made to abolish and dispense with the personal attendance of the lesser barons, and to enable them in future to appear and act by their representatives. All freeholders of the king, under the degree of prelates and lords of parliament, were required to attend the ensuing elections; and independent of these comprehensive words, the spirit and essence of the measure evidently was, that all who were formerly entitled or obliged to sit in person, should thereafter send their representatives. There is not a colour of reason for supposing that any man so entitled before, was thereafter to be disfranchised or relieved of his feudal obligations.

The only question therefore upon this head is, In what character did those eldest sons of peers, whom we find sitting in parliament before 1587, attend? Feeling the unavoidable conclusion if it is answered, as lesser barons; the respondents struggle to raise a supposition that it may have been in some other character, and they bewilder themselves, and endeavour to puzzle the cause by figuring other characters. They allege, It was as apparent heirs of peers, by a sort of nobility. But this is not countenanced by any thing in the law or constitution. In all other respects they were commoners. As far as can be judged from the arrangement of the rolls, they were classed with the lesser barons. They are generally placed after the greater and before the lesser barons, and often along with the latter. The only instance in which they are placed among the greater barons is in the year 1487, when some eldest sons of earls are placed before the lords: but they are never found intermixed with the greater barons, as they frequently are with the lesser. Again, the respondents have said, they attended only as spectators or auditors. But they are marked in the rolls as members, and it is in evidence that they sat on committees. Next, it was as proxies for their fathers. But proxies are always mentioned as such, and for whom, and there is not a single instance of an eldest son being proxy for his father: besides, there are upwards of twenty instances of the father and son both sitting at the same moment. Lastly, It was as private individuals, whose assistance or attendance the king had required by special summons, though otherwise not qualified. But this too is mere assertion, and in the same way that this is ventured, the respondents may broach any fancy however wild and improbable. There is not the least authority for saying that the sovereign ever called to parliament persons not otherwise entitled, or that he had the power of doing so. Sir George Mackenzie, though the greatest stickler for royal prerogative, was clearly of opinion that he had not. The acts of 1457, c. 75, and 1503, c. 78, which are the only authorities the respondents have quoted, afford them no aid.—By the first it was declared, "That no freeholder of the king, under the sum of £20 should be constrained to come to parliament, unless he was a baron, or else he should be specially warned by the king's commandment." By the second, That no baron, free-[30]-holder, or vassal, within 100 marks of new extent, should be compelled to come personally to parliament, unless written specially for. How these acts should be stated as evidence that persons not freeholders could be, or in fact were, specially summoned to attend parliament, is inconceivable. The exercise of the royal authority, which has long prevailed in England, of calling the eldest son of a peer by writ for a barony in the father, was never heard of in Scotland. The only way in which the sovereign of Scotland could command the attendance of one who had no parliamentary qualification, was by bestowing one upon him, or creating him a lord of parliament; and there is neither vestige nor probability of the masters appearing in the rolls being created peers, the name given to them alone demonstrating the contrary. Lord Kaimes, in his *Essays on British Antiquities*, asserts, That the eldest sons of the nobility who attended parliament before the act 1587, were "barons by tenure infeft in lands to entitle them to a seat there:" and the assertion is justified by the search made on the present occasion. The last of many of the records, and the imperfection of others, renders it impossible to give evidence of the real situation of all the masters marked as attending parliament; but so many of them are proved to have had estates held of the king, that it is no stretch to suppose they all had. In several instances the estates appear to have been given on purpose to qualify them, as Lord Kaimes says.

The facts thus proved, of several of the masters who appear sitting in parliament having estates in their own right, which, if they had not been the eldest sons of peers, undoubtedly qualified them, lead to inextricable difficulties on the respondents' hypothesis that they were disqualified, while it cannot be denied that they actually attended. The obligation to attend parliament and other courts of the sovereign were of the essence of the grants, and legally attached upon the grantees by acceptance; yet, according to the respondents, attendance would have been illegal and nugatory.—How is this to be extricated? If they say the king must have dispensed with the feudal obligation, how is this to be reconciled with the power they suppose to be in the king to call for their attendance as individuals, and his actually exercising it in so many instances? First, he is made to dispense with the feudal obligation in respect of the legal disqualification, and then again to dispense with that disqualification, in order to have the assistance in parliament of the peer's son as an individual subject, which he could not have from him as a feudal vassal. In such absurdities and contradictions, those who deny the force and consequence of plain evidence, of a simple truth, must ever involve themselves.

The argument of the respondents, "That even if the eldest sons of peers had the right by common law, by the constitution, and by the statutes, they have lost it by disuse," is so wild and untenable as scarcely to merit notice. In the first place, many of the rolls of parliament are wanting, and [31] there were no rolls of freeholders till 1681, so that the eldest sons of peers may have voted, and may have sat in parliament. In the next place, though it were certain that none of them had ever attempted to exercise their right since the act of 1587, it could have no influence. A privilege, which it is optional to use or not, can never be lost by non-user. All that can be inferred is, either that peers' eldest sons, from family pride, or from the insignificance of the object, did not claim the privilege, or happened not to be chosen. A privilege which belongs to individuals unconnected, and which arises to every one separately when he comes to be possessed of the qualification, cannot be injured by the act or neglect of others, though they happened to be in the same predicament. Suppose that there could be no instance given of a person claiming to be inrolled and to vote by virtue of his holding lands valued at £400, that all the enrolments hitherto had been upon the old extent, could it be maintained that a person at this time had lost the benefit introduced by the act of 1681, or that that statute was so far in desuetude? By the law of Scotland a statute may be virtually repealed by desuetude; but that always implies a contrary use, and an opposite right acquired by custom. Here no person can be said to have acquired what the eldest sons of the peers have hitherto neglected, or been prevented from using. What the respondents or other freeholders have acquired through the exclusion is ideal, or it is odious and unconstitutional; amounting to nothing but the increase of their own influence by diminishing the number of electors and eligible persons.

Mr. Erskine lays down the law on the subject of desuetude with precision, and in conformity with all other institutional writers: "No statute can be repealed by mere non-usage or neglect of the law for the greatest length of time; for non-usage is but a negative which cannot constitute custom: There must be some positive act that may discover the intention of the community to repeal it.—This power in custom to derogate from prior statutes has been confined by most writers to those concerning private right; and it has been adjudged once and again, That laws which regard the public policy cannot fall into disuse by the longest contrary usage."

The appellant having thus shown that the eldest sons of peers were members of parliament before the act 1587, as lesser barons, when possessed of freeholds, and did actually, as such, attend; that by the terms of the acts 1587, 1661, and 1681, all persons in that situation became entitled to elect or be elected county representatives, and that the right vested by the statutes is not nor could be lost by disuse or non-claim; the only question seems to be, Whether the resolutions of 1685, 1689, and 1708 ought to induce the courts of law to put a construction on the statutes contrary to the plain import of the words used in them, or oblige the judges of the present day to shut their eyes [32] and give up their understandings? The appellant knows that where there is a doubt in the construction of statutes, much weight is due to the decision of the proper judges explaining them: and once

explained by proper authority, it is often better to submit to what is erroneous than to let uncertainty prevail; but where the statutes are perfectly plain and clear, as in the present case, no decision or train of decisions can be allowed to operate a repeal or contrary enactment. Still less weight surely is due to the resolutions of parliament in matters of contested elections, which cannot, even with propriety, be quoted as legal authorities in courts of law, and above all, to resolutions circumstanced like those of the parliament of Scotland and in the British house of commons on the point in question. The only one of them that bears a mark of solemnity is that in 1708, on which occasion there is no reason to believe the house of commons went on any other ground than the supposed authorities and precedents of 1685 and 1689; nor can it be reckoned a failure in respect to them, to doubt if they were competent judges of a question in the law of Scotland, for properly determining which a deep knowledge of the constitution, and a search into records and precedents during a remote period, were necessary. The two cases that have occurred since were merely following the rule laid down in 1708. That of Lord Elcho in 1787 roused the attention of those concerned, and gave occasion to the investigation, the result of which is now submitted to your lordships.

If it could be said that the entry in 1685 and determination in 1689 corresponded with the general sense of lawyers and of the people as found constructions of the statutes, it were something; but when we find the most eminent systematical writers on the law and constitution of parliament living at the period, silent on the head, and laying down general rules as to qualifications, and the capacity to elect and be elected, repugnant to the doctrine supposed to have been thus recently established, without hinting at the exception so introduced, now held out as deciding a great constitutional point, we must draw the conclusion, either that they never heard of those determinations, or that they thought them unworthy of regard. When we see a majority of the parliament of Scotland, when settling the union, putting their negative on declaration, "That the eldest sons of peers are by law incapable of being elected;" and the whole body of the peerage struggling for and obtaining the declaration, "That such as were capable by the laws of Scotland should be and remain so, and none else;" and when we see a number of the eldest sons of peers immediately standing candidates, and four of them successful, it is impossible that the respondents can be heard to allege that the sense of the people, or of those who could judge, went along with the resolutions of 1685 and 1689 as just constructions of the statutes, or as recognising an established rule of law.

[33] On the whole therefore, as the capacity of electing or being enrolled stands at this moment precisely as it did by the law of Scotland at the time of the union, and, as by that law there was no bar to the eldest son of a peer being enrolled a freeholder when possessed of the requisite qualifications, the appellant, with confidence, expects your lordships' judgment in his favour.

The following are the reasons stated by the respondents for dismissing the appeal, and in support of the interlocutor complained of: (A. Wight, G. Fergusson.)

I. Although the only question between the parties that was or could be agitated before the court of session was, Whether the noble appellant had or had not a right to be admitted to the roll of freeholders? The solution of that question must necessarily depend upon his eligibility, the right to elect and to be elected going hand in hand, and unless where, by particular statutes, a disqualification in one respect only is imposed. The act of 1587 ordered the freeholders to elect freeholders. The act of 1661, cap. 35, declares, that persons of a particular description "shall be and are capable to vote in the election of commissioners of parliaments, and to be elected commissioners to parliaments." The act of 1681 calls the rolls of freeholders the rolls for elections. Fountainhall, when mentioning an election for the county of Mid-Lothian that took place upon the 12th of March 1685, observes, that "the king's advocate and justice clerk should not have voted in this election, because, being officers of state, they were not capable to be elected, and to elect and be elected *sunt correlata quorum uno sublato tollitur et alterum.*" The act of the 12th of Anne, cap. 6, constantly joins together the right to vote and the right to be elected. The act of the 16th of George II. also provides, that every person chosen in his absence to serve in parliament for a shire in Scotland, "shall, before his taking his seat in parliament, take the oath appointed to be taken by every freeholder who shall

"claim to vote at any election of a member to serve in parliament, by the act of the seventh year of his present majesty, etc. before the lord steward of his majesty's household, or any person or persons authorised by him for that effect, which he or they are hereby empowered and required to administer; and if a member, to serve in parliament, so elected, shall neglect or refuse to take the aforesaid oath, such election shall be void." The resolutions formed by several committees of the house of commons in the year 1781, that the clause of the act of the 12th of Queen Anne, declaring, that from and after the determination of the then parliament no conveyance or right whatsoever, upon which infeftment was not taken, and the sasine registered one year before the teste of the writs for calling a new parliament, or one year before the date of the warrant for making out a new writ for an election, during the continuance of a parliament, should entitle the person or persons so infeft to vote or to be elected at that election in [34] any shire or stewartry in Scotland, was virtually repealed by a clause of the act of the 16th George II. enacting, "That no purchaser or singular successor shall be inrolled till he be publicly infeft, and his sasine registered, or charter of confirmation be expedited, where confirmation is necessary, one year before the inrolment;" and that persons so inrolled were eligible, although their infeftments had not been recorded a complete year before the teste of the writs for calling the parliament, proceeded also on the same ground that the right of voting implied eligibility, and *vice versa*. In short, every disqualification that is founded upon a person's status, goes equally to his right to elect, as to his eligibility. It is because they cannot be elected that women are excluded from electing; but their husbands are allowed to vote in right of their estates because they can be elected.

II. The constitution of almost every country is the creature of usage: It is seldom to be found in any written code, and the principles upon which it in part depends are often difficult to be traced, and sometimes cannot be at all discovered. It suffers alterations by degrees, and, owing to a change of manners and of sentiments, as it were imperceptibly; but when moulded by long usage into a system, no innovation, how expedient soever it may seem, can be introduced by courts of law, or in any other manner than by the general voice of the people collected and declared in a constitutional manner. It is in vain for those who have had no seat in the legislative assembly for a long tract of time to attempt to claim it on the pretence that they enjoyed it in more ancient times, and could not lose by mere disuse what was once their acknowledged right. Such disuse in matters of a national concern becomes contrary usage, which is of itself sufficient not only to alter the constitution of parliament, but also to impair the prerogative of the Crown. It is, however, an admitted fact, that for more than two centuries not one instance can be traced of the eldest son of a Scottish peer representing a county or borough in Scotland, either in the Scottish or in the British parliament. Nay, the appellant, notwithstanding all his researches, has hitherto failed to bring clear and positive proof that such eldest sons did, at any period, sit in the parliament of Scotland in virtue of their being possessed of lands held of the Crown, and of their making part of the freeholders, or *libere tenentes*.

The appellant does not pretend to have discovered any eldest sons of peers (to all of whom, in more ancient times, the appellation of master was indiscriminately given, as it was likewise even to all their presumptive heirs, whether by blood or destination) in the rolls of parliament prior to the year 1478. His lordship has, indeed, found about thirty-two or thirty-three masters in the rolls of parliament (that are now extant) between that period and the year 1587, when the representation of the lesser barons or freeholders was established. But as no evidence [35] has been produced to show that more of these masters were possessed of lands held by them of the Crown, than twelve or thirteen at most, so it does not appear that even they sat in the character of freeholders or lesser barons. On the contrary, there are strong reasons to presume that this was not the case; for 1st, These masters are in no one instance described by their lands, whereas the lesser barons are in the rolls of parliament uniformly so described. 2dly, Some of them might have attended as proxies for their fathers. It is indeed proved by the act 1425, cap. 52, that proxies were allowed even for freeholders. 3dly, Their sitting in the character of lesser barons or freeholders is inconsistent with what passed at the famous con-

vention in 1560, as the doubt which then arose respecting the right of the lesser barons to attend in parliament, and their petition to be restored to that right, never could have existed if those masters, who are to be found in some of the rolls only a few years before, had been understood to have sat in virtue of their lands,² and in the character of lesser barons or freeholders. Nor is it an answer to this that other lesser barons are likewise to be found in the rolls of parliament. They likewise may have attended in consequence of a special summons from the Crown; which is surely more probable than that the whole body should know so little of their own rights as to present a petition for the purpose of obtaining an acknowledgement of what they had always enjoyed, and of which they were actually in possession at the time.

The presumption therefore is, that all those masters who appear in the rolls of parliament attended only as proxies, or in consequence of their being called by special writ; and this presumption is strongly confirmed by the constant usage which took place from the time that the representation of counties was established in 1587, down to the period of the union.

Objection. The appellant contended, that the power of calling by special writ reserved to the king by the acts of 1457 and 1503, was only meant to apply to those whose constant presence was thus dispensed with; and that it would have been adverse to the idea of parliament, as well as an insult to the dignity and privileges of those who sat there, to introduce amongst them any person who was not a tenant *in capite* of the crown.

Answer. This observation stands however altogether unsupported by evidence of any kind. It ought to be remembered, that, in those days, attendance in parliament was considered not as a privilege bestowed upon, but as a burden inherent in, a certain tenure: Why, therefore, presume the king restrained from requiring the assistance of any of his subjects in his great council, but those who were possessed of landed property held immediately of the crown? It is more reasonable to suppose, that his prerogative entitled him to lay that burden upon any person he chose to summon; and it is at least probable, that, in [36] the exercise of this prerogative, he would call upon persons high in point of rank, or of consequence in other respects.

It is no doubt true, that those masters who, upon the authority of Mr. Randolph's letter to Sir William Cecil (for there is no other), are said to have attended the convention of estates in 1560, could not have been summoned by the Crown, that convention having assembled without the royal authority; but laying out of the question that one of the five masters whose names are to be found in the list, (*viz.* the master of Lindesay,) was not the eldest son of a peer; it must appear sufficient to observe, that the convention was called by those who took the lead in the conduct of affairs, in consequence of an article in the treaty of Leith, while the importance of the business then in agitation would render any person of consequence welcome to a national meeting held independent of the royal authority: it is accordingly worthy of remark, that Randolph, in his letter to Cecil, after giving a particular list of clergy, nobles, peers' eldest sons, commissaries for boroughs, and lesser barons, adds, "with many other barons, freeholders, landed men, but all armour."

III. Even supposing the eldest sons of peers, as well as every other person who held lands immediately of the Crown, not only entitled, but bound by their tenure to attend in parliament, the claim now made by the appellant must be rejected, in respect of his being obliged to admit that, from the year 1587, when the representation of the lesser barons was established, down to the present day, not a single instance is to be found of the eldest son of a Scottish peer representing either a Scotch county or borough in parliament. It cannot be supposed that this could proceed from mere accident: considering attendance in parliament as a burden, it must have been natural for the freeholders to impose it upon them as most able to bear it; and, considering it as a privilege, they would, in all probability, be disposed to court it. The fact can, therefore, only be rationally accounted for, by supposing it to have been understood to be a constitutional point that they were ineligible on account of their intimate connexion with a higher order in the state, and of which they seem, from the passage above referred to in the work of David Chambre, to have been understood to make a part.

The appellant found it necessary to endeavour to assign some reason for the total

absence of the eldest sons of peers from parliament after the representation of the lesser barons was established; he accordingly observed, that to be the delegated deputies and hired messengers of such inferior persons could but ill befit the gallant sons of proud and independent nobles. This, however, is not altogether consistent with the foundation of his plea, which rests entirely upon their being bound to attend by being lesser barons or freeholders; the consequence of which must have been to put it out of their power to refuse that burden when imposed upon them by the other freeholders. The [37] conclusion drawn from their haughty spirit will, at the same time, appear to be better founded, when applied to a more ancient period, when all the lesser barons, except those of the smallest estates, were upon the same footing. The eldest sons of peers might then wish to keep themselves distinguished from an order of men whom they considered to be greatly their inferiors; on that account they would be unwilling to appear in parliament, unless in the character of proxies for their fathers, or when summoned by special writ; and hence it came to be understood, that although possessed of lands held immediately of the Crown, they did not belong to the order of freeholders, and therefore were not bound to come to parliament; the more especially as, after the introduction of personal honours, their fathers were considered to hold their seats by virtue of their dignities, and not of their possessions, as in more remote ages.

That the act of 1587 was understood to exclude the eldest sons of peers from sitting in parliament, there is also much reason to presume, from the general dissatisfaction this statute gave to the peerage. They were sensible that it would have been inconsistent with the form into which parliament was then moulded by the king to continue to summon any person by special writ; and they saw that when the load was to be taken off the whole body of the freeholders, and two only were to come from each county, and these two were to be allowed a certain sum for defraying their daily expence, the attendance of the commons would be more regular and numerous, and of course their own parliamentary influence would be much diminished: But of this they must have had less apprehension if it had been understood that their eldest sons, who were to succeed them in the peerage, were capable to be chosen commissioners from shires.

This presumption is farther confirmed by a minute of the parliament of Scotland, (August 18, 1681,) containing a letter from Charles II. to the Duke of York, in which, after stating that the county of Kinross had been represented in parliament, until it came almost entirely to belong to two peers, the Earl of Morton and the Lord Burleigh, his Majesty proceeds as follows: "But that now Sir William Bruce of Balcaskie having acquired the Earl of Morton's interest, (which is the far greatest part of the shire,) and having likewise a commission from the rest of the freeholders thereof, doth crave that he may represent that shire in parliament, according to former custom founded upon the said act and records, and we being well satisfied with the dutiful deference shewn to us by the said Sir William, in the prosecution of that his right, it is now our will and pleasure, and we do hereby authorise and require you to cause him to be enrolled and called in this parliament, to the effect the said shire may enjoy its old privilege of being represented in parliament by its barons." If the eldest son of a peer had been capable of representing the commons in parliament, it can [38] scarcely be doubted, that one or both the noble lords who divided the shire of Kinross between them, would from time to time have taken care that their eldest sons should have lands of 40s. of old extent in order to represent the county; for though confidential conveyances were at that time unknown, a father could have been under no difficulty, in such circumstances, to divest himself of a part of his estate in favour of his eldest son and presumptive heir.

It is in vain the appellant resorts to the different statutes relative to the election of commissioners from shires to shew that under the words freeholders, heritors, etc. occurring in these statutes, the eldest sons of peers, who were infeft in lands held in chief of the Crown, must have been included: Custom is the best interpreter of the words made use of in an act of parliament, and under such a guide we must with certainty discover whether a particular expression or term has been adopted in the view of including all who can possibly be comprehended under it, or only in a more limited sense. Had any usage prevailed of eldest sons of peers representing counties in the parliament of Scotland subsequent to the act 1587, it might have been more

difficult to maintain that they were not included under the general terms of freeholders, heritors, liferenters, wadsetters, etc. that appear in these statutes : But as, instead of any such usage being proved, not a single instance can be produced from the year 1587 down to the time of the union, the respondents must be entitled, independent of the resolutions to be immediately taken notice of, to presume, that the legislature, in passing these statutes, had no idea of including them under these general terms : It seems, therefore, scarcely necessary to add that some of these statutes are far from being correct and accurate in the form of expression.

IV. The question does not rest upon usage alone. Those who composed the parliament of Scotland in 1685 must have been at least as well qualified to judge of a question regarding its constitution, as even the most enlightened antiquaries of the present age. But the resolution above inserted with regard to the incapacity of the eldest son of Sir George Mackenzie to represent the county of Ross, in respect that his father had been created Viscount of Tarbat, between the time of his election and the meeting of parliament, shews it to have been then a settled point that the eldest sons of peers were ineligible. This resolution must also have the greater weight when it is considered that it was not formed in a controverted election, which, according to the practice, would have gone before a committee appointed to try such cases, but was taken up by parliament itself. And it is in vain the appellant attempts to derogate from the force of this precedent, either by abusing the Viscount of Tarbat as the defender of the proceedings that took place in the preceding parliament, when the Duke of York acted as commissioner for his royal brother, or by conjecturing that, as it was not a time for urging unpopular topics, especially in the case of [39] a son of an obnoxious minister, the Viscount chose rather to withdraw his son from parliament than to try the question. It is well known that the Viscount of Tarbat stood at that time high in favour with King James ; and although the arbitrary measures that were afterwards adopted by that monarch soon proved ruinous to his family, few princes were more popular at the time of their accession. It is therefore impossible to believe that the Viscount of Tarbat could have any inducement for withdrawing his son from parliament on this occasion, or that the seat of the son would have been vacated in this manner if it had not been understood to be perfectly clear that the ennoblement of the father did *ipso facto* disqualify him from holding it.

It is equally in vain for the appellant to attempt to depreciate the force of the subsequent resolution in 1689 respecting Lord Livingstone. The circumstance on which he chiefly founds, namely, that the memorial or case for Mr. Higgins takes not the smallest notice of the ineligibility of Lord Livingstone as the eldest son of a peer, serves only to shew that the committee who tried the question were too attentive to the constitution to allow the noble lord's ineligibility to pass unnoticed, even in a case where there were other good grounds for deciding in favour of the other candidate.

V. But if by the constitution of the Scottish parliament the eldest son of a peer was ineligible for a county or borough, there is an end of the question ; it having been enacted by the act 1707, cap. 8, which was declared to be as valid as if it were a part of and engrossed in the treaty of union, " That none shall be capable to elect or be elected to represent a shire or borough in the parliament of Great Britain for this part of the united kingdom, except such as are now capable, by the laws of this kingdom, to elect or to be elected commissioners for shires or burghs to the parliament of Scotland."

The appellant endeavoured to derive some aid from the minutes or journals of the parliament of Scotland on this occasion. It thence appears that upon the 24th of January 1707, a clause was proposed to be inserted in the act in these terms : " That thirty shall be the number of the barons, and fifteen the number of the burrows, to represent this part of the united kingdom in the house of commons of Great Britain ; and that no peer, nor the eldest son of any peer, can be chosen to represent either shire or burgh in this part of the united kingdom in the said house of commons." The question was accordingly put, " If the number shall be thirty for the barons and fifteen for the burrows ?" which was carried. The house then adjourned till the 27th of the month ; and the second part of the clause relative to peers and their eldest sons being again read, it appears from the minutes, that after

a debate thereon another clause was offered in these terms : " Declaring always that " none shall elect nor be elected to represent a shire or burgh in the parliament of " Great Britain [40] from this part of the united kingdom, except such as are " capable, by the laws of this kingdom, to elect or be elected as commissioners for shire " or burgh to the said parliament : " And after further reasoning thereon the vote was stated, " Approve of the first clause or of the second : " But before voting it was agreed that the votes be marked, and that a list of the members' names, as they vote, be printed and recorded ; and the Lord Chancellor was allowed to have his name printed and recorded amongst those who voted for the second clause. Then the vote was put, " Approve of the first clause or second ; " and it was carried " Second." And from these materials the appellant supposes that the question with regard to the eligibility of the eldest sons of peers was at least reckoned doubtful ; but the smallest attention to what generally passes in popular assemblies will shew, that there is nothing solid in the observation. The first motion, That peers and their eldest sons were incapable to elect or be elected, would no doubt have been more satisfactory than the second, which, without any express determination, left matters as they stood : But it does not follow that they were then deemed capable of electing or being elected ; on the contrary, the proposers of the first motion must have expected to carry it. Indeed it was only lost by a majority of eighty-six to seventy-two, while the peers did not venture to put the direct question. That they themselves, or their eldest sons, were eligible. Each party, as is uniformly the case in such assemblies, wished to carry the motion most decisively in their own favour ; and there is a palpable defect in the inferences drawn by the appellant ; for if they prove any thing at all they prove too much. Every argument which, from the double state of the question, has been drawn in favour of the eldest sons of peers is equally applicable to their fathers ; and yet it will not be said that, at that time of day, there was an idea that, in the parliament of Scotland, peers were entitled to sit as the representatives of the commons. Besides, the first motion was only directed to a particular object, and must have been followed up by other resolutions in order to settle who were qualified to elect or be elected. It was therefore more proper to form one general resolution, which in a few words would settle the whole at once, and it was so framed as to leave no doubt. Peers might likewise be averse to declare their eldest sons expressly excluded, lest it might prove an example for excluding them from seats in England.

VI. Had there been any doubt with regard to the ineligibility of the eldest sons of peers to represent a Scotch county or borough, it must have been removed by the resolutions of the house of commons in the cases of Lord Haddo, and other persons in the same situation, in the year 1708. The question was fairly tried and decided, as might have been expected, in conformity with the resolutions of the parliament of Scotland respecting the Master of Tarbat and the Lord Livingstone ; and [41] as, in these cases, the resolution of the house went the length of declaring that the eldest sons of peers of Scotland were incapable, by the laws of Scotland at the time of the union, to elect or be elected as commissioners for shires or boroughs to the parliament of Scotland, and therefore by the treaty of union were incapable to elect or be elected to represent any shire or borough in Scotland to sit in the house of commons of Great Britain, the respondents must be entitled to contend that independent of every other consideration, these resolutions must afford an effectual bar to the appellant's claim to be admitted to the roll of freeholders of any county in Scotland ; more especially as by the act of 2d George II. cap. 24. it was expressly enacted, " That such votes shall be deemed to be legal which have been so declared " by the last determination in the house of commons, which last determination concern- " ing any county, city, borough, cinque port, or place, shall be final to all intents " and purposes whatsoever, any usage to the contrary notwithstanding."

VII. The matter has accordingly ever since been understood to be completely settled. No attempt has been made since the year 1708 by the eldest son of any peer of Scotland to represent in parliament the commons of that part of the united kingdom ; and in every instance that has occurred of a representative either of a county or of a district of boroughs in Scotland becoming the eldest son of a Scottish peer, his seat has been understood to be vacated, and a writ has issued for the election of a new member of the house of commons in his place. The attempt, therefore, on the part of the appellant, to revive a claim in behalf of himself and others of his

order to a right which they confessedly have not enjoyed for upwards of two centuries, and which it is not proved they ever enjoyed, will meet with no countenance from your lordships, especially when in direct opposition to repeated resolutions of the whole body of the Scottish parliament and of the British house of commons.

It was accordingly ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutor therein complained of be affirmed. (MSS. Jour. *sub. ann.* 1793.)

NOTE. [18] The following note was subjoined to the appendix to the appellant's case, which contained copies of three of the rolls alluded to, and a table of the names of such eldest sons of peers as had sat in the parliaments of Scotland from 1478 to 1596.

General Account of the State of the Rolls of Parliament.

During the reigns of James I. and James II., no rolls of parliament are now extant. The first roll that has yet been discovered, is that of the parliament which was held at Edinburgh upon the 12th of October 1467, in the reign of James III. It mentions, as present, 25 ecclesiastics, 24 of the nobility, and 12 lesser barons. The next roll is that of the parliament held 20th November 1469, at which there appear to have been [19] present, 23 ecclesiastics, 2 officers of state, 33 of the nobility, 21 lesser barons, and 22 commissioners of burghs. Both these rolls, however, are incomplete, and near at the end, *et quampluribus aliis*.

Besides these, there are rolls of most of the parliaments held during the reign of James III. In the parliament 1471, there appear 30 ecclesiastics, 29 of the nobility, 10 lesser barons, and 23 commissioners for burghs. In the parliament 1471-2, there are 15 churchmen, 20 of the nobility, 34 lesser barons, and 11 commissioners for burghs. In the parliament 1476, there appear 17 churchmen, 32 of the nobility; but no lesser barons nor commissioners of burghs are mentioned. In the parliament 1478, there appear 14 churchmen, 14 of the nobility, 7 lesser barons, and 20 commissioners of burghs; and this is the first roll in which the names are set down in columns.

The roll of parliament 1478 is very distinctly written in columns; first the bishops, then the abbots, then the *comites et barones*, then the *domini parliamenti*, next the *barones*, and lastly the *burgorum commissarii*. In the class of the *barones* are placed the Magister de Halis and the Magister de Ersdyn.

In the roll of the parliament 1481 the names are not set down in columns. Amongst the *barones*, however, are placed the Magister de Ersdyn and the Magister de Halis.

Of the parliament held 1481-2, the roll has the names set down in columns. There is one column with a common title for all the barons. In this, after the *Domini*, there is a blank space; after which are placed the eldest sons of peers; and immediately after them, without any blank space, the other lesser barons. These eldest sons are the Magister Crawford, Magister Keith, Magister Morton, Magister Erskine, Magister Sommerville.

In the roll of the parliament 1484 there are three eldest sons of peers, Magister Crawford, Magister Erskine, and Magister Kilmaurs. In the parliament 1484-5, in that held 1485, in that of 1487, and in that of 1487-8, there appear also some of the eldest sons of peers.

Thus, in nine of the parliaments held during the reign of James III. the rolls show eldest sons of peers to have been present, and marked as constituent members; and of the other parliaments held in this reign, the rolls of some of them are lost, and others incomplete.

In the first parliament of James IV. held 6th October 1488, there appear in the roll, 32 ecclesiastics, 21 of the nobility, 13 lesser barons, including two eldest sons of peers, and 15 commissioners of burghs. The Magister de Argyll, and the Magister de Levenax, are the two eldest sons of peers. In the roll of the parliament held 3d February 1489-90, there is the Magister Angusie; and in the roll of the parliament held 24th April 1491, there is the Magister de Erskine. In the roll of the parliament held 6th February 1491-2, there is the Magister de Morton, and he is placed immediately after the lords, and at the head of the lesser barons, the whole being arranged under one title *Pro baronibus*.

Of the parliament held 8th May 1493, and of that held 27th November 1494, there are no rolls extant ; but of the parliament held 1st March 1503, there is a roll, in which there appear two eldest sons of peers, Magister Hume and Magister Erroll ; placed among the lesser barons.

Of the parliaments held 4th June 1504, of that held 3d July 1505, and of that held in November 1505, no rolls have been found.

Thus, during the reign of this prince, there appear to have been held fourteen parliaments, of seven of which there are no rolls extant ; and in the remaining seven, of which we have rolls, there are to be found eldest sons of peers sitting in no fewer than five of them.

During the reign of James V. there appear to have been held seventeen parliaments, of five of which no rolls are to be found ; and of the remaining twelve which have rolls, there appear eldest sons of peers in five of them. In the roll of parliament 1524 there appears the Magister Lindsay ; and he appears again in the roll of the parliament 1525, where he is also mentioned as one of the committee, *pro judicatis discutiendis*. In the roll of parliament 10th December 1540, there is the Magister Borthwick ; and in the roll of the parliament 14th March 1541 there is the Magister Ruthven and the Magister Borthwick.

During the reign of Queen Mary, there appear to have been held fourteen parliaments, of four of which there are no rolls ; but in every one of those which have rolls [20] there are found the eldest sons of peers. In the parliament 1542 there are the Magister Montrose, the Magister Borthwick, and the Magister Ruthven. In the parliament 1543 there are the Magister Eglinton, the Magister Montrose, the Magister Erskine, and the Magister Buchan.

Again, in the parliament 1554, there are the Magister Eglinton, the Magister Semple, the Magister Ross, and the Magister Rothes ; and the Magister Eglinton is one of the committee for the Articles ; and the Magister de Semple is one of the committee for the discussion of Domes.

In the parliament held 1st October 1545 there appear the Magister Rothes, Magister Home, and Magister Semple. In the roll of parliament 30th July 1546 there appear the Magister Erskine and Magister Forbes. In the roll of 4th August 1546, the Magister Glencairn, Magister Montrose, Magister Erskine, and Magister Ogilvie ; and in the roll 15th August 1546, there are Magister Glencairn, Magister Semple, and Magister Home.

There are no rolls of parliament from this time till 29th November 1558, when there appear Magister Gordon and Magister Cassilis.

Of the parliament 4th June 1563, being the first held after Queen Mary's return to Scotland, no roll is extant ; nor are there any rolls of the after parliaments held during her reign, except of her last parliament, held in April 1567, and in which no eldest sons of peers are to be found.

Of the two first parliaments of James VI. the first held 15th December 1567, and the other held 18th August 1568, the rolls were discovered very lately, while the present cause depended, and they are found to contain the names of four eldest sons of peers. From that time, down to the year 1587, there do not appear in any of the rolls of parliament any eldest sons of peers, nor any lesser barons whatever.

From the account which has thus been given of the rolls of parliament from the year 1467, when, for the first time, any roll is to be found, it will be perceived that they are extremely defective ; and that there are many parliaments of which the rolls are not now extant. These, however, which remain, furnish the most ample proofs of eldest sons of peers sitting as constituent members.

[42] CASE 2. —THE GOVERNOR AND COMPANY OF UNDERTAKERS for raising Thames Water in York Buildings,—*Appellants*; ALEXANDER MACKENZIE, Writer to the Signet,—*Respondent* [15th April—13th May 1795].

[Mews' Dig. vii. 234. 1 Scots R. R. 717, 797. See *Mill v. Hill*, 1852, 3 H. L. C. 869; *Luddy Trustee v. Peard*, 1886, 33 Ch. D. 500; B. R. r. 316.]

[A common agent or solicitor in court employed on behalf of the creditors of the estate of a bankrupt in Scotland, may be considered in the nature of a trustee; a purchase therefore by him of any part of the bankrupt's estate may be set aside; and at all events will be so if there appear any circumstances of improper or negligent conduct in such agent.]

[Interlocutors of the Court of Session reversed.]

The estates in Scotland which belonged to the Appellants, an insolvent company, having been sold for the satisfaction of their creditors by the court of session under the authority of the general statutes, as well as of a special act of parliament, a part of them was purchased by the Respondent at a public judicial auction in February 1779. The sale being confirmed by the Court after an interval of several months, the respondent paid the purchase money, and in the course of eleven years' possession expended large sums in buildings and other improvements. At that distance of time, when the value of the estate was greatly increased, the appellants attempted to set aside the sale, and to recover the estate in order to be sold anew, by the action, the proceedings in which were brought under review of the house of lords by the present appeal.

Three grounds were taken: 1st, That the respondent was disabled by law from purchasing, being the common agent, that is, the solicitor in court, who conducted the proceedings in the ranking of the appellants' creditors, and sale of their estates: 2d, That he had acted fraudulently in concealing the value of the estate, or not promulgating its advantages; in machinations to prevent others from bidding at or attending the sale, and in other particulars, flowing, it was alleged, from a design to secure the purchase to himself at an under value, or to have had that consequence: And 3d, That he was guilty of a breach or an omission of his duty, as common agent at the sale, in allowing the estate to be knocked down to himself, and not moving for a delay or adjournment, which would or might have given time for other bidders appearing. The respondent answered to the first, That the disability pleaded was unheard of, and nothing was more usual than common agents bidding and purchasing for their own benefit at such sales: To the 2d, That the most anxious investigation on the part of the appellants had tended only to show that the charge of fraud was totally groundless: And to the 3d, That there was nothing unusual or irregular in [43] the conduct of the sale; and had it been otherwise, he was not responsible. That the circumstances did not warrant a motion for delay or adjournment; and if they had, it was not incumbent on him; indeed he was in some respects the last person entitled to propose it. And the respondent pleaded, "That the acquiescence for so many years by all concerned, by the appellants, by their creditors, and by the persons said to have intended to bid, and to have been disappointed, was a bar, or must be held as a waiver of the plea of disability in him, and must operate to prevent the appellants being allowed now to take advantage of the alleged breach or omission of duty at the sale, even if it was of a nature to have defeated his right as purchaser, had it been recently stated to the Court.—That the delay in bringing the challenge, allowing it for argument's sake to be well founded, on grounds independent of actual fraud, was cruel and unjust, as it was not in the respondent's power to throw up the bargain: And that the bringing it at the period when these proceedings were commenced could only be accounted for by the advantage which the appellants then saw was to be gained from fortuitous circumstances, a conduct which deserved no countenance, and unquestionably put it in the power of the Court to quash their action as untimely."

The action came before the court of session three times for judgment, and received it solemnly. On none of these occasions did it appear that the charge of fraud was regarded as proved by any of the judges. On the first occasion, the action was dis-

missed in all its branches. On the second, the appellants prevailed by the narrowest majority : but upon the single ground that the respondent was disqualified to be the purchaser by holding the office of common agent. On the third, the Court returned to their original sentiments, and acquitted the respondent *simpliciter*, with costs.

[These are the outlines of the case ; which appears to have been ultimately determined in favour of the appellants on the first of the three grounds above stated. The following statement therefore will only comprehend such facts and arguments on both sides as appear to apply to that general question, omitting such circumstances as were merely personal between the parties, or as tended to throw the imputation of fraud, or unfair or inequitable conduct, on the respondent, with respect to which the proof in the cause was uncertain and contradictory.]

In the year 1733, when the York Buildings company came to be considered as bankrupt, besides the water-works from which they take their name, and the estate of Widrington in England, they were owners of certain of the forfeited estates in Scotland, of which the yearly rent was £10,536.

On the other hand, their debts were as follow : Annuities amounting to £10,067 yearly, secured by infestment over their Scots property.

[44] Secondly, Bonds to the extent of £10,000, originally due to Sir John Meres, which afterwards were transferred to William Locke Esq. and for security of which the Scots estates were mortgaged in the year 1732.

Thirdly, An annuity of £3600 during thirty years, payable to the Duke of Norfolk and partners, in lieu of the lease of Strontian Mines, conveyed by them to the York Buildings company, and in security of which annuity the company had obliged themselves to give infestment on their estates in Scotland.

Fourthly, Bonds amounting to £100,000 for security of which, beside the estate of Widrington, the company, in the year 1731, had granted a conveyance also of their Scots estates to trustees for the creditors, who were accordingly infest ; and this set of creditors were commonly called the Deed of Trust Creditors.

Fifthly, Personal debts due by bonds and otherwise, to the amount of £200,000.

For the payment of this great and increasing load of debt the company's estates appeared to be very unequal. The trustees for the annuitants took possession of the Scots estates ; and as the annuities exhausted the rents, the other debts were yearly augmenting by the accumulation of interest.

Adjudications, however, were led in the court of session by different creditors, and particularly by the Duke of Norfolk and partners, for the arrears of the annuity payable to them. A process of ranking and sale was also brought by them in 1735, but no progress was made in it ; and a new action of the same kind was raised by his grace and partners, and certain other creditors, in 1750.

During the pendency of the process in 1740 the English estate of Widrington was sold, and the price divided among the creditors secured on it, by the court of chancery. In course of time too, many of the annuitants, the trustees for whom were in possession of the Scots estates, had died, and the rents exceeded considerably the remaining annuities ; whence it appeared that a considerable part of the estates might be sold without injuring the security of the annuities which still subsisted : This opened a prospect to the creditors, who were next in preference to the annuitants, of drawing payment ; but the law of Scotland, as it then stood, put off that prospect to a period indefinitely remote, for it was then requisite that the ranking of a bankrupt's creditors should be brought to a conclusion ; and the extent and validity of every claim against him, and its order of preference finally settled, before any part of his estate could be sold : on this account some of the creditors who, by judgments of the court of session and of the house of lords, had been found to stand next to the annuitants in the order of preference, bethought themselves of applying to parliament for relief.

Accordingly, upon the petition of Mr. Locke, who stood in the right of Sir John Meres's debt, the trustees for the creditors under the deed of trust in 1731, and the Duke of Norfolk and [45] partners, a private act of parliament (3 Geo. III. c. 43.) was passed in the year 1763, which, after reciting the circumstances of the case, enacted, " That it should be lawful for the judges of the court of session in Scotland, " and they are thereby directed and empowered, without delay, and without waiting " the conclusion of the ranking of all or any of the said governor and company's

"creditors, to proceed to the sale of certain parts and portions of the said estates of Pannure, Southesk, Marishall, and Pitcairn, by public roup or auction, to the highest bidder or bidders; and that either in separate baronies, or smaller lots or parcels, as to them shall appear most for the interest of the said governor and company and other creditors.

The purpose of this statute being that the court of session should forthwith proceed to the sale, the requisite steps were immediately taken, but not without opposition from the York Buildings company, who petitioned the Court to delay the sale: The petition being refused, they appealed to the house of lords, but the interlocutors were affirmed (31st January 1764).

Immediately after this the estates mentioned in the act were exposed to sale by the Court; but although they had been divided into seventeen different lots, in order to give the better chance of a competition, and although the country was in a prosperous condition, yet no one ventured to interfere with the heirs of the forfeited families, who were suffered to buy every lot at the price put on it by the Court.

The whole price for which the lands sold was £118,183 12s. 6d. which, after paying Mr. Locke and the Duke of Norfolk and partners, left £13,583 to be divided among the Deed of Trust creditors.

Notwithstanding this payment, and large sums formerly received by them out of the price of the Widdrington estate, there still remained due to these Deed of Trust creditors £40,042 13s. 10d. of principal, and £8075 18s. 8d. of interest.

For this sum they were preferable creditors over the whole remaining estates of the York Buildings company in Scotland, the rents of which amounted to £6600 yearly. But the trustees, although the annuities were now reduced to about £2000, held possession; and still it was necessary, before any farther sale could take place, to wait the end of a ranking, which no man then living could reasonably hope to see concluded. So hopeless did the undertaking appear that during twelve years no step was taken in the ranking.

At last, the Deed of Trust creditors resolved to follow the example which had been set them, and to apply for an act of parliament, authorising a sale of at least as much of the company's estates as would satisfy their claim; and as the annuities were every day falling, the other creditors too became more attentive to their interest, and soon perceived that it could in no ways impede, but, on the contrary, would tend greatly to [46] expedite the ranking, if the whole property of the company should be sold, and such of them as could establish an unexceptionable preference be thus enabled to draw their payment immediately by warrants on the purchasers.

One of the most active persons in this business was John Walsh Esq. an English gentleman, who had acquired several of the deed of trust debts in consequence of certain transactions between him and Robert Mackintosh Esq. advocate. Mr. Mackintosh had bought those debts from the original creditors with money advanced by Mr. Walsh, who, in a suit before the court of Chancery, insisted that Mr. Mackintosh was merely a trustee for him. Mr. Mackintosh denied this, but admitted the advance of the money; and for recovery of it, Mr. Walsh, among other measures, proceeded against him in the court of session, and obtained decrees of adjudication, not only of the York Buildings debts which stood in Mr. Mackintosh's person, but of a landed estate, which belonged to that gentleman.

The respondent was employed by Mr. Walsh to prosecute the actions against Mr. Mackintosh in Scotland, and as they were of a disagreeable nature, it was difficult to avoid giving offence to the gentleman against whom they were directed; yet, while on one hand he did nothing but what his professional duty exacted, he, on the other, executed that duty faithfully, and to the entire satisfaction of his employer, who probably, for this reason, recommended him as a person fit to conduct the proposed application to parliament.

At the request of Mr. Walsh and others concerned, the respondent went to London in the year 1777 to solicit the act of parliament, under the direction of counsel of the first eminence; and a public act was accordingly obtained, [17 Geo. III. c. 24.] intituled "An act for expediting the sale of the estates in Scotland belonging to the York Buildings company, for the relief of their creditors." After setting forth the company's large debts and its insolvency, with the sale of parts of its estates by the former act, it proceeded thus: "And whereas processes of ranking and sale have been brought

" before the court of session by the Duke of Norfolk and his partners, and also by the trustees or the annuitants, against the company and their other creditors, which have been depending several years ; but the law of Scotland requiring that in all actions of sale of bankrupt estates, either depending or to be thereafter raised, the ranking of the creditors shall proceed, and first be concluded by decree, at least to the avail of the price of the land found and stated by the judges of the court of session, before the lands can be exposed to roup and sale, such sale cannot be obtained by the ordinary process in a long course of years, especially as many of the company's creditors have deferred, and still do defer, the production of their grounds of debt ;

" And whereas the expediting the sale of the company's estates will be the means of the preferable creditors on the said [47] estates in a little time receiving their just demands, and will be of great benefit to the subsequent creditors of the said company, and the lands and estates of the said company, which have been long neglected and uncultivated while remaining in the hands of the insolvent company, will, by being transferred to purchasers, be improved to the benefit of the public ;

" Be it therefore enacted, That it shall and may be lawful for the judges of the court of session in Scotland, and they are hereby directed and empowered, without delay, and without waiting the conclusion of the ranking of all or any of the said governor and company's creditors, to proceed at the suit or upon the application of any person or persons having interest to the sale of the whole lands, baronies and estates belonging to the said governor and company, lying and situated in Scotland, yet remaining unsold, by public roup and auction, to the highest bidder or bidders, and that either in separate baronies, or in smaller lots and parcels, as to them shall appear most for the interest of the said governor and company, and their creditors ; and for that purpose, the said judges are hereby empowered and directed to proceed to the consideration of the proof taken by authority of the said court, in the aforesaid processes of sale, and to take what further proofs to them shall seem necessary, of the rent and value of the said lands and estates, and of the deductions from the said rents, and thereupon to ascertain and determine the yearly free rental of the said lands and estates, and of the different lots in which the same are to be exposed ; and also the value or number of years purchase, at which the said land may and ought to be exposed to public auction or sale, and in general to pronounce such interlocutor or interlocutors as the said judges usually pronounce upon such proofs in other processes of sale of bankrupt estates ; and thereupon to award letters of intimation for publishing the roup, or auction and sale of the said lands, in the usual manner, and to ascertain and adjust such articles and conditions of roup, or auction and sale, as are usual in the like cases, and as the said judges shall think just and proper.

" And be it enacted by the authority aforesaid, That notwithstanding the judges of the court of session are hereby directed to proceed, without delay, to the sale of the whole lands, baronies, and estates, belonging to the said governor and company, yet it shall and may be lawful to the said judges, upon cause shewn by the said governor and company, or their creditors, to put off or adjourn the sale of any part or parcels of the said lands, baronies, and estates, to such time or times as shall appear to be most for the interest of the said governor and company, and their creditors ; and in the mean time, and until sale of all and every part of the said lands, baronies, and estates, shall take place, and the purchaser or [48] purchasers shall have entered into possession thereof, that the said judges shall have power, and they are hereby directed, to sequester the rents and profits of the said estates.

" And whereas it would be prejudicial to such creditor or creditors, as by their rights or diligences are entitled to early payment out of the estates of the said company, or the price thereof, to wait the conclusion of the ranking of the other creditors, before they could draw their money ; be it therefore enacted, That it shall and may be lawful to the judges of the said court of session, and they are hereby directed and empowered, without waiting the classing and ranking of the other creditors, to issue their acts and warrants upon the purchaser or purchasers, for payment to such creditor or creditors as has or have been already, or shall be hereafter found preferable on the estates of the said company, or the price thereof, of such sum or sums of money as is or are, or shall be, found due to such creditor or creditors, who, upon

"such payment being made, shall grant a receipt and discharge, or conveyance, to the purchaser or purchasers, who shall be ordered to make such payment; and which payment so made, shall be held and imputed in part of the price of the said lands so purchased."

The sale being thus appointed to proceed, according to the accustomed form of judicial sales, before the court of session, with the difference only, that it was to go on immediately, and without waiting the end of the ranking, Mr. Walsh and the other creditors forthwith took the requisite steps for bringing it forward, of which the first was, to have the whole estates sequestrated, and a commission renewed for proving the rental and value.

The next measure was, to move the ordinary to appoint the creditors to meet by themselves, or agents, in terms of the act of sederunt 1756, and chuse a common agent; the nature of which office was thus stated in the respondent's case:

"In the court of session, as is the case in the higher courts of most countries, besides the counsel, who plead causes, and make motions to the court, there is another body of men who assist in managing the process, furnish the counsel with the requisite information, attend to the enrolments of the cause, and observe that all the forms required by the orders of the court, according to the nature of the action, be regularly gone through. Persons who follow this business are in common speech called agents, and sometimes in the acts of sederunt, solicitors.—In the carrying on of a process of ranking and sale, as well as in every other process, an agent is necessary; and till 1756 the private agent of the person at whose instance the action was commenced, had the whole of this business devolved on him: But as all the other creditors were equally interested with the pursuer, it came to be thought proper, that the agent for carrying on the process should be chosen by a majority of the whole body; and for this reason the act of sederunt of 17th January 1756 made it a regulation, that the lord [49] ordinary should appoint a time and place for a meeting of the creditors, who shall have produced their rights, for chusing an agent or solicitor for carrying on the process of ranking and sale, and the division of the price among the creditors; which election is to be reported to the lord ordinary, and approved of by him. The steps requisite for the common agent to take, in conducting the ranking and sale, are all pointed out by particular acts of sederunt, regulating the form of that process, or by the well-known and settled practice. The bankrupt himself, against whom the process is carried on, and who is brought into Court as a defender, has no vote in the choice of the common agent, but employs his own agent and counsel to manage his defence, if he any has, against the action, or to oppose any particular steps taken by the common agent for the creditors, which he thinks not warranted by law, and hurtful to his interest. The creditors, too, individually, who, by the forms of the process, are all cited and brought into the field, besides a vote in choosing the common agent, who is to carry on those measures against the bankrupt in which all are equally interested, have also their own private agents, who attend to their particular interests in the competition that generally ensues among them about the preference of their claims, and who, at the same time, have their eye on the common agent, and if he takes any wrong measure, as, for example, by bringing on the sale too quickly, or delaying it too long, can, and frequently do, represent the matter to the Court, and obtain redress."

The office and the duty of this common agent was described by the appellants in the following terms:

"A common agent is an agent or solicitor, who is an agent or solicitor in the court of session, and is elected by the creditors, and afterwards approved of by the court. He is equally charged with the interest of the creditors and of the debtor; that the former may obtain payment of their debts, and the latter have the benefit of any reversion which may arise from a fair sale. It is his duty to make particular enquiries into the nature and advantages of the property to be sold, and he has the conduct of the proof of the value, which the forms in Scotland render necessary before fixing the price at which it is to be exposed, which is called the upset price. He disburses all the expences attending the sale, and is repaid, together with an allowance for his own trouble, from the proceeds of the estate. It is also the duty of the common agent to make up the rentals, abstracts, and particulars of the property;

"to draw up the advertisements for the public newspapers, describing the estate
 "to the best advantage. All intending purchasers apply to him for information
 "as to the selling of the estate; and it is his duty to study that the estate be sold for
 "the best price that the market can afford."

[50] On August 6, 1777, in consequence of an appointment by the lord ordinary to that effect, a meeting of the creditors of the York Buildings company for choosing a common agent was called, when agents for the whole of them, excepting three, appeared, and the respondent was unanimously elected. After which the election was reported to the lord ordinary, and approved of by him.

The first thing that the respondent had to do was to take a proof, under the act and commission, of the rent then yielded by the company's estates, and of the number of years' purchase thereof which they were esteemed to be then worth, in order that, this being laid before the court, their lordships might fix the prices at which they should be exposed to sale. And the respondent suggested that no instance had ever occurred, of greater anxiety than was shewn in this case to bring every thing before the court and the public, which could shew the true value of the estate, and excite the universal attention of those who might be looking out for an opportunity of purchasing land.

During these preparations for the sale the respondent, as well as every other person concerned, became sensible that, from the universal want of money occasioned by the war, and other circumstances peculiarly felt in Scotland, it would be improper and inexpedient to sell the whole estates of the company at once. It was judged better to begin with selling such parts of them as had a chance of speedily finding a tolerable price before the immense property which, by the winding up of the affairs of the Ayr bank, was coming fast into the market, should totally overstock it: And the estate of Winton, (on the sale of which the question in this cause arose,) it seemed most probable, would allure purchasers, especially if the court should order it to be divided into lots, suited to the smallness of the sums which people at that time could command, or might choose to vest in land. This idea was universally approved of, as well by the agents for the creditors and the agent for the company, with whom the respondent consulted, as by gentlemen of knowledge in matters of this sort, whose advice he took.

In order to attract public attention, and recommend the purchase of the estate, or part of it, to every person who might have thoughts of buying land, the respondent drew up an advertisement, which was examined and approved of by all the agents for the creditors, and which contained a minuter detail of all circumstances that could render the purchase desirable than is usual even in the most anxious advertisements, which private persons publish who are desirous of selling their property to the best advantage. The tenor of it as follows:

"Sale of the estate of Winton and others. By authority of the lords of council
 "and session, and in pursuance of an act of parliament, (of the 17th year of his
 "present majesty,) there will be exposed to public sale, by auction, within the par-
 "lia-[51]-ment-house of Edinburgh, on Monday the 15th February next, between
 "the hours of four and six afternoon, the lordship, baronies, and lands in East
 "Lothian, belonging to the York Buildings company, viz. the lordship of Seaton, the
 "barony of Long Niddry, Winton, Tranent, and Cockenzie, with the coal and salt
 "works, whereof the present feu duties, rents, mails, etc. after converting the
 "victual, etc. are as follows, viz.

1. The lordship of Seaton, ...	£1113	5	2 $\frac{1}{2}$
" 2. The barony of Long Niddry, ...	1217	16	1
" 3. The barony of Winton, ...	444	10	10 $\frac{1}{2}$
" 4. The barony of Tranent, including Cockenzie, ...	1301	6	10 $\frac{1}{2}$
" 5. The coal and salt works, ...	300	0	0
	£4386	18	2 $\frac{9}{12}$
" Deductions for Stipend, etc.	118	6	9 $\frac{5}{12}$
" Free rent, ...	£4268	11	5 $\frac{4}{12}$

" The whole premises, except the coal and salt works, are			
" to be set up at 25 years purchase of the above free			
" rent, being	£99,214	6	1 $\frac{1}{2}$
" The coal and salt works are to be set up at 3 years pur-			
" chase of the present rent,			
	900	0	0
" In all,	£100,114	6	1 $\frac{1}{2}$

" This estate is pleasantly situated within eight miles of Edinburgh and four of Haddington, to either of which places, in the option of the proprietor, the tenants are bound and in use to carry the grain payable by them, which is of remarkable good quality. The lands are not inclosed, and are very improveable; particularly an extensive common, which has been divided within these few years, and the rents of such parts thereof as were allowed to several proprietors in the neighbourhood have been greatly raised; but the rents of the company's estates (now to be sold) have not been raised for these sixty years past; nor is there any value put upon the fines or grassums paid by the tenants, which have been very considerable and frequent during that period. The leases are all expired, so that the purchasers will get immediate possession. The coal and salt works yielded at the time of the company's purchase in 1719 above £1000 per annum, but having been neglected in the general confusion of the company's affairs, are now let at £300 per annum, and are to be set up at three years purchase of that reduced rent. There is still an extensive field of coal, whereof no part has hitherto been wrought by fire engines or other proper machinery. The whole of the coal lies at a small distance from the sea. [52] The port and harbour of Seaton make part of the estate to be sold, and there is a waggon-way from the coal-pits to the salt-pans and the shore.

" The valued rent of the baronies of Seaton, Winton, and Long Niddry, is £8615 Scots, and of the baronies of Tranent and Cockenzie, £3525 5s. 10d. making together £12,140 5s. 10d. Scots, which will entitle the purchasers to a considerable interest in the political influence of the county.

" The lands will be sold in separate baronies or smaller lots, in such manner as to encourage offerers and accommodate purchasers. With this view a survey and plan has been made, not only of the whole estate, but of the separate baronies, distinguishing the lots into which it is proposed to divide them, (if sold in lots.) which, with printed particulars of the rentals, etc. may be seen in the hands of Alexander Mackenzie, writer to the signet.

" Also to be sold, at the same time and place, The lands of East Reston and West Reston, etc."

N.B. Here follow the particulars of the real and valued rents of these lands, after which there is the following paragraph:

" The whole of these lordships, baronies, lands, and others, are holden blench of the Crown. The title deeds, articles of sale, and the judicial rentals, may be seen in the office of Alexander Keith, deputy clerk of session, or in the hands of the said Alexander Mackenzie."

This advertisement was inserted in the *Caledonian Mercury* and *Evening Courant* on the 11th August 1778, and continued to be repeated in one of these papers upon the Saturday, and in the other upon the Wednesday of every week, and in like manner was inserted in the *Edinburgh Advertiser* on Friday every week, till the 18th December; having been fourteen or fifteen times repeated in each of these papers. The advertisement was also published from time to time in one of the London newspapers; and in this way the publication thereof, in every shape possible, was continued for the space of five months.

Afterwards, when an interlocutor had been duly pronounced, authorising the sale by lots, a new advertisement was published, specifying, *inter alia*, the price put on each lot by the court of session, or, as it is termed, the upset price, as follows:

"The lordship of Seaton in three lots.

	<i>Proven free rent.</i>			<i>Upset price.</i>		
" Lot 1.	£389	11	2 $\frac{6}{12}$	£9,379	0	2 $\frac{6}{12}$
2.	349	6	1	8,732	13	3 $\frac{7}{12}$
3.	275	0	2 $\frac{11}{12}$	6,875	6	0 $\frac{11}{12}$

"Barony of Long Niddry, in four lots.

" Lot 1.	£475	15	3 $\frac{6}{12}$	£11,944	2	3 $\frac{6}{12}$
2.	349	6	1 $\frac{7}{12}$	4,506	0	8 $\frac{4}{12}$
3.	258	18	11 $\frac{4}{12}$	6,473	13	7 $\frac{4}{12}$
4.	343	10	3	8,587	16	3

[53] "Barony of Winton in one lot.

£409	0	7 $\frac{6}{12}$	£10,005	15	6 $\frac{6}{12}$
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"Tranent and Cockenzie, with the coal and salt pans, in three lots.

" Lot 1.										£679	17	1 $\frac{2}{12}$	£16,995	2	7 $\frac{3}{12}$
2.										286	4	5 $\frac{10}{12}$	2,755	12	11 $\frac{0}{12}$
3.										619	2	1 $\frac{7}{12}$	13,498	18	3 $\frac{7}{12}$
										£4,268	11	5 $\frac{4}{12}$	£100,114	6	1 $\frac{4}{12}$

And reference was made to the former advertisement in the following manner : " Some of the advantages attending these lands have been so generally known, it " is unnecessary to say any more than observe, that in the divisions of the estate into " lots great attention has been paid to render the lots commodious."

After this several particulars, occasioned by the letting of the estate, are mentioned, and then there is the following paragraph : " The schemes of the lots, printed " particulars of the rental of each lot, general plan of the estate, distinguishing the " boundaries and marches of the different lots, plans of each boundary, and separate " plans of the eleven lots, pointing out every possession, shot or field, and its quality, " may be seen in the hands of Alexander Mackenzie, writer to the signet."

This advertisement was published in all the Edinburgh newspapers, and very frequently repeated in them, from the 19th of December till the 15th of February, which was the day of the sale.

The advertisement, it will be observed, mentions that the sale was to proceed on that day between the hours of four and six in the afternoon. This is the common tenor of such notices : and the established practice has always been, that the lord ordinary, who is to preside at the sale, fixes the precise instant at which he is to commence the proceedings, and which, in cases where only a few parcels are to be sold, and little time is to be consumed, he makes later or earlier according to his convenience. Persons who mean to attend, but do not wish to lose time by coming too early, enquire at his lordship's clerk, or at the clerk of the process, or at the common agent, or some of the officers of court, who inform them of the hour which has been fixed.

On the occasion of the sale of the Winton estate Lord Monboddo was ordinary : and as a great number of lots were to be sold, he gave notice that he would take the chair, and begin the business precisely at four o'clock, which was immediately known to every man of business in Edinburgh, the sale having attracted universal attention. Mr. Taylor too, the assistant common agent, from his extreme anxiety in the business, was induced, besides the former advertisement, which was continued as usual, to draw up an additional one of the following tenor, which the respondent saw and approved of : " The sale of the estate of [54] Winton, etc. being to proceed " on Monday, at four o'clock afternoon, in the parliament-house, the articles of sale " are now printed, and copies thereof may be had by applying to Alexander Mackenzie, " writer to the signet."

This advertisement Mr. Taylor sent to the *Edinburgh Advertiser*, on Friday the 12th of February, in which it was inserted : and he had also intended that it should appear in the other two newspapers which are published on the Saturday, but owing to some neglect, either of his clerks or of the printers, which he cannot now account for, it appears not to have been published in those papers.

From the great number of enquiries which, from the time of the advertisements

being first published, were every day made concerning the lands, the respondent took for granted that, notwithstanding the general want of money and lowness of credit at the time, there would be offerers for many of the lots, though he had no access to know that any particular person was to bid for any one lot.

As to himself, he stated in his case that he had originally no thoughts of purchasing any part of the estates, though he recommended it to others so to do; and particularly to Lord Colville, with whom he had the honour to be well acquainted, and whom he knew to have money which he wished to employ on a purchase of lands in Scotland.

In summer 1778, he carried his lordship to Seaton, in order that he might see the estate; and even as late as February 1779 pressed him to bid for the first lot.

Afterwards, however, though but a short while before the sale, it did occur to him to offer for some of the first lots of Seaton, although a gentleman of the first skill in these matters, whom he consulted, seemed to think the upset price high enough, and advised him not to venture far beyond it.

On the day of the sale, (February 15, 1779,) the lord ordinary, according to the notice he had given, took the chair at four o'clock of the afternoon, by which time the court-room was quite full; great numbers of men of business and others, among whom it was most reasonable to look for bidders, being collected, besides a crowd of people, whom curiosity and expectation, excited by so many advertisements, had drawn together.

The articles of roup having been read over, which is the first thing done on such occasions, the first lot of Seaton was, in terms of those articles, exposed to sale; and the respondent, in his own name, and on his own account, offered the upset price of £9739 sterling, and no person bidding more, he was, after waiting the usual time, declared by the judge to be the purchaser. Afterwards the second lot of Seaton was exposed, and the respondent offered for it also the upset price of £8732 sterling, and was preferred to it in the same manner. All this appears from the minutes of roup drawn up by the clerk of the process, and which make part of the record of Court. They [55] bear, "that accordingly an half-hour glass being set up, and the first lot " of the lordship of Seaton being exposed to sale, and public intimation being made " to all parties that had a mind to offer;

" Thereupon compeared Alexander Mackenzie, writer to the signet, and offered " for the said lot the upset price, being £9739 Os. 2½d. sterling.

" The half hour glass being run out, and the said Alexander Mackenzie being the " only offerer, the judge preferred him to the purchase of the said first lot of the lord- " ship of Seaton; and the said Alexander Mackenzie did thereby enact, bind, and " oblige himself, his heirs, and successors, to find sufficient caution, and grant bond " for payment of the price offered by him, being £9739 Os. 2½d. sterling, with annual " rent and penalty, in terms of and conform to the conditions of roup in all points.

" The half-hour glass being again set up, and the second lot of the lordship of " Seaton being exposed to sale, and public intimation made to all parties that had a " mind to offer;

" Thereupon compeared the said Alexander Mackenzie, writer to the signet, and " offered for the second lot of the lordship of Seaton the upset price, being £8732 13s. 3½d. sterling.

" The half-hour glass being run out, and the said Alexander Mackenzie being the only " offerer, the judge preferred him to the purchase of the said second lot of the lordship " of Seaton; and the said Alexander Mackenzie did thereby enact, bind, and oblige " him, his heirs, and successors, to find sufficient caution, and grant bond for payment " of the price offered by him, being £8732 13s. 3½d. sterling, with annual rent and " penalty, in terms of and conform to the conditions of roup in all points."

The third lot of Seaton was next exposed, when the respondent also offered the upset price, but another person bid more and was preferred as the highest offerer. The other lots were successively exposed to sale in the course of that night, and were all purchased, except the fourth lot of the barony of Long Niddry, and the first lot of Tranent, the sale of which was necessarily adjourned to a future day, as no person appeared to offer the upset price. Few of those which were sold fetched much more than the upset price, and for one of the best of them there was no competition.

The respondent had no idea that there could be any objection to his appearing as a bidder at the sale, or to his being declared purchaser at the upset price when no

one offered more. Nothing of this sort was at the time hinted either to him or to the lord ordinary.

It was necessary that the ordinary should report the sale to the whole Court, stating the highest prices offered for the several lots, and by whom they were offered, in order that their lordships, on revising his report, might pronounce their decree, [56] adjudging the lands respectively to those purchasers. On these occasions, if any sufficient reason were stated to their lordships, there is no doubt that they would refuse to pronounce decree, and would take such measures as the case might seem to require. But if no objection is stated, and the decree passes, it is regarded, and justly, (considering the numerous solemnities and the great publicity which have attended the whole process,) as the most solemn which the Court can pronounce, and as forming the surest and most sacred title to property known in the law of Scotland.

In the present instance the lord ordinary did not make his report till after some months, (June 1779,) and no objection being made from any quarter, the decree of sale passed in the usual terms.

The respondent, in consequence of it, entered into possession of the two first lots of Seaton, paid the price to different creditors, in terms of the warrants on him granted by the Court, and expended large sums in inclosing and building, and making other improvements on the estate. He heard no complaint either from the creditors of the York Buildings company, or from the company itself, or from any person, either by protest or otherwise. No surmise ever reached him from any quarter that he had done wrong, or that his right was in any respect exceptionable, and no such idea ever occurred to his own mind.

Meanwhile he proceeded in his duty as common agent, not only to bring on some other sales, but also in the important business of making up a state of the interests produced in the ranking, which was a work of extreme difficulty, but which he executed in a manner that procured him the thanks of the creditors. In the sequel however, Mr. Mackintosh, the advocate already mentioned, came to Scotland, and appeared as counsel for the York Buildings company; from which time, the respondent, finding himself opposed in almost every measure which he considered as incumbent on him to follow, applied to the Court for leave to resign the office of common agent, and another person was appointed.

It was on occasion of one of those disputes, in which the respondent was found by the Court to be in the right, that the first insinuation was thrown out on the part of the company (for no complaint was made by the creditors) against his conduct. The Court had appointed the estate of Callendar (one of those which belonged to the appellants) to be sold on the 1st of August 1783, and a petition was given in by the company, praying their lordships to stop the sale upon account of pretended omissions in the proof of the rental and value, to enforce which demand they made some observations with regard to the sale of the Winton estate, as having been improperly conducted upon a defective proof of the rental, and purchased by the respondent at an under value, when other gentlemen who meant to offer were not allowed a fair opportunity of attending. Those reflections, [57] however, were made obliquely, and not at all in a manner which indicated an intention of challenging his right to the two lots which he had bought: the petition, *inter alia*, having the following expression: "The above facts (*i.e.* the pretended improprieties of the respondent's conduct) are mentioned only to show that it is not without reason that they now interfere, confident that they must weigh much as a very forcible inducement to your lordships to listen to the present application."

The respondent, in resisting the attempt to delay the sale of Callendar, took occasion to explain to the Court those circumstances with regard to himself which had been so much misrepresented. The petition was refused, and the sale having proceeded, the respondent, with a view to the interest of the company and creditors, ventured to bid against the heir of the forfeited family, which set other gentlemen free from an obligation not to interfere, that some of them had incurred by a positive promise, and which, at any rate, a general prejudice rendered in some sort binding on all. By this means a competition ensued for the estate, and it sold for £47,212 beyond the price which the court had set on it.

Soon afterwards, namely in June 1784, when other disputes had occurred between

the respondent and those who appeared on behalf of the York Buildings company, a summons (libel or declaration) in their name, and which was understood to have been drawn up by their counsel Mr. Mackintosh, was raised against the respondent, which concluded for a reduction of the sale to him of the two first lots of Seaton, on the ground of his having contrived a deliberate plan of fraud for obtaining them at a low price, carried on from the first concoction of the act of parliament through every step of the proceedings, which accusation, was expanded to an uncommon length, in a stile of great acrimony, and when printed made a pamphlet of 46 pages in quarto, of which several hundred copies were circulated.

The respondent used all the means in his power to compel the prosecution of this action, but in vain. The appellants, the nominal pursuers, making default to his judicial protestations or requisitions to proceed, this inchoated action of course fell to the ground. A copy of the summons was however given in evidence in the present action, which followed after an interval of more than five years.

In January 1790, a new summons, at the instance of the appellants, was executed against the respondent, concluding for reduction of the decree of sale, in as far as concerned the estates purchased by him, and which, though conceived in terms more suited to judicial proceedings than those of the former, yet, like it, was founded on an allegation of direct fraud in the conduct of the sale.

This summons having come into Court, witnesses were examined by both parties; and (on December 7, 1791), the question having been argued at great length, the following [58] interlocutor was pronounced by their lordships: "The lords having advised the state of the process, testimonies of witnesses adduced, writs produced, cases given in for the parties, in obedience to a former interlocutor of court, and having heard parties procurators thereon, with the supplementary proof and minutes, with the additional minutes and answers thereto, repel the reasons of reduction, sustain the defence, assoilzie the defender, and decern: and in respect one of the reasons of reduction was a charge of fraud against the defender, find the pursuers liable in the expence of the defender's proof, and ordain an account thereof to be given in; but find they are not liable in any other expence of process."

Against this judgment the appellants presented a petition, which having been advised with answers, the lords, on July 6, 1792, pronounced the following interlocutor: "The lords having advised this petition, with the answers thereto for Alexander Mackenzie, writer to the signet: in respect Mr. Mackenzie was common agent when the sale of the two lots of Seaton in question took place; therefore reduce the said sale *in toto*, and decern and declare accordingly, and find no expences due to either party, superseding extract till the third sederunt day of November next."

This interlocutor, which was carried by the narrowest possible majority, proceeded chiefly on the idea that the respondent, as being common agent in the process of sale, was legally incapacitated from being a purchaser, though some of their lordships did not take so general a ground for their opinion, but only held such an incapacity to exist in the peculiar circumstances of the case. On one point, which to the respondent is the most material of any, the Court were unanimous, giving their opinion that there was no pretence for charging him with direct and wilful fraud: accordingly the interlocutor expressly mentioned that the sale was reduced, in respect that the respondent was common agent; and it was recommended to his counsel from the chair, that if a reclaiming position were presented on his part, it should not be lengthened out by a repetition of the evidence and argument on that branch of the cause which charged fraud.

The respondent did reclaim against the judgment, and his petition was answered by the appellant, who being, on their part, dissatisfied with the *ratio decidendi* of the interlocutor, added a prayer to their answers, craving the Court, "so far to alter or explain the former interlocutor, as to find that the fraudulent, or at least the improper conduct of the defender in managing the judicial sale is sufficient, *per se*, and independent of the question how far a common agent can or cannot legally purchase the common debtor's estate, to support the conclusions of the summons of reduction," etc.

This being a petition on the part of the appellants, the respondent was allowed to answer it; and afterwards minutes were given in for both parties.

[59] These papers which were voluminous and elaborate, brought the whole cause again under the consideration of the Court ; but the only question material to the present report was, Whether the respondent's character of common agent incapacitated him from purchasing at the sale ?

It was on all hands admitted, that neither in the act of sederunt of 1756, which first ordered the appointment of a common agent, nor in any other act of sederunt, nor in any statute, is such a disqualification expressed. The appellants, however, maintained, that by the principles of the common law of Scotland, it was implied in the nature of such an office.

In the first place, it was said, that the common agent was truly the seller of the estate, and could not also be the buyer, in opposition to the maxim *alius emptor alius venditor*.

To this the respondent answered, that the common agent could in no sense be considered as the seller ; not certainly in that which means the person whose property is sold, for the estate is none of his ; and just as little in the other, which means the auctioneer or vendor of it. He is only the solicitor who manages those parts of the proceedings which belong to persons of that profession ; and although the object of every step he takes is to have the estate sold, yet he himself is no more the seller than the counsel employed, or the clerks of court who make out the orders or interlocutors. The lords of session are in truth the only sellers. It is by them that the day of sale and the price is fixed. One of their number is appointed by them to preside, and to act for them as auctioneer, taking the sand glass into his hands, and inviting, by the voice of the mace who attends him, all persons to come forward and bid.

In the next place, the appellants argued that the common agent is a trustee for the bankrupt and his creditors : and that in consequence of this he is legally incapable of acquiring any right relative to the property of his constituents : or at least that the acquisition must be held as made for their benefit.

The respondent observed, that the circumstance in the relation between truster and trustee, on which this maxim is founded, is unlimited power in the one and exuberant confidence in the other, which may arise either from the parties themselves, as in the case of voluntary trusts, or from the act of the law, as in the case of pupils and tutors. But there is no such connexion between the common agent and any of the parties concerned ; and least of all does it exist between him and the bankrupt, who has not even a vote in electing him, and is not supposed in any way to trust him. Though intrusted with the performance of a certain duty towards the creditors, every part of which is pointed out by law, and which he ought faithfully to perform, yet he is not, according to the received sense of the word, a trustee for any person : He is an officer of the court appointed to perform certain specific functions ; and if he execute them according to law, which, in the present view of the case, is to [60] be supposed, he is as free to offer his money at the sale, when it takes place, as any other of the officers of court, or as the judges and advocates, who all, as well as he, have their respective duties to perform, and none of whom, it was ever imagined, are debarred from purchasing the estate. His duty, as already explained, consists in taking the steps which belong to the business of an agent for conducting the sale : In all of them he is only the person to move the court (by his counsel) to make certain orders and appointments ; and no such motion can be made by or for him without previous notice to all concerned. In every case the requisite forms give the fullest opportunity to all the creditors, and to the bankrupt himself, of being heard in opposition to every thing suggested by the common agent, and in nothing can he proceed by his own authority : If he move the Court to appoint a day for the sale, which the creditors or the bankrupt think too early, they are entitled to state the matter to the Court, who, if they are of the same opinion, will name a different day. The same things may be said of every other part of the agent's duty ; so that, considering the limitation of his powers, and the manner in which he is elected, it is altogether absurd to call him a trustee for any person, and especially for the bankrupt.

But farther, even in the case of proper trusts, as the maxim referred to is chiefly founded on the power which the trustee has to injure the truster, so when that power vanishes, the maxim ceases to apply. Hence, even where the trustee is disqualified from purchasing goods belonging to the truster, or rights affecting him

by a bargain proceeding in the manner of a private treaty, he may nevertheless purchase them openly at a public sale by auction, fairly advertised, and at which every person may appear and bid the highest price he thinks them worth : This is the case even with regard to tutory, the most sacred of all trusts, and where the law is most jealous of the trustee : So it was determined by the Roman law, l. 5. *Cod. de contrahenda emptione* ; and the point has always been understood to be settled in the same manner in the law of Scotland. Thus Mr. Erskine (B. 1. tit. 8. §. 19.) says, " A tutor cannot lend money to the minor, because a loan lays the debtor under an obligation of repayment ; nor can he purchase any subject belonging to the minor, unless it be put up to public sale, in which particular case, his raising the price of the minor's goods must, without exposing him to the least danger, bring him a certain profit."

But of all public sales that of a bankrupt's estate by judicial auction, or roup as it is called, is the least liable to the possibility of any danger following from the allowing of all persons indiscriminately to purchase. As to the common agent, even in the previous parts of the process, there is not a step he can take without the knowledge of all concerned, and the sanction of the court. At the auction the functions of the common [61] agent are entirely suspended the business being devolved on the judge who presides, who alone takes the direction of the proceedings, and whose duty it is to take care that they be in every respect fair and regular. The common agent may indeed, as well as any other person present, suggest to his lordship any thing that occurs to him as proper or improper to be done, but he has no more power than they, nor any means of getting the estate than by publicly outbidding all other offerers. So high a confidence does the law put in the proceedings at the sale, which have been regulated by a most scrupulous attention to the means of obviating all improper practices, that not only the common agent has always been considered as at liberty to purchase, but likewise the pursuer of the sale, or any of the creditors, or even, which in any other sort of sale would hardly be permitted, (7th August 1753, Gray against Stewart,) the bankrupt himself, whose estate is exposed.

The record of all judicial sales since the act of sederunt 1756 was searched, and the particulars laid before the court, and it appeared that from the 1st of January 1756 (when the act of sederunt passed) to the 1st of January 1791, the number of judicial sales which took place before the court were 420

Those on which the roup had proceeded previous to the act of sederunt were 3

Those at the instance of apparent heirs, in which there is no common agent 87

Those in which the common agent could not be discovered 16

— 106

Remain 314

In 87 of the 314 the common agent was a bidder, either for himself or for the behoof of some other person.

In some of these 87 sales several lots were exposed ; and as the common agent was frequently an offerer for, or purchaser of more lots than one in the same sale, the number of lots offered for by him amount in the whole to 135, as under :

Those lots for which the common agent offered, but of which he did not become the purchaser, being outbid by other offerers, were 82

N.B. For twelve of these he offered the upset price.

Those which he purchased for the behoof of others to whom assignments were afterwards granted, or for whom the purchase was declared, are 32

N.B. Fourteen of these he purchased at the upset price, and one at a reduced upset price.

Those which he offered for and purchased in his own name, ... 18

N.B. Seven of those he purchased at the upset price ; and two at a reduced upset price ; and in two more he offered the upset price, but met with competition.

[62] Those purchased for his behoof by a trustee, ... 3

N.B. Two of these three at the upset price.

In all 135

These numerous sales, where the common agents appeared as offerers or pur-

chasers, were carried on publicly in the face of the whole college of justice : were reported to the court, by which they were approved of without doubt or hesitation.

The appellant observed that the common agent had better opportunities than any other person to become acquainted with the estate : that he might conceal its value, and in general might conduct the previous proceedings in such a manner, as when it comes to auction would throw it into his own hands at a low price : and that, although when he discharges the rest of his duty faithfully, there can be no possible harm in allowing him to bid for the lands, and to be preferred if he be the highest offerer, yet the best security for his being actually faithful was to remove from him all temptation, by absolutely incapacitating him to purchase.

To this observation the respondent replied, that the nature of the common agent's duty, and the intimation of every step which must indispensably be given to the creditors, and the bankrupt or their agents, gives assurance that no malversation on his part can escape notice. In general, he knows nothing about the estate, except what he learns from the proof, which every person concerned may look at as well as he. No one indeed will trust entirely to it for the information on which he is to determine whether or no he is to bid for the premises, but will either inspect them himself, or employ those he can trust so to do, and satisfy himself with respect to the soil, climate, beauty of the place, and a thousand other particulars, in which investigations the common agent has no advantage over him.

With respect to a superiority of information inferring no disability, the case of the heir pursuing a judicial sale of his ancestor's estate is a strong one : he is entitled without proving the bankruptcy, to bring a process of ranking and sale, which is conducted in all respects as the other process at the instance of a creditor, towards which a proof of the bankruptcy is requisite, only there is no common agent, the action being carried on by his own private agent. When by this process the estate is exposed to sale, not only his agent, who has precisely the same functions to perform that the common agent has in the other case, but even he himself is at liberty to purchase it, and the examples of his so doing are frequent, nor have they ever been complained of : yet surely he, generally born and bred on the estate, must know more of its real value than any one else. At any rate, a person's bidding who is supposed to know something of the condition of the estate, must be an inducement to others to bid the more readily.

But even if the expediency were acknowledged of incapacitating the common agent from buying at the sale, it could [63] only be an inductive reason to the legislature for prohibiting by statute all such purchases in future, and could in no ways be regarded by a court of justice in determining with respect to the validity of those which had already been made. It is according only to the laws as they stand at the time that this must be tried : and it can never be held as a sufficient reason of reduction that one of the parties was in a situation which tempted him to overreach the other, and which facilitated his so doing. The actual commission of fraud in the particular instance must also be proved.

The cause having come for the third time before the court of session for judgment, was ultimately decided in the respondent's favour by the following interlocutor, 8th March 1793 : " The lords having advised this petition, with the answers, and petition for the York Buildings Company, answers for Mr. Mackenzie to said petition, with the minutes for both parties, they repel the reasons of reduction, sustain the defence, assoilzie the defender, and decern ; and in respect one of the reasons of reduction was a charge of fraud against the defender, find the pursuers liable in the expence of the defender's proof, and ordain an account thereof to be given in, but find they are not liable in any other expence of process, but supersede extract till the third sederunt day in May next."

From this last interlocutor, as well as from that of the 7th of December 1791, the present appeal was made to the lords by the Company, who prayed, that those two interlocutors might be reversed, varied, or amended : And with respect to the question to which the present report is confined, the appellants assigned the following reasons (R. Dundas, J. Mansfield, J. Mackintosh) :

The sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity, which precluded him from being the purchaser. The office infers a natural disability, which *ex vi*

termini imports the highest quality of legal disability. A law which flows from nature, and is founded in the reason and nature of the thing, is paramount to all positive law. This is not an arbitrary or local regulation; it is the constitution of nature itself, and is as old as the formation of society, and of course it must be universal. It proceeds from nature, and is silently received, recognised, and made effectual wherever any well regulated system of civil jurisprudence is known.

The ground on which the disability or disqualification rests, is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expence of those for whom he is entrusted.

[64] The danger of temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation where the danger is imminent, and the security against discovery great, as it must be where the difficulty of prevention or remedy is inherent to the very situation which creates the danger. The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation.

"It may seem hard," said a great judge, "that the trustee is the only person of all mankind, who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed: for it is very obvious what would be the consequence of letting trustees have the lease, on a refusal to renew to *cestui que trust*." So Lord Chancellor King, in the case of Keech and Sandford, 31st October 1726, (1 Eq. Ab. 741.) when his lordship decreed a lease renewed to the trustee, to whom the expired lease had been devised in trust for an infant, to be assigned to the infant, considering the renewal to be a trust for the infant, although the trustee had applied to the lessor for a renewal, for the benefit of the infant, and the lessor had refused the renewal in regard the lease being only of the profits of a market, there could be no distress, and must rest singly on covenant, which the infant could not do.

Again, Lord Chancellor Hardwicke, in the case of Whelpdale and Cookson, in 1747, (1 Ves. 9.) the trustee to whom lands were devised in trust for payment of debts, purchasing part: "He would not allow it to stand good, although another person, being the best bidder, bought it for him at a public sale;" for (said his lordship) "I know the dangerous consequence, nor is it enough for the trustee to say You cannot prove any fraud, as it is in his own power to conceal it." These cases are authorities; but the principle expressed with such firmness in both is the authority for the cases, and the ground upon which every like case is to be judged.

The office of a common agent has already been described in this case: and it is needless to enter into refinements or niceties as to the nature of trusts, or the specific name of trustee. There is no magic in the term: He is a trustee (in technical style) who is vested with property in trust for others; but every man has a trust, to whom a business is committed by another, or the charge and care of any concern is confided or delegated by commission. He that is employed by one either to sell or to buy land for him, is in that instance his trustee, and has a trust reposed in him. The respondent is an agent, that is, he is to act for others, not for himself. He is a common agent, which implies, that he has the charge of a concern in which different parties have a common interest: He is agent for the creditors, for the satisfaction of whose debts the estate is to be sold; and for [65] the owner of the estate, who has the resulting interest in the reversion of the price, if any emerges after the debts are paid.

The office of the common agent in this case is a judicial office, derived from an act of the Court confirming the election of the creditors under a special ordinance of regulations: The common agent is therefore not only responsible to those for behalf of whom he is entrusted with the charge and concern committed to him, but he is answerable to the Court from whose authority he derives his character. His charge is an official duty, and his office a judicial office. The duties of the office

are the more strict, because those for whom the common agent acts, are, if not wholly, yet to a very great degree, excluded by his appointment from the charge and care of their own interest, and even from the means of protecting or attending to it with effect. Both the management and the funds are put into the power of the common agent.

Such is the nature of the office the respondent held, and the situation and circumstances of the character in which he acted, when he himself, as the agent for others, and for the appellants in particular, officially exposed the estate to sale at the judicial roup, and purchased to himself, *privato nomine*. Nothing, therefore, can be clearer than this, that his case and the present question comes within the rules so forcibly laid down by Lord King and Lord Hardwicke, and within the authority of every analogous case which has been determined on the principles which these great and eminent judges laid down.

All the authorities concenter in one principle. It is of no moment what the particular name or description, whether of character or office, situation or position, is, on which the disability attaches. "Tutor, aut paulus, rem pupilli *emere non potest* : idemque porrigendum est ad similia, id est, ad curatores, procuratores, "et qui negotia aliena gerunt." L. 34. § 7 ff. De contrah. emptione, etc.

The reason of this law is implied in the nature of the cases to which it is extended. Its energy does not consist in a distinction of mere words, that a tutor cannot be both seller and buyer : neither does it rest on another applicable enough adage, *Nemo potest in rem suam auctor esse* : which, though a general rule in its proper and sound sense, is not literally universal. The *sententia* of the Roman Jurisconsult is, that the tutor cannot buy his pupil's estate, because he has a trust and a charge for his pupil : and therefore it is that the law is extended *ad similia*, and to all *qui negotia aliena gerunt*.

By this principle, as the sound and substantial reason of the law, is to be interpreted that other text in the pandects, which says, "Item ipse tutor, et emptoris et venditoris officio fungi non potest." L. 5. § 7 ff. De Auct. & Cons. Tut. & Cur.

Accordingly, when the civilians say that the different parties in a contract are so distinct and separate, though the contract is but one, that "*una non potest esse altera, aliudque semper sit* [66] *emere, aliud vendere alius emptor, alius venditor*," which is the language of Vinnius, the celebrated commentator on the Institutes, the meaning agrees with the reason of the thing, viz. That the part which the seller and the buyer have to act stand in direct opposition to each other in point of interest, it being the object of the seller to sell as high as he can, and of the buyer to buy as cheap as he can. So it is said in one of the texts of the Roman law, "*In pretio emptionis & venditionis naturaliter licere contrahentibus, se circumvenire*." L. 16. § 4 ff. De Minor, etc. Because, as Cujacius expresses himself in his commentary, "*Emptor emit quam minimo potest, venditor vendit quam maximo potest*." Cuj. tom. iii. p. 388.

This conflict of interest is the rock, for shunning which, the disability under consideration has obtained its force by making that person, who has the one part entrusted to him, incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust. And the true principle of the thing, rightly understood, necessarily concludes the respondent's case to fall within the rule of disability which Lord King and Lord Hardwicke hold up as never at all to be relaxed or departed from in any case to the nature and circumstances of which the rule applies.

It is upon the same principle that the general doctrine of the law of Scotland stands with regard to all the acts of tutors and guardians, factors, trustees, and all who are a-kin to a trust by any connection of character or office.

And the analogy of the law of England appears perfectly to agree in the same doctrine. The cases are well known in the law books both of England and Scotland, particularly with regard to the purchasing in of debts, with eases and compositions, and the like ; where the law presumes the persons in the particular situation of trust, in all things relative to the estate of those for whom they are entrusted, to act for them and not for themselves. The reason is, the law will not allow them to act otherwise for the danger of their situation. And another reason may also be assigned, namely, that the law in no case will permit persons who have undertaken a character or a charge, to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others.

To shew the universality and extent of the principle now contended for, there

needs but to observe that particular law among the Romans, by which magistrates and others, in the provinces, were disabled from making purchases at sales under their own authority, and a heavy penalty inflicted if they attempted it. "*Non licet ex officio, quod administrat quis, emere quid vel per se, vel per aliam personam, alioquin non tantum rem amittat, sed et in quadruplum convenitur secundum constitutionem Severi et Antonini.*" L. 46 ff. De contrah. emptio. Voet, commenting on this law, intimates as the reason for inflicting the penalty, that selling, while in the functions of their office, [67] they were, at the same time, both buyers and sellers: "*Si ex officio emerint, id est, si emerint dum ipsi suo fungentes officio eam vendiderant aut vendi jusserant, atque ita ipsi emptores simul ac venditores essent.*"

Perezius, one of the most celebrated commentators, puts the question, "*Sed quæ ratio prohibitionis?*" and he answers the question from Cicero in Verrem, "*Quæ fuit causa, inquit, cur tam diligenter nos in provinciis ab emptione removerunt? Hæc; iudices quod putabant ereptionem esse non emptionem, cum venditori suo arbitrato vendere non liceret.*"

Among the Romans also, in the case of judicial sales, the prohibition or incapacity extended to all who had any connection with them. The learned civilian Mattheus wrote a book on purpose, *De auctionibus*, in which there is a particular list of the persons to whom the prohibition reached; and the reason of the prohibition, as he applied it to the several persons in the plainest manner, points out the relation which the prohibition bears to the case of the respondent. The list mentions the judge before whom the judicial sale was carried on: "*Cum nemo adversus magistratum licitare ausit.*" The clerks of court, because they were entrusted with writing out the decree; the procuratores and executores, "*adque ne per fraudem eorum res minori pretio projiciantur;*" and even the *scriba auctionis*, and the circuitor or crier, "*qui per compita auctiones denunciat;*" for, as the learned author says, "*sunt enim his suæ quædam artes et veteratoria calliditas, qua instructi, facile minimo pretio res auferre possint.*"

Upon this point, besides the two celebrated cases already referred to, for the sake of the nervous words of Lord King and Lord Hardwicke, the appellants founded on other later cases in chancery, which have been decided on the same general principles, such as *Twining v. Morrice*, 1788, (2 Bro. C. R. 326.) *Crowe v. Ballard*, 13th July 1790, (3 Bro. C. R. 117.) and *Fox v. Mackreth*, 11th December 1788, affirmed in parliament with costs, 14th March 1791. [See Vol. IV. p. 259, of this work, tit. Fraud, case 19.]

The Scotch authorities agree with the English both in the doctrine and the principle and reason of the thing.

Lord Stair, lib. 1. t. 6. s. 17. "Tutors or their factors are presumed to do that for behoof of the pupil which they ought to do; and though it be done *proprio nomine*, it accresceth (*i.e.* accrues) to the pupil, 18th July 1635, *Edmonston*. And so a tack (lease) of the pupil's rent, taken by the tutor's factor, to himself and his wife, was found to accresce to the pupil, 28th March 1632, L. of *Ludquhairn contra L. Haddo*. This is presumed *præsumptione juris et de jure*." Lord Bankton lays down the same doctrine. b. 1. t. 2. s. 39. And Mr. Erskine does it very explicitly with reasons that speak the same language that occurs in the English cases: "In every transaction which hath a natural connection with the minor's estate, it is pre-[68]-sumed he acts as his trustee;" adding with great propriety, "if it were otherwise, a tutor, through the knowledge of the minor's affairs, and concealing them from others, might raise to himself a fortune, by such purchases, at his ward's cost." And the modern decisions, cited agreeable to the above principles, are *Cochran against Cochran*, 17th February 1732, and *Bee against Biggar*, 19th June 1745.

In a very great cause, part of which came to parliament, the Earl of Crawford against Hepburn, 4th March 1767, where the case was debts purchased in by a trustee, and the factor and cashier of the trust, the principles were recognized in the strongest manner; and Lord Kaines, reporting the case in his *Select Decisions*, has these remarkable words: "To permit a trustee to transact debts for his own behoof would tempt him to direct his whole management for his own profit. However innocent such an act may be in itself, it is poisonous in its consequences; for if opportunity be given for making profit in this manner, a trustee will soon lose sight of his duty, and have nothing in view but his own interest."

A very late case occurred, in which the principles were fully considered, and applied

with their utmost force. Fac. Coll. Wilsons *contra* Wilson, 26th June 1789.—The case was very nearly the same with that of Keech and Sandford, determined by Lord King in 1726.

The British legislature, though it cannot be said to have enacted the disqualification in question, recognized and sanctioned it by applying the law, upon the very principle of it, in a particular case, namely, that of the commissioners and trustees of the forfeited estates. The statute of 4 Geo. I. c. 8. empowered them to sell the estates "to any person or persons, being protestants, bodies politic or corporate, their heirs, successors, executors, administrators, or assigns," with this exception, other "than the said commissioners or trustees, or their officers respectively, or any other" or others in trust for them or any of them."

The respondent assigned the following reasons for affirming the two interlocutors complained of, so far as related to his capacity of becoming a purchaser. (J. Scott, R. Blair, W. Grant, W. Miller, W. Adam.)

Because the respondent's holding the office of common agent inferred no capacity to become the purchaser. Such a disqualification is established by no statute, and by no act of sederunt, or other regulation of the Court.—It is not hinted in any one treatise on the law or forms of proceeding, and there is no decision of the Court from whence it receives countenance. The practice, since the year 1756, when the office first existed, and the proceedings in this very case demonstrate that such an idea had never been entertained till it was broached by the appellants, and to them it did not occur till years after the estate was in possession of the person alleged to have been incapable of buying it.

[69] Whether it would be expedient now to introduce such a regulation is a question which the respondent will not presume to discuss or determine, though his own practice, and the general sense of practitioners entitle him to say, the affirmative is by no means clear; but to establish it with a retrospect, or by the decision of a particular case, where the party acted *optima fide*, and did nothing that was not sanctioned by custom, the respondent ventures with confidence to pronounce is what ought not to be, and never will be. An able and upright judge, reporting a case in the last century which arose upon the law which inflicts a punishment on practitioners purchasing claims in litigation, and where the question was made, whether the purchase should not be set aside, says, "The lords confessed there was great inconvenience, in sustaining such sales, but they could not redress it, that being a work for parliament. Arguments *ab incommodo* ought not to move judges to recede from established laws; and judges, tied by the law as they are, have no power to alter laws." He might have added, or to make or extend laws.

It is from analogy only that the appellants infer the alleged disqualification to be founded in law; and allowing that the principles which have, with approbation, governed the decision of one case may be applied to a similar case, certainly the principle ought to be clear, and the analogy very strong, before the decision can be considered as a law, of which the application was obvious, or as a beacon that could not escape observation. The cases relied on are, those of a guardian acquiring the property of his ward, and trustee that of his *cestui que* trust: but (not to dwell on the exception laid down by one of the best writers on the law of Scotland of the acquisition being made at a public auction) the disqualification in those cases depends on the maxim that one cannot be *actor in rem suam*. The very idea of private purchase by a person vested with the character of guardian or trustee is fraudulent; no honest man would hold such an acquisition against the consent of the person interested; and therefore, though purchaser, he is still held to be a trustee. But it is straining beyond all bounds to call the common agent in a judicial sale, as the appellants have found themselves obliged to do, the seller of the estate, or a trustee: His office has been explained, and his duty detailed above, and need not here be repeated: He is merely the solicitor to collect evidence for the information of the Court, to attend to the formal part of the business, and, in every instance, to act by directions of the judges, and under the watchful eyes of the creditors and their particular agents. At the actual sale he has nothing to do or to execute: There is no occasion even for his presence or concurrence in any shape: The Court, or the judge delegated, or in other words, the law, is the seller. The conduct of the formal part of that day's business is entirely in the hands of the clerk of court. In the previous preparatory steps the common

agent [70] may act fraudulently, with a view to derive an advantage to himself by superior information, and so may others, though it must be with extreme difficulty, considering how the process is conducted. It is admitted that fraud proved would vitiate the purchase : but, at present, the only point for consideration is the abstract question, Whether the common agent is or is not *eo nomine* disqualified ? And the respondent concludes, that as there is no law at present unfavourable to him, so there is very little reason to make one to attach in future. It is proved that it has been very usual for common agents to bid and purchase ; and there is no instance, till the present, of its being challenged on the head of fraud or any other ground, or complained of as inconvenient or dangerous.

" After hearing counsel on this appeal for sixteen days, between the 15th of April and 11th of May, it was, on the 13th of May 1795, ORDERED and ADJUDGED, That the said several interlocutors complained of in the said appeal be reversed ; and it was declared, that the decret of sale, and the charter under the great seal, proceeding on the said decret of sale in favour of the defender, with the instrument of seisin in his favour following thereupon, all which were challenged by the summons in the process, ought to be set aside and avoided to such extent and degree, and in such manner as is after provided ; and the defender ought to refund to the pursuers all the rents and profits which he had received out of the estate in question, and an adequate consideration for the enjoyment of such parts thereof as he occupied himself, but without prejudice to the title of the defender to reclaim all such sums of money as he hath paid for the original price of the estate in question, and also for the permanent improvement of the same, with the interest thereof, to be computed from the times when the same were respectively advanced and paid, according to such rate as the court of session should appoint : and likewise without prejudice to the titles and interests of the lessees and others who might have contracted with the defender *bonâ fide*, and before the dependance of the present process ; and also without prejudice to the title of the common creditors to have the value of the estates in question, and the amount of the intermediate produce thereof applied in payment of their demands, as fully as the same might have been done if the foresaid decret, and instrument following thereon, had not passed, the expences incurred by the pursuers in recovering the same being first deducted : And it was further ordered, That an account be taken of the rents and profits, of the estates in question, received by the defender, and of the yearly value of such parts thereof as had been in his occupation, and of all sums of money received by the defender for the sale of timber, stone, coal, or other parts of the inheritance, and that interest be computed upon all such sums respectively, from the respective times of their being [71] received, at such rate as the court of session, according to the course of that Court, should thing fit to order : And it was further ordered, That an account also be taken of the several sums of money which the defender actually paid as the original price of the said estates, and also of such further sums of money as the defender actually laid out for the permanent benefit and improvement of the said estates ; and that interest be computed, at the above mentioned rate, upon the said several sums from the times when the same were actually disbursed ; and that one of the said accounts be set against the other, and such rests be made in taking the same as justice may require ; and that either party do pay to the other such sum of money as shall be found due on the balance of the said accounts ; and if nothing should be found due to the defender, or upon payment of what should be so found due, that the defender should reconvey the said estates to the pursuers, subject to the demands of their creditors, and to the leases and other contracts as aforesaid, in such manner as the court of session should think fit to direct : And it was also further ordered, That the cause be remitted back to the court of session in Scotland, and that the said court should give all necessary and proper directions for carrying this judgment into execution.*"

* The taking the accounts directed by this decree produced fresh disputes between the parties, and three more appeals to the House by the Company, in all of which they were unsuccessful. One of these appeals was determined June 14, 1797, and the other two on June 19, 1797. They related to questions of interest, costs, and expences, wholly unimportant to any but the parties.

CASE 3.—RICHARD TROWARD, Gentleman,—*Plaintiff*; JOHN CALLAND, Esquire,
—*Defendant* (in Error) [16th May 1796].

[Mews' Dig. v. 1240. See *Reg. v. Eton College*, 1857, 8 E. & B. 628.]

[If, after a grant of a next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grant is not defeated; but the grantee may present on the next vacancy occasioned by the death or resignation of the king's presentee.]

[Judgment of the Court of K. B. (affirming a judgment of the Court of C. P.) affirmed.]

2 H. Black. Rep. 324: 6 Term Rep. B. R. 439. 778 [*sub nom. Troward v. Cailland*].

The Defendant in Error, in the year 1791, having agreed with the plaintiff in error for the absolute purchase of the advowson of the rectory of Bletchingley, in the county of Surrey, for the sum of £7000, of which living the Reverend Matthew [72] Kenrick, doctor in divinity, was then the incumbent; the plaintiff in error, by indenture under his hand and seal, made and dated the 26th July 1791, in consideration of that sum paid to him by the defendant in error, granted, bargained, and sold the same to and to the use of the defendant in error, his heirs and assigns, and entered into the usual covenants for tithe, and against incumbrances.

A claim being afterwards made and insisted upon to the next presentation, under and by virtue of a grant and subsequent assignment thereof, as hereafter stated, the defendant in error, in Michaelmas vacation, in the thirty-fourth year of the reign of his present majesty, commenced an action of covenant in the court of common pleas against the plaintiff in error, and declared therein in Hilary term following. The following is a copy of the Declaration from the record in the cause:

“PLEAS inrolled at Westminster before the Right Honourable Sir James Eyre
“Knt. and his brethren, justices of his Majesty's court of common bench,
“of Hilary term, in the thirty-fourth year of the reign of our sovereign lord
“George the third, by the grace of God of Great Britain, France, and Ireland,
“king, defender of the faith, and so forth. Rolls $\frac{8}{12}$.

“London to wit. Richard Troward, late of Norfolk-Street, in the parish of St.
“Clement Danes, in the county of Middlesex, gentleman, was summoned to answer
“unto John Calland, Esquire, of a plea that he perform unto the said John the cove-
“nants between him and the said Richard, according to the force, form, and effect
“of a certain indenture thereof between them made, etc. And whereupon the said
“John, by John Smith his attorney, complains, that whereas by a certain indenture
“made at London aforesaid, to wit, in the parish of St. Mary-le-Bow, in the ward
“of Cheap, on the twenty-sixth day of July, in the year of our Lord one thousand
“seven hundred and ninety one, between the said Richard of the one part, and the
“said John Calland of the other part, one part of which said indenture, sealed with
“the seal of the said Richard, the said John now brings here into court, the date
“whereof is the same day and year aforesaid; reciting, that the said Richard was
“seised in fee-simple of and in the advowson of the rectory, parsonage, or parish-church
“of Blechingley, in the county of Surrey, of which living the Reverend Matthew
“Kenrick, doctor in divinity, was then the incumbent: And further reciting, that
“the said John had contracted and agreed with the said Richard for the absolute
“purchase of the said advowson at or for the price or sum of seven thousand pounds,
“it is witnessed. That for and in consideration of the sum of seven thousand pounds of
“lawful money of Great Britain to the said Richard, in hand well and truly paid by
“the said John, at or before the sealing and delivery of the said indenture, [73]
“the payment and receipt of which said sum of money the said Richard did thereby
“acknowledge, and of and from the same, and every part thereof, did acquit, release,
“and discharge the said John, his heirs, executors, administrators, and assigns, and
“every of them for ever; by the said indenture he the said Richard had granted,
“bargained, and sold, and by that indenture did grant, bargain, and sell unto the

" said John, and to his heirs and assigns, all that the advowson, donation, free dis-
 " position, and right of patronage and presentation of, in, and to the rectory, parsonage,
 " or parish church of Blechingley, otherwise Bletchingley, otherwise Blechingleigh,
 " in the said county of Surrey, with its appurtenances, and the reversion and rever-
 " sions, remainder and remainders, and profits thereof; and all the estate, right,
 " title, interest, trust, property, claim, and demand whatsoever, both at law and in
 " equity, of him the said Richard of, in, to, or out of the said advowson or right
 " of patronage and presentation to the rectory or parsonage of the said parish-church,
 " and other the premises thereby bargained and sold, or expressed or intended so to
 " be, with the appurtenances, to have and to hold the said advowson, donation, free
 " disposition, right of patronage and presentation of, in, and to the said rectory,
 " parsonage, or parish church of the said parish of Blechingley, otherwise Bletchingley,
 " otherwise Blechingleigh, and other the hereditaments and premises thereby bargained
 " and sold, or expressed or intended so to be, with their and every of their rights,
 " members, and appurtenances, unto the said John, his heirs and assigns, to the only
 " proper use and behoof of him the said John, his heirs and assigns, for ever: And
 " the said Richard, for himself, his heirs, executors, and administrators, did covenant,
 " promise, and agree to and with the said John, his heirs and assigns, by the said in-
 " denture, in manner following; that is to say, That he the said Richard then, at the
 " time of the sealing and delivery of the said indenture, was, and stood lawfully, right-
 " fully, and absolutely seised of and in, or otherwise well and sufficiently entitled
 " unto the said advowson, or right of patronage and presentation, hereditaments, and
 " premises thereby bargained and sold, or expressed or intended so to be, and every
 " part thereof, of and in a good, sure, perfect, lawful, absolute, and indefeasible estate
 " of inheritance in fee-simple, without any manner of condition, contingent, proviso,
 " power of revocation, limitation, use, or trust, or other matter, restraint, cause, or
 " thing whatsoever, to alter, change, charge, revoke, defeat, determine, or make void
 " the same; and also that he the said Richard then had, in himself alone, good right,
 " full power, and lawful authority to bargain and sell the said advowson, right of
 " patronage and presentation, hereditaments, and premises therein before bargained
 " and sold, or expressed or intended so to be, and every of them, and every part and
 " parcel thereof, with the appurtenances, unto the said John, [74] his heirs and
 " assigns for ever, in manner aforesaid, and according to the true intent and meaning
 " of the said indenture; and likewise that the said advowson, right of patronage and
 " presentation, hereditaments, and premises thereby bargained and sold, or expressed
 " or intended so to be, and every part and parcel thereof, were then free and clear of
 " and from all charges and incumbrances whatsoever, as by the said last-mentioned
 " indenture, amongst other things, more fully appears: And the said John, in fact,
 " says, that before the said Richard had any thing in the said advowson, and before
 " the making of the said indenture, to wit, on the thirtieth day of May, in the year
 " of our Lord one thousand seven hundred and forty five, Sir Kenrick Clayton, Baronet,
 " was seised of the advowson of the church aforesaid, as of one in gross by itself as
 " of fee and right; and being so seised thereof, he the said Sir Kenrick Clayton, after-
 " wards, and before the making of the said indenture, to wit, on the day and year
 " last aforesaid, at London aforesaid, in the parish and ward aforesaid, the said church
 " then being full of one John Thomas, clerk, the then incumbent thereof, by a certain
 " deed-poll, bearing date the same day and year last aforesaid, sealed with the seal
 " of him the said Sir Kenrick, for and in consideration of the counsel and advice of
 " the said Matthew Kenrick, given to the said Sir Kenrick Clayton in his law and other
 " affairs, and for and in consideration of the sum of five shillings of lawful money of
 " Great Britain to the said Sir Kenrick Clayton, in hand well and truly paid by the
 " said Matthew Kenrick, granted unto the said Matthew Kenrick, Esquire, his executors,
 " administrators, and assigns, the next presentation, donation, and free disposition
 " of and to the rectory of the said parish-church of Blechingley, otherwise Bletchingley,
 " otherwise Blechingleigh aforesaid, to have and to hold the said next presentation,
 " donation, and free disposition aforesaid, to the said Matthew Kenrick, his executors,
 " administrators, and assigns, to present one fit and able person to the said rector
 " and parsonage of Blechingley, otherwise Bletchingley, otherwise Blechingleigh
 " aforesaid, and all other things which should be necessary to be done in and about
 " the premises, to do and accomplish as fully, freely, and entirely as the said Sir Kenrick

" Clayton or his heirs might or could do, or have done, if the said deed-poll had not been made, as by the said deed poll, reference being thereunto had, will appear : by virtue whereof the said Matthew Kenrick, Esquire, became and was possessed of and entitled to the next presentation, donation, and free disposition so granted to him as aforesaid : And the said John Calland further saith, that the said church being so full of the said John Thomas as aforesaid, and the said Matthew Kenrick, Esquire, being so entitled as aforesaid, he the said John Thomas was afterwards, and before the making of the said indenture, to wit, on the first day of June, in the year of our Lord one thousand seven hundred [75] and seventy-four, rightfully and canonically created and consecrated bishop of the bishoprick of Rochester ; and the said church thereupon then became vacant by the promotion of the said John Thomas to the said bishoprick of Rochester, whereby our present sovereign lord the king, by reason of his royal prerogative, became entitled to present a fit person to the church aforesaid so vacant ; and thereupon his said Majesty, by his royal prerogative, before the making of the said indenture, that is to say, on the same day and year last aforesaid, by his letters patent, sealed with his seal of Great Britain, presented the said Matthew Kenrick, in the said indenture mentioned, his clerk to the said church so being vacant as aforesaid, that is to say, at London aforesaid, in the parish and ward aforesaid, who upon the said presentation of our said lord the king was afterwards, and before the making of the said indenture, to wit, on the day and year last aforesaid, admitted, instituted, and inducted into the same, in the time of peace, in the reign of our said lord the present king, and thereby became, and was, and continually from thence, until the time of making the said indenture, and from thence hitherto hath been and still is the parson and incumbent of the said church, on the said presentation of our said lord the king ; and the said church being so full of the said last-mentioned Matthew Kenrick, the incumbent thereof as aforesaid : And the said Matthew Kenrick, Esquire, being so possessed of and entitled to the next presentation, donation, and free disposition, granted to him as aforesaid, he the said Matthew Kenrick, Esquire, afterwards, and before the making of the said indenture now brought here into court, to wit, on the eleventh day of August, in the year of our Lord one thousand seven hundred and seventy-seven, at London aforesaid, in the parish and ward aforesaid, by a certain indenture, sealed with his seal, and made between him the said Matthew Kenrick, Esquire, of the one part, and the said Matthew Kenrick, the said clerk of the said church, of the other part, for the consideration therein mentioned, granted and assigned unto the said Matthew Kenrick, the said clerk of the said church, his executors, administrators, and assigns, the said next presentation, donation, and free disposition, so granted to him the said Matthew Kenrick, Esquire, as aforesaid, to have and to hold the same to the said Matthew Kenrick the said clerk, his executors, administrators, and assigns, as by the said last-mentioned indenture, reference being thereunto had may more fully appear : by virtue whereof the said Matthew Kenrick, the said clerk, became and was possessed of and was entitled to, and from thence, until at the time of making the said indenture, now brought here into court, continued to be, and still is possessed of and entitled to the next presentation, donation, and free disposition of and to the said church, to present a fit person thereto, contrary to the form [76] and effect of the said indenture now brought here into court, and of the said covenant of the said Richard in that behalf made as aforesaid : And so the said John Calland saith, that the said Richard has not (although often requested) kept with the said John Calland his said covenant so made with him as aforesaid, but has broken the same, and to keep the same with him as hitherto wholly refused and still does refuse, to the damage of the said John Calland, of ten thousand pounds, and therefore he brings suit," etc.

To this declaration the plaintiff in error demurred generally, and the defendant in error joined in demurrer.

This demurrer was argued in the court of common pleas ; and after one solemn argument, (a farther one being offered by the court, but declined by the plaintiff in error as well as the defendant,) and time taken by that court for consideration till Trinity term following, the judges of that court were unanimously of opinion, that the grant of the next presentation to Matthew Kenrick was not defeated by the right of the king by virtue of his prerogative, but still continued a subsisting incumbrance

upon the advowson, and gave judgment for the defendant in error. (2 H. Black. Rep. 324.)

On the 12th December 1794, a writ of inquiry was executed before the chief justice of the said court of common pleas, whereon, by an order of *nisi prius*, which has since been made a rule of the court of common pleas, it was ordered by the court, by and with the consent of all parties, their counsel and attornies, that there be a verdict for the defendant in error for £7980 damages, and 40s. costs, the defendant in error undertaking, in case he should be ultimately entitled to the benefit of a judgment to reconvey to the plaintiff in error the advowson in question, at the expence of the said plaintiff in error, on payment of the said sum of £7980 and costs as aforesaid, together with such further interest as should be due thereon from the 27th day of January 1795 to the time of such reconveyance; and the jury thereupon assessed the defendant in error's damages, besides his cost of suit, to £7980, and for those costs to 40s. and judgment was thereupon signed against the plaintiff in error in Hilary term following for those sums, and also for £77 9s. increased costs, amounting in the whole to £8059 9s.

Upon this judgment the plaintiff in error brought a writ of error, returnable in the court of king's bench, in which court the case was solemnly argued in Trinity term 1795, and a second argument granted at the particular instance of the plaintiff in error by his counsel; and the case coming on again in that court for argument in the ensuing Michaelmas term, the second argument was then declined on the part of the plaintiff in error, and the court of king's bench immediately and unanimously affirmed the judgment of the court of common pleas. (6 Term Rep. K. B. 439.)

The plaintiff in error thereupon brought the present writ of error, returnable in parliament, and assigned for error, that judg-[77]-ment was given for the defendant in error, whereas, by the law of the land it ought to have been given for him the plaintiff in error, therefore that in that there is manifest error; for which, and for other errors in the record and proceedings appearing, he has prayed a reversal of the said judgments, and that the defendant in error might rejoice to the said error, which the defendant in error did on the 23d day of February last:

In his printed case the plaintiff in error stated the following reasons for reversing the judgments of the courts of common pleas and king's bench (J. Scott, T. Erskine, J. Fonblanque):

First, Because the next presentation to a church is at law grantable, though it be subject to the interception of the prerogative.

Second, Because all deeds which are expressed in clear unequivocal terms, ought to be construed agreeably to the import of the terms in which they are expressed, and the rule that *verba fortius accipiuntur contra proferentem* is a rule not to be resorted to until every other rule of construction has been unsuccessfully applied. Lord Bacon's Max. Reg. 3.

Third, Because the right to the next presentation being subject to the interception of the prerogative, involves a contingency which must necessarily influence the terms of the contract of the purchase of such right; and he who contracts for the first and next presentation, contracts for it as he would for the perpetual advowson, which is but a succession of rights of presentation, subject to every contingency to which it is liable by operation of law.

Fourth, Because the grantee of the first and next presentation claiming from a person entitled to grant the same, is not only upon principle, but also upon the authority of adjudged cases, excluded from claiming any other than the first and next presentation, Woodley v. Bishop of Exeter, Cro. Jac. 691. Winch's Rep. 94.

Objection first. But it is objected by the defendant in error, that a grant of the first and next presentation must be construed to mean the right to present to the first and next avoidance to which the grantor would himself have been entitled to present, for that an act of law shall not work prejudice to the grantee, and a passage in Co. Litt. 379 (a), and a note in Dyer, 228, are referred to.

Answer. The grantor had a right to grant the next presentation in the manner in which he was entitled to it himself at the time of the grant, that is, subject to the interception of the prerogative, and in the present case the grantor hath granted it in words suitable to the intention of granting it in such manner as he was entitled to it himself; to attribute to him the purpose of granting a larger interest than the

words of his grant, in their common and technical acceptance, import, is not to expound but to extend his grant; and as to the rule *lex nemini facit injuriam*, the plaintiff in error does not feel it necessary to controvert the existence of the rule, but objects to the application of it to a contract, the terms of which must have been in some degree influenced by the possible interception of the prerogative. [78] With respect to the case referred to by Lord Coke in illustration of the rule, the plaintiff in error observes, that it was in the above case, *Woodley v. Bishop of Exeter*, Cro. Jac. 691, denied to be law: and as to the case stated in margin of *Dyer*. 228, it appears to be a short anonymous note of a case in M. 19 Jac. whereas judgment was not given in the case of *Woodley v. Bishop of Exeter* until Mich. 22 Jac. The plaintiff in error admits, that the case of *Woodley v. Bishop of Exeter* is entered on the roll, 18 Jac. and that the pleadings are of that date; but if the case referred to by Chief Justice Treby (the note of which he could not himself have taken) be *Woodley v. Bishop of Exeter* and others, the plaintiff in error submits, that it is remarkable that the judgment given in that case should be so differently stated: but the plaintiff in error, considering the record of the judgment as the best criterion of what it really was, has searched for and found the same to agree in substance and in date with the report of Croke and Winch: the plaintiff in error therefore submits, that if the case referred to by Chief Justice Treby, be the case of *Woodley v. Bishop of Exeter* and others, that the note in the margin of *Dyer* is erroneous; and if the case so referred to by Chief Justice Treby, be not the case of *Woodley v. Bishop of Exeter* and others, but a different case, determined M. 19 Jac. that the subsequent judgment, M. 22 Jac. in the case of *Woodley v. Bishop of Exeter* and others, has over-ruled it.

Second objection.—But the defendant in error insists, that the authority of the case of *Woodley v. Bishop of Exeter*, is considerably weakened by the decision of the case of the Grocers' Company against the Archbishop of Canterbury, 2 Bla. Rep. 770, in which case it was held, that the prerogative presentation to a church, of which the advowson was held in common, does not pass for the turn of the otherwise rightful patron, and that the learned judges stated in the case of *Woodley v. Bishop of Exeter* was not clearly settled to be law.

Answer to second objection.—It is observable that the learned judges, in giving judgment on the above case of the Grocers' Company, remarked, that if the case of *Woodley v. Bishop of Exeter* be law, it was very different from the case before them, the latter being a general right of patronage, the former only a grant of the next avoidance, which they admitted in strict construction cannot extend to a second or other subsequent vacancy; and as to the doubt respecting the authority of *Woodley* against the Bishop of Exeter, it was founded upon the note in *Dyer*, to which the plaintiff in error has already adverted; and on the case of *Evans v. Askwith*, Sir W. Jones' Rep. 158, which upon perusal will appear to have no relation to the present question, but to have turned upon a very distinct question, namely, whether a dispensation to hold in *commendam* was a presentation?

Third objection.—The defendant in error further objects, that the judgment in the case of *Woodley* against the Bishop of Exeter, ought not to govern the present case, the party in that case [79] claiming the next presentation not as grantee under a deed but as devisee under a will, and the devise being not of the first and next presentation, but of the first and next presentation which should first and next happen.

Answer to third objection.—The plaintiff in error submits, that in the construction of a deed much more strictness prevails than in the construction of a will, and that if the words first and next presentation in the construction of a will, could not be so construed as to extend to the second or any subsequent presentation *a fortiori*, they cannot receive such construction in a deed; and as to the words "which should first and next happen," the plaintiff in error submits, that they express no more than the preceding words first and next presentation necessarily imply, & *expressio eorum quæ tacite insunt nihil operatur*.

In affirmation of the judgments of the courts below the defendant in error assigned the following reasons (E. Law, G. S. Holroyd):

1. The question made on this record is, Whether the grant of the next presentation to Matthew Kenrick "to present one fit and able person to the rectory of Bletchingley, and all other things which should be requisite to be done in and about the premises, to do and accomplish as fully, freely, and entirely as the grantor or his heirs might

"or could do, or have done, if the grant had not been made," is a subsisting incumbency on the advowson, and still in force; or whether it is defeated by the vacancy which has happened by promotion since the grant, and which has been filled by the king's prerogative?

The person seised in fee has in him the whole estate of the advowson, that is, the entire and absolute right of patronage: he can grant the whole or a part of that estate which he has, but he can neither grant, nor can he be supposed to grant, or to have intended to grant, that which he neither has, nor which, in his own contemplation, or in that of others, can be supposed to have had. The prerogative right to present on promotion to a bishopric is no part of that estate which a grantor can have, or can assume, or be supposed to have. It has been held not to be "a right of patronage, but a contingent casual right arising upon a particular event, viz. the incumbent's becoming a bishop." (*Grocers' Company v. Archbishop of Canterbury*, 2 Black. 770. 3 Wils. 233.) This contingent casual right of the king, which forms no part of the estate, even of that grantor who has in him the whole estate of the advowson, cannot be the thing intended to be granted, or taken to be so by either party to the grant. Where the thing intended to be granted is the very next presentation, as, if a man grant the next presentation to A. and afterwards grants the next presentation to B., in that case, though the grantor had it not at the time of the second grant, he assumed to have it and to grant it, the grant therefore cannot extend to and pass a presentation subsequent to the first, no other than the first being at all in the contemplation of the parties. This is substantially the reason assigned in *Brooke's Abridgment*, and in *Coke upon Littleton*. (Co. Litt. 378. b. Dyer. 35. Br. Presentation. 52.) So neither can the party take the [80] second when he might and ought, by the grant, to take the first: (*Baskerville's case*, 7 Co. 28. *Starkey v. Pool*, 1 Bulstr. 26.) But in the present case he could not take the first; nor can the grant import the king's right of presentation as the thing granted; and if it does not import the next presentation, which would belong to the person seised in fee, and which only he could therefore assume a power to dispose of, the grant in this event is made to import nothing. This distinction seems to have been taken by *Winch Justice* in the case of *Woodley and the Bishop of Exeter* (*Winch's Reports*, 94), for he says, (speaking of the devise in that case,) "it is punctually expressed that he shall have the first, and that shall not extend to the first which may be granted; but," *Winch* further says, "I grant, if two coparceners had an advowson, and the eldest presented and then granted the next, in this case the grantee shall have the next which may be granted; and the reason is because she may not dispose of the estate of another." In that case it must be taken that she did not assume to have a larger estate than as coparcener, the grant, therefore, is construed with reference to the estate which she was taken to have.

A grant of "the next presentation," therefore, by a person seised in fee, that is, having all the estate therein which he can assume to have, is the same thing in intent and effect as if the grant was expressed "my next presentation."

II. It has been *contra* argued, that a perpetual advowson consists of next presentations in endless succession, subject to the contingency of the king's prerogative of presenting on promotion: that a grant of the next presentation is a separation of a member of the estate from the residue subject to the same contingency, and therefore that the grant cannot extend to a presentation subsequent to that which is filled up by this prerogative of the crown. But this reasoning is fallacious. Allowing for a moment that the estate of the grantor is subject to the contingency, it does not follow that a grant of the next presentation is liable to be absolutely defeated by this contingency. This cannot be, unless in the event that has happened the king's right to present is taken to be the thing granted, which the defendant in error humbly submits is not the case. The effect of that reasoning is this, that the grant shall be void, in case there shall happen to be a vacancy on the king's promotion of the incumbent to a bishopric. No such condition is expressed, or can be implied, in the grant; the grant is absolute. But that which was vested in the patron is more properly the perpetual right of presentation, with the exception of those cases where the king's prerogative intervenes; which prerogative, though exercised upon the rectory, is wholly independent of the estate of the patron in the advowson, and neither forms part of it, nor operates upon it. The king's right seems to be more correctly

a mere substitution of one person in the place of another, whom the king has removed, from which person so substituted a future vacancy may arise as soon as, or sooner than if the former incumbent had continued ; a substi-^[81]-tution, putting the church in the like condition as if the king had not made the vacancy, by which vacancy the patron otherwise would be benefited, and leaving the patron probably as near his turn to present as he was before the change. All this reasoning, to shew that a grant of the next presentation is not subject to the king's prerogative, so as to be defeated by it, is confirmed in the decision of the Grocers' Company against the Archbishop of Canterbury. (2 Black. Rep. 770. and 3 Wils. 233). If it be liable to be so defeated those statutes for uniting particular parishes, which statutes vested the presentations to the new churches in two or more persons by turns, and which are in effect statute grants of such presentations, must have been deemed to have granted the next presentations perpetually subject to and liable to be defeated by the above contingency of the king's prerogative ; the contrary of which was directly adjudged in the case last above mentioned, and in other cases there cited. It was said there by the Court, that " this does not supply, it only suspends or postpones, the turn of the patron. It " postpones the turns of all the patrons, if more than one, but does not take away the " right of one, and leave the rest entire, which would be rank injustice ; and this being " the act of law, *nemini fecit injuriam*." (So Co. Litt. 379. a). Upon what principle can it be said that the same reasoning is not equally applicable here ?

III. The construction contended for on the part of the plaintiff in error would violate every rule of law directed to be applied to the construction of grants. It is contrary to that maxim which says, " that every man's grant shall be taken by construction of law most forcibly against himself ; " the force of which maxim Lord Bacon says is (*inter alia*) " in deducing or qualifying the exposition of such grant " as were against the law, if they were taken according to their words." (Co. Litt. 183. a. Bac. Law Maxims, Reg. 3.) It is contrary too to that rule which says that the former maxim " is so to be understood that no wrong be thereby done ; for it is another maxim " in law that *legis constructio non facit injuriam* ; " and contrary to that which declares that " *verba ita sunt intelligenda, ut res magis valeat quam pereat*." It insists upon a construction most favorable to the grantor, which, instead of qualifying the grant, makes it assume to do a thing contrary to law, namely, to pass the king's right, creates injustice to the grantee, and renders the grant in the event that has happened wholly inefficient ; and all this in a case where the intent of the parties is manifestly conformable to that construction which would arise from the application of the above maxims of law. Those maxims would be applicable to a case even where the intent was not expressed or manifest ; but here the object and intent of the grant of the next presentation to the grantee is expressed to be " to present one fit and able person to " the rectory, and all other things which should be requisite to be done in and about " the premises to do and accomplish as fully, freely, and entirely as the grantor or his " heirs might or could do, or have done, if the grant had not been made." The latter ^[82] words, " as fully," etc. are not restrictive of the former, as has been contended ; but the whole together shew a clear intent that the grantee should have that presentation to which he might by law present, and to which the grantor might have presented if he had not made the grant, and that he should accomplish that as fully as the grantor might have done. A grant implies a covenant that the grantee may enjoy the thing granted ; but a covenant cannot here be implied that he should enjoy the king's right of presentation, because that is contrary to the manifest intent, and a covenant is implied by law of that only which appears by the deed to be intended. A liberal construction was made at a time when grants were construed more rigidly than now, of a grant of a next presentation, in giving to a technical expression having an appropriate legal import, a construction different from its usual legal import, in order to avoid a wrong ; which case is shortly this (Davenport's case, 8 Rep. 145) : The Earl of Huntingdon being possessed of the rectory of Orton, to which the advowson of the vicarage was appendant for fifteen years, granted the next avoidance of the vicarage, " if the same should happen to be vacant, during the term of years then *in esse* of the rectory ; " and his administrator afterwards, and before an avoidance, surrendered his term in the rectory, which the reversioner accepted, by which the term of years determined. The vicarage afterwards becoming void, the sole question was, if by the surrender the grant of the next avoidance was void or not ? But the Court held

that, notwithstanding the surrender, the grantee should have the next avoidance. That is a case upon the same subject with the present, and in its principles and determination strong and applicable in favour of the defendant in error.

IV. But the case of Woodley against the Bishop of Exeter (Cro. Jac. 691. Winch. 94.) is objected as having decided that the grantee in such a case as this cannot take any other than the presentation upon the very first vacancy, and that the grant is defeated by the king's prerogative. That case, however, is distinguishable from the present. It was the case of a devise, which is gratuitous, and not the case of a grant: the devise was particularly worded, (see Winch's Entries, p. 877, in one edit. in the other p. 767,) so as to be considered by Winch Justice to be "punctually expressed" that the devisee should have the first, "at the very time that he admits and distinguishes the case of the coparcener above put, which case, in principle, is directly in point with the present. Lord Hobart and Winch, as the case is reported in Winch, both decide that case upon intention; but if that case could be carried further, and so as to be applied to the present, it is humbly submitted to be of no great weight. It would be a determination not only contrary to justice, and to all the rules of construction, but also contrary to former authorities; a determination not recognised by contemporary or subsequent law writers, unsupported by and inconsistent in principle with subsequent authorities, and its validity expressly disputed, at least, by a very [83] late decision. (Grocers' Company v. Archbishop of Canterbury, 2 Bl. Rep. 770.) Besides too, that some of its most important doctrine, with respect to the king's right of presentation, has been since over-ruled, it cannot be considered as having the effect, as to this point, of a determination submitted to, inasmuch as there was a fault in the declaration, by which the plaintiff could not, with success in the suit, impeach the determination in a writ of error. As to the former authorities, besides the above case of the coparcener, is the case of 15 Hen. VII. stated in Co. Litt. 379, *a*. determining that the grantee of the third presentation, being deprived of it by right of dower, shall have the fourth, that is, the third which the grantor could grant, having regard to the grantor's estate. This case has the confirmation of Lord Coke's opinion; for he states it to shew the diversity between the act of law and the act of the party, and to illustrate the rule that the act of law shall work no prejudice to the grantee. He considers, therefore, this case as good law, and does not exhibit the case of Woodley against the Bishop of Exeter as trenching upon it, or upon the above rule, although he must have known of that determination, and although the first edition of that book was published in 1628, and the second edition, supposed to have been revised by him, in 1629, both of them soon after that determination. (Hargr. Pref. to Co. Litt.). Chief Justice Treby, in his notes on Dyer, p. 35, states the case of dower, as allowed by Chief Justice Hobart and by Hutton Justice, to be as above stated; and the case of a grant of the next presentation, and of avoidance by promotion to a bishopric, as determined in favour of the grantee. This latter point he also states in his notes in Dyer, 228, *b*. as having been so decided.—Whether the case or cases there mentioned be the case of Woodley v. the Bishop of Exeter, or not, it seems that Treby Chief Justice, as well as Lord Coke, did not conceive that case, which was the case of a particular devise, as extending to the case of a grant of the next presentation, or deciding that the law would in the case of such grant defeat the grantee, but as deciding or allowing the contrary; he states also the reason to be, that the act of law and the king's prerogative shall prejudice no man. It is observable too, that the case, though decided by Lord Hobart, is not reported by him. The decisions since upon the statutes for uniting particular parishes, and granting the presentations of the new churches to the patrons of the old churches by turns, are contrary in principle to the decision of Woodley against the Bishop of Exeter, as reported in Winch and Cro. Jac. if that determination be considered as extending to the case of a grant, or beyond the question on the intention of the testator manifested by the particular wording of that devise.

V. Therefore, upon all the rules of construction, upon the maxims that the act of law, or the king's prerogative, shall prejudice no man, upon the authority of decided cases, as well prior as subsequent, upon the manifest and expressed intent and object of the parties to the grant in question, and upon the [84] principles of justice, the defendant in error humbly submits that this grant must be construed so as not to be defeated by the king's prerogative. The strict literal construction contended for

on the part of the plaintiff in error, without regard to the subject matter of the grant, and the nature of the king's right to present by his prerogative, cannot, it is humbly submitted, be allowed, without violating the above rules, maxims, authorities, intent, and principles. The only case, too, that can be attempted to be cited to support that strict construction, it is humbly submitted, is clearly distinguishable from the present, and, as far as it is said to apply to this case, is a determination in contradiction to the decided law as it then stood: a determination never since allowed, or recognized to be law; contrary to the law in similar cases as since determined, and contrary to what was understood at that time by Lord Chief Justice Coke, and since by Lord Chief Justice Treby, to have been the law. The defendant in error therefore humbly hopes that the judgments of the courts of common pleas and king's bench will for these and other reasons be affirmed.

After hearing counsel in this writ of error, the counsel were directed to withdraw—and the following question was put to the judges:

Whether the grant to Matthew Kenrick set forth on the record is defeated by the vacancy which has happened by promotion since the grant, which has been filled by the king's prerogative?

Whereupon, the Lord Chief Justice of the Court of Exchequer delivered the unanimous opinion of the Judges present upon the said question in the negative.

Then, ordered and adjudged, that the judgment given in the Court of King's Bench, affirming a judgment of the Court of Common Pleas, be affirmed—and that the cause be remitted. (MSS. Jour. *sub ann.* 1796.)

[85] CASE 4.—THOMAS HENCHMAN, Esquire,—*Appellant*; THE UNITED COMPANY OF MERCHANTS OF ENGLAND trading to the East Indies,—*Respondents* [21st June 1797].

[Mews' Dig. v. 909; xi. 982. See Ilbert, *Government of India*, pp. 259, 260.]

[A covenanted servant of the East India company, being a senior merchant, and acting as agent of the Company, (as resident or chief at one of their factories,) is incapable of forming any contract whatsoever, in which the Company is interested; so as to derive profit to himself, or any otherwise however than for the profit and advantage of the Company: And if any such contract be actually made between him, as a merchant dealing for himself, and the Company's board of trade in India, in which contract undue advantage is taken by him, by means of his knowledge and influence as resident at the factory, he cannot, to a bill in chancery by the Company for discovery and relief, demur generally on the ground of want of equity.] [Order of Loughborough C. over-ruling such demurrer, affirmed.]

The respondents stated the following case:

In 1765 the appellant entered into the company's service as a writer and covenant servant at their presidency of Fort William in Bengal, and upon entering into such service he executed an indenture of covenants under his hand and seal, made between the company of the one part, and himself of the other part, whereby, after reciting that the company (upon his special request and entreaty, and upon the conditions and agreements therein contained on his part to be performed), had received him into their service as their writer and covenant servant at Fort William, to serve them for five years, and to be employed in all or any of their traffic or merchandises, businesses and affairs, in any place or places whatsoever, between the Cape of Good Hope and the Straights of Magellan, as the company, or their court of directors for the time being, or any thirteen or more of them, or any person by them authorised, should appoint, at or for the wages of five pounds by the year, to commence from his arrival at Fort William: It was witnessed, that he (the appellant) for himself, his heirs, executors, and administrators did, and he did thereby covenant and agree with the company as follows, viz. That from his arrival at Fort William, for five years, he would

faithfully, honestly, diligently, and carefully serve them at such place and places, and in all and every such affairs and business whatsoever, as he should be employed in : That he would at all times observe, keep, and fulfil all and every the orders of the company, and of the said court of directors, made and to be made for the government of their factories and settlements, officers, agents, or servants abroad ; and would also observe, keep, and fulfil all such orders, instructions, and directions which he should therewith or thereafter receive under the company's seal, or from the said court of directors for the time being, or any thirteen or more of them, or from any persons [86] authorised thereunto by such directors : That he would, to the utmost of his power and skill, resist and withstand all and every persons who should break, or endeavour to break the said orders, instructions, or directions, or any of them, and that he would not do, attempt, or practice, nor wittingly, or willingly permit or suffer any other person whatsoever to do, attempt, or practice any matter or thing whatsoever to the hindrance, hurt, prejudice, damage, or defrauding of the company, their successors, or of their servants, or of any of them, or of their goods, merchandises, trade, or traffic, or any of them, or any part thereof, but would, as much as in him lay, prevent and defeat the same : That he would at all times from thenceforth give notice and intelligence, with all convenient speed, unto the said court of directors for the time being, of all and every the deceits, wrongs, abuses, breach of orders, inconveniences, and hindrances which he should know, understand, hear, or suspect to be done, practised, offered, or intended against the company of their successors, or their goods or trade, or any of them, or against any person by them, or by the said court of directors employed, or in their service in any place or places, together with the names of those persons by whom the same should be so offered, practised, or intended, and that he would not engage or employ either the company's stock, or any part thereof, or make use of their credit in any kind, or other way and manner whatsoever, than for the affairs of the company, and as by the major part of the said court of directors for the time being, under their hands, or under the company's common seal, should be ordered and directed : That he would at all times keep and conceal their secrets, and every matter and thing committed to him as such by the said court of directors, or their agents, factors, officers, and servants, or any of them : That he would at all times from thenceforth, during his said employment, keep, or cause to be kept, a true and particular journal or day-book of all passages and proceedings relating to the affairs of the company, and also books of account : in which journal, day book, and books of account he would daily, duly, truly, and faithfully enter, or cause to be entered, the accounts of all and every particular, buying, selling, receipts, payments, barterings, and other transactions and occurrences relating to his trust, during the time he should continue in the company's service and employment, and that he would not place or consent to the placing to the company's account, nor otherwise charge them with any more or greater sums than he should really and in good faith pay for all or any goods, merchandises, or effects which he should buy, or cause, procure, or consent to be bought for on account of the company : and also that he would bring to the account of the company, in their books, the full rates and prices for which he should sell, or cause to be sold, any of their goods, merchandises, or effects, and that he would not directly or indirectly take, accept, or receive, or agree to take, accept, or receive any [87] gift, reward, gratuity, allowance, compensation, sum or sums of money whatsoever, from any person of whom he should, by himself or any agent for him, buy or barter any goods, merchandises, treasure, or effects for or upon account of the company : and that he would not take, accept, or receive, or agree to take, accept, or receive any gift, reward, gratuity, allowance, compensation, sum or sums of money whatsoever, from any person or persons to whom he should directly or indirectly, by himself, or any agent for him, sell or barter any goods, merchandises, treasure, or effects of or belonging to, or for, or upon account of the company : And further, that he and his executors or administrators should and would produce and deliver the said books so to be kept together, with all waste-books, pocket-books, diaries, memorials and other writings and papers whatsoever, wherein he should make, or cause to be made, any entries, or set down any matter or thing touching or concerning the company's affairs, or any of them, or any way relating thereto, (although the same might or should be intermixed with his own or others concerns,) unto the company's said court of directors for the time being, or to such persons as

should, by letter or order under the hands of thirteen or more of the company's said court of directors, or under the company's seal, be authorised and appointed to demand and receive the same, and, if required, make oath to the truth of such books, diaries, memorials, writings, and papers, and that the same contained the whole of his transactions, and had not been defaced, obliterated, or altered, and that he would well and truly deliver and pay to the company, or their successors, all and every such monies, goods, merchandises, and things whatsoever, as by the foot of his account, or otherwise should be due from him, or remain in his hands and possession, and for which he ought to be chargeable or answerable in any manner: And lastly, that he would at all times, during the time of his service aforesaid, faithfully and diligently demean himself as a good, honest, and faithful servant towards the company and their successors, and those by them authorised. And upon condition that he (the appellant) did in all things perform his covenants and agreements with the company, and to encourage him so to do, it was by the said indenture further covenanted and agreed between the company and him, that it should be lawful for him, and the company did thereby licence him, during the term of five years aforesaid, freely to trade and traffic for his own account only, from port to port in India or elsewhere, between the Cape of Good Hope and the Streights of Magellan, without any let, hindrance, or interruption from the company, so as such trade and traffic so to be carried on should be subject to such rules, regulations, and limitations as the company, or their court of directors for the time being, had already directed, or should from time to time thereafter direct and appoint, and so that the same should not be to the hurt or prejudice of the company, or of their trade or commerce. And after [88] taking notice that it frequently happened that the president and council, agent and council, chief and council, and several other subordinate officers of several of the company's factories abroad, had, by mutual influences on each other, settled, stated, and adjusted among themselves their own accounts with the company, in order, as far as they could, to bar and preclude the company from reviewing, altering, amending, correcting, or contesting the same, it was by the said indenture declared, that all and every such account and accounts so at any time theretofore stated, balanced, signed, or adjusted as aforesaid, were and was ever designed by the company to be, and the same and all and every such account and accounts so thereafter to be stated, balanced, signed, or adjusted by and between, or amongst such presidents and councils, or agents and councils, or chiefs and councils, or other subordinate officers, or any of them, were and was thereby agreed to be taken and esteemed to be open accounts, and formed and prepared only for the inspection, perusal, and approbation or correction of the company, and not in any sort or kind, or in any article thereof, binding or conclusive upon the company. And in the said indenture was contained a proviso, that if he (the appellant) should continue in the company's service after the expiration of the said five years, such continuance should be upon the same terms, conditions, and agreements as were then made and agreed upon for the said five years, save and except that if he should rise to any superior place or office than what he was thereby employed in or appointed for, that then he should (upon his performing the covenants aforesaid) have and receive such wages as were usually paid to officers in the like advanced stations, places, or employments.

Previously to the appellant's executing the before-mentioned indenture the same was perused by him, and he, in fact, signed an indorsement thereon, acknowledging that he had so done.

The appellant left this country and arrived at Fort William in September 1765, and he continued in the service of the company, in the capacity of writer or covenant-servant, from the time of such his arrival till the 29th of January 1781, when he returned to Europe, where he remained till some time in the year 1785, when he returned to Fort William in the service of the company as a senior merchant, and in which character he arrived there on or about the 28th day of September, in the year 1785.

Previously to the year 1774, the company's trade and commerce at Fort William was managed and conducted by their president and council there, and by others of their servants employed under them, but in November 1774, upon a change being made in the supreme government of the said presidency of Fort William, by an act of parliament (13 Geo. III. c. 9.) passed for that purpose, the company established

a council of commerce, or board of trade of the said presidency, consisting of eleven persons of their senior servants, not being counsellors of the said [89] presidency, for the conduct and management of all the company's commercial concerns in the said presidency, and such establishment continued during the whole time of the transactions of the appellant hereinafter mentioned, but its members changed very frequently, so that the whole number of the different members who acted during the time of such transactions was very great.

For the more convenient carrying on of the company's trade in the said presidency of Fort William, the company now have, and for a long course of years before and during the transactions after mentioned, the company had divers factories and aurungs in different parts of the country there, and particularly a factory called the Maulda factory, for the purpose of purchasing goods on their account, the business whereof hath always been and now is conducted at each of such factories and aurungs, and particularly at the said Maulda factory, by one of their servants, called a resident or chief, assisted by a council and servants under him; and such resident or chief, and other servants were, before November 1774, appointed by the president and council of the said presidency, but they have from that time been appointed by the said council of commerce or board of trade.

The usual and regular mode of procuring goods for the company hath always been for their resident or chief, at the said respective factories or aurungs, to purchase or procure the same from the native merchants or manufacturers thereof by previously advancing to them sums of money on account of the goods, and before the same were actually manufactured, and afterwards, when manufactured and found to be of proper quality and goodness, and packed up and sent to the presidency at Fort William, by paying the balances then due upon the prices of the said goods. And this business hath always been used, or ought always to have been managed and carried on by such of the company's servants as aforesaid, in consideration of certain established salaries, and the licence given to them to trade on their own account as aforesaid, and without their charging any commission, or taking, either directly or indirectly, any profit or emolument whatsoever to themselves for their managing and carrying on the same; and when the trade of the company hath been so conducted, the same has been very profitable to the company, and particularly in the article of raw silk, whereby they heretofore usually made a clear profit upon the sale thereof in England of about nine shillings per great pound, or pound of twenty-four ounces; but in some few instances, previous to the establishment of the board of trade aforesaid, and in many instances since that time, sundry parts of the company's investments, and particularly several large parcels of raw silk have been procured, by contract, with the company's own servants, and in such instances the company have sustained considerable loss.

Before the establishment of the board of trade aforesaid, to wit, on the 14th of January 1771, the appellant was appointed [90] to and took upon him the office of resident at the company's factory at Maulda, with the salary and allowances usually annexed to that station, and he continued in that station from the time of his appointment until December 1780; and during all that time he was paid, and had the usual salary and allowances, and also enjoyed the usual privilege of trading on his own account, the same being granted by the company, and received and taken by him as a stipend, reward, and full compensation for all his trouble, labour, and services in his said station of resident, and he therefore ought not, either directly or indirectly, to charge the company with, or to have taken to himself any commission, agency, brokerage, or other profit or advantage whatsoever, for or in respect of any thing done by him in the performance or discharge of any of the duties of his said station. And it was the duty of the appellant, in his said station of resident at Maulda, to purchase and procure, for the company's account, all such goods and merchandises produced, or which could be procured in the said district, proper for the company's European investment, and to purchase and procure the same at the cheapest rate, and upon the best terms possible, without making or taking any advantage to himself thereby or therefrom; and in order thereto it was also his duty, from and after the establishment of the board of trade aforesaid, fully and fairly to have related to and informed the said board of all that he knew or believed relating to such goods, with respect to the manufactory thereof, and the rates and prices at which the same could be purchased or procured, and every other circumstance material to enable the said board

to judge of the terms upon which it was proper for them to contract for the purchase thereof on the company's account.

But the appellant, by means of his residence at Maulda aforesaid, found that a very great profit might be made by a trade in raw silk, or in the making thereof in the filature method, and he therefore, (though raw silk was one of the articles which it was his duty to procure and purchase on the company's account, and as factor for them, and not in any manner on his own account, at the cheapest rate, and upon the best terms he could, and without charging the company any thing more than the prime cost thereof,) with a view to promote his own private advantage, and to enrich himself at their expence, instead of forwarding and promoting such trade in raw silk for the benefit of the company, sought means to secure the advantage to be made therefrom to himself, and to sell all such silk to the company at a very high and extravagant price; and for that purpose, between the month of January 1775 and the month of March following, by letters, and also personally and otherwise, he applied to the said board, both collectively as a board and to several members thereof individually, and used every means in his power to induce the said board to enter into a contract with him for all the raw silk prepared by filatures, according to the Italian method, which [91] he could make in the said district for three years then next following; and to induce the said board to enter into such contract with him, and give a very extravagant price for such silk, he concealed the true circumstances of the various expences thereof in purchasing cocoons, and the labour and charges of winding the same, and represented it to be a mere experiment which would be attended with considerable expence and risk; and he moreover represented to the said board that the quantity which he should be able to make would be very small, and more especially for the first year, and not to a greater amount than from 30 to 50,000 rupees; and by such and other misrepresentations the said board was induced to consider the making of filature silk at Maulda a new experiment; and as the appellant represented his inability to engage for a certain quantity, and declared that the quantity he could make would be small, finally to agree to contract for all the silk the appellant could make, according to a sample produced by him, at the price of thirteen rupees per seer of seventy-two sicca weight, but which price, although the company have since discovered that the same was most extravagantly high, yet the appellant, under false representations of the hazard and expences of the experiment, induced the company's board afterwards to increase, and to consent to give thirteen rupees and eight annas per seer of seventy-two sicca weight. And thereupon a contract or agreement, in writing, dated the 14th of March 1775, was made and entered into between the then members of the said board of trade, on behalf of the company, and the appellant; and the appellant thereby covenanted and agreed to deliver into the company's warehouse in Calcutta all the filature raw silk, or silk wound off after the Italian method, which he should be able to provide in the Maulda district for three years successively, from the 1st of March 1775; that such silk should be equal in goodness to the muster or sample then tendered, and whereon the appellant had fixed his seal, and whatever should prove inferior to the said sample should be returned and deemed no part of his agreement; that such silk should be delivered in the company's warehouse in Calcutta unto the export warehouse-keeper for the time being, or such other person as might be appointed by the board of trade to receive the same; that for every seer of filature raw silk delivered at the company's warehouse in Calcutta, and agreeable to muster, (the seer to be reckoned at seventy-two sicca weight,) the appellant should be allowed thirteen rupees eight annas sicca, and should subject the company to no other charge whatever, duties excepted. And the appellant, moreover, engaged for three years then to come not to dispose of any filature raw silk to any person whatever, except the company, under the penalty of sicca rupees 20,000.

In pursuance of this agreement the appellant, in the year 1775, sent to the company's warehouses at Calcutta, on their account, raw silk to the amount of 50,000 rupees; and in the [92] year 1776, to the amount of a lack (100,000) of rupees; and in the year 1777, to the amount of two lacks of rupees; and he charged for all such silk sent in by him in each of those years after the rate of thirteen sicca rupees and eight annas per seer of seventy-two sicca weight; and he made and received therefrom a clear profit of 100,000 sicca rupees, or £10,500 sterling, or some such large

profit, over and besides the expence of the filature buildings and utensils, the whole of such silk (supposing the same to have been of the best quality, but which was not the case, inasmuch as he sent in and delivered silk of a very inferior quality, and such as he could make the most advantage of) being not worth more than after the rate of seven sicca rupees per seer, including every expence attending the same, *and a great part thereof was in fact procured by the appellant of other persons at such or smaller prices.*

The above contract not being to expire till March 1778, and the appellant being desirous of making a still further advantage thereof than he had already done, though he had received a profit therefrom of 100,000 sicca rupees as aforesaid, he thereupon, and under a pretence that he had been limited in his supplies of silk contrary to the terms of the contract, and had been injured thereby, and making the same an excuse for his asking for, and for the company's board of trade granting him further orders to a great extent, on the 30th of November 1777, wrote and sent a letter of that date, addressed to the said board in the words and figures following; viz. "To William Aldersey Esq. president, and members of the board of trade:—
"Honorable Sirs, Having dispatched my last parcel of silk, completing the quantity ordered for 1777, I beg leave to solicit your attention to the remaining term of my present contract, the tenor of it, the great expence I have been at in buildings, and the limitations I have every season acquiesced in at the pleasure of the board, it is unnecessary for me to trouble you with a repetition of; but I should hope they alone would plead so strongly in my favour as to induce you to receive from me the produce of this November bund at my contract price, if the extent of my engagement, which expires only next March, did not make my claim to such admission so equitable that you will readily allow the justice of my expectations: so much encouragement have I given to this business that I shall be able to manufacture 200 maunds from the cocoons I shall purchase this month and next: and I flatter myself that you will allow me to conclude my contract by delivering that quantity, on account of the company, at 13 8 per seer. I might also urge in favour of my request, that my contract beginning in March, the produce of only two November bunds have yet been included in it, and which you must well know, is the bund that furnishes more cocoons than any other throughout the year.—If this application should meet with your approval, I shall be obliged by the [93] authority to draw on Dinagapore for such an advance of cash as you may think proper to allow me."

Upon receipt of this letter, the board of trade, not then knowing the very great profit which had been made by the appellant, by means of the concealments and misrepresentations used by him, still considering the contract made with him as a fair and reasonable one, and considering moreover, that it would be a hardship upon him if they refused to take the silk, offered by his said letter, complied with his request, and they actually received the said two hundred maunds of silk mentioned in the letter, and paid for the same at the rate of thirteen sicca rupees and eight annas per seer, and the appellant made the like or a greater proportion of profit thereby as he did by the former quantities of silk supplied by him.

The appellant having, by means of the concealments and misrepresentations used by him, succeeded in the first place in getting the contract before mentioned, and afterwards in getting an extension thereof, and having still continued to keep the board of trade ignorant of the real costs of the silk supplied by him, in the month of January 1778, proposed to, and prevailed upon, the said board, to enter into a further contract with him for the term of three years, from the expiration of his then present contract, for the delivery of six hundred maunds of silk in each of the said three years at twelve sicca rupees per seer of seventy-two sicca weight, and upon the condition, that at the end of the term he should deliver up his filature works to the company, and thereupon articles of agreement, dated the 16th day of April 1778, were made and entered into between the then members of the said board, on behalf of the company, and the appellant: and the appellant thereby covenanted, promised and agreed, that for the consideration of twelve sicca rupees for every seer of filature raw silk, or silk wound after the Italian method, of seventy-two sicca weight, of the goodness of an approved muster, then lodged by him with the said board of trade, and to which his name and seal were affixed, and for the other con-

siderations, and under the provisos or conditions thereafter mentioned, he would deliver into the company's warehouses at Calcutta, in the space of one year, from the 1st of March 1778, six hundred maunds of filature raw silk wound off after the Italian method, in full of the quantity thereby agreed to be delivered in the first year of the term of his contract; that he should receive the whole of the amount of the price of the said quantity of six hundred maunds of filature raw silk in advance at the periods and in the proportions following, viz. 126,000 sicca rupees on the 15th of March, 36,000 on the 15th of May, 36,000 on the 15th of July, 72,000 on the 1st of September, and the balance being 18,000 sicca rupees, on completing the delivery of the said silk; that he would deliver at the warehouses of the company at Calcutta aforesaid, upon the same terms and conditions, at the same rates, periods, and proportions, the quantity of six hundred [94] maunds of filature raw silk, or silk wound off after the Italian method, in each of the two succeeding years of the term of his said contract, making in all 1800 maunds, the whole quantity agreed to be provided by him in the said three years; and in case of deficiency in the quantities of silk so stipulated to be delivered by him annually, that he would be liable to repay the advance made him on account of the same, and a penalty of ten per cent. on the amount of all such deficiency. And he thereby further agreed to convey his filature-buildings to the company on completing the said contract; and it was thereby agreed on the part of the company that they would take six hundred maunds of silk in each of the three years aforesaid, upon the terms proposed by the appellant, subject to the following provisos; first, provided that if the funds allowed to the board of trade for the provision of their investment should, either in the year between March 1779 and March 1780, or in the year between March 1780 and March 1781, being the second and third years of the proposed term of the said contract, be less than the amount granted them in the present year, (the same to be ascertained by the books and records of the company,) then the quantity of silk to be received in either or both of those years respectively should be reduced in proportion to such decrease as should happen in the general funds of the board; and secondly, provided that it should be left fully and absolutely to the company's court of directors in London for the time being, to ratify or annul the said contract, for such part of the term of it as might be unexpired, upon the receipt of orders from them at Fort William respecting it, such orders to be either authenticated specially, or in the usual way in which the orders of the court of directors are received by their servants at such presidency; and that in case of deficiency in the delivery of the quantity of silk above mentioned the appellant should be liable to repay the advance made him on account of the same, with a penalty of ten per cent. upon the amount of all such deficiency; but in case either of the above provisos should prevent the full delivery of 1800 maunds of silk as engaged for, then and in that case it was, on behalf of the company, thereby agreed, that they should pay to the appellant eight annas for each and every seer of silk that should be by those, or either of the clauses before mentioned, deficient of the full quantity of 1800 maunds as aforesaid.

The appellant did, in fact, deliver several quantities of silk according to the terms of the said contract; but the price of twelve sicca rupees per seer for such filature raw silk as was so delivered, was most shamefully extravagant, and infinitely exceeding what the same would have cost the company had the same been fairly and honestly provided; inasmuch as it appears by inquiries made by the company for the purpose of ascertaining what was the fair price to have been charged for such silk, and, by an accurate statement, which the company, in consequence of such inquiries obtained of the prime cost of the [95] materials, and the expence of the manufacturing of raw silk in the Italian, or filature manner, within the province of Bengal, that the manufacturing of a seer of silk of the best quality so manufactured does not cost more, including all the expences attending the same, than six sicca rupees four annas (see note, p. 472); and this the appellant well knew at the times he made his proposals for the two several contracts aforesaid, and he also then knew that the quantities of silk to be supplied by him, under the said contracts, would not cost him more than seven sicca rupees per seer; and, in fact, the appellant did obtain the greater part of the silk he delivered the company under the said contracts from the native or European merchants, agents, contractors, or manufacturers at very low prices, and not exceeding, at the most, six sicca rupees, or [96] $6\frac{1}{2}$ sicca rupees per seer, or some other

loss per seer; and that such part as he manufactured himself did not cost him so much per seer.

On the 6th of December 1780, the appellant having acquired a large fortune by means of the aforesaid contracts, and being desirous of returning to Europe, and there being at that time a considerable part of the last-mentioned contract to be performed by him, the whole benefit whereof he was not willing to forego, entered into an agreement with one Mr. Prinsep, then in the service of the company, to get the said contract made over to him upon certain terms agreed upon between them, and to that end the appellant, on the 9th of the said month, wrote and sent the following letter addressed to the board of trade:—"Gentlemen, In consequence of my leaving Maunda I have disposed of the remainder of my filature silk contract to Mr. J. Prinsep; and as I have intentions of returning to Europe very shortly, I shall be much obliged if you will admit such part of the contract, as still continues unfinished, to be transferred to Mr. Prinsep, who is ready to enter into engagements with you for the execution of it; in such case I hope my contract will be delivered up to me, and I will, if you should be so obliging as to comply with this request, have the accounts of the concerns made up to this day, and lay them before you to shew you what remains for Mr. Prinsep to perform. Calcutta, 9th of December 1780."—And on the 10th of the same month of December the appellant made out an account current with the company, and delivered the same to the board of trade; and by such account it appeared that he had delivered to the said board of trade, on account of the company, under the said last-mentioned contract made by him with them, 1350 maunds of filature silk, and that the balance due from the company to him, and which he entered in the same account as transferred to the said John Prinsep, was current rupees 83,520, being the value or price to be paid by the company for 150 maunds of filature silk, which remained to be delivered by the appellant to them, of the quantity of silk to be by him that year delivered, but more particularly it so appeared by a note added to the said account, in the words and figures following, that is to say:—"The contract is for 1800 maunds, to be delivered at six hundred maunds annually, but the reduction of the investments in 1780 made the board resolve to take only three hundred maunds that year, so there will be 1500 maunds delivered as described, the other three hundred maunds stand over for 1781, to be then settled."

By the agreement entered into by the appellant with the said John Prinsep, he (the appellant) reserved and retained to himself out of the said 83,520 current rupees, or he agreed to accept and receive from the said John Prinsep out of the said sum, or the said John Prinsep agreed to pay to him some certain sum of money in consideration of his assigning and making over the [97] residue of the contract aforesaid to him; and the appellant did in fact, upon his assigning the said contract, which he did to the said John Prinsep, retain and keep back a certain part of the said 83,520 current rupees so transferred to the said John Prinsep, or he did receive from the said John Prinsep, or from some other person on his behalf, or otherwise, some sum of money on account of such assignment; besides which he also made out and delivered to the said John Prinsep an account of the profit which he (the appellant) alleged would arise or accrue from the residue of the said contract; and in such account he charged the said John Prinsep with sicca rupees 9000 over and above the profits, or the share of the profits, which he required and insisted that the said John Prinsep should allow and pay to him on account of the said assignment, and which he alleged and pretended to the said John Prinsep he was entitled to receive from the company, being the eight sicca annas per seer on the quantity of 450 maunds of filature silk, part of the 1800 mentioned in the last-mentioned contract, and which at the time of the said assignment were not delivered to the company, but which he told the said John Prinsep he was entitled to claim under and by virtue of the covenants contained in the said last-mentioned contract; but such allegation and pretence of the appellant was fraudulent and false, the said eight sicca annas per seer being, by the said contract, reserved to be paid him only on such parts of the said silk as the company should refuse to receive; whereas the said John Prinsep was, by virtue of that assignment, to have delivered 150 maunds of filature silk, part of the said 450 maunds of filature silk, in that year, and the remaining 300 maunds thereof in the following year, as clearly and particularly appears by the said note hereinbefore mentioned to be at the bottom of the said account furnished by the appellant; however he, the appellant,

received from the said John Prinsep the said 9000 sicca rupees over and above the profits, or the share of the profits, which he alleged to the said John Prinsep would accrue from the residue of the said contract so assigned by him to the said John Prinsep.

Moreover, the prices agreed by the said contracts before set forth to be given by the company to the appellant, not only very far exceeded the prices at which the same might and ought to have been provided and furnished to the company in the manner usually practised for providing their investments, previous to their establishment of the board of trade, but also exceeded the price at which the said board of trade, have since contracted with certain other of the company's servants for the providing of filature silk of the factory of Jungepore, and at the very same factory at Maulda, of which the appellant was resident, and this appears as follows: 1st, It appears by a certain contract made by the said board of trade, for the investment of 1782-3, with Mr. Peter Speke, for the provision of filature raw silk at the factory of Jungepore aforesaid, by and under which contract the said Peter Speke contracted to deliver to the company, a large [98] quantity of filature raw silk of the manufacture of the said factory of Jungepore, partly at the rate of eight sicca rupees and eight annas per seer for every seer of seventy-two sicca weight to the seer, and did actually deliver to them fifty-three maunds six seer and eight chatack of filature raw silk, at the said rate of eight sicca rupees and eight annas per seer of the manufacture of the factory of Jungepore, such silk so delivered by the said Peter Speke to the company, being of a quality greatly superior to the silk delivered by the appellant to them in pursuance of the said contract made by him. And 2dly, by another contract made by the said board, for the investment of 1783-4, with Mr. Charles Grant, for the providing of filature silk at the factory of Maulda aforesaid, by and under which the said Charles Grant contracted to deliver to the company a large quantity of filature raw silk of the manufacture of the said factory at Maulda, at the rate of eight sicca rupees and twelve annas per seer for every seer of seventy-two sicca weight to the seer, and did actually deliver the quantity of 100 maunds of filature raw silk at eight sicca rupees and twelve annas per seer, of the manufacture of the factory at Maulda, such silk so delivered by the said Charles Grant to the company being also of a quality far superior to the silk delivered by the appellant to them in pursuance of the said contract made with him.

But further, although the appellant demanded and received such extravagant prices as aforesaid for the silk he provided, yet he did not deliver the same equal or nearly equal to the musters mentioned in his contract, and by such means also the company were greatly injured.

At length the company having been deceived and imposed upon, the appellant having made such undue advantages by means of the silk supplied by him as aforesaid, and which he ought to have procured and provided for the company upon the most reasonable terms, and as their factor or agent, and without deriving any benefit to himself therefrom, they applied to him to come to an account with them for all and every the sums of money and other profit made and received by him for and in respect of the several quantities of silk so supplied over and above the money advanced and paid by him in providing the same, or to pay over to the company the full and clear balance which, on the adjustment of such account, should appear to be remaining in his hands. And the appellant having declined complying with such application, the company, in Michaelmas term 1791, filed their bill of complaint in the high court of chancery against the appellant, and such bill stated the several matters, or to the effect aforesaid, and it charged that the company were greatly injured and imposed upon by the appellant in the contracts therein and hereinbefore mentioned, and that the silk supplied by him thereunder was not supplied on the most reasonable terms but the most unreasonable and unjust. And as evidence thereof, it charged that the appellant, by means of the said [99] contracts, acquired a fortune of £60,000 and upwards, which he could not have done upon the quantities of silk supplied by him had the same been supplied upon fair and reasonable terms, even in case he had been justified in making any advantage to himself therefrom.

The bill also charged that the appellant, acting as the agent of the company, had no right to treat with them as a merchant dealing for himself, and that in making such contract as aforesaid he acted in direct breach of the covenants before set forth to have been entered into by him, the same being hurtful to the company in their

trade and commerce, and also being contrary to their orders by which they expressly prohibited any of their covenant-servants from being concerned in any contract with them, and in violation of his duty as a servant of the company.

The bill also charged, that if the said contracts were in any degree justifiable as being made between their board of trade on their behalf, and the appellant in his private station as a merchant, (but which the company did not by their bill admit,) yet that it was incumbent on the appellant, in his quality of resident at Maulda, fairly to have represented to, and fully to have apprised the company's board of trade of all the circumstances respecting the said silk trade in the Maulda district, and to have informed them of the price of materials, and of the labour of making a seer of silk of the weight mentioned in the said contracts; but that he not only concealed all those circumstances, but made such representations as to induce the said board of trade to think that the contracts they entered into were fair and reasonable; and the company, by their said bill, submitted, that in respect of the said contracts the appellant ought to be considered as agent or factor (as he really was) for them, and dealing for their benefit; and that he was, at any rate, bound to provide them with the silks supplied under such contracts upon the best and most reasonable terms that the same could have been procured.

The bill also charged that the appellant, previously to his applying for the said contracts, made or procured estimates to be made of what the silk to be contracted for by him would cost him, and that it appeared by such estimates that the same would not cost him more than such price per seer as in the schedule to the bill was contained (see note in page 472), except that in the said estimates, or some of them, the appellant also made an allowance of divers sums of money to be paid to some of the company's servants for their friendship about the said contracts, or about the passing of silk inferior to the musters, or on some other pretence or pretences, but which gifts or payments had no relation to or were any part of the expence of making the said silk, but were made for the purpose of forwarding his scheme and plan of deceiving and defrauding the company.

[100] *And the bill also charged that, although the said contracts were entered into under an idea that the silk was to be manufactured by the appellant at his own filature works by way of experiment, yet a very small part only of the silk delivered to the company was made or manufactured there, but was, in fact, bought ready made from other persons at very low rates and prices, and that, being so purchased, the company ought not to be charged more than the price actually paid for the same, and that such price ought to be considered as the fair price to be allowed the appellant for the rest of the said silk:* and in respect to the second of the two contracts aforesaid, the bill, in answer to a pretence which it was supposed would be set up by the appellant, that the said contract was fair and reasonable, for that, after deducting the value of the filature buildings, which were, by the terms of the said contract, to be delivered up to the company, the silk to be delivered to them by virtue thereof would not stand them in more, or very little more, than the fair price of the said silk to be purchased of natives or other manufacturers; the bill charged that the said buildings so to be delivered to the company were of very trifling value, and that in their original building they cost no more than a few hundred pounds, and that, by the length of time they had been used, their value was very much decreased, and the whole value had been before abundantly over paid, beside the profit before mentioned to have been made in said first contract, and that so it would appear if the appellant would set forth the particulars of the costs of the said buildings, and of the costs of the said silk.

The bill then charged that the appellant had refused to come to any account with the company touching the monies received by him in respect of the contracts aforesaid, and that he also refused to produce or shew to the company the books of account kept by him relating to the said contracts, sometimes pretending that all his accounts relating to the said contracts were left by him in India, at other times pretending that all his books and papers relating thereto had been burnt or otherwise lost, and that he has no copies, duplicates, extracts, or memorandums of the same, and he therefore could not furnish the accounts required of him; and at other times pretending that he had finally settled his accounts relating to the said contracts with the board of trade in Bengal, and he was therefore not bound to come to any further

account in regard thereto ; whereas the bill charged that the appellant then or lately had in his custody or power divers books, papers, and writings, containing all his accounts respecting the said contracts, or in which were divers, or some entries or memorandums relating to all or some of the matters of the said contracts, and by which, if produced, would appear a full and clear account of all the monies received and expended by him in the performance of the said contracts, or on account thereof, and of the clear profits which he made thereby, and of all other the matters aforesaid ; and the bill also charged and insisted that no account so settled between him and the board [101] of trade in Bengal was conclusive against the company, for that the appellant had, by his indenture of covenants before set forth, expressly agreed that all and every account and accounts thereafter to be stated, balanced, signed, or adjusted by or between, or amongst the presidents and councils, or agents and councils, or chiefs and councils, or other subordinate officers, or any of them, should, at all times thereafter, be taken and esteemed to be open accounts, formed, and prepared only for the inspection, perusal, and approbation, or correction of the company, and should not, in any sort or kind, or in any article thereof, bind or conclude them.

The bill then further charged, that the company had desired the appellant to account with them for the difference between the qualities of silk which was delivered by him and the musters, agreeable to which he contracted to deliver the same ; but that he refused so to do under a pretence that all the silk delivered by him to the company was of a quality equal to the musters given in by him, and that as the same had been received and passed by the board of trade, or their export warehouse-keeper, or the superintendant of their investment, or some other of the covenant or native servants of the company employed in their export-warehouse at Calcutta, without any abatement or deduction being required at the time, he therefore ought not now to be called upon to make any such abatement or allowance, though the bill charged that the company was not concluded thereby ; for that, as the bill charged, the appellant did give certain sums of money, presents, gifts, bribes, or promises, at some time or times during the times he held the contracts aforesaid, or one of them, to the said export warehouse-keeper or the superintendant of investments, and to all, or several, or some of the persons employed by or under the company in inspecting, examining, passing, or approving the quantities of silk delivered at different times by him to the company under the said contracts, and that it was on such or similar corrupt practices or contrivances of the appellant that he was enabled to get, and did get, the said several quantities of silk passed the company's said export-warehouse without any deduction or abatement being required, as alleged by him.

The bill, after stating and charging the several matters, or to the effect aforesaid, concluded with praying that the appellant might answer the premises, and might be decreed to account with them for all and every sums of money laid out and disbursed, and made and received by him, or by any other persons by his order, or for his use, on account of the contracts aforesaid, and for the clear profits arising therefrom, and to pay to the company what should appear to be the amount of such clear profits, together with interest at twelve per cent. per annum from the times when he should appear to have made and received the same, being the usual rate of interest for money in Bengal, and [102] that the company might have such further or other relief as the nature of their case might require.

To this bill the appellant filed a general demurrer on the ground that the bill did not contain sufficient matter of equity whereupon the Court could or ought to ground a decree in favour of the respondents, or give them any relief against the appellant, touching the matters therein mentioned. This demurrer came on to be argued on the 14th and 15th days of December 1791, before the Right Honourable Lord Thurlow, the then lord high chancellor, and his lordship was pleased to hold the said demurrer to be good and sufficient, and did therefore order that the same should stand and be allowed.

On the 4th day of July, in the year 1793, the respondents obtained an order that the said demurrer should be set down to be re-argued.

In consequence of this order the demurrer came on to be re-argued before the Right Honourable Alexander Lord Loughborough, the present lord high chancellor, on

Saturday the 15th day of March 1791, when his lordship was pleased to order that the order of the 15th day of December 1791, made by the late lord chancellor, should be reversed, and that the said demurrer should be overruled.

From this order the appellant appealed, praying that it might be reversed, and the order made by Lord Chancellor Thurlow affirmed, and the demurrer allowed; and in support of his appeal the appellant stated (J. Mitford, R. Hollist) the following reasons:

First. The object of the respondents' bill, as appears evidently both from the tenor of it and the prayer, is to make the appellant accountable to them for the profit he acquired from his filature works, by means of his two contracts with the respondents' board of trade in the years 1775 and 1778, upon the principles that the appellant was merely the servant of the respondents, and was, by the deed of covenants which he entered into with them in the year 1765, when he first went out in their service, prohibited from entering into any such contracts with them or any of their boards or officers on their behalf. The principle is very plain and intelligible in itself; but, in the first place, there is nothing in the deed of covenants on which this principle can be founded. By the terms of the deed the appellant, in all his acts of buying and selling for the respondents, was not to make any profit to himself, but was, in his purchases for them, to charge no more than he actually paid, and, in his sales for them, to bring to account the full rates or prices for which he should sell, and was not to take any gift or reward from any person of whom he should buy, or to whom he should sell on behalf of the respondents; but there is nothing in the deed that restricted the appellant from setting up a manufactory of his own, or from selling the goods manufactured by him either to the respondents or their agents, if they chose to pur-[103] chase from him, any more than he was restricted from selling to other persons. It might as well be said that if the appellant had occupied and cultivated a quantity of land he was disabled from selling any part of its produce to the respondents; and many other ideas of the same kind might easily be suggested.

Secondly. In the next place, if any thing could be founded in favour of the respondents upon the deed of covenants itself, yet their subsequent conduct did it away. The contract of the 14th of March 1775 was sealed with the seal of the respondents, and it was as competent to them to enter into a new deed, making different terms with the appellant, varying their original engagement with him, as it was to enter into the original deed. The respondents were fully apprised of this contract; they never complained of it, but acted and received the appellant's manufactures under it; and by so doing they affirmed the act of the board that made the contract. By the terms of the contract the appellant was restrained from selling his manufactures to any other person, and it would be the most unreasonable and unjust thing in the world for the respondents to encourage the appellant to go on with a manufactory, (the produce of which he had a full right to sell to any one,) and to agree to purchase of him all the goods he should make, on condition that he sold none to any other person, and then, having taken and paid him for his goods, to say that he had no right to make from them a profit upon his goods, which, but for his contract, he might have sold at profit to others. The contract of the 16th of April 1778, which was also sealed with the respondents' seal, is still stronger against them than the former. There is a clause in it, that it should be in the power of the respondents' court of directors either to ratify or annul it for such part of the term as should be unexpired; and as a part of the consideration for the contract, the appellant agreed to convey the filature-buildings to the respondents on completing the contract. No objection was made to this second contract. The appellant was in England for upwards of four years, viz. from 1781 to September 1785, and yet nothing was then done to impeach either of these contracts.

Thirdly. The respondents must, before they filed the present bill, have been satisfied they had no good ground to make the appellant account with them for the profits of these contracts, upon the principle of his being their servant, and consequently incapable of contracting with them, for they, in Michaelmas term 1790, filed a long bill in the court of chancery against the appellant, stating the contracts, and all that related to them, very much to the effect of the present bill, and praying the same relief which they now pray. To this bill the appellant put in, as he has now, a general

demurrer for want of equity ; that demurrer came to be argued before Lord Chancellor Thurlow in Easter vacation 1791, and, after full debate, the demurrer was allowed. (See 1 Ves. jun. 287.) If the respondents thought that decision erroneous, they should have appealed from it, and not have filed a new bill.

[104] OBJECTION.—But it will probably be objected that, though the former bill could not, and if the present bill cannot, be supported upon the general principle of the appellant being the servant of the respondents, and therefore disabled from contracting with them, yet that the present bill contains certain allegations, particularly those printed in *Italicks*, (pages 464, 465, and 468,) which were not contained in the former bill, and which make a case for the respondents beyond the question of the validity of the contracts, and to which the appellant was bound to answer however he might have screened himself from answering the bill at large ; and that as the demurrer went to the whole bill, it covered too much, and was therefore properly overruled on the re-argument of it.

ANSWER.—That is no reason for supporting the present bill.

1. Those particular allegations are not the object of the suit, but are introduced as necessary to the case, and, as it were, by way of aggravation of it ; no relief is prayed with respect to those allegations, independently of the account relating to the contracts ; and if they would in themselves have made a case for relief, yet, inasmuch as the principal case cannot be supported, the necessary ought to follow its fate.

2. Had the respondents any just cause to suppose that the appellant, under the pretence of performing his contracts, had bought silk of other persons and sold it to them at a profit as being of his own manufacture, yet that would not have been a ground for relief in a court of equity, but would have been proper for an action at law. All that the respondents would have been entitled to in equity would have been a discovery of the transaction in aid of their action. A bill for the discovery, instead of containing, like the present bill, the enormous length of 201 folios, might well have been comprised in a tenth part of it, and having been answered, the respondents must have paid the expence of it. It has, for a length of time past, been the course of the courts of equity, that if a plaintiff entitled to a discovery, but not to relief, files a bill both for discovery and relief, and the defendant demurs to it generally to allow the demurrer, because the plaintiff should not have prayed relief.

3. If it be permitted to parties, as plaintiffs, to file bills in equity, stating, at great length, cases which in principle cannot be sustained, but which, by introducing incidentally small circumstances giving an appearance of equity, prevent the defendants from demurring generally to such bills, the consequences will be ruinous to many defendants, and it will be in the power of the rich to oppress the poorer part of the community. In this point of view it is hardly possible to shew in a stronger light the situation of parties, than that of the respondents, a body of the first consequence in this country, and one of their covenanted servants.

4. Though great part of the bill is wholly without foundation, yet, if the small part alluded to had afforded an appearance [105] of equity, it would have been impossible to have referred such a bill for impertinence. The observation of a master in chancery must unavoidably have been, the bill states a case and prays relief adapted to it ; it is not competent to me to judge whether that relief is founded in equity or not, and there is nothing in the statement of the bill extraneous to its object, and therefore I cannot pronounce it impertinent ; of the want of equity the Court only is the judge. In the present case, if it could be admitted that the parts alluded to would, of themselves, have entitled the respondents to relief in a court of equity, it would have been beyond human attention and industry to frame a partial demurrer with a competent answer ; and in such a case the plaintiff has no reason to complain of the Court which says to him, the principal aim of the bill is without foundation, and you have so complicated the case that your bill deserves no answer at all.

In support of the decree of Lord Chancellor Loughborough and against the present appeal, the respondents assigned (J. Scott, J. Mansfield, G. Rous, F. P. Stratford) the following reasons :

First, That the appellant was, during the time of the transactions in the respond-

ents' bill mentioned, both by reason of the office he held in their service, the peculiar duty of which it was to procure goods for the respondents at the cheapest rate, and upon the most advantageous terms, and also by reason of the express covenants entered into by him, altogether incapable of forming any contract whatsoever in which the respondents were in any manner interested, so as to derive any profit or advantage therefrom to himself, or otherwise than for the profit and advantage of the respondents; and therefore both the contracts before mentioned to have been made by the appellant are to be considered as made on the behalf of the respondents, and consequently he is liable and bounden in equity to account for and pay the profits arisen therefrom to them.

Secondly, That taking the case stated upon the bill filed by the respondents in the most favourable light for the appellant, he can be considered only as their agent or factor, in respect of the two contracts therein mentioned, and therefore, like other agents or factors, liable to account and answer for the profits arising therefrom to his employers.

Thirdly, That supposing the appellant, notwithstanding his office in the service of the respondents, and also notwithstanding the express covenants entered into by him, to be capable of contracting with them or on their behalf in such manner as to derive a profit to himself, both the contracts hereinbefore mentioned were obtained by him by means of an undue advantage taken by him of the confidence which he procured the servants of the respondents, with whom he treated, to place him in regard thereto; and, under such circumstances of misrepresentation and fraud, that he ought not to be permitted to retain the profit made thereby for his own benefit, but ought to be considered as [106] a trustee for the respondents, and to be compelled to account for and refund all such profit to them.

Fourthly, That it could not be contraverted that, with respect to all such silk as the appellant purchased from others, he acted merely as factor or agent to the company, and from the nature of such employment, as also by the express terms of his covenants, was bound to render an account of all such dealings.

It was accordingly ORDERED and ADJUDGED that the appeal should be dismissed, and the order therein complained of be affirmed. (MSS. Jour. *sub anno* 1797.)

NOTE. [95] The following is a copy of the Schedule annexed to the respondents' bill in chancery, and which contains the calculations alluded to.

The mode of purchasing cocoons is either by weight or tale, in either of which cases, the price turns out nearly the same. If bought by weight the price is at a certain rate per maund, reckoning from forty to forty-five seers to the maund, as the buyer and seller shall agree. The current price of cocoons in this mode is from ten to twelve sicca rupees per maund; when bought by tale it is according to the following table:

Four cocoons are a gundah.	
Twenty gundahs, or eighty cocoons, are a pun.	
Sixteen puns, or 1280 ditto, a baund.	Sa.R. A. P.
The price of cocoons, reckoned upon an average of the last eight years, have turned out three baunds, three puns to the sicca rupee; a maund or forty seer of cocoons is found to yield two seers and a quarter of silk, which, reckoned at the highest rate of cocoons, viz. twelve sicca rupees per maund, will cost per seer,	5 5 4
The charges of winding a seer of silk are:	
Wages for two days to a spinner and ruler, about, together, rupees seven and a quarter per month,	0 8 0
Each bason will require from three-fourths to a maund of fire-wood, which, at twelve rupees per maund, is about	0 4 0
Cooly hire and accidental charges will not exceed	0 2 0
Is per seer of silk, sicca rupees	6 3 4

Sixteen baunds and a half of cocoons are also found to give one seer of silk, at which rate thirty seven baunds and two puns will yield two seer and a quarter of silk, the quantity produced from a maund.

Sa.R. A. P.

Thirty-seven baunds and two puns reckoned at the price of three baunds, three puns to a rupee, will cost	11 10 4
Which is per seer of silk, ...	5 2 10
Charges of winding as above, ...	0 14 0
	6 0 10

A practice has prevailed between some of the silk contractors and the pykars, the latter of whom agree to furnish cocoons on being paid for the quantity of silk that shall be actually produced therefrom, at the rate of from five sicca rupees four annas to five sicca rupees eight annas per seer, the manufacturer being at the charges of winding.

The average price in this mode is, per seer, ...	5 6 0
Charges of winding as before, ...	0 14 0
	6 4 0

CASE 5.—JOHN ORD, Esquire, His Majesty's Attorney-General of the Duchy of Lancaster, (at the Relation of John Pate Neville, Esquire, William Turner, sole Executor of the last Will and Testament of Joseph Turner, deceased, and Richard Paley, John Sowden, and Hannah Rhodes, Executors and Executrix of the last Will and Testament of John Rhodes, deceased, and the said John Sowden and William Burrows, Executors of the last Will and Testament of William Hodgson, deceased,) Informant, and the said JOHN PATE NEVILLE, WILLIAM TURNER, RICHARD PALEY, HANNAH RHODES, JOHN SOWDEN, and WILLIAM BURROWS,—*Appellants*; SAMUEL BUCK, Esq., WILLIAM SHEEPSHANKS, Clerk, THOMAS WRIGHT, JAMES ROBINSON, and JOHN METCALF, the Younger,—*Respondents* [26th June 1797].

[Where a defendant, in an inferior court, admits a custom alleged by the plaintiff to a certain extent, and the plaintiff insists upon a custom beyond that extent which the defendant denies, this is a proper subject for a trial at law : And the order of the inferior Court (the Duchy Court of Lancaster) to proceed to a trial on an issue specified was accordingly affirmed.]

The relator and appellant John Pate Neville was the owner, and his ancestors for a long course of years had been the owners, of certain water corn mills situate at Leeds, in the [107] county of York, at which all the tenants, resiants, and inhabitants within the manor of Leeds had done, and ought to do, suit and soke : (that is to say) as the appellants insisted, every such tenant, inhabitant, or resiant was bound to have all the corn and grain used or spent ground in their respective dwelling-houses within the said manor, ground at the said appellants' said mills.

In order to establish this right of mulcture, and also to recover satisfaction from certain persons who had withdrawn their suit from the said mills, some time about the year 1662 an information, in the name of the then attorney-general of the said duchy, was exhibited at the relation of Gervase Neville, an ancestor of the said appellant John Pate Neville, against Edward Cooper and certain other persons, in which, after stating that the then relator was lawfully seised of the said mills and premises

under the yearly rent of £13 8s. 8d. payable to his Majesty, and was entitled to all the rights, privileges, and prerogatives to the said mills belonging; and that the defendants in the said cause, and the other tenants, resiants, and inhabitants were bound to bring their corn and grain which they or any of them should use or spend ground in their respective dwelling houses within the said manor to the said mills there to be ground, the defendants were charged with having withdrawn their soke and suit from the said mills in breach of the said custom. And the defendants, being a great many in number, by their answers to the said information all denied the custom as alleged by the then relators.

The cause came on to be heard the 30th May 1663, before the then chancellor of the said duchy, assisted by Mr. Justice Twisden, when, upon reading the grant of the said water corn mills of Leeds from the then late king, and several mesne conveyances, whereby the then relator derived his title, as also several depositions of witnesses taken in the cause, and several orders, decrees, and other records of the said Court, in an order of that day particularly recited, and on full debate of the matter by counsel on both sides, the Court was satisfied not only of the then relator's title to the said mills, but also that it was in those times (to which the records of the said Court relate) admitted and taken for granted that soke and suit were due to the said mills of Leeds by the tenants, inhabitants, and resiants of the said manor or lordship of Leeds; and that the withdrawing thereof was then interpreted to be a disinherison of the Crown; and that no distinction was then made between the resiants and tenants, and that therefore it was just to establish possession accordingly with the then relator, till it should be made out that there was no such custom as was alleged in the information, which being proper to be determined at law, it was then ordered that the said matter of custom, as laid in the information, should be referred to a trial at law in such sort as in the said order at the hearing was more particularly expressed. And it was then declared, that if at such trial the verdict should fall out for the then relator, then, upon his resorting to that Court, further [108] orders should be taken for his relief according to justice; and in the mean time the possession of the said soke and suit was settled with the then relator, his farmers and tenants of the said mills, according to the said orders and decrees, by the injunction of the said Court under the qualification in the said order at the hearing more particularly mentioned.

A trial at law was accordingly had at the assizes for the county of York, and a verdict was given for the said relator, the issue upon the trial being: "Whether there is, and, from time whereof the memory of man is not to the contrary, there hath been, within the manor of Leeds, in the county of York, a custom that all housekeepers, dwelling in any ancient houses within the said manor for the time being respectively, for all the time aforesaid, have used and ought to grind ALL their grain, malt, pease, and beans whatsoever at the aforesaid mills, or one of them, which being ground they used and spent in their aforesaid respective dwelling-houses, and not elsewhere; and during the whole time aforesaid have paid and used to pay the owner and farmers of the said mills, for the time being, reasonable mulcture for grinding of the said grain, malt, peas, and beans, in consideration, whereof the said owner and farmers from the time whereof the memory of man is not to the contrary, have used to amend and repair the said mills at his and their own costs and charges, when it was necessary, and to keep and maintain millers and servants experienced in the art of grinding, to be continually attending at the said mills to ground the said grain, etc. at the said mills or one of them!"

On the 6th day of February 1664, the said cause came on for further directions; when, on consideration of the former proceedings, and of the said issue and verdict at law, and of what was objected on behalf of the defendants, by their counsel, (that is to say) that many houses had been, in late years, erected within the said manor, which it was prayed might not be included within the decree; as also the insufficiency of the said two water corn mills to grind all the corn and grain of the said inhabitants within the manor of Leeds, they being many thousands in number, and the said manor of a large extent; and that, by the tenor of the former injunction, the defendants had liberty to buy in any market ground corn for the expence of their houses, which it was prayed might be continued; and, on the matter, it was also prayed on the defendants' behalf that a second trial of the said custom might be directed. In satis-

faction to all which, it was taken notice of by the Court, that the said custom extends to the whole manor, and so to houses of a later as well as of a more ancient erection, as being comprehended within the said manor. And that if the said mills were not sufficient to grind all the said corn and grain of the said tenants, resiants, and inhabitants, whereby any of them should be prejudiced by the not grinding of their corn and grain there within convenient [109] time, the law, in that case, provided a remedy, and relief would be therein given upon satisfying the Court by information in that behalf. And as to the liberty of buying corn ready ground for the use of their families in Leeds aforesaid, according to that formerly granted by the tenor of the said injunction, the Court observed, that liberty was then given for quietness sake; that the custom respecting ALL corn and grain spent in their houses might possibly be frustrated and destroyed by the great quantities of corn which might be brought and bought into the said manor ready ground, to prevent grinding at the said mills; and that, if the defendants, or other the inhabitants, should set that on foot, it might be proper to bring that point to consideration upon an attachment, in order to an examination whether it were within the decree or no! or the defendants might exhibit their bill to that purpose. And as to another trial, the Court took notice that that trial was intended merely for their satisfaction as to the custom, (in order to the passing a decree,) wherein they had accordingly received satisfaction: And upon full debate and mature consideration of the whole case, the Court being satisfied that a decree ought to pass for the relator upon the information, answers, and issue aforesaid, on Monday the said 6th day of February 1664, it was finally ordered and decreed, that all and every the tenants, residents, and inhabitants within the said manor or lordship for the time being, ought to bring or send ALL their corn or grain, which they or any of them should use and spend ground in their several and respective dwelling-houses within the said manor of Leeds, to the relator's said water corn mills in Leeds, or one of them, there to be ground, or otherwise to deliver the same to the carriers or loaders belonging to the said mills for the time being, to be there ground; and that they ought not to carry or send their said corn or grain to any other mill or mills, nor to deliver the same to the carriers or loaders of any other mill or mills, to be ground there; and that they ought to pay the due toll and muletire for the same: And that accordingly the full, quiet, and peaceable possession of the soke and suit were settled and established to and with the then relator, his farmers and tenants of the said mills in time then to come. And that the defendants, and all other resiants, tenants, and inhabitants within the said manor or lordship of Leeds aforesaid, should well and truly perform, from time to time, to the relator's said water corn mills at Leeds, or one of them, their soke and suit for all their corn and grain from time to time used and spent ground in their several and respective dwelling houses within the said manor or lordship; and that none of the defendants, or other tenants, resiants, or inhabitants within the said manor or lordship, should send, carry, or deliver to any carrier or loader of any other mill, any of their said corn or grain to be carried to any mill or mills, to be there ground, other than the relator's said water corn mills, or one of them.

[110] And it was further ordered and decreed, that no owner or farmer of any other mill or mills should, in time to come, grind at any such other mill or mills any of the said corn or grain of such tenants, resiants, and inhabitants within the said manor. Nevertheless it was ordered that the said decree should not be construed to restrain the defendants, or any of the said tenants, resiants, or inhabitants from buying bread ready baked for the use of their families, within the said manor or lordship. And it was further ordered, that the defendants should pay to the relator costs, according to the course of the Court, for his charges and expences in that suit.

Gervase Neville, deceased, a descendant from the relator before named, being seised in fee of the said mills, devised the same, together with his other estates, to his daughter Dorothy Lister, the mother of the appellant John Pate Neville, for life, with remainder to the said appellant.

In the year 1766 a suit was instituted in the said Court, by information and bill, by the said Dorothy Lister and William Banks, the then tenant of the said mills, against John Pickering, John Ellis, James Ellis, Thomas Adamson, and five other persons, inhabitants of Leeds aforesaid, charging that Adamson had sold flour, not ground at the said mills, to the inhabitants of the said manor, in fraud of the said

custom ; and also charging that the said J. Pickering, John Ellis, and James Ellis, had purchased meal and flour, the produce of corn ground at other mills than the said relator's said mills, and had baked part thereof into bread, and sold the same in the way of their trade, and had sold other part thereof in their houses within the said manor of Leeds, and which the then relators insisted were fraudulent evasions of the said custom, and tended to frustrate the rights of them the relators.

The defendants John Pickering, John Ellis, and James Ellis, by their answer to the last mentioned information and bill, denied that the owners of the said mills had all the suit, soke, and mulcture for grinding the corn, grain, and malt, that the inhabitants of the said manor had or bought, and which they had ground within the said manor ; or that the inhabitants of the said manor had, for time immemorial, either by custom or otherwise, used to grind at the said mills ALL the corn, grain, and malt which they used ground within the said manor ; or that the inhabitants of the said manor were, by ancient usage or otherwise, bound to grind their corn, grain, and malt at the said mills.

The said last-mentioned cause being at issue, and witnesses having been examined therein, came on to be heard in or about April 1771, when the information and bill were dismissed with costs as to defendant Thomas Adamson. And an account was directed to be taken of the grist of the malt used by the defendants John Pickering, John Ellis, and James Ellis, in their [111] respective houses ; and it was ordered that those defendants should pay costs to the relators, as far as respected the accounts thereby directed. And it was further ordered that the said information and bill should be retained against the said three last-named defendants until Easter term 1772, and the relators were to be at liberty to bring actions against them for the grist of flour consumed by them in their houses, within the said manor, made from corn not ground at the relator's said mills, and for the selling of bread within the said manor, and used by any inhabitants of or within such manor, not made of flour produced from corn ground at the said mills, in order to ascertain whether the custom, found by the verdict, established by the said decree of the year 1664 extended to those cases ? And in case the relators failed or neglected to proceed to trial therein, within the time before in that behalf mentioned, then the said information and bill were to be dismissed, as against the said last-named defendants, with costs, so far as related to the matters directed to be so tried at law.

The relators in the last-mentioned suit, for the reasons hereinafter mentioned, did not appeal from the last-mentioned order, or proceed to the trial of any action which they had thereby liberty to bring, within the time limited, and therefore the information and bill were dismissed, with costs, as against the said three defendants, J. Pickering, John Ellis, and James Ellis, so far as related to the matters directed to be tried at law as aforesaid.

Dorothy Lister died in the year 178 , and upon her death the appellant John Pate Neville entered into the possession of the said mills, under the will of the said Gervase Neville, and afterwards demised the same to the said Turner, Hodgson, and Rhodes.

In 1791 the appellants instituted the present suit by bill and information, in which, after stating the proceedings in the said first-mentioned cause, as hereinbefore stated, they charged that the respondents Buck, Sheepshanks, Wright, and Robinson, had for some time withdrawn from the said mills their suit and soke of corn and grain used and spent ground in their dwelling-houses ; and that the respondent Robinson had brought into the said manor, or had purchased of other persons who had brought therein, great quantities of meal and flour not ground at the said mills ; and had sold the same to the tenants, residents, and inhabitants of the said manor ; and that the respondent Metcalf had withdrawn the suit and soke of his corn, grain, and malt used and spent ground in his dwelling-house.

To this information and bill the respondents appeared, and put in their answer ; in which they admitted the decree stated in the said information and bill, dated 6th February 1664, and that the same was of or to such or the like purport and effect as stated in such information and bill, so far as the same is therein stated ; but they insisted that they were not thereby restrained from buying their meal and flour ready ground, whether ground at the [112] said mills, or not, to be used in their dwelling-houses within the said manor ; and the said respondents further insisted, that the

issue mentioned in the decree of 1664 was expressly confined to housekeepers, and inhabitants of ancient houses, the respondent Buck, in particular insisted, that the house in which he resided was a modern built house, and therefore not within the soke of the said mills. And the respondents, in their answer, further insisted upon the insufficiency of the said mills to grind all the corn, grain, and malt, of all the tenants residents, and inhabitants of the said manor; and likewise insisted that, with regard to malt, the mulcture claimed by the relators, though it might at first have been a reasonable one, yet was then from the duties of excise become exorbitant and unreasonable.

The defendant Metcalf admitted, that he had consumed a quantity of malt not ground at the said mills, for the toll or mulcture of which he offered to account, and also to pay the costs of the suit, so far as related thereto; but, like the other defendants, he insisted upon his right to buy meal and flour not ground at the appellants' aforesaid mills. And the respondents also took notice of the suit instituted by the said Dorothy Lister and William Banks, and the abandonment thereof.

The appellants replied to the answers of the respondents, and the cause being at issue, many witnesses were examined on both sides.

Nine witnesses were examined on the part of the appellants as to the existence of the custom in question, by whose depositions the custom contended for by the appellants was (as the appellants contended,) fully and unquestionably proved; and as to the rights insisted on by the respondents, namely, "That the inhabitants of the said manor may purchase flour for the use and consumption of their families, not made from corn ground at the said mills," all the said witnesses, except one, were (together with three others,) examined on the part of the appellants, from whose depositions it was inferred, that the practice of purchasing flour by some of the inhabitants of the said manor, for the use and consumption of themselves and their families, which had not been made from corn ground at the said mills, was not a custom or immemorial right, or an exemption from, or an exception out of, the custom in question, but was only a practice of modern introduction; and likewise, that the purchase of fine flour by any person within the said manor was of very recent origin.

Several witnesses were examined on the part of the respondents, among whom were two of the witnesses examined on the part of the appellants, and whose depositions on the part of the respondents were in substance and effect the same as, or not contradictory to, their depositions on the part of the appellants. And, although the depositions of the witnesses who were so examined on the part of the said respondents were in general in favour of the said right so insisted on by them the said respondents, yet none of those witnesses disproved the custom contended for by the appellants, or in any material respect contradicted the witnesses of the appellants as to that custom.

On Thursday the 13th November 1794, the said last-mentioned cause came on to be heard before the right honourable the Chancellor of the said duchy, assisted by Mr. Justice Rooke and Mr. Justice Lawrence. Upon the hearing, the counsel for the respondents abandoned the exemption claimed by the respondent Buck, on the ground of a supposed distinction between ancient and modern houses; they also waived the point upon the insufficiency of the mills; and admitted the custom, as to malt, to be as alledged by the appellants; so that the cause was reduced to the single question, Whether the purchasing meal and flour by the inhabitants for their consumption in their houses in Leeds, such meal and flour being produced from corn ground at foreign mills, was or not a violation of the soke claimed by the appellants and admitted by the respondents?

On the part of the appellants it was contended, that by the decree in 1664, the custom insisted upon was already established, and that that custom, so established and admitted on all hands, was in its substance and meaning directly prohibitory of the acts the respondents admitted they had done, and of the practice of buying flour and meal which they contended for. That this practice of the respondent was an evasion of the rights claimed by the owner of the mills, and came directly within the doctrine laid down by Lord Mansfield in the case of Manchester mills (in the Duchy Court, 21st of May 1757, and stated in Douglas, 222, note 13), and if permitted, went to the total destruction of the valuable right of the appellant Neville; for if the inhabitants were to be bound only to send such corn as they might have in an

unground state, to the mills, and might purchase meal and flour wherever they pleased, it would totally prevent the owners of such mills from deriving any advantage from them, and instead of being a benefit, they might prove a burden. That the owner was bound at all times to keep the mills in repair, and also to keep servants, horses, carts, loaders, etc. at a great and certain expence; and if the inhabitants might have their meal and flour ground elsewhere, the mills might be wholly without employment and be quite unproductive. And the cases of Bradford mills (Duchy Court, 31st January 1782, (not reported)), and Wakefield mills (Duchy Court, 12th December 2 Geo. III. (not reported)), and the cause of *Cort v. Birkbeck* (Douglas, 218. [In that case it was determined that such a custom as is here alleged is good in law]), were cited and relied upon. The counsel for the appellants also contended, (as they also insisted on the present appeal,) that the event of the suit of 1766, ought not to be regarded as a matter of much importance to the point in dispute, in as much as it appeared by the evidence in the present cause, that the reason why Mrs. Lister submitted to the decree without appeal was, that she being only tenant for life, with a numerous family, at an advanced age, did not think herself, in justice to her younger children, warranted in prosecuting a very expensive law suit, of which her eldest son only was to reap the benefit; the more especially as she was advised by very high legal authority, that her acquiescence could not prejudice the right of her son, the present appellant, when he should come into possession. That from the time of that last mentioned suit the matter had been in constant agitation; the right to buy meal and flour produced from corn and grain not ground at the said mills having been insisted on, on the one hand, and denied on the other; and beyond all doubt great quantities of meal and flour had been brought from foreign mills into the manor; but the appellants contended that little stress ought to be laid on the evidence of what had passed since the time when the dispute may properly be said to have commenced. The counsel for the respondents insisted that, before any decree could be made, an issue should be directed to try the matter before a jury. The Court took time to consider, and, on the 5th day of February 1795, Mr. Justice Rooke (Mr. Justice Lawrence being then absent) pronounced the following order:

"Let the parties proceed to a trial at law in the court of king's-bench at the now, next, or some future assizes to be held in and for the county of York, on this side, and before Michaelmas term 1796, on the following issue: 'Whether, from time whereof the memory of man is not to the contrary, all the corn and grain used and spent ground by all and every the tenants, residents, and inhabitants within the manor or lordship of Leeds, in their several and respective dwelling-houses within the said manor or lordship, have been ground, and of right ought to have been ground, and still of right ought to be ground, at the relator John Pate Neville's said water corn mills in Leeds, or one of them, and not elsewhere?' And if upon the trial of the said issue any other custom, or other matter material to the matters in question between the parties shall be found by the jury impannelled to try the same different from what is contained in the said issue, let the same be indorsed on the postea."—And the said Court reserved the consideration of costs, and all further direction, until such trial should be had, and either party was to be at liberty to resort to the Court as occasion should require.

The appellants, conceiving themselves aggrieved by this order, instituted the present appeal, and assigned (T. Plumer, J. P. Heywood) the following reasons for the reversal of the order:

1st, Because there is no fact in dispute between the parties to be tried by a jury. The custom contended for by the appellants, and stated in their information and bill, is not denied, but is admitted by the defendants in their answer; and the only point is a question of construction, viz. Whether the practice of buying meal and flour ready ground at foreign mills, to be used and consumed by the respondents respectively in their dwelling-houses in Leeds, is not a practice inconsistent with and utterly subversive of the right of the appellants, and the custom established by the decree of 1664, stated in the information and bill, and admitted in the answer? a question which ought to be [115] decided by the Court and not by a jury. To refer this question to a jury, to ask them what are the true intent and meaning of this custom in any shape or mode, is to abdicate the proper province of the Court. The Court alone, as the appellants are advised, are to decide whether the particular act in question

be or not without the custom already found by the verdict of a jury upon the issue before directed and tried. In the case of Manchester Mills it was decided that an evasion was matter to be decreed upon by the Court without an issue; and in *Cort v. Birkbeck* the custom was almost verbatim the same as in the present case, and the Court held the practice now contended for by the respondents to be inconsistent with it.

2d. Because the custom contended for by the appellants is not only established by the decree of 1664 before mentioned, but the extent of it is by that decree ascertained. The Court there observed, that liberty had been given to buy corn ready ground for quietness sake: but that the custom respecting ALL corn and grain used and spent in the houses of the inhabitants might possibly be frustrated and destroyed by the great quantities of corn which might be bought and brought into the said manor ready ground, to prevent grinding at the said mills:—from whence it must be inferred that the Court considered the practice as having been trifling in its origin, and therefore yielded to; but that when, from a probability of such practice becoming extensive, the custom itself might be in danger: and when they were called upon to decide the rights of the parties, they were bound to decree, that ALL the corn and grain which should be used and spent, ground within the said manor, should be ground at the aforesaid mills, and they did so decree accordingly:—and that it was the intention of the Court to include in that decree the prohibition of the practice insisted on by the respondents is obvious, not only from the observations then made upon the probable effect of such practice, and from the comprehensive words of the decree itself, but because the purchasing of bread ready baked is the only case to which the decree is declared not to extend.

3d. Because customs of this kind are supposed to be founded in contracts of mutual benefit: whereas, if the practice contended for by the respondents shall be permitted, the appellants will be in this singular and hard predicament: They are and will be bound to keep the mills in repair at a very considerable expence, to keep a sufficient number of loaders and other servants to do the business, to give a preference to the inhabitants over all other customers, and, what is still more important, prevented from converting the mills to any other of the many very valuable purposes to which, in the country where they are situated, they are particularly applicable.—Whilst, on the other hand, the inhabitants will be permitted to use meal and flour ground where they please, and it will be in their power to leave the mills wholly without employment, and their owner under a [116] perpetual obligation, the consideration for which will be precarious and uncertain, depending merely on the interest or caprice of the inhabitants.

The respondents insisted that the said decree or order, pronounced on the 5th of February 1795, was just and right, and assigned (E. Law, A. Chambre) the following reasons for its affirmance:

The respondents having, by their answer, admitted the custom alleged by the appellants to a certain extent, and the appellants insisting upon a custom beyond that extent, which the respondents deny, the same is a proper subject of a trial at law, and the issue directed for the purpose by the decree now appealed from, with the direction for a special indorsement on the postea of any other custom or material matter that may be found by the jury, are properly adapted to the nature and circumstances of the case.

To the OBJECTION, on the part of the appellants, "that the decree of the 6th of February 1664, had conclusively decided the question, and that the terms in which the custom was established by that decree excluded the inhabitants and resiants, within the manor of Leeds, from the use of any flour, meal, or ground malt in their houses, except such as had been ground at the relator's mills, whether the corn producing such meal or flour, or the malt, had been ground for such inhabitants or resiants, or belonged to them when in a grindable state or not;"—the following ANSWERS were offered by the respondents:

I. That supposing the language of the decree of 1664 to require that construction, it was *extra judicial*, and is not binding upon the inhabitants in respect of meal, flour, or malt, which they purchase ready ground.

The custom alleged in the information does not go to that extent; it only requires that such corn and malt as the inhabitants should grind, and afterwards use in their

houses, should be ground at the relators' mills, and that they ought not to grind it elsewhere. The prayer of the information is adapted to such a custom only, and the custom so alleged in the information is that which is denied in the answer, and upon which the parties take issue. The issue tried at law, under the direction of the court of the duchy, and upon which the decree was founded, extends the question no further. The decree therefore, so far as relates to the matter now in question, could not have bound the inhabitants of Leeds if it had been explicit upon the point, (which it is contended not to be,) because it is not supported by any thing charged or confessed, or put in issue in the pleadings, or determined by any trial at law.

II. The decree of 1664 does not by reasonable, much less by necessary, construction, import that the inhabitants of Leeds are precluded from using in their houses ground corn, which they purchase in that state, although it may have been ground at other mills than those of the relators. Customs are *stricti juris*, and not to be extended by construction: and no custom can be less [117] entitled to favour than one which tends to a monopoly of the necessities of life. Such is the tendency of the custom insisted on by the appellants; and the persons to be affected by it are the inhabitants of one of the principal towns of trade and manufacture in the kingdom. The obligation is to grind their corn which they use ground. The first part of the obligation necessarily implies that they must have corn in a grindable state before the custom can attach upon it. The latter part does not extend the obligation but narrows it, and leaves them at liberty to use corn unground, or to grind it elsewhere for sale or other purposes than their domestic consumption. The negative or prohibitory declaration also distinctly marks the limits of the custom: it negatives the right of grinding at other mills, but contains no prohibition against the use of purchased flour. It is further manifest, from the proceedings in that cause, that the Court did not mean to decide the present question. The orders of the 30th of May 1663, and 16th of July 1663, leave the defendants at liberty to purchase and use ready ground meal and flour: and the decree of 1664, so far from deciding against their right to do so, only expresses a doubt whether any abuse in the exercise of it might defeat the custom, and points out the modes of proceeding to litigate the question when the case should arise: The decree, also, in express terms, leaves them at liberty to purchase bread, which is inconsistent with the extended sense in which the appellants construe the words which are declaratory of the custom. It also appears from the decree of 1771, referred to in the answers, that the Court at that period, in directing a trial at law, construed the decree in the restrained, and not in the extended sense, which construction the then relators assented to, by declining a trial, and therein have also impliedly acknowledged the fact of usage.

III. It will be sufficient upon the present occasion, if the words may admit of either construction. Customs originate in contracts, of which usage is the evidence. The subject of the original contract might be the corn which the inhabitants had in a grindable state only, or (if such a contract or a custom, presupposing it would be good in law, they might contract to restrain themselves from the use of any ground corn which had not been ground at the relators' mills. If there be any ambiguity in the terms of the decree, there are no other means of ascertaining the extent of the custom than by recourse to the usage, of which there is abundant evidence in favour of the respondents, and the only proper mode of determining the question in that case is by a trial at law.

IV. With respect to the case of Cort and Birkbeck, (relied upon for the appellants as an authority for their construction of the decree of 1664,) it may be sufficient to observe of that case, that it has not decided the question whether the terms of the custom, as stated in the declaration in that suit, and the decree which was produced in evidence, (which terms are alleged to be [118] similar to those of the decree of 1664,) are necessarily, or were primarily, to be construed in the extended sense contended for by the appellants. The defendants in that suit were entangled by the forms of the proceeding. The question arose upon a demurrer to evidence, the proper application and effect of which were then misunderstood. The Court do not decide merely upon the decree, but upon the whole evidence stated in the record, parol as well as written, from whence they conclude, that there was some evidence of the custom upon which the jury might have found for the plaintiff upon the breach alleged. So far as the meaning of the decree is considered, it is construed, from what appeared

by the answers, to have been the real question disputed by the parties betwixt whom that decree was made, and all that can be collected of the opinion of the Court in the case of Cort and Birkbeck, is that the language of the decree, explained by other circumstances, might bear the construction put upon it by the plaintiff in that suit, and sustain the action upon the breach alleged in the declaration, not that it necessarily must be so construed. On the contrary, the case is an authority for referring to other evidence to ascertain the extent of the custom in the present case.

To a second OBJECTION on the part of the appellants, "That the purchasing and using of ready ground meal and flour was an evasion of the custom, which was necessarily to be considered as fraudulent," the respondents answered thus:

This objection admits that the case is not within the custom, and that the acts complained of are not direct breaches of the custom. If the custom itself has not imposed the restraint, the mere use of purchased meal or flour can be no violation of any right of the owner of the mills. It is either a breach of a custom, or it is the exercise of a lawful right, and to decide otherways would be to confound the distinction between the different degrees of restraint which the original compact, evidenced by usage, may in different instances have established, and would place those who had only submitted to restrain themselves from grinding their own corn elsewhere, upon the same footing with those who had agreed to a total restraint from the use of any meal or flour not ground at the mills to which they bound themselves thereafter to owe suit. Combinations or other special circumstances might possibly constitute a fraud, but the question in the present case turns upon the general right, and not upon any special circumstances of fraud or supposed fraud.

It was accordingly ORDERED and ADJUDGED that the appeal be dismissed, and that the decree therein complained of be affirmed. (MSS. Jour. *sub ann.* 1797.)

[119] CASE 6.—THOMAS SMART, Mason in Dundee,—*Appellant*; THE MAGISTRATES AND TOWN COUNCIL OF THE BURGH OF DUNDEE,—*Respondents* [22d November 1797].

[1 Scots R. R. 801. Considered in *Berry v. Holden*, 1840, 3 Dunlop, 210.]

[Where the Sea-flood is stated as the boundary of premises granted on the shore of a sea port, being an incorporated burgh, this does not give the grantee a right to follow the sea, (or to the land acquired from it, or left by it where it has receded,) in prejudice to the corporation, having, by their charter, a right vested in them to the whole territory of the burgh.

The above seems the only general principle to be gathered from this case, which is involved in many particular circumstances; and is only inserted here as of some importance on the general law of *alluvion*.

The interlocutors of the Court of Session (which reversed an interlocutor of the celebrated Lord Monboddo) were affirmed.]

The respondents stated the following case:

The appellant possesses a small inclosure or yard situate within the royalty of the burgh of Dundee, on the south side of a lane or street called The Road to Yeaman's Shore. He shews no original charter or grant from the town, or any other person, as superior of this property, but rests his title upon certain mesne conveyances and base infeftments, the earliest of which last is in the year 1758, and consequently within the years of prescription.

In the conveyances to the appellant the property is described as an inclosed yard or garden, bounded on the north by the passage or lane to Yeaman's Shore, on the east and west by other tenements, and on the south by the sea-flood, that is, by the frith of Tay, on which Dundee is situated. Some time ago the sea or frith appears to have washed the south boundary of this little inclosure, and the adjoining tenements, and it is certain that at an earlier period the scite of all these tenements was overflowed by the sea at high water; for, in the grants of the tenements to the north-

ward of the present lane to Yeaman's Shore, they are all described as being bounded on the south by the sea-flood.

By embankments and operations of the town, in improving the harbour and otherwise, the water has receded, so that there is now between the sea or high-water mark, and the appellant's inclosure or yard, and the other adjoining properties, a tract of dry ground called the Shore; of different parts whereof the town has from time to time made grants in feu, and upon other parts the slaughter-houses and other public works have been erected by the corporation.

Notwithstanding the town's thus using the acquired land or shore as its property, and particularly erecting the slaughter houses partly upon the ground intersecting between the appellant's inclosure and the river, and notwithstanding it had been in the year 1788 solemnly determined, in an action between the town [120] and Mr. Laird, that the boundary *per fluxum maris*, or sea flood, did not give the grantee a right to follow the sea, or to the land acquired from it, or where it had receded, yet the appellant set up a claim to the ground between his inclosure and the river, and thereupon brought his action of declarator in the court of session, concluding, that it should be found "That the pursuer has the only good right to that piece of ground lying along the sea-beach, bounded on the west by a straight line from the south-west corner of the inclosed part of the pursuer's said property, to the north-west corner of the slaughter-houses lately erected by the town of Dundee, partly upon the rock of Saint Nicholas, belonging to the town, and partly upon the ground taken in by them within the pursuer's boundary, by the north or north-east wall of these slaughter houses, and a great gate or cart entry to the street or passage to the craig of Dundee; on the south, by a straight line from a point in the dike, two feet north from the north-side of the said great gate or cart entry, till it join the south-west corner of the houses belonging to the heirs and successors of the said James Kay and others, and the said houses, till they join the south-east corner of the inclosed part of the pursuer's property on the east, and the said inclosed part of the said property on the north parts."

After the summons had been called in court, the appellant brought an action against the respondents in the sheriff court of Forfarshire, in which he claimed the right of a cart road through the same grounds which were the subject of his declaratory action. A bill of advocation was preferred, and, after being passed, it was conjoined with the declaratory one, so that the whole might be decided at the same time.

The matter having come before the Lord Monboddo, as ordinary, he pronounced the following interlocutor: "Having considered the memorials for both parties, with the plan produced, finds, *1mo*, That the town of Dundee, so far as concerns the river and frith of Tay, has only a right to the same for the purpose of navigation, and of loading and unloading vessels; but that they have no right to challenge any thing done in the river by the proprietors of the adjacent lands, if it be not hurtful to the navigation of the river, and the other purposes before mentioned, which is not alleged to be the case of what the pursuer has taken from the river: Finds, *2do*, As the pursuer's property is bounded on the south by the sea-flood, he has a right to whatsoever land the sea leaves adjoining to his property, or that he shall acquire by any *opus manufactum*, not prejudicial to the navigation of the river, and the foresaid purposes: Therefore decerns and declares in terms of the pursuer's libel, but finds no expences due to either party."

Both parties having represented, the town upon the merits, and the appellant on the point of damages for which his libel concluded, and also respecting expences, his lordship adhered in [121] the following terms: "The lord ordinary having considered this representation, with the answers thereto, together with the counter-representation for the respondent, refuses the desire of both representations, and adheres to the interlocutor represented against for the reasons therein given, and for this additional one, that the respondent Thomas Smart appears to have been in the actual possession of the sea-beach claimed by him, by making a gate into it and a road through it, which he has used ever since the sea was excluded; and in respect the cause has been so fully laid before the lord ordinary by a pleading, memorials, and representations and answers, prohibits the clerk from receiving any more representations in this cause."

The now respondents presented a petition to the whole lords, reclaiming against

the interlocutors of the lord ordinary, to which answers were made by the appellant. The Court afterwards directed a plan of the property in dispute, and adjacent grounds, to be made, and allowed the respondents to recover and produce certain writings judged material; and then ordered the parties to put in memorials upon the whole cause, as now more fully explained by the evidence than it had been to the lord ordinary.

The respondents, in their memorial, stated that Dundee is of great antiquity as an incorporated royal burgh, though its more ancient charters are not now extant. This appears from a charter of confirmation and *novodamus* granted by Charles I., afterwards ratified in parliament, which begins with a general confirmation of all the charters, infeftments, and other rights granted to the town; the first being a commission granted by Robert I. to some of the great officers of the crown for revising and recognising the privileges which the town of Dundee possessed in the time of king Alexander.

Another charter is recited as granted by the same king Robert: "*Omnium libertatum et jurium quæ burgenses habuerunt et possederunt tempore quondam Wilhelmi Scottorum regis, etc. cum libero foro et mundinis per ipsos usitat,*" etc. Here, for the first time, mention is made of fairs and markets, although it is evident that these had been enjoyed by the town for many years before.

In like manner another charter is referred to as granted by David I., giving, and in feu-farm letting, to the burgesses the borough with its pertinents, and particularly with the power of levying small customs and contributions for the use of the community.

So, too, there is another charter by the same king, in which, for the first time, is mentioned the port, "*lie pier seu schoir, proficuis, privilegijs, et divorijs earund.*" But from thence it is impossible to infer that the town was, before that period, without the right of having a port, or the profits and dues from thence arising. And in the same way, although there is no [122] mention of the right of navigation, or the privilege of loading and unloading vessels, till a very late period, it cannot be imagined that the town, although in the constant and uniform enjoyment of these privileges, could at any time be deprived of them for want of a special right.

That, however, is not all: For although it is clear that at this time the town was in possession of considerable landed property, consisting of various public buildings, of the mills, of several pieces of ground, which, in the subsequent charters, are specified as part of its common good, the charters already recited take no particular notice of them. But it does not follow from this that any objection could be relevantly stated to the town's right in those subjects. Although, from the reign of king David to the present time, the town's charter had never been renewed, it is evident that, in virtue of its corporate privileges, as explained by usage and possession, the town would have the same title to the subjects already mentioned as if they had been particularly conveyed. And in order to prevent any argument from the terms in which those charters are conceived, the following clause is added:

"*Insuper, cum consensu antedict. volumus et concedimus, ac pro nobis et successoribus nostris decernimus et ordinamus, quod dict. generalitas nullum damnum nec prejudicium inferret specialitati, nec specialitas ullo modo derogabit aut prejudicabit generalitatem.*"

After all this follows the clause of *novodamus*, whereby the king of new grants to the magistrates, town council, and community, "*totum et integrum prædict. nostrum burgum de Dundee, cum omnibus terris, tenementis, et annuis redditibus, jacen. infra eund. burgum et territorium ejusd. et omnia et singula privilegia hujusmodi, de quibus ipsi suiique predecessores ullo tempore præterito in possessione fuerunt; una cum minutis custumis, portibus, lie pier, proficuis, privilegijs, et divorijs, ac cum tollonijs, custumis, et divorijs fororum nundinarum dicti nostri burgi solit. et consuet.; cum immunitatibus, privilegijs, et libertatibus aquæ de Tay, oneratione et exoneratione navium et cymbarum ad quamlibet partem dict. aquæ ubi ijs placuerit, ex utroque latere ejusd. ab ostijs torrentis de Innergowrie, vulgo vocat. lie Burnmouth de Invergowie, ex occidentali; ad locum qui vocatur lie Gaw de Barrie, ad orien. ex boreali latere præfat. aquæ de Tay, et a loco ubi monasterium de Balmerinoch situatum fuit, ad occidentem, ad arenas quæ vocantur Drumlasondis, ad orien. ex australi latere ejusd. aquæ de Tay; cum potestate*

"negandi vel impediendi alios ab omni operatione et exoneratione quarumcunque
 "navium vel cymbarum, in ulla parte prædict. aquæ infra prænominatas bondas,
 "et levandi ac recipiendi omnes minutas custumas et anchoragia, lie shore silver,
 "aliasque divorias intra præscript. bondas, *ad hoc libere, in omnibus respectibus, sicuti*
 "*burgus de Edendburgh levat apud burgum de Leith, et ut levatur per quem.* [123].
 "cunque alium liberum burgum regalem, vel quascunque alias personas, *apud*
 "*quoscunque portus marinos infra dict. regnum nostrum, etc.* ac etiam salmonum
 "piscarias, aliasque piscationes ex boreali latere dictæ aquæ de Tay, inter dict. ostia
 "torrentis de Invergowrie vulgo vocat. *the Buramouth of Invergourie*, ad occiden.
 "et saxum vocat. *lie Kilcraig*, ad orien," etc.

Here is a general grant or confirmation of all the rights which the burgh had been in possession of, and also a reference to the privileges enjoyed by the town of Edinburgh as superiors of Leith, where it is a matter of notoriety, the sea-shores, to a considerable extent, have been understood to belong to the town. And there is also a right to ports or harbours, and to the exclusive privilege of loading and unloading vessels of all kinds at any part of the shore within the limits prescribed, which, in effect, is a grant of the shore itself, as is laid down by Sir Thomas Craig. He says, "*Portus autem dicitur is, quatenus maximus hibernus fluctus excurrit; littusque*" "*et ad ævus ætium ad portum pertinet, ut locus sit ubi onera imponantur, et effertur.*" "*tur, et ad tempus servantur.*" This is the natural meaning of such a grant, which would be in a great degree useless if it were to be confined to those parts of the shore which were applied to the purposes of navigation at the date of the grant.

The most satisfactory explanation, however, of the rights granted to the town of Dundee, so far as relates to the shores opposite to it, is to be found in the understanding of the parties interested therein, being the magistrates and town council of the burgh on the one hand, and the burgesses and inhabitants of the town on the other. From thence it appears, that although individuals have been allowed to defend their property from the sea by embankments, or, in some instances, to appropriate part of the sea-shore, where it was thought advantageous to them, without interfering with the general interest of the town, yet the sea-shores and the duties have at all times been let along with the other property of the community. On many occasions the town has feued out parts of the shore either to the contiguous proprietors, or to other individuals who had occasion for it; and on every occasion where it was necessary to make embankments for the accommodation of the town, or where private proprietors could not engage in such an undertaking with any advantage to themselves, the corporation has been in use, without challenge, to embank the sea-shores, and to appropriate them in any way for the benefit of the community.

Thus it appears that the corporation, at different times, has laid out large sums in making harbours for the benefit of the inhabitants, without consulting those who possessed the property adjoining to the sea-shore.

In the same manner the magistrates have erected large buildings, called the East and West Heads, for the security of the harbour, and basons for cleansing the harbour. They have erected different market places, and extensive wharfs and wood [124]-yards, and other repositories for the accommodation of the trade. The site of all these different works, containing several acres of ground, has been taken in from the sea at a very great expence, without any objection from the contiguous heritors, although many of them enjoy their properties bounded on the south and west sides *per fluxum maris*, or by words of similar import.

The proceedings of the corporation, with regard to that part of the shore which is more immediately connected with the present dispute, afford the clearest and most unequivocal proof as to the nature and extent of the town's right.

The plans shew, that on the west side of the town there are two streets running from east to west, and terminating on the sea-shore. One of them, being the most northerly, is called the Nethergate; and the other, which is farther south, is called the Street or Road to Yeaman's Shore. Between these two streets or roads there are a number of houses and gardens, almost every one of which appears at some time or another to have been bounded by the sea-flood. But this has not prevented the corporation from feuing out or otherwise disposing of such parts of the sea-shore as they thought proper; nor was it ever conceived that the proprietors of those

tenements had any right to interpose. The respondents mentioned some of these, as to which the facts were proved by the writings produced in this cause.

At No. 67, on the plan, is a property belonging to Mr. Pitcairn, merchant in Dundee. In all the title deeds it is described as bounded by the sea-flood mark on the south; and as Mr. Pitcairn and his predecessors have carried on an extensive trade for several generations, it would have been most important to them to preserve a landing-place immediately opposite to their warehouses, which are on the north side of the road to Yeaman's Shore: Yet it appears that about sixty years ago the town of Dundee feued out to Mr. Graham of Meathie, the grounds marked No. 30, and 31, situated between the warehouses and the sea.

To the eastward of Mr. Pitcairn's property is a tenement marked No. 64, and belonging to James Davidson. It is described in all the writings to be bounded by the sea-flood on the south: But although the town, in the year 1783, conveyed part of the ground lying immediately to the south of Mr. Davidson's property, this gentleman never objected to it as an encroachment upon his property.

Another instance of the same kind appears from the history of the tenements marked No. 57, formerly belonging to Mr. Alexander Duncan and now to Baillie Guild. The east half of the tenement is held in burgage, and the west part in feu of the family of Douglas, (in which the superiority of several tenements within the burgh is vested, as parts of the estate of the old Earls of Dundee, annexed to the constabulary). In a charter to Mr. Duncan, dated 29th July 1775, the tenement is described as bounded by the flood-mark and passage of the said tenement [125] upon the south; and there cannot be a doubt that this description has been copied from the more ancient title-deeds. Yet it is certain that Nos. 54 and 55, now also the property of Baillie Guild, have been immemorially between the grounds already mentioned and the sea: the appellant himself referring to certain of the title-deeds of these subjects as far back as 1695.

These circumstances, the respondents contended, went far to shew, 1st. The town's general right of the sea-shore; and 2dly. The proper import and meaning of the words *per fluxum maris*, insisted upon by the appellant as giving him right to that part of the beach which joins his inclosed yard or garden on the south. But evidence respecting the grounds on the south of the road to Yeaman's Shore, if possible, was stated as still more conclusive and satisfactory. The evidence on the part of the respondents shewed, 1st. That every single tenement of land so described has been derived from the town; and 2dly. That the inclosed yard or garden, now occupied by the appellant, was disposed of by the town in the end of the last century as their undoubted property; so that if the appellant has any right at all, even to the inclosed yard or garden itself, it must be in virtue of a grant flowing from the town, and attended with such circumstances as are completely exclusive of his present claim.

1st. Nos. 30 and 31, being the grounds nearest the sea shore, were feued out by the town to Mr. Graham of Meathie, about the year 1730, as before mentioned.

2d. No. 29, which is immediately to the eastward, was feued out by the town, in the year 1783, to Mr. James Laird.

3d. By an act of the town council of Dundee, dated the 22d of September 1696, it was resolved to feu out to Mr. John Hill, then one of the schoolmasters of the town, a small piece of the shore to be converted into a garden or yard; and accordingly, 26th December 1697, a charter was granted to Mr. Hill, describing the property in the following terms: "*Totam et integram illam peliam rasta terre (FORE HORTUM) duce, a venula vocat. Spalding's Wynd, ad littus Joannis Yeaman, vulgo John Yeaman's Shore, inter hortum Alexandri Blair, unius balivorum dicti burghi ex oriente — ex occiden. fluxum maris ex australi, et dict. communem viam ex boreali partibus, una cum omnijure,*" etc.

It is to be particularly noticed, that this spot of ground feued out to be a garden, which is marked on the plan No. 52, as belonging to the Fraternity of Seamen, is described as bounded on the east by another garden belonging to Alexander Blair, one of the baillies of the town, and on the south by the sea-flood.—It will be afterwards demonstrated that the garden belonging to Blair in 1697, is the yard now possessed by the appellant.

4th. No. 28 was feued out by the town to Captain Laird in the year 1788.

Thus, on the west side of the inclosed yard or garden possessed by the appellant,

the town's right to the sea shore on the south [126] side of the road to Yeaman's Shore appears to be clear and indisputable; and in fact it is not disputed. The situation of the tenements which bound his property on the east side is next to be noticed. And

5th, No. 26 is held by the town as their undoubted property.

6th, Nos. 49, 49, on the plan, which are immediately to the northward of No. 26, were fenced out by the town, in the year 1753, to a shipmaster of the name of Kay. What renders this the more remarkable is, that the tenements immediately to the northward, being Nos. 48 and 83, formerly the site of a windmill and magazine belonging to the town, are described as bounded by the sea-flood on the south, which, however, was never understood, either in this instance or in any other, to prevent the town from disposing of that part of the sea-shore which bounded the tenements formerly disposed by it.

7th, To the northward of No. 48 is a property called Graham's Land, marked No. 50, which is described as bounded by the old windmill, and the sea-flood on the south. At the same time it does not appear that the proprietors of this tenement ever pretended to any right in the sea shore. And the same is the case with No. 51, which now belongs to the heirs of William Mitchell.

All the tenements last described, being Nos. 48, 49, 50, 51, and 83, either hold in burgage or fen of the town. This was established either by production of the title deeds or by the attestation of William Walker, notary public, after inspecting them.

It would, therefore, have been surprising if the inclosed yard or garden possessed by the appellant, situated between these tenements on the west and the properties already described as bounding it on the opposite side, should have been in a different situation. After much investigation, and at a late stage of the proceedings, the respondents discovered in what way this yard or garden was given off by the town.

[The statement on this part of the subject, and which was controverted by the appellant, would not tend to elucidate the case materially, and is therefore omitted.]

A protest taken by the appellant states, "That he himself opened a door in the "south side of the garden," which clearly showed, that before his purchase, in 1768, there was no access from his garden to the sea-shore on the south. And so late as the year 1781, when the appellant for the first time let his garden or inclosed yard to Stirling and company, and when an opening was made on the south side of the inclosure so as to permit a cart to pass, the manner in which he authorised the alteration shewed that at the time he was fully aware of his having no right to the grounds now claimed by him. He in the first place let his "inclosed yard," without any limitation; then followed the words "as also the ground to the south or east [127] "of the said inclosed yard," not indefinitely, as before, but only so far as the said "Thomas Smart has a right thereto."

The respondents further stated, that in the year 1737, the town's managers having purchased a small island or rock called Saint Nicholas's Craig, opposite to the town, which had formerly belonged to Lyon of Carse, resolved, at a later period, to erect public slaughter houses upon it, these being very much wanted. This was done in 1768, by running from the southern extremity of the rock, a sloping pier, a considerable way into the sea; by which at the same time the harbour was very much improved, as well as the passage at the ferry betwixt Dundee and the opposite shore.

After having accomplished this purpose, the town's managers formed a plan of extending the bulwark from Saint Nicholas's Craig in the line marked Nos. 84, 84, on the plan, so as to inclose a considerable part of the sea-shore, to the southward of the road leading to Yeaman's Shore.

The late Mr. Andrew Laird was proprietor of a large house called the Earl's Inn or Lodging, marked No. 60, situated on the north side of the road to Yeaman's Shore. This gentleman objected to the embankment carried on by the magistrates, because it would have the effect of putting the flood mark at a greater distance from his property. However, he made no serious opposition, and the work was completed at a considerable expence.

After Andrew Laird's death, his son, James Laird, purchased a part of the grounds secured by the embankment opposite to the Earl's Inn, for which he paid a full and

adequate price; and he obtained a conveyance from the town council, expressly in the character of proprietors of the subject therein mentioned.

James Laird sold the tenement called the Earl's Inn, and the piece of ground purchased from the town of Dundee, to his brother, Captain Laird. This gentleman afterwards purchased the inclosed yard or garden, No. 52, which has been so often mentioned, as feued out by the town to John Hill in the end of the last century; and, the terms of the conveyance being copied from the old title deeds, gave him, "totam et integram illam petiam castre terre fore hortum ducen, a venula vocat *Spalding's Wynd*, ad littus *Joannis Yeaman*, vulgo *John Yeaman's Shore*, inter hortum *Alexandri Blair*, unius balivorum dicti burgi ex orien. ex occiden.; *fluxum maris ex australi*, et dict. communem viam ex boreali partibus, una cum omni jure, etc. ac justis suis pertinen. quibuscunque."

Upon the authority of this conveyance, Captain Laird brought a process of declarator, for having it found that he was entitled to that part of the sea-shore which bounded his property on the south: contending that the town had no special rights to the shores, and therefore could not enter into any competition with him. He further maintained that his property being bounded on the south by the sea-flood, he alone was entitled, both by the special [128] terms of his right, and by the common law, to take in ground from the sea, by embankments and other operations of the same kind, opposite to his property.

On the other hand, it was maintained for the town, that in virtue of the broad and comprehensive rights which had been already recited, explained by immemorial usage and possession, they had right to the sea-shore opposite to the town, for the benefit of the community; that, by the constant practice of the borough, such words of description as occurred in Captain Laird's title deeds were not understood to give any right to the sea-shore: and that Captain Laird could not object to the rights of the town, his own titles derived from no other source: so the original feu-right to Mr. John Hill only giving him a piece of ground to be a garden, his property was of the nature of an *ager limitatus*, and could not be extended beyond the walls of the garden itself.

The cause being reported to the Court upon informations, the issue was an unanimous judgment, sustaining the defences, and assailing the town from the action.

Upon the whole, therefore, the respondents contended that the general rules of law relied on by the appellant did not apply to such a case as this: that he had not shewn such an original or prescriptive title as could entitle him to the judgment demanded; that the right of the town was proved by the grants produced, and by immemorial usage in similar cases, and had been solemnly recognised in the case of Laird; and that the title to the inclosed yard or garden, possessed by the appellant, was incontestibly proved to have flowed from the town, and to be a limited right.

The court of session pronounced the following interlocutor: "The lords having advised the memorials for the parties with the former printed papers in this cause, they, in the process of declarator, at Thomas Smart's instance, alter the interlocutor reclaimed against, sustain the defences, and assailing the defenders, and decern; but find no expences due to either party: And in the process of advocacy concerning the road claimed by the pursuer Thomas Smart, they remit to the lord ordinary to hear parties, and to do therein as he shall see cause." The Court, at the same time, refused the desire of a petition which the appellant had presented, praying that damages and expences might be awarded to him.

Against this interlocutor the appellant presented his petition, which was refused without answers:—And the appellant then appealed to the House of Lords from the said interlocutors of the 6th July and 22d November 1796, as well as from the interlocutor of the lord ordinary, refusing to award damages and expences, praying that the said interlocutors might be reversed, varied, or amended:

In his printed case he stated his right and claim in the following terms:

[129] The appellant is proprietor of a piece of ground commonly called a yard (garden) in the town of Dundee, the south boundary of which, in all the title deeds, is described to be the sea-flood, and which was, in fact, the boundary at the time of the appellant's purchase. The river Tay, into which the sea flows, and along which the town of Dundee is stretched, coming close up to it every tide.

The appellant, when he bought this piece of ground, paid, on account of its situa-

tion, more than its real value, intending to convert it into an area for hewing stones, for which it was peculiarly well accommodated, it being in the power of the proprietor to convey stones from the quarry by sea, and land them on the very spot where they were required. At this time the sea, every tide, washed the dyke or wall on the south side of the appellant's yard : and for his greater conveniency he opened a passage to the river, and was at the trouble and expence of taking in part of the beach, which he considered himself to be entitled to do, for the sea-flood being his boundary to the south, every addition on that quarter, whether arising from the operation of nature or from human industry, was, upon the principles of law, an accession to his property.

The appellant did this without challenge or interruption ; but some time after the town council (corporation) of Dundee thought proper to begin an embankment of the ground to the south of the appellant's yard, by which operation they intended both to acquire the property of the ground taken in by them, and deprive the appellant of what had been gained by himself. But against this proceeding the appellant took the following protest :

"At Dundee, the 13th September 1770 years. Which day, in presence of me
"notary public, and witnesses subscribing, where was also present William Chalmers,
"then dean of guild, of Dundee, and his assessors, upon a judicial visitation of the
"subjects after mentioned, compared Thomas Smart, mason in Dundee, and repre-
"sented, that he was heritable proprietor of a yard lying near the craig of Dundee,
"by the original writs of which the south boundary is declared to be the sea-flood :
"That till of late the sea came up every tide close to the complainer's dyke on the south
"side of the said garden : That he, for his own conveniency, opened a door in the
"south dyke of his garden, and was at the expence of filling up part of the ground
"on the south side of his garden, without any interruption from any person : That
"some short time since the town council of Dundee have thought proper, at their
"own hand, to fill up the remaining part of the ground upon the south side of the
"complainer's garden, and over which the sea came every tide : and thereby pretend
"to acquire the property of the ground so taken in by them, and not only so, but to
"deprive the complainer of the ground taken in by him on the south side of his garden,
"and to deprive him of the door made out by him on the south side of his dyke, and
"for that purpose [130] have this day called a visitation of the said subjects : That
"as his title deeds lead him to the sea flood on the south, whatever ground is filled
"up by him or others within the sea-flood on the south side of his garden, must become
"his property, and therefore protested against the said town council and all others
"concerned for filling up the ground on the south side of his garden : and that their
"doing so should not deprive him of his right of property thereto : and that they
"should be liable to him in damages, and all expences he may be brought to in defend-
"ing his right : and thereupon took instruments in the hands of me notary public
"subscribing," etc.

Notwithstanding the protest, the town council still proceeded in their encroachments, and at last they began to build a wall close by the river as a boundary to the south of the ground they had embanked, which would have had the effect of entirely excluding the appellant from any communication with the sea, and would of consequence have rendered his property of very little value or use. The appellant therefore took another protest :

"At Dundee, the 30th September 1773 years. Which day, in presence of me
"notary public, and witnesses subscribing, compared Thomas Smart, mason in
"Dundee, and passed with us to the personal presence of Henry Geekie, Esquire,
"present provost of Dundee, and there represented, That he the said Thomas Smart
"was proprietor of a yard lying near the craig of Dundee, on the south side of the
"Nethergate, purchased by him from William Mitchell, ship-carpenter in Dundee :
"That by the ancient title deeds of the said subjects, as well as by the disposition
"in his favour, the south boundary of the subject is the sea-flood, and to which, for
"time immemorial, the sea at flood came close up : That his great inducement for
"making this purchase, which cost him a considerable sum above its real value, was
"for the purpose of erecting therein a shade for his servants hewing stones, and the
"conveniency of bringing his stones from the quarry by sea, and landing them at
"the foot or south end of his yard, and which conveniency he enjoyed for several

"years : That he a few years ago, at a considerable expence, filled up, and took in off the beach about thirty feet square, at the foot or south end of his garden, in order to extend his property, and for his further conveniency ; and in which he was not interrupted by any person whatever : That the town council of Dundee, about two years ago, thought proper, without his consent, and in the face of a protest taken by him against them, to fill up a large space of the sea-beach on the south side of his garden, and of the ground newly taken in by him, thereby intending to assume to themselves the property of the ground so taken in, as well as to deprive him of the property of that which he himself had taken in ; and in prosecution of this their intention, in November or December 1770 years, a petition was presented, at the instance of the town treasurer, to the dean of Guild, [131] against him the said Thomas Smart, craving that it should be found he had no right or property to an entry from the south end of his garden, or to any part of the sea-beach on the south side of his garden, or to have any communication from the south end of his garden with the sea : To this petition answers were given in for him, upon which they thought proper not to insist farther in it ; but now they have begun to build a wall on the south side of the new taken-in ground, and which, if finished, will entirely exclude him from any communication with the sea, and thereby render his property of little value or use to him : That neither the new taken-in ground nor the garden itself, hold burgage, but both hold feu of the family of Douglas ; so that the town council, as representing the burgh, cannot even pretend, as superiors, to assume to themselves the property of the sea-beach at this part, although neither he the said Thomas Smart, nor any other individual, had right to it, far less when it is clear by his title-deeds that his south boundary must entitle him to follow the sea-flood, however far it might retire from its original situation : Therefore the said Thomas Smart protested against the said provost Henry Geekie, for himself, and as representing the town council, for filling up the ground on the south side of his property, betwixt it and the sea-flood, and thereby depriving him of the benefit thereof, and that their doing so should not preclude him from the property thereof, but that the same should still belong to him, to the sea-flood, that being the only limit of his property on the south ; and that they should be liable to him in all damages and expences he should be brought to in defending his right, and that they should not inclose the ground so as to deprive him of a free communication with the sea ; and thereupon took instruments in my hands," etc.

This protest has so far effect as to induce the magistrates to make a cart entry in the wall, and to allow the appellant free access through the embanked ground to the sea.

The appellant for some time possessed the piece of ground he had gained from the sea-shore, and was in the custom of landing stones upon it, as they were needed in the course of his business ; and after he let the ground to others, he included the beach in the lease. At last, however, the magistrates of Dundee thought fit completely to assume to themselves the possession not only of that part of the beach over-against the appellant's property, which they had taken in from the sea, but also of what had been embanked by the appellant himself, merely allowing him the benefit of a road through the embanked ground to the sea by the gateway already mentioned.

After the appellant had long suffered what he considered to be an usurpation of his rights, being the more clearly convinced of the injustice done him from the practice of all the proprietors around him, who, without challenge, took in ground from the [132] sea, and having a material interest to check the illegal encroachments of the corporation on account of his possessing more valuable property than the one immediately in question, in a similar situation, he at last (the town of Dundee having refused an amicable settlement) raised against them a declaratory action before the court of session, which concluded, That it should be found and declared, that the piece of ground lying along the sea-beach to the south of the appellant's yard, of the same breadth therewith, within certain bounds particularly described, was his undoubted property ; that the magistrates and town council of Dundee had no right or title whatever to any part thereof ; and that therefore they should be decerned and ordained to desist and cease from all possession of the foresaid piece of ground, and to leave the same void, to the effect that the appellant might peaceably occupy

and possess the same in all time coming ; and also that the magistrates ought to be decreed to make payment of the sum of £500 sterling, on account of their encroachments since the year 1770, and of the expences of process.

In the answers given in by the appellant to the petition for the magistrates, he founded a material argument upon the embankments daily made in the town of Dundee by proprietors of ground which lay adjacent to the river, without any challenge so much as attempted by the magistrates, and he pointed out a variety of cases in proof of this averment. The Court, therefore, thought it proper, before coming to any decision, to pronounce the following interlocutor (Nov. 20, 1795) : " The lords, upon advising this petition with the other petition for the pursuer, answers thereto, they appoint Mr. Ireland, land surveyor at Middleton, near Montrose, to make out a plan of the subjects in question, and any part of the adjacent grounds which either of the parties may think necessary, and appoint the same to be engraved at the mutual expence of the parties, and put into the lords' boxes ; also appoint mutual memorials upon said plan to be printed, and put into the lords' boxes against the first Thursday after the Christmas recess."

In consequence of this order, a very accurate plan was made out by Mr. Ireland, at the sight of both parties, and engraved, which, comprehending a large extent of ground, was necessarily executed upon a small scale. A plan also of such part of the grounds as the magistrates of Dundee supposed might better favour their plea, was executed upon a larger scale by the same gentleman, but was not engraved ; and memorials upon the plan were prepared and given in, in terms of the interlocutor of court.

[The appellant then went into a discussion of some length as to the principles and maxims of the civil law on this subject, but with which it does not appear necessary to burden this report.]

In answer to what the respondents urged respecting the practice of the town in granting feus of part of the beach, the [133] appellant maintained that in innumerable instances exactly the very reverse had taken place, and that proprietors of land bounded by the sea-flood, holding both of the magistrates and other superiors (lords paramount), had gained ground from the sea, and made embankments under the very eye of the magistrates, who never once attempted to prevent such operation, or to assume the property to themselves ; and the appellant cited the following instances :

In the year 1753 the magistrates feued out the beach of their property called the Magazine or Windmill, which was bounded by the sea-flood on the south, to a person of the name of Key, who made an embankment and built houses upon the beach ; upon this occasion they did not permit him to occupy any part of the shore but what was situated exactly to the south of the magazine, which demonstrates that at this time they were satisfied they had no right to the sea-coast, unless in so far as it lay opposite to their own property, which they held not by virtue of any title supposed to be conferred by their charter, but by infettment (feoffment) as any other proprietor.

But a still stronger proof is offered from the following circumstances occurring at a later period, (some of which it will be seen were alluded to by the respondents in support of their claim.) About the year 1782, James Laird, merchant in London, raised an action of declarator against the town of Dundee, concluding that it should be found that the ground embanked by the town to the south of his property belonged to him. Upon this occasion the magistrates thought proper to enter into a compromise, whereby they assigned Laird a piece of ground worth upwards of £1000 sterling, upon his paying them £250, which was little more than the expence of the bulwarks built by the town upon this property ; and it appears from certified copies of the acts of council produced in this action, that they entered into this transaction by the advice of two of the most eminent lawyers then at the Scotch bar. On this occasion, indeed, the town, generous at the expence of others, made over to Laird, not only the beach of his own property, but also what belonged to some adjoining proprietors, viz. James Davidson, and the heirs of Fairweather and Scott. But the terms of the disposition granted upon this occasion completely demonstrates the conviction of the magistrates that what they did was liable to challenge ; for they gave such a title as could not secure Laird against eviction. They granted him indeed warranty to the beach opposite to his own property, at all hands (against all men) ;

but as to what lay opposite to the property of others, they granted him warranty from fact and deed only, (in so far as respected themselves alone,) which was no security at all against the real proprietors whenever they chose to interfere.

A dispute also arose, in the year 1783, between the town of Dundee and the heirs of Patrick Scott, about a part of the beach situated between a garden belonging to them and the sea-flood. [134] This the magistrates attempted to seize in a summary manner; but, upon a protest being taken against them, they thought proper to desist. The appellant, in his papers before the lord ordinary, stated, that the town of Dundee afterwards purchased the property from Mr. Scott's heirs. This the respondents thought proper to deny; but they granted what came precisely to the same thing; for they have admitted that Scott's heirs were allowed to sell the property without interruption; that Mr. Riddoch, one of the magistrates, bought it, and afterwards conveyed his purchase to the town.

The circumstances attending the most material embankments made by the magistrates also demonstrate, that they never hitherto have been confident that they possessed the right for which they now contend. Upon the plan, Nos. 21, 22, 23, are delineated the most valuable embankments made by the magistrates, such excepted as have an immediate relation to the port and harbour. This portion of the beach lay opposite to a property lately belonging to the heirs of Dr. Mitchell, and had the magistrates considered that they had a right to embank, without ceremony, wherever they inclined, they would no doubt have proceeded, without any regard to the proprietors of the adjacent ground: However, in this case, they thought it prudent to secure themselves from challenge by purchasing the adjacent property, which they accordingly did at a very high price.

With respect again to the practice of proprietors of land bordering upon the sea-coast in and about the town of Dundee, it is a most undoubted fact, upon which the appellant could with great readiness peril his cause, that beyond the memory of man, and at this day, such proprietors both holding of the town of Dundee and other superiors, have been and are in the constant practice of gaining ground from the sea, and making embankments, without any complaint or challenge whatever on the part of the town. Indeed, the notion that the town is pleased at present to entertain of their rights is quite new, although said to be founded upon ancient charters; and, should they prove successful, an immense number of persons in the same situation with the appellant must, upon the same principle, be obliged to surrender their property, to the inconceivable emolument of the town of Dundee.

The appellant, in his answer to the town's petition, stated, that no more would be necessary, in order to establish the truth of what is now set forth, than to stand upon his property and take a view of the ground upon each side, as far as the eye could reach, when the most complete conviction would be obtained of the practice of the different proprietors with respect to embankments; and he pointed out a considerable number made by persons holding of the town, Lord Douglas, and other superiors.

This last important point, however, was then supported by no better evidence than the confident assertion of one of the parties, and was apparently, at least in its full force, denied by [135] the other. On this account the Court ordered a plan to be drawn of the property in question, with the adjacent grounds, which has accordingly been done; and which the appellant considered as affording a full demonstration of the favourable nature of his plea.

This plan contains a space of about a mile and a half within the bounds of the charter of the town of Dundee.

There are therein delineated no fewer than thirty-four embankments made by private persons to the south of their property without any authority from the magistrates, and without meeting with the smallest interruption.

It is worthy of observation, that several of the most material embankments are made upon the private property of some of the respondents themselves, merely in virtue of their right of property, without any consent either asked from or given by the town of Dundee. These gentlemen, therefore, must either be unjustly opposing the appellant, or acting themselves in an unwarrantable manner. This circumstance would not be fully discovered from inspection of the plan, as all of them are not therein distinguished by their official titles; but the appellant begs leave

to point out the following instances of such embankments: No. 17 is a most valuable one, made by baillie James Haliburton, one of the respondents, very lately, and since this suit was commenced: No. 33 is an embankment made by provost Alexander Riddoch, another of the respondents; and No. 36 is one made by baillie John Thom.

Upon this plan appears very extensive and important embankments, in comparison of which the one in question is of very little consequence: No. 2, belonging to the Glass work Company, where, of late years, great embankments have been made, and a harbour, pier, and wharf built, where vessels daily load and discharge their cargoes: No. 20, belonging to Messrs. Wemyss and Sons; and Nos. 10, 11, 12, 13, the properties of George Gray, and of the Foundry Company, which are at this moment carrying on.

After controverting the statement of the respondents respecting their original title to the premises in question, and the way in which it had been parted with by them, the appellant observed, that the interlocutors of the Lord Ordinary in his favour proceeded upon the broad grounds of law, and not upon any specialties with respect to the manner of holding: In the same point of view had the appellant uniformly argued his cause: and although he aided his plea from the consideration of his not holding of the town of Dundee, yet the main stress of his argument had always been placed upon circumstances independent of this, upon maxims which equally apply to burgage and feudal tenures, viz. that, possessing ground bounded by the sea-flood, he is entitled by the law of the land to embank in defiance of all mortals, whether the superior from whom the grant originally flowed, or any other person.

[136] To the argument of the magistrates, that the words *per fluxum maris*, occurring in the title deeds of property situated in the town of Dundee, could not fix down its real boundary, but must be held as merely descriptive of its local situation at the time when the original grant was made: the appellant replied, that it would be impossible for him to give an accurate answer without having it in his power to consult all the charters of property situated in the town of Dundee, near the sea-flood, and to compare the real situation of the lands and tenements contained in them, with the description given in the title deeds. This labour, however, although practicable, would in the present case be entirely unnecessary: for it is a point admitted, that when the appellant bought his property, the description in the writings was literally true. This circumstance alone induced him to purchase it; and if it is not now bounded *per fluxum maris*, this is entirely owing to the improper interference of the town of Dundee, and on account of which redress is claimed in the present action.

To the claims of the town of Dundee as proprietors of the rock of St. Nicholas, which lies to a certain extent between the appellant's property and the sea, the appellant stated that he had uniformly answered, that in so far as the rock of St. Nicholas was, in consequence of the town's embankments, interposed between any part of his property and the river, he was ready to admit, that the right claimed by him of going down to the sea ought not to affect the positive title of the town of Dundee to that rock.

With respect to the argument founded by the respondents upon the case of Captain David Laird of Strathmartine, the appellant insisted that as to him this was no *res judicata*, in whatever similar circumstances the two cases might be considered to stand. That the judgment in the case of Laird ought not to form a precedent for the determination of similar questions. That in that suit the proper evidence was not laid before the Court, and which had been brought forward in the present cause: and if it was really intended in that case to decide that proprietors bordering upon the sea coast had no title to embank their property, this was certainly opposite to the known principles of law, and to the only decision collected upon this subject. (Erskine's Institutes, b. 2. tit. 6. § 17.) In that question also the pursuer gave up the cause after the first judgment against him, either in consequence of a compromise having taken place, or from the prudent consideration of his own interest, for Mr. Laird of Strathmartine had acquired right from his brother to that part of the beach lying opposite to the ground of other proprietors, which the town of Dundee had disposed to him only under a warranty against their own acts and deeds; and it there-

fore appeared very evident, that Mr. Laird must have lost that property upon the same principles on which he gained the other which was of less value.

[137] The appellant concluded his case by stating (T. Erskine, W. Adam, H. Erskine, H. D. Inglis) the following reasons for reversing the interlocutors complained of :

I. The appellant purchased a piece of ground in the town of Dundee, bounded by the sea-flood, the value of which situation considerably enhanced its price. He then proceeded to embank a part of the sea-shore, when he was interrupted by the magistrates, who, in the face of repeated protests, embanked the remainder of the beach, and seized upon that portion of it which had been taken in by the appellant.

The point at issue between the parties is shortly this. Whether or not a proprietor of land bounded by the sea-flood is entitled to an accession to his property from that quarter, that may arise from either the operation of nature or the works of human industry ?

The appellant is advised that this question admits of an easy solution, both upon the principles of the Roman law, and of the law of Scotland.

The civil law establishes the three following maxims, viz. That the banks of rivers, although navigable, belong to the adjacent proprietors : That the shores of the ocean are capable of appropriation by the first occupier : But that in no case can any occupancy be permitted hurtful to navigation and commerce, or prejudicial to the established rights of others.

li, therefore, the Tay be considered as a navigable river, the appellant is entitled to every increase that arises to his property from its banks. If it be viewed as a branch of the ocean, he has a right to the sea-coast as the first occupier : and even although the magistrates of Dundee had first commenced operations, they could not, by so doing, deprive the appellant of his established boundary.

Any difference in this respect between the coasts of navigable rivers and those of the ocean, supposed to exist in the law of Rome, is in the law of Scotland entirely unknown, both being equally capable of appropriation by the proprietors of the neighbouring ground.

The appellant humbly contends that the principles of the law of Scotland upon this subject may be reduced to the following propositions :

That the sovereign, as the trustee for the public, has a right to prevent all such appropriation of the sea-shore, or the banks of navigable rivers, as would impede navigation, render it dangerous, or hurt the interests of commerce, either inland or foreign : That all private persons or corporations, having a grant of a port and harbour, possess, to a certain extent, the same privileges as derived from the sovereign within a defined space : But that, as to the gaining of ground from the sea or navigable rivers in situations where the safety of navigation and the interests of trade are not concerned, all proprietors of the adjacent land have a legal title to do so, which cannot be defeated by any [138] supposed right, either inherent in the sovereign, or communicated by him to others.

It seems to be insinuated by the town of Dundee that there is a right constitutionally vested in the sovereign, (which must equally apply to England and Scotland,) which his majesty can effectually communicate to public bodies or private individuals, subversive of the rights of proprietors as above stated : but the appellant maintains with great submission, yet with equal confidence, that there is no privilege lodged in the sovereign which can, by our laws, interfere with the rights of proprietors now contended for, and that consequently no such powers can be communicated.

The magistrates of Dundee have but weakly controverted the principles of law as stated by the appellant.—They have indeed brought forth several objections against the natural operation of the principles of law in the appellant's favour, but which he humbly trusts cannot produce the desired effect : The most material of these are the following :

Objection 1st.—The town's charter.

Answer.—But this charter gives them no right to the shore, but in so far as is connected with a port and harbour, which is not disputed. Their privileges extend by this charter for about six miles on both sides of the river, but it surely cannot be successfully maintained by them that they have a right to the whole sea-shores

within these limits : and they cannot prove that they have a better right to the *littus maris* at Dundee, than through the whole bounds of their jurisdiction, unless in so far as it can be shewn that the interest of navigation or commerce are concerned, which in this case never was and cannot be alleged.

Objection 2d. The magistrates have further stated use and custom as in their favour. This will be more fully considered upon another head :

Answer. It is sufficient in this place shortly to answer, that a thousand instances of proprietors of land suffering the magistrates to do what neither public law nor the terms of their charter authorised, could never bar another person from resisting such an attempt with success.

Objection 3d. The magistrates have founded much argument upon the great expence which they have laid out upon embankments, they say to the extent of about £1000 sterling.

Answer. In answer to this the appellant observes, 1st, That the expence is greatly exaggerated : for in this calculation is not only included the money laid out upon embankments, but also in erecting slaughter-houses and other public works, for which a very competent return of rent is annually obtained. 2dly, A good deal might be said if the object of this action was to deprive the town of Dundee of the advantages of those operations : but nothing of this kind is at stake. The town of Dundee will have [139] the full benefit of all the bulwarks, slaughter-houses, piers, docks, etc. which they have made, and will continue to derive all the advantage and emolument arising from these works in whatever way this action shall be decided. The present question merely is, Whether they or the appellant are to have the benefit and advantage arising from the beach of the appellant's property ? which has no manner of connection with any plan of public utility, but will be put to the same use by letting it to a private merchant as an area for goods, whichever of the parties prevail in the present dispute. All the argument therefore maintained by the respondents respecting the expence which they have incurred has really a tendency to mislead, for they have already received every benefit from this expence which they intended, and with none of which does this action in any shape interfere. It may be very true that from the bulwarks which they have reared, a consequential advantage may redound to the appellant, without any loss or detriment arising to them ; but this benefit he is surely entitled to enjoy according to every principle of equity or law. If, however, it can be shewn that the particular spot of ground claimed by the appellant has cost any expence to the town of Dundee, although the magistrates have themselves to blame for incurring it after being so well put upon their guard ; yet, in that case, the appellant is satisfied to make them a full remuneration upon their accounting to him for every pecuniary return they have hitherto received, which is surely all that can in equity be required.

Objection.—In the last place, the magistrates have insinuated that the appellant derives his right from the town of Dundee, and that, on that account, he is not entitled to embank.

Answer. The appellant never before heard that a right to embank was not conveyed to a vassal along with the ground bounded by water, but was a privilege necessarily reserved by the superior. Were this the case, there could exist no such title in any subject in Scotland ; and the king, as superior lord, could alone possess the privilege. The appellant is humbly confident your lordships will not be of opinion that there is any force whatever in this argument ; and he has reason to believe, from what passed upon the bench, that this reasoning made no impression upon the court of session. He must also beg leave to say, that were it of any consequence in the cause, it would be necessary for the town to establish the fact upon which their argument is grounded. This would be no easy matter for them to do ; for the appellant's yard, marked on the plan No. 47, must, from its situation, have been once the beach-ground of the tenements marked No. 58 and No. 55, which both hold of the family of Douglas. An old act of council, founded on by the town, assigning this ground to Baillie Blair, is no sufficient proof that the magistrates were superiors ; for this might have taken place either through mistake, or from a design to increase [140] their privileges, and it was never effectually followed out by granting a charter.

II. It is clearly established, from the plan drawn by appointment of the court of session, that it is a general custom in the town of Dundee and its vicinity, for the

proprietors bordering on the river, whether holding of the town or of other superiors, to increase their property by embankments, without any challenge on the part of the magistrates, several of whom, indeed, have followed the same practice much to their private emolument. This fact is altogether inconsistent with the averments made by the town in this suit ; but the truth is, they are at present rather engaged in an attempt to establish a right which hitherto they have not been understood to enjoy, than employed in defending the known and established privileges of the corporation.

The magistrates, in their papers before the court of session, have indeed pointed out several instances of embankments made under their authority ; but it will be very apparent, if they had a plea any way tenable, that, with the influence which even imperceptibly attaches itself to a corporation, they must have had it in their power to found upon innumerable examples, instead of the few dubious cases which they have been able to produce.

Most of them respect such embankments as are essentially connected with a harbour, pier, and the security of navigation. Their right to make such has never been disputed by the appellant.

As to private grants of the sea-shore, some such appear to have been made, and the possessors may now perhaps be secured against challenge by prescription. The fact however is, that almost all the private grants condescended on, and embankments interfering with private property made by the managers of the town, either have been actually disputed, or stand in such peculiar circumstances as to form no just precedent. Thus the beach ground of the property belonging to James Davidson, disposed of by the town, marked No. 64 on the plan, is universally considered to be an encroachment. It has been already mentioned that the magistrates themselves seem, by the nature of their warranty, to have entertained the same idea, and indeed no sooner had Mr. Laird taken possession, in consequence of his grant from the town, than he was met by a formal protest, at the instance of Mr. Davidson the proprietor. The embankment marked No. 29 was challenged by Mr. Laird, and the dispute settled by a compromise, much to his advantage. The one marked No. 28 led into the suit between the town and David Laird of Strathmartine. The embankments marked No. 26 and No. 49, the first made by the town and the other by James Key, in consequence of a grant from it, cannot hurt the appellant's plea, as these embankments have been formed upon the beach of a property held by the town as proprietors, viz. the [141] Magazine, or Windmill. These are almost the only examples which have been produced of the town of Dundee having interfered with the beach attached to private property bounded by the sea, or of having made embankments not connected with the navigation and trade of the borough.

III. If your lordships, in your great wisdom, shall be pleased to alter the judgment of the court of session as to the matter of right, and to approve of the interlocutors of the lord ordinary, the appellant humbly trusts that you will also alter the judgment both of the whole lords and of the lord ordinary with respect to damages. The appellant shall very shortly state the grounds upon which he apprehends he ought to be found entitled to them.

1st, The appellant a considerable time ago took in part of the beach opposite to his property, of which he has had no manner of use, owing to the encroachments of the town of Dundee.

2d, The town took in the remainder of the ground at a very small expence ; for as the streets of Dundee were at that time lowered and paved by private subscription, it was a great convenience to get the rubbish laid down at that place, which the magistrates accordingly did ; and while they thus executed their work at little or no expence, they at the same time reaped a considerable profit therefrom ever after, having drawn from this part of the beach £20 annually.

3d, The magistrates, during the dependence of the action of declarator, took upon them to block up a cart entry which the appellant and his tenants always enjoyed through the beach to the sea. When this conduct was complained of to the sheriff, that judge ordered a proof with respect to possession, but they, in order to avoid a proof, which would have brought the question to a speedy termination, carried the cause before the court of session by advocacy, which was conjoined with the action of declarator ; by which conduct they prevented the appellant from letting the inclosed

part of his property, which is of little value, without an entry to the sea, by which he has lost twenty guineas per annum. The appellant has from these circumstances suffered considerable damage, and one of the conclusions of his libel is to obtain indemnification.

In affirmance of the interlocutors complained of, the respondents assigned (J. Scott, W. Tait) the following reasons :

I. The quotations from the civil law and from the writers on the law of Scotland, of which the appellant has been so lavish, are all foreign to the present case, which must be judged on its own particular circumstances. The respondents have no occasion to dispute the general doctrine, that where a person's property reaches to the sea or to a river, he has a right to the soil that may be acquired from the sea or river, by their receding naturally, or by his own industry in embanking, where no other person can shew a title to that soil : But to apply this to the site of a tenement, or to a garden within a burgh, where the [142] incorporation is entitled to all the soil not expressly granted away, because the property is described as close to the sea or river at the time of the grant, is absurd. It is evident that such a description or boundary is a limitation of the subject of the grant, in the same way as stating that it is bounded by the tenement of another person : and in the latter case it might with parity of reason be maintained, that if the adjoining tenement became waste, it would accrue to the grantee. Nothing but an express declaration of an intention to grant the soil which might be acquired (a declaration the validity of which would be most questionable) could support the idea, that the corporation meant to renounce their inherent right to the bed of the sea or river, and to bestow it on the grantee.

II. The corporation or burgh of Dundee has, from the nature of its constitution, as well as from the charter of Charles I., and the preceding grants thereby confirmed, right to the whole territory of the burgh, which, it is not disputed, comprehends the property now in dispute, and in that quarter is bounded by the sea or river. The charter of confirmation and *novodamus* gives to the magistrates, burgesses, and community " *Totum et integrum burgum de Dundee cum omnibus terris et tenementis jacentibus infra eund. burgum et territorium ejusdem et omnia et singula privilegia de quibus ipsi sive predecessores ullo tempore præterito in possessione fuerunt.*" And these grants are explained, by usage, to include the shore or beach, and the ground gained from or left by the sea. While the shore was overflowed at every tide, the only act of possession which could be exercised was by the town, or the persons authorised by the magistrates, levying shore dues at that place, which it is not denied that they did. After the sea receded or was embanked, it is established by the evidence in this case, that the corporation has from time to time feued or made grants of parts of the soil so acquired without challenge, except in the case of Laird, where their title was recognised by the court of session ; and particularly it has been instructed, that the whole tenements on the south of the road to Yeaman's Shore (in the middle of which tenements the appellant's yard and garden is situated, and all of which, it is admitted, have been gained from the river) are held under titles flowing from the corporation ; and if his possession is not held in the same manner, he holds it without any legal title. And therefore if the appellant, instead of being *in petitorio*, had been in quiet possession of the beach opposite to his inclosed yard or garden, and the respondent had brought a declaratory action to recover, there seems to be no doubt that they must have prevailed. This is a view of the case, however, by far too favourable for the appellant ; for

III. The general right of the corporation to the natural possession of every inch of territory within the burgh can only be counteracted by clear titles produced by the burgesses or feuars, there being instances or grounds within a burgh held of the so [143] sovereign, not in burgage ; and Dundee affords an instance in the property now belonging to the Douglas family, who have their sub-feuars. Now the appellant has produced no title even to the inclosed yard or garden (as a pertinent whereof he claims the part of the beach in dispute) which could protect his possession, if the respondents were disposed to quarrel it, unless he ascribes it to the act of council in favour of Blair, in 1697, as an obligation still binding on the corporation to grant a charter, and connects himself with Blair. He indeed took upon him, at the commencement of the proceedings below, to state positively that he held by titles derived from the Douglas family, unconnected with the town ; and to the last he seemed

unwilling to abandon this, though the contrary was made clear to demonstration. But though that statement had been true, and though his title had been a charter from the family in the precise terms of the only titles he has yet exhibited, (namely, the mesne or subaltern conveyances,) the respondents, with confidence, maintain that he could not have claimed an inch of ground beyond the garden or inclosure possessed by him. Nothing more, it is evident, was intended to be given. The inclosed yard, which is the subject of the grant, is no doubt described as bounded by the sea-flood on the south; and in the same manner it is described as bounded on the north by the road to Yeaman's Shore; and on the east and west, by the different tenements which are specially mentioned. These particulars, however, instead of limiting the rights of the continous heritors, were evidently intended to limit those granted to the appellant: And thus, taking the words occurring in the appellant's title-deeds in their plain and obvious sense, and supposing his rights to be derived from any superior he pleases, they do not support his claim, but the contrary. What they give to him is not *ager arcifinius*, it is an *ager limitatus*. An inclosed garden, and the ground inclosed by the walls of a garden, are one and the same thing. It is impossible to distinguish between the two expressions. And although the garden had been conveyed with pertinents, in the ordinary way, it would have been absurd to maintain that the appellant might claim, as a pertinent of an inclosure, which only contains 14 falls, a piece of ground beyond the walls of the inclosure, containing no less than 33 falls. But his titles make no mention of pertinents. All that is given is the inclosed garden, with every part and portion thereof; that is, of the inclosed garden.

IV. The appellant's claim is not only inconsistent with the plain and obvious meaning of his own rights, but the words occurring in his title deeds, on which he relies, have been held, by the uniform and unvaried usage of the burgh of Dundee, to give no right to any part of the sea-shore. It has been proved, that almost the whole property on the north side of the road to Yeaman's Shore, and every tenement, without exception, on the south side of that road, are held under title deeds, describing the [144] subjects as bounded on one or more sides *per fluxum maris*, or by the sea-flood, or by the highest flood-mark, (all these expressions being considered as synonymous,) and yet, until the late unsuccessful attempt by Mr. Laird, it was never once maintained or imagined that grants of that kind could give any right to the shore itself. They have been considered merely as words of description, and such too as were only accurate at the date of the first conveyance; and therefore it would be altogether unjust to construe them in any other manner.

V. The appellant's right (if he has any) to the inclosed garden or yard being traced to the act of council in 1697, in favour of Blair, renders it impossible for him to dispute the general right of the corporation, while the circumstances attending that grant are such as explain the meaning of the parties beyond all doubt. If, by the words *per fluxum maris*, a grantee from the town has a right to any part of the sea-shore, the magistrates in 1697 were not entitled to give to Blair the garden itself, because the Smiddy Green on the east (83) was held by a previous grant from the town, bounded on the west as well as south by the sea-flood.—Nor is this all; what Blair asked from the magistrates was a right to a piece of ground to be a yard or garden, and that, not in broad and unlimited terms, but referring to the yard or garden on the west, lately granted to Mr. John Hill, and to the tenement called the Smiddy Green on the east. The right granted must therefore be exercised within those limits, and cannot go beyond them. The ground thus given to Blair in 1697 was incontestibly the identical spot now possessed by the appellant, and was then a waste, overflowed by the sea at high water.—It appears from the evidence that it was possessed and inclosed by Blair.—How it came from him to the persons from whom the appellant purchased, it does not appear; but it is demonstrated that it could not belong to the David Fergusson who the appellant chose to represent as the owner in 1695, in order to connect it with the property on the north of Yeaman's Shore, held of the Douglas family. The conclusion is, that if the appellant stands in the right of Blair his claim is untenable; and if he does not, he has produced no title upon which he can found any claim whatever, as against the respondents, for surely the words of a subaltern conveyance not followed by possession, and though it were not beyond the years of prescription, can vest no right in competition with the respondents, who are entitled

to every inch of property within the burgh, to which a clear legal right cannot be shewn by others.

And therefore, on the whole, as the appellant's claim is so groundless, as his conduct in the course of the proceedings, in withholding and misrepresenting facts within his knowledge, has been very improper, as there is the greatest room to believe that he is possessed of writings which, if produced, would at once have put an end to the dispute, and as he might well have rested satisfied with the decree of the court of session confirming their [145] former decision in the case of Laird, distinguishable from the present in no respect, but as more favourable for the then claimant; the respondents, with confidence, expect that the appeal will be dismissed as vexatious; and that they will receive an indemnification in costs from the justice of your lordships.

It was accordingly ORDERED and ADJUDGED that the appeal be dismissed, and that the interlocutors complained of be affirmed. [MSS. Jour. *sub anno* 1797.]

CASE 7. THE MOST NOBLE MARY ISABELLA, DUCHESS OF RUTLAND, THE MOST NOBLE HENRY, DUKE OF BEAUFORT, AND THE RIGHT HONORABLE WILLIAM PITT, Executrix and Executors of the Most Noble Charles, Duke of Rutland, deceased, and Guardians of the Most Noble John Henry, Duke of Rutland, an Infant, and the said John Henry, Duke of Rutland,—*Appellants*; WILLIAM WAKEMAN AND VINCENT EYRE, Esquires, Devises and Trustees named in the Will of Thomas Eyre, Esquire, deceased,—*Respondents* [22d February 1798].

[Mews' Dig. x. 1626.]

[Where estates are devised to trustees, their heirs and assigns, upon trust to sell the same, and pay the produce (subject to certain charges) to several persons named, and it is declared that the receipts of such trustees shall be sufficient discharges, etc. it is not necessary that the persons so entitled to the purchase-money [nor, as it seems, the heir at law] should be parties to the conveyance; nor can they be called upon to enter into covenants for the title in proportion to the interest they respectively claim in the purchase-money.]

[Decrees, etc. of Lord Loughborough C. affirmed.]

Thomas Eyre, of Hassop, in the county of Derby, Esquire, deceased, being, at the time of making his will, and at the time of his death, seised or entitled, in fee-simple, of or to the manor, messuages, lands, and hereditaments hereinafter more particularly mentioned, duly made and published his last will and testament, in writing, in such manner as, by law, is required for passing real estates by devise, bearing date the 8th of October 1788, and thereby (*inter alia*) gave and devised his capital messuage or mansion house called Eastwell, in the county of Leicester, with the lands, hereditaments, and appurtenances thereto be-[146]-longing, and all other his messuages, lands, and hereditaments in the said county of Leicester, (except a messuage, with its appurtenances, in the said county of Leicester, devised by his said will to other persons in fee) unto the respondents, their heirs and assigns, upon trust, as soon after his death as conveniently might be, absolutely to sell and dispose thereof, either together or in parcels, by private or public sale, for the best price that could in reason be got for the same, and to pay and apply the money to arise by such sale or sales, and the interest thereof, as also the yearly rents, issues, and profits of the said estates and premises so directed to be sold, (till such sale or sales should take place) towards payment of such of his debts and legacies, as his personal estate, not thereby specifically bequeathed, and the monies to arise from the other sales of both real and personal property, thereby directed to be made, might be deficient to pay and satisfy, and subject to such provision

for payment of his debts and legacies : the said testator desired that his said trustees would place the said monies to arise from the sale of his Leicestershire estate out at interest, on public or private security, and pay and apply the yearly interest thereof in satisfaction and discharge of an annuity of one hundred pounds to his steward Mr. John Robinson, for his life : one other annuity of sixty pounds to Agnes, the wife of the said John Robinson, if she should survive her said husband ; and an annuity of forty pounds to Mary, the daughter of the said John Robinson and Agnes his wife, if she should survive the said John Robinson ; and in satisfaction of any other annuities which the said testator should or might leave by codicil. And the said trustees were to pay the remainder of the interest of the said monies, to arise from sale of the said Leicestershire estate, unto his wife, Lady Mary Eyre, for her life : and after her death, to pay two fifth parts thereof unto his cousin James Eyre, for his life : two other fifth parts thereof unto his cousin Charles Eyre, for his life ; and the remaining one fifth part thereof unto his cousin Mary Eyre, for her life : And if the said Mary Eyre should leave any lawful issue living at her decease, he gave unto such issue one equal fifth part of the principal monies, the interest whereof was given to her for her life, if more than one, equally to be divided amongst them : But if the said Mary Eyre, his cousin, should die without issue, his will was that the interest of the monies so given to her for her life should be equally divided between her two brothers the said James and Charles Eyre, if they should be living at her decease, for their respective lives : or if only one, to the survivor, for his life : And if the said Charles Eyre should leave any lawful issue living at his decease, it was his will that such issue should be entitled to the principal monies, the interest whereof was given to the said Charles Eyre for his life, if more than one, equally to be divided amongst them : but if the said Charles Eyre should die without issue, leaving the said James Eyre, his elder brother, he gave unto the said James Eyre all benefit and advantage of the bequest [147] thereby made to the said Charles Eyre : And if the said James Eyre should, without having succeeded to and been in possession of his family estate of Hassop for the space of five years next before his decease, leave any lawful issue (other than an eldest or only son) living at his decease, his will was, that such issue (other than an eldest or only son) should be entitled to all the principal monies, the interest whereof the said James Eyre might be entitled to, if more than one, equally, share and share alike : But if the said James Eyre should die without leaving any such issue, leaving his brother the said Charles Eyre, or, having no lawful issue [other than an eldest or only son,] should come into possession of the Hassop estate, or, having such lawful issue, should have, hold, and enjoy the same for the space of five years, then and in such cases, and from the happening thereof, the said Charles Eyre should be then living, his intention was, that all benefit and advantage of the bequest thereby made in favour of the said James, should belong unto his brother the said Charles : And if both the said James and Charles should die without lawful issue to be entitled, as aforesaid, to the said bequest, his will was, that the whole property thereby bequeathed to them as aforesaid should go and be disposed of by the survivor of them two in such manner as such survivor should think fit. And for facilitating the sale of the said estate the said testator, by his said will, directed, that the receipt or receipts of the person or persons empowered to sell the same should be a sufficient discharge for so much of the purchase-money as should be expressed in such receipt or receipts to have been by him or them received ; and that no purchaser of any of the said estates should be deemed or taken to be answerable or accountable for the application of such purchase-money. And the said testator appointed his said wife, together with the respondents, joint executors and executrix of his said will.

And the said testator Thomas Eyre, by a codicil to his said will, dated the 25th of March 1792, gave an annuity of forty pounds per annum to Joseph Wainwright, which he directed should be paid by his said trustees out of such monies as he had by his said will directed to be charged and chargeable with any annuities which he might thereafter, by any codicil bequeath.

The said Thomas Eyre departed this life soon after he made the said codicil, without revoking or altering his said will, save by the said codicil, and without altering or revoking the said codicil, leaving the said Lady Mary Eyre, his widow, and his uncle Francis Eyre, Esq. his heir at law, and also the said James Eyre, Charles Eyre,

and Mary Eyre, (now the wife of Arthur Onslow, Esq.) him surviving. And, upon the said testator's death, the respondents proved the said will and codicil in the Pre-rogative Court of the Archbishop of Canterbury.

The respondents, soon after the death of the said testator, agreed to sell part of the premises, by the said will devised, to the appellants the Duchess of Rutland, the Duke of Beaufort, [148] and William Pitt, for thirty-six thousand pounds: And such agreement was reduced into writing, and was signed by William King, Esq. as the agent on the behalf of the said appellants, who had duly authorised him in that behalf, and by the respondent Vincent Eyre, on the behalf of himself and the respondent William Wakeman, in the following terms:

"Articles of agreement, indented and made this third day of November one thousand seven hundred and ninety two, between Vincent Eyre, of Sheffield, in the county of York, Esq. on behalf of himself and William Wakeman, of Beckford, in the county of Gloucester, Esq. devisees named in the last will and testament of Thomas Eyre, Esq. deceased, for the sale of the estate hereinafter mentioned, of the one part, and William King, of Belvoir Castle, Esq. on behalf of the guardians of the present Duke of Rutland, now a minor, of the other part, as follows:

"*First*, The said Vincent Eyre, for and in consideration of the sum of thirty-six thousand pounds of lawful money of Great Britain, to be paid as hereinafter mentioned, doth covenant and agree to and with the said William King, that the said Vincent Eyre and William Wakeman, at the proper costs and charges, in the law, of the said guardians of the said Duke of Rutland, shall and will, on or before the twenty-fifth day of March now next ensuing, by such deeds, conveyances, and assurances in the law as the counsel of the said guardians shall reasonably devise, advise, or require, well and sufficiently grant, convey, and assure unto the said guardians, their heirs and assigns, or unto such other person or persons as they shall direct or appoint, All that the manor, or reputed manor of Eastwell, in the county of Leicester, with its rights, members, and appurtenances: And all that capital messuage or mansion house called Eastwell Hall, with the stables, out-buildings, and appurtenances thereunto belonging: And all and every the messuages, farms, lands, tenements, and hereditaments, whatsoever, in the manor or parish of Eastwell, or in Goadby, Hoscote, or Kettleby, or elsewhere, in the said county of Leicester, late the estate and inheritance, in possession, of the said Thomas Eyre, deceased, and in and by his last will and testament devised unto the said William Wakeman and Vincent Eyre, in trust to be sold, with their and every of their appurtenances (except a messuage, tenement, or dwelling-house at Eastwell aforesaid, with the barn, stable, garth or homestead, yard, garden, and appurtenances thereunto belonging, as now in the possession of Mr. John Exton; and also the two fields, closes, or parcels of ground, near the said messuage, called The Corner Close and The Corner Close Pingle, containing together nine acres and thirteen perches, or thereabouts, and marked with the roman letters M. and N. in a plan of a part of the Eastwell estate, by William Barnes, and which said excepted messuage and premises, with their respective appur-[149]tenances, are not intended or agreed to be conveyed as aforesaid). And the said William King, on behalf of the said guardians, doth hereby covenant, promise, undertake, and agree to and with the said Vincent Eyre, That, upon the execution of such conveyances or assurances as aforesaid, the said guardians shall and will well and truly pay or cause to be paid unto the said Vincent Eyre, the full sum of thirty-six thousand pounds of lawful money of Great Britain, as and for the absolute purchase of the manor, messuages, lands, and hereditaments hereby before agreed to be conveyed as aforesaid. And it is hereby further agreed by and between the parties hereto, That the guardians of the Duke of Rutland shall be let into possession of the said estate, so agreed to be purchased as aforesaid, at Lady Day now next ensuing; and shall and may, from thenceforth, take and receive all the rents, issues, and profits thereof, but without prejudice to the purchasers of a few small lots of timber or trees some time ago contracted for, and not yet taken off the estate. And it is also further agreed, in case the conveyances and assurances so agreed to be made as aforesaid shall not be prepared and executed on or before Lady Day now next ensuing, and the said purchase money shall not be then paid, That from thence, and until payment thereof, interest shall be allowed and paid thereon, after the rate of four pounds

"per centum per annum. And it is also agreed, that the said guardians shall and will take and accept of such household goods and furniture, or dead stock, now in or about the mansion-house at Eastwell, as the said Vincent Eyre shall not otherwise dispose of at the valuation and appraisal made or to be made thereof by Mr. Burton, of Melton Mowbray, sworn appraiser and auctioneer. In witness whereof the said parties to these presents have hereunto, interchangeably, set their hands and seals, the day and year first before written.—Vin. Eyre, (L. S.) Wm. King, (L. S.) Sealed and delivered in the presence of Jas. Wheat, John Barnard."

Soon after the date and execution of the said agreement, viz. in the month of January 1793, an abstract of the title to the estate, so contracted to be sold, was sent by the respondent Vincent Eyre to Mr. Joseph Hill, the solicitor for the appellants: who requiring that the title should be traced further back, an additional abstract was furnished by the respondent Vincent Eyre in the following month of February, in time to have enabled the said Mr. Hill to have completed the purchase by the time agreed upon; but the said Mr. Hill not taking any steps for that purpose, and making the objections hereinafter mentioned.

The respondents, on the 10th of March 1794, filed their bill of complaint in the high court of chancery against the appellants, therein stating to the effect aforesaid: And that the appellants, the said Duchess of Rutland, the Duke of Beaufort, and William [150] Pitt, upon or soon after entering into the said agreement, took possession of the said premises, and had continued in the possession thereof ever since; and that the appellants, the said Duchess of Rutland, the Duke of Beaufort, and William Pitt, refused to accept the conveyance proposed by the respondents, and insisted, that the persons beneficially interested in the monies to arise from the sale of the said estate ought to join with the respondents and the said Francis Eyre in the conveyance thereof, and enter into such covenants, for the title, as are usual between vendor and vendee in general cases: Whereas the respondents were advised and insisted, that, under the circumstances of this case, and according to law and practice, the persons beneficially entitled to the purchase monies were not necessary parties to the proposed conveyance; and that the purchasers were not entitled to any other covenants therein than the covenants usually entered into by trustees, and a disinherited heir at law.

The bill also charged that it was impossible in the present case to procure some of the persons beneficially entitled to the purchase money to execute the said proposed conveyance, inasmuch as they were beyond the seas.

And the bill prayed, that the said agreement, for the purchase of the said estate, might be specifically performed and carried into execution by the appellants the Duchess of Rutland, the Duke of Beaufort, and William Pitt, under the directions of the said court of chancery, the said respondents being ready and willing to perform the same, on their part in every respect: And that it might be declared, that the persons beneficially entitled to the said purchase-money were not necessary parties to the conveyance of the said premises: or, otherwise, that it might be referred to one of the masters of the said court of chancery to settle a proper conveyance between the respondents and appellants: And that the appellants might be ordered to pay to the respondents the said purchase-money and interest upon the execution of such conveyance [which the respondents, by their said bill, offered to execute]: And that the respondents might have such further or other relief as the nature of their case might require.

The appellants, the Duchess of Rutland, the Duke of Beaufort, and William Pitt, appeared to the said bill, and put in their joint answer thereto, which was filed the 27th of June 1794, and thereby submitted, that in order to establish the said will and codicil, as part of the title to the estates comprised therein, and for the security of the purchaser thereof, the heir at law of the said testator ought to have been a party to the said suit, and the said will and codicil proved, *per testes*, in the said suit, or admitted by his answer.

And the said appellants, by their said answer, admitted that the said agreement was entered into by the said William King, who was duly authorised by them to enter into treaty for the purchase of the said estate.

[151] And the said appellants, by their said answer, further said, that they had not taken possession of the said premises, or any part thereof; and that they had been

informed and believed that the agent or solicitor for the respondents had delivered an abstract of the title to the said manor and premises to the agent for the appellants; and that the same had been laid before a counsel or conveyancer on the appellants' behalf, who had perused the same, and pointed out several objections to or defects in the said title, and that certain deeds and conveyances affecting the same were wanting, and which, the appellants were advised, were the more material, as the said Thomas Eyre, the testator, and his ancestors were, as the appellants had been informed, Roman Catholics, and under the disabilities created by several acts of parliament respecting Roman Catholics.

And the appellants, by their said answer, further said, that the respondents had caused to be delivered to the appellants' solicitor or agent a draft of a conveyance of the said manor and premises, in which draft Francis Eyre, therein called the heir at law of the said Thomas Eyre, was made a party, and was thereby made to covenant for himself, his heirs, executors, and administrators, that he the said Francis Eyre, or the said Thomas Eyre, or any of the ancestors of the said testator, had not made, done, or committed any act, deed, matter, or thing whereby the title of the said manor, hereditaments, and premises would be injured or affected, and to enter into the other usual covenants: But the appellants had been informed that Arthur Onslow, Esq. a barrister at law, who intermarried with Mary the daughter of the said Francis Eyre, had objected on the part of the said Francis Eyre, his father in law, to his entering into such covenants as aforesaid: and had likewise objected to similar covenants on the part of the several devisees under the will of the said Thomas Eyre, according to their respective interests under the said will: And that the appellants were advised that, under such objections to the title, and with such refusals to enter into the proper covenants on the part of the several parties interested in the said contracted for estates, they could not safely or prudently complete the said purchase without the sanction and direction of the said court of chancery; but that the said appellants were very willing to submit the examination of the said title, the form of the conveyance, and the covenants to be contained therein, to the judgment of the said court.

And the said appellants, by their said answer, submitted to the judgment of the said court of chancery, that the heir at law and devisees under the will of the said testator Thomas Eyre, ought to have been made parties to the said suit, and to have been bound by the judgment of the said Court, and ought to have entered into such covenants as, in the said appellants' answer mentioned, on the part of the said heir at law; and that the purchase money for the said manor and premises ought to be liable to the covenants for the said title so long as the same should remain upon [152] the trusts in the said will mentioned; and the said appellants also submitted, whether the debts of the said testator ought not to have been discharged under the directions of the said court of chancery, and advertisements have been inserted in the *Gazette* for that purpose.

The appellant John Henry Duke of Rutland also put in his answer to the respondents' said bill by the other appellants, his guardians, and thereby said, that he was a stranger to the several matters in the bill contained; and that, being an infant under the age of twenty one years, he submitted his interest to the protection of the court of chancery, and to act in the premises as the Court should direct.

The said cause being at issue, came on to be heard before the Right Honourable the Lord High Chancellor of Great Britain (Lord Loughborough), on the 16th of July 1795, when his lordship was pleased to order and decree, that it should be referred to Mr. Smith, one of the masters of the said court of chancery, to see if a good title could be made to the estate in question: and, in order thereto, all deeds and writings in the custody or power of any of the parties relating to the said estate, were to be produced upon oath, before the said master, or as he should direct. And his lordship reserved the consideration of the costs of the said suit, and of all further directions until after the said master should have made his report.

In pursuance of the said decree the said master made his report, bearing date the 2d of March 1796, and thereby certified, That he had been attended by the solicitor for the respondents, and by the counsel and solicitor for the appellants; and an abstract of the title to the said estate having been laid before him, he had looked into and considered the same, and was of opinion that a good title could be made to the said estate.

and all persons claiming under or in trust for them or any of them ; and also as entering into such other covenants for the title as are usual between vendor and vendee in general cases ; and in which draft of conveyance no notice is taken of the articles of agreement for the sale of the said estate to the appellants, or of the interest which had grown due on the said thirty six thousand pounds purchase money, so that it appeared upon the face of the said draft to be a conveyance of the said estate in consideration of thirty six thousand pounds, upon a fresh contract.

On the 31st of January 1797, the said master made his report, and thereby certified, that he had been attended by the solicitor for the respondents, and by the counsel and solicitor for the appellants ; and that two drafts of a conveyance of the said estate having been laid before him, one on the part of the respondents, and the other on the part of the appellants, he had perused and considered the said two drafts, and had altered, settled, and approved of the draft of the conveyance laid before him by the respondents.

To the last mentioned report the appellants filed the following (among other) exceptions :

First, For that in the said draft of conveyance, mentioned to be allowed by the said last mentioned report, the following persons were not mentioned as parties thereto, namely, the Right Honorable Lady Mary Eyre widow of the testator, Thomas Eyre, in the said draft of conveyance mentioned, and a legatee in his said will, and James Eyre, and Charles Eyre, Esqrs. and Arthur Onslow, Esq. and Mary his wife, late Mary Eyre, which said James Eyre, Charles Eyre, and Mary Onslow, are legatees named in the said will.

Fifthly, For that the said master had not in the said draft of conveyance caused to be inserted the usual covenants for the title from Lady Mary Eyre, James Eyre, Charles Eyre, and Arthur Onslow, and Mary his wife, as far as they were respectively benefited under the will of the testator Thomas Eyre, deceased, according to the form or to the effect of the covenants left by the appellants with the said master for that purpose.

Sixthly, For that the said master had not, by his said report, certified, that he had allowed of the draft of the conveyance left with the said master on the part of the appellants, as the same was approved of by Mr. Macnamara, Mr. Shadwell, and Mr. Cruise.

[155] The said exceptions were argued before his lordship, on the 8th of August 1797, when his lordship held the first, fifth, and sixth exceptions (above stated) to be insufficient, and did therefore order that the same should be overruled. (3 Vez. jun. 504.)

From the said decree, reports, and orders, and other proceedings, the said appellants brought the present appeal, contending that they ought not to be compelled to perform the said agreement unless such conveyances and assurances were made to them as were usual and necessary in such cases : that nothing more was required in the present case, and that the decree and orders complained of were erroneous. — In support of this opinion they stated (R. Graham, T. M. Sutton, W. Cruise) the following reasons for reversing the decree of the 16th July 1795.

First, It is an invariable principle in a court of equity not to interfere by decreeing a specific performance of an agreement in favour of a party who refuses to perform his part according to its fair intent and spirit. The respondents in this case have refused so to do, and therefore are not entitled to the decree which has been pronounced.

For,

Second, In consequence of the several defects which appeared upon the face of the title to the estates agreed to be purchased by the appellants, particularly as to the manor or reputed manor of Eastwell, which was one of the chief inducements for making the purchase, the appellants were advised that the heir at law of Thomas Eyre the testator ought to have been made a party in the suit, and ought to have joined in the sale.

It is said, that the heir at law is willing to join in the conveyance to a certain extent : But this is a mere assertion ; he is not a party to the suit, and therefore cannot be compelled to join in the conveyance.

Third, It is further submitted, that Lady Mary Eyre, James Eyre, Charles Eyre, Arthur Onslow, and Mary his wife, were necessary parties to the bill, because the

appellants were entitled to have covenants for the title from them to the extent of the benefit which they derived from the sale.

The appellants humbly submit, that from the words and purport of the contract, they are entitled to such covenants; and they are advised that a proper conveyance cannot be made without them. The agreement is not to purchase the vendor's title, but a good title to the estate; and as the conveyance by lease and release passes only what the vendors can legally convey, and contains no warranty, the purchaser cannot be assured of a good title, nor guarded against latent incumbrances, without such covenants.

If the devise had been to the respondents themselves, for their own use and benefit, subject to the payment of debts and legacies; and they had contracted to sell, they must have covenanted with the purchaser for the title, as it would in that case have been their estate. Upon the same principle the devisees of the purchase-money, after payment of debts, are compellable to enter into similar covenants, to the extent of their respective interests, [156] for it is in substance their estate, and they might pay off the incumbrance, and prevent the sale.

In proof that the respondents decline to do on their part what is fair and reasonable, it is impossible to say that there is no risk in this case—If there is any, those persons should indemnify against it who are paid as for a perfect title.

In the case of *Lloyd v. Griffith*, reported in 3d Atkyns, 268. Mr. Thomas Lloyd devised certain estates in the Isle of Anglesea and county of Carnarvon to trustees, upon trust out of the rents thereof, or by selling or mortgaging the same, to raise such sums as should be sufficient to discharge a mortgage affecting an estate which the testator had settled by deed on Mrs. Hester Webb, as well as all his other just debts.

Upon a bill for carrying the trusts of this will into execution, the estates in Anglesea and Carnarvon were sold for twenty-seven thousand pounds, and a draft of the conveyance was prepared by Mr. Booth, the purchaser's counsel, in which Mrs. Webb was made to enter into the usual covenants for the title.

The counsel for the grantors, Mr. Weldon, together with two other conveyancers, Mr. Lane and Mr. Fazakerley, being of opinion that Mrs. Webb was not bound to covenant for the title; the master reported accordingly.

Upon an exception to the Master's report, Lord Hardwicke allowed the exception, and directed the master to alter the draft of the conveyance "by inserting therein proper covenants from Mrs. Webb, against her own act and the acts of Mr. Thomas Lloyd her devisor, as to so much as she was benefited by the estate."

This decision, and the principles therein laid down, have never been controverted, but on the contrary have been the rule adhered to and pursued in practice by every conveyancer from that time to the present.

Objection.—It is objected, that the purchasers would have an equal right to call upon simple contract creditors, whose debts are by the will charged on the real estate, to covenant for the title. And it is also objected, that in sales under the Crown, or by the assignees of a bankrupt, there are no covenants.

Answer.—With respect to simple contract creditors, whose debts are charged by the will upon the real estate, they cannot be considered as volunteers, and standing in the place of the testator; and the course and practice of conveyancing has been, not to require that they should be parties to the conveyance, or enter into any covenants; the agreement therefore in this case could not imply on the part of the vendors any undertaking for such covenants, and the appellants do not require what is unusual to grant. As to contracts for the purchase of an estate from the Crown, or from the assignees of a bankrupt, the party who contracts to buy is apprised, at the time he enters into the contract, that he can have no covenants for the title, and therefore, in these cases, there is no breach of agreement on the part [157] of the vendors, which makes them perfectly distinct from the present. Besides the cases last mentioned are exceptions to the general rule, and cannot therefore be urged to prove its non-existence.

Objection.—The respondents object that Lady Mary Eyre and Charles Eyre are not within the kingdom, and cannot be compelled to execute the conveyance.

Answer.—There is no proof of their being out of the kingdom; neither is it material to the purchasers, for if the necessary parties do not join in the conveyances, the title

is incomplete, and the appellants are not bound to complete the purchase: But it appears that Francis Eyre and Mr. and Mrs. Onslow are in England, and have actually refused to enter into any covenant whatever. The objection that Lady Mary Eyre is not in the kingdom is a mere pretence, for her ladyship is tenant for life of the residue of the interest of the purchase money, after payment of any debts of the testator, if any there are, and after deducting certain annuities in the will mentioned; and she cannot receive such interest without executing the necessary powers and discharges for that purpose.

3d Objection.—Another objection made by the respondents' counsel, and repeatedly urged is, that if the devisees were to covenant as far as they respectively receive a benefit from the sale, the title of the appellants would still be defective.

Answer.—This is an objection that should arise from the appellants rather than from the respondents: If the appellants are content to accept the title under that defect, the respondents at least have no reason to complain. But the truth is, the title is as complete, with the addition of covenants from the devisees of the purchase-money, as the present state of the family will admit: because there is no person in being entitled, under the testator's will, to the principal of the money arising from the sale of this estate. But in case of the eviction of a purchaser, the appellants are advised that a court of equity would, upon a proper bill filed for that purpose, restrain the respondents Wakeman and Eyre from paying or transferring such purchase-money to any reversioner, until the tide of the appellants was made good, or the purchase-money restored to them.

Fourthly. In support of the appeal against the order of the 29th of July 1796, in respect to the first and second exceptions before stated to have been taken by the appellants to Master Smith's report of the 2d March 1796, approving the title, viz. "That the testator's heir at law, and Lady Mary Eyre, and the other devisees in the testator's will, should have been made parties to the suit," the appellants insist that those exceptions ought to have been allowed for the reasons before stated: And as to the third and fourth exceptions, the title to the manor or reputed manor of Eastwell was apparently defective, and the leases for lives, which were stated in the abstract of the title, did not appear to have fallen in at the time when the recovery of 1709 was [158] suffered, a circumstance which affects the validity of that recovery: nor was any proof produced that the annual sums of £46 15s. and £38 5s. which appeared to be issuing out of the estates, were given in lieu of tythes, or that such composition could be maintained.

Lastly. The appellants humbly submit, that the situation in which they were placed in this transaction, acting as the guardians of an infant, and laying out a large sum of his money, made it necessary that they should proceed with the utmost degree of caution and circumspection: and that they should require every security, which the practice of conveyancing, and (as they are informed) the rules of the court of chancery authorised them to expect. And as that security has been refused them, they trust that they will not be compelled to complete this purchase.

In support of the said decree, orders, etc. and of the principles on which they were founded, the respondents stated (J. Scott, J. Mansfield, R. Richards) the following reasons:

Because, as to the decree of the 16th of July 1795, it is a decree in the common course, for a specific performance of an agreement which is proved and admitted in the cause, and the directions are the directions proper and useful in every decree, for the specific performance of an agreement. If the present decree had been different from what it is, it would certainly have been improper and erroneous.

Because, as to the decretal order of the 27th of July 1796, upon the exceptions to the master's report of the 2d of March 1796, the respondents conceive it would be sufficient for them to insist, that the first and second exceptions to the said report of the 2d of March 1796, are not applicable to a report, which only certifies that a good title can be made to the estate in question, and which could not, without departing from the decree, certify otherwise, than that a good title could, or could not, be made. But the respondents have no difficulty in contending, in answer to the first exception, that, without considering the question how far it might, or might not, be necessary, in the present case, to prove the will, *per testes*, every possible objection of that kind is removed by their making the heir at law of the testator a party to the conveyance

proposed, and by his consent to execute it. Clearly, he was not a necessary party to the suit, which is not instituted to establish the will, but for the performance of an agreement between the respondents and appellants. It is the master's duty to see that all proper parties join in the conveyance, if the parties differ; and if the heir at law is a proper party, the master will not approve of a conveyance without his joining. The propriety, however, of the heir's joining in the conveyance, was not submitted to the master in this cause, because the respondents, of their own accord, and with his consent, proposed to make him a party; and he has always been ready to execute any conveyance, which the master should approve of. And, with regard to the second [159] exception it is sufficient here to remark, that the objections it suggests, are only to the form of the conveyance, and not to the titles.

Because, as to the decretal order of the 8th of August 1797, the respondents humbly insist, that it is not erroneous; for, with respect to the first of the exceptions taken to the report of the 31st of January 1797, it is contended, that no one of the persons named in that exception, is a necessary party to the proposed conveyance, because the testator's will devised the estate in question to the respondents and their heirs, in trust, to be sold, for the payment of his general debts in the first place, and declares, that the receipts signed by the respondents for the purchase-money shall be sufficient discharges to the purchasers, and that such purchasers shall not be bound to see to the application of the purchase-money; therefore, and as the persons named in the first of the exceptions now under consideration, are only legatees, they can never dispute the title of the purchasers of the estate in question, or seek any account of the purchase-money from them. And it has been settled, as it is conceived, that, in such a case as this, the persons standing in the situation of those named in the exception, are not necessary parties in a conveyance from trustees, in the situation of the respondents.

With respect to the fifth of the said exceptions, the respondents submit, that it cannot be maintained; and that the appellants in this case are not entitled to any other covenants than such as are usually entered into by trustees and a disinherited heir at law; and such covenants are inserted in the draft of the conveyance, approved of by the master.

If it were adopted as an established principle that the persons beneficially interested in the monies arising from the sales of estates, circumstanced as the estate in question is, were necessary parties to the conveyance of such estates, and that they must enter into covenants for the title in proportion to the interest they respectively claimed in the purchase-moneys, the inconvenience would be without measure, and the execution of numberless trusts rendered impossible. It would extend to all sales from the assignees of bankrupts; to all sales by trustees for the payment of debts, where the creditors are not named, and frequently cannot be found until after it may be necessary to sell the estate; to all sales where infants are, and persons unborn are when born, to be interested in the purchase-money in any degree; and even to sales under decrees of courts of equity. Besides, if the covenants required could be insisted upon, it is easy to conceive the impossibility in many cases, and the difficulty and expence in most cases, of ascertaining the quantum of damages to be answered by the covenantor, his heirs, executors, administrators, or assigns, at, perhaps, very distant periods of time. Many more objections must necessarily occur to any one conversant with the subject. It has been urged that [160] the legatees chiefly interested in the purchase-money ought to covenant to the value of their interests: But the rule and principle upon which the Court is to act, in requiring or not requiring those covenants, cannot possibly depend upon the quantum of the legacy which a party takes. Every simple contract creditor, whose debt is paid out of money arising from the sale of lands charged with simple contract debts, in fact, receives payment of his debt merely under the effect of the testator's will, as much as a legatee receives payment of his legacy under the effect of that will. If any of the legatees are compellable to covenant for the title, all of them must be compellable to covenant in respect of the value of their legacies, whether vested, contingent, remote, to be presently paid, or to be paid in future, to be enjoyed in gross, or to be taken by persons born and unborn in succession; and every simple contract creditor, who could not have his debt paid if the will had not charged the land purchased, and who, under the will, takes before the legatees, must also be compellable to covenant to the value of his debts.

Such covenants, therefore, as are now required must be mischievous : Principle cannot require that they should be inserted, and, in practice, they are seldom inserted in conveyances by trustees of estates devised to them to be sold.

In the present case the purchasers knew they were contracting with such trustees, and of course they purchased with notice that they could only expect to have from those with whom they contracted such covenants as are, in the ordinary course of business entered into by trustees and a disinherited heir at law, in case he was willing to join in the conveyance. And they further knew the almost utter impossibility, in the present case, of procuring some of the persons beneficially interested in the purchase money to execute the proposed conveyance, on account of their residence beyond the seas : And there is nothing in this case which calls for a deviation from the common course of business : The title is clear and no fair objection can be made against it.

And as to the sixth of the exceptions now under consideration, it was, as the respondents humbly contend, properly overruled, as the draft of the conveyance, mentioned therein, contained the covenants which the respondents have already observed upon, and other matters not proper to be inserted therein.

It was accordingly ORDERED and ADJUDGED that the appeal be dismissed, and that the decree, orders, report, and other proceedings therein complained of be affirmed. (MSS. Jour. *sub. ann.* 1798.)

[161] CASE 8.—ALBANY WALLIS AND RICHARD TROWARD,—*Appellants* ; THE MOST NOBLE WILLIAM HENRY CAVENDISH BENTINCK, DUKE OF PORTLAND, —*Respondent* [5th April 1798].

3 Ves. jun. 494.

[To a bill against two defendants for a discovery whether the plaintiffs were not employed by one of the defendants, a peer, as solicitors to present and prosecute a petition to the House of Commons on behalf of the other defendants, complaining of an undue election and return, a general demurrer was allowed: principally because such a transaction amounts to maintenance at the common law; and incidentally on the grounds of public policy, and because the discovery could have no effect to enable the plaintiff to maintain any action.]

[Order of Lord Loughborough C. affirmed.]

[Mews' Dig. iii. 203 ; v. 910. Followed in *Bradlaugh v. Newdegate*, 1883, 11 Q. B. D. 7; and see *Harris v. Briscoe*, 1886, 17 Q. B. D. 511.]

In Michaelmas term 1796, the appellants filed their bill of complaint in the high court of chancery of Great Britain against the Most Noble William Henry Cavendish Bentinck, Duke of Portland, and George Tierney, Esq. setting forth, that the appellants were, in the year 1789, employed by the said Duke of Portland to act as his solicitors, and to present, on the behalf of the said George Tierney, a petition to the house of commons, complaining of the return made of George Jackson, Esq. now Sir George Jackson, to serve as member for the borough of Colchester in parliament, and alleging that the aforesaid George Tierney had been duly elected to serve as member in parliament for the said borough, and praying that the said George Tierney might be declared duly elected : And further setting forth, that the appellants did, in compliance with the direction of the said Duke of Portland, cause to be prepared and presented a petition to the aforesaid purport and effect : and that the appellants, having been instructed by the said Duke of Portland to retain Mr. Douglas and Mr. Graham as counsel in support of such petition, the appellants did retain them accordingly : And further setting forth, that the 24th day of February 1789 having been appointed for the ballot of a committee to try the merits of the said petition, the appellants did instruct the aforesaid counsel to attend and appear in support of the aforesaid petition : and that the appellants did continue to act as solicitors on the said petition during the whole period which the same was depending, and did

advance very considerable sums of money on account of the same, amounting to the sum of £3407 11s. 6d. : And further setting forth, that the said petition having been determined on or about the 4th of April 1789, the appellants did make out an account or a bill of the costs and charges which had been incurred and paid by the appellants, and did deliver the same to a gentleman who acted as a confidential friend of the said Duke of Portland : And further setting forth, that the appellants not having received the amount of such their bill of costs, they [162] repeatedly applied to the said Duke of Portland and the aforesaid George Tierney for the same, with which applications the appellants hoped that the said Duke of Portland and the said George Tierney would have complied : but that the said Duke of Portland alleged that he was not indebted to the appellants on the aforesaid or any other account, and that he never, in any manner, directed or instructed the appellants, or either of them, to act as his solicitors, or to present such petition against the return of the said George Jackson to serve in parliament for the aforesaid borough of Colchester, or did in any manner, direct or indirect, give the appellants to expect that the expence which might be incurred by presenting and proceeding upon such petition should be defrayed by him the said Duke of Portland. That the appellants did, by their said bill, filed in the court of chancery, charge that they were, about the beginning of February 1789, informed by the said George Tierney that he the said George Tierney had seen the said Duke of Portland, and that he the said George Tierney was directed by the said Duke of Portland to instruct the appellant Richard Troward to present a petition against the return of the aforesaid Sir George Jackson to serve in parliament for the aforesaid borough of Colchester, and to prosecute the same : And further charging, that they the appellants, believing the direction to have been received by the said George Tierney from the said Duke of Portland, did present and proceed upon such petition : And further charging, that the said Duke of Portland at other times pretended that he did repeatedly, after such petition was presented, declare to the appellants that he did not consider himself liable to the payment of any demand which might accrue to the appellants in respect of such petition : and that the said Duke of Portland at other times pretended that he did request a gentleman, who was then his confidential friend, to communicate to the appellants that he did not consider himself liable to any demand in respect of such petition, and to apprise the appellants that if they proceeded thereon, they must not look to him for payment of any of the costs or charges which might be thereby incurred : and that the said Duke of Portland further pretended, that the said communication was made to the appellants by letter : and that the appellants being apprised of the said Duke of Portland's not holding himself liable to reimburse the appellants what they might expend in the course of proceeding upon such petition, did proceed thereon upon the credit of the said George Tierney. And the appellants further charged, by their said bill in chancery, that they never received from the said Duke of Portland, or from any person on his behalf, save as hereinafter mentioned, any declaration or instruction that he the said Duke of Portland did not consider himself liable to the appellants' demand for the costs of such petition, but, on the contrary, the appellants, by their said bill, charged, that they did present and proceed upon such petition upon the credit of him the said Duke of Portland, [163] in consequence of such direction as aforesaid. And the appellants, by their said bill, further charged, that the only intimation which they ever received of the said Duke of Portland's not considering himself liable to the expences of the said petition, was by a letter, [From a friend of the Duke's. See 3 Ves. 495, and *post.*], dated the 15th of March 1789, and which was addressed to the appellant Richard Troward, and was in the words and figures following : " The events of Friday and Saturday last have made it very material for us to deliberate very maturely on the state of Colchester. I wished therefore to have had a thorough and deliberate consultation on the subject with the Duke of Portland, Mr. Fox, Mr. Tierney, Mr. Graham, Mr. Douglas, and yourself, but I did not like to disturb the duke in his present condition. Mr. Fox, I found, was going out of town on Tuesday, and I shall be at Maidstone assizes till Wednesday or Thursday, I am therefore reduced to the necessity of writing to you. Your very handsome offer in your letter to me of the 3d instant is most properly considered : but I am desired to say that it is impossible to think of putting you to the inconvenience which accepting it would be attended with to you. As things now stand,

it is material that we should turn our attention to the expence incurred, to that which is likely to be incurred, and to the probable judgment of a committee in the end. It seems to me that the sum which I mentioned to you and Mr. Tierney to be brought in and of the expence of the petition must be exhausted, and that it would be unfair to him not to suggest this to his consideration: you and he are better able to judge of every circumstance than any body else, and as my object in obtaining a consultation on the case has been frustrated, I hope you will be prepared to have it considered as soon as possible, in order that no measure may be pursued which can tend to produce any difficulty about the expence, or lead to more than "Mr. Tierney may think convenient for him to bear," etc. And the appellants, by their said bill, further charged, that the appellant Richard Troward being very much surprised and alarmed at the conclusion of the said letter, did shew the same to the said George Tierney, who expressly declared that he did not consider himself liable to the costs of the said petition, and also expressly declared, that he was, as aforesaid, authorised and directed by the said Duke of Portland to instruct the appellants, as aforesaid, to present and proceed upon such petition: And further charged, that the appellant Richard Troward did answer the aforesaid letter, and, amongst other things, therein stated that he had shewn the aforesaid letter to the said George Tierney, and that the same had a good deal alarmed him, as he said he never intended making any addition to the expence already incurred by him: and that it was understood that he was not to be at any expence respecting the said petition, and reminded the appellant Richard Troward that he had so informed him in the beginning of the business: and the appellant Richard [164] Troward further stated, that he conceived the expence incurred at that time to be not less than the sum of £1300. And the appellants further charged, that the appellants, not receiving any reply to the aforesaid letter, did proceed upon the said petition, concluding that if the aforesaid Duke of Portland had intended to withdraw his liability to the costs thereof, that he would, in consequence of the said letter so written by the appellant Richard Troward, have declared such his intention, and thereby have prevented further expence being incurred. And the appellants, by their said bill, further charged, that the expence then incurred did not exceed the sum of £1500, and that the appellants were entitled to be repaid such sum of the said Duke of Portland, although he the said Duke of Portland should have thought proper to withdraw himself from future liability. And the appellants, by their said bill, further charged, that the said Duke of Portland pretended that he had paid the appellants the amount of their demand, so far as respected him, and that the appellants ought to apply to the said George Tierney for payment of the remainder of their demand: and that at other times the said Duke of Portland pretended that the appellants had never applied to him for payment, and that he had always been and still was ready to discharge their demand: whereas the appellants charged that they had never received any sum of money whatever on account of their demand, except the sum of £1000 which they received from the said George Tierney, and which sum they had heard and believed the said George Tierney had received from the said Duke of Portland: And that the appellants further charged, that they the appellants had repeatedly applied to the said Duke of Portland for payment: and that he had not complied with their request of payment of their demand, though he had in conversation admitted the justice of the same. And the appellants particularly charged in their said bill, that the said Duke of Portland did, on or about the 27th day of June 1789, in a letter addressed to the said George Tierney, express himself to the following purport and effect: "I just learn from a letter which Mr. Adam has shewn me from Troward, that some doubts remain in his mind respecting Colchester, which I had flattered myself the repeated conversations we had previous and subsequent to the election, ought entirely to have obviated; however, as that unfortunately seems not to be the case, give me leave to request you to refer him to the letter which Mr. Adam wrote him with my privacy and concurrence, or to take the trouble of appointing a meeting with him and Mr. Adam, that no misunderstanding may remain respecting that business." And the appellants, by their said bill, further charged, that the said Duke of Portland did consider himself liable to the whole or part of the said expence of preparing and proceeding upon the said petition, and had admitted the same within the last six years, but had re-

quested the appellants not to prosecute their demand, but to wait for some time longer : And therefore the appellants, [165] by their said bill, prayed that the said Duke of Portland and George Tierney might make a full and ample discovery of all the matters aforesaid.

In the said Michaelmas term 1796, the said Duke of Portland filed his demurrer to said bill ; and thereby, for cause of demurrer, alleged, that the appellants had not in any manner, by their said bill, made or stated such a case as did or ought to entitle them to any such discovery from the said respondent the Duke of Portland, touching the matters in question, as was thereby sought and prayed against the said Duke of Portland : Wherefore, and for divers other errors and imperfections appearing on the face of the said bill, the said Duke of Portland did demur in law to the said bill, and demanded the judgment of the said court of chancery, Whether he ought to be compelled to make any further or other answer to the said bill or any part thereof ?

The said demurrer being set down for argument, the same came on to be heard before the Right Honourable the Lord High Chancellor of Great Britain on the 8th day of February 1797, when his lordship was pleased to adjourn the giving judgment thereon until a future day.

On the 7th day of August the said cause was set down for judgment, when the lord chancellor was pleased to order that the said demurrer should be allowed, and that the appellants should pay unto the said Duke of Portland the costs occurred by the said demurrer, beyond the sum of £5 the usual costs of a demurrer, to be taxed by the master.

From this order the appellants brought the present appeal, and in support of the proposition that the demurrer ought to have been overruled, they stated (J. Fonblanque, J. Mackintosh) the following reasons :

I. Because the bill states a transaction, the facts of which, if substantiated by evidence, would entitle the appellants to recover the amount of their demand in an action at law against the noble respondent ; and because it is the peculiar province of courts of equity to enforce a discovery of all facts, the admission of which would assist a plaintiff in making his legal right available, without subjecting the defendant to any penalty, forfeiture, or punishment as consequent upon such admission.

But it is objected that the discovery sought by the appellants' bill ought not to be enforced,

First, Because by the 29th Car. 2. c. 3. § 4. it is enacted, That no action shall be brought whereby to charge defendant upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto lawfully authorised ; and that the appellants do not, by their bill, state or allege that the noble respondent did, by any writing signed by him, or by any other person thereunto lawfully authorised, agree to pay and satisfy the [166] demand of the appellants in respect of business done, and money expended for and on account of George Tierney, Esq.

Second, Because courts of equity will not enforce a discovery unless material to the purpose of justice ; and that if the appellants have any demand against the noble respondent, the discovery sought by their bill is immaterial, the bill itself disclosing evidence by which, if such demand could be otherwise legally enforced, it might be substantiated.

Third, Because courts of equity ought not to enforce the discovery of transactions which would subject the defendant making such discovery to any species of forfeiture, penalty, or punishment ; and that the transaction stated by the appellants' bill, if admitted by the noble respondent, would or might subject him to some forfeiture, penalty, or punishment.

Fourth, Because courts of equity will not enforce a discovery of any transaction which would subject the defendant making such discovery to the consequences of having offended against a resolution of either house of parliament : and that the transaction stated by the appellants' bill would, if admitted, subject the noble respondent to the consequences of having acted in breach of a resolution of the honourable house of commons.

Fifth, That courts of equity will not be assistant to contracts adverse to the in-

terests and views of public policy : and that the transaction stated by the appellants' bill is, if not strictly illegal, at least injurious to public policy.

The first objection assumes, that the noble respondent is called upon by the appellants' bill to admit or deny a purely collateral undertaking for the debt of another ; whereas the appellants submit that the bill does sufficiently charge the noble respondent as the principal debtor, by alleging that the appellants did proceed upon the credit of the noble respondent : but supposing that the bill does not sufficiently charge the noble respondent as the principal debtor, the appellants submit that it does set forth sufficient evidence in writing to charge the noble respondent in respect of his engagement for the debt of another, by setting forth the letter bearing date 15th March 1789, and which letter the noble respondent, by another letter also set forth, bearing date 27th June 1789, admits to have been written with his the noble respondent's privity and concurrence. But supposing that the appellants, by their bill, have not charged the noble respondent as the principal debtor, nor set forth a sufficient writing to sustain an action at law against the noble respondent, in respect of a collateral undertaking for the debt of another, it will still remain to consider whether such circumstances do afford a ground of demurrer to the discovery sought by a suit in equity.

The 29 Car. 2. c. 3. intituled, " An Act for the prevention of Frauds and Perjuries," has undergone, perhaps, more discussion than any other act of parliament. In the construction of its courts of law have, in some instances, considered themselves bound by the letter of its provisions, whilst courts of equity, consulting its spirit, have felt themselves free to reject that construction which would render an act of parliament, professing to have for its object the prevention of frauds, the most effective instrument for the accomplishment of frauds.

The appellants submit, that if their demand against the noble respondent be founded in conscience, the resisting of their demand by the noble respondent is against conscience, and that a court of conscience cannot extend its protection to the principle of such resistance without losing sight of that enlarged and liberal policy which has hitherto governed their construction of the statute of frauds.

The second objection assumes, that the discovery sought by the appellants is immaterial, or that if it be material the bill shews the want of it can be supplied by other evidence. The appellants submit, that the discovery which they seek by their bill is material ; because, if the noble respondent should admit the several facts alleged by their bill, such admission would give the appellants a right of action against the noble respondent : and the appellants further submit, that they are not bound to content themselves with any evidence which may be within their reach, if by the course of proceedings in courts of equity they are entitled to the more conclusive evidence of the noble respondent himself.

The appellants admit the principle of the third objection, and consequently that if the discovery sought by their bill can legally subject the noble respondent to any species of forfeiture, penalty, or punishment, the noble respondent ought not to be compelled to make such discovery. The question therefore is, Whether the discovery sought by the appellants can legally subject the noble respondent to any species of forfeiture, penalty, or punishment ? The noble respondent insists that it might. The appellants submit that it cannot.

The transactions stated by the appellants' bill has been described to be not only maintenance, but maintenance of the most aggravated description. The appellants submit that it has none of the qualities of the offence of maintenance, either as regarded at common law, or as extended and defined by statute ; because the interference ascribed to the noble respondent by the appellants was not in a transaction of a merely civil nature, but in assertion of a political right, and because the offence of maintenance does not extend to the upholding of another in the enjoyment or assertion of a right of a political or public nature.

In answer to the fourth objection the appellants submit, that if they have a legal demand against the noble respondent, a resolution of either house of parliament cannot be interposed in bar of such demand, nor of the discovery sought by the appellants in order to render such demand available.

The fifth objection assumes, that the engagement attributed to the noble respondent, by the appellants' bill is, in its principle and [168] tendency, injurious to the

interests of public policy. The appellants submit, that such is not the quality of the engagement attributed to the noble respondent; but submit, that if it were, the noble respondent cannot protect himself from the discovery sought by the appellants, by alleging that the engagement attributed to him be injurious to the interests of public policy, because, though courts of equity will not compel a defendant to discover the particulars of a transaction, the discovery of which might subject him to any forfeiture, pain, or penalty, yet they will not allow a defendant, who has entered into an engagement injurious to public policy, to avail himself of such misconduct to the prejudice of any claim which may have arisen out of it. This distinction may be illustrated by a variety of cases.

In support of the order, and against the appeal, the following short reason was stated (*J. Scott, J. Mansfield, T. Erskine, R. Pemberton*) in the respondent's printed case.

Because the discovery, sought by the bill, appears, from the bill itself, to be neither material nor necessary; and because a court of equity will not aid a plaintiff seeking a discovery in a case of maintenance, and in the other circumstances of it such as the plaintiff has stated in his bill.

It was accordingly ORDERED and ADJUDGED that the appeal be dismissed, and that the order therein complained of be affirmed with £200 costs. (*MSS. Jour. sub anno 1798.*)

CASE 9.—HIS MAJESTY'S ADVOCATE-GENERAL,—*Plaintiff*; WILLIAM MENZIES, late Distiller at Gorbals of Glasgow,—*Defendant* (in Error) [7th June 1799].

[2 Scots R. R. 24.]

[If a person, being regularly licensed as a distiller of corn-spirits, etc. in Scotland, under stat. 26 Geo. 3. c. 64. for one year, discontinue business as a distiller, and sell his stills to another before the expiration of such licence, but keep on hand, for future sale, a considerable stock of spirits which were lawfully distilled under such licence, he is to be considered as keeping and selling such spirits as a dealer, and is accordingly compellable to take out an excise licence as a seller of, or dealer, by wholesale, in aquavite, under stat. 33 Geo. 3. c. 69. § 9. And also to make entry of his warehouses, etc. under stat. 6 Geo. 1. c. 21. § 12. And is liable to the penalty of 40s. per gallon, under stat. 11 Geo. 1. c. 30. § 3. for selling such spirits in any unentered place.]

[Judgment of the Court of Exchequer in Scotland reversed.]

[See also the succeeding Case.]

By several acts of parliament in force prior to 5th July 1786, there were then imposed duties to the amount of 2s. 1d. per gallon on all spirits distilled in Great Britain for [169] home consumption from corn or grain; 1s. 4½d. per gallon on all spirits from cyder, perry, or other British materials, except grain; 2s. 8½d. per gallon on all spirits from melasses or sugar; and 4s. 2d. per gallon on all spirits from other foreign materials, to be paid by the makers or distillers thereof.

From the 5th July 1786, these duties were discontinued in Scotland, and in place of them (by 26 Geo. 3. cap. 64.) an annual licence duty was imposed on the content of the still, which licence-duty, in 1797, was £54 per gallon per annum, of the content of each still, including the head, etc. used for making low wines or spirits from corn, grain, malt, tilts, cyder, perry, or other British materials; or for the rectifying, compounding, or mixing spirits; £90 per gallon per annum on stills for making spirits from melasses or sugar; and £180 per gallon per annum on stills for making spirits from other foreign materials, to be paid by the distiller or rectifier, or person using such stills.

By stat. 24 Geo. 3. st. 2. cap. 41. § 1. every brandy-dealer, or person selling brandy or other spirituous liquors, not being a retailer, and not being a rectifier, is required to take out an annual licence, and pay for the same the sum of £5.

By stat. 30 Geo. 3. cap. 38. every retailer of distilled spirituous liquors (not being aquavitæ in Scotland) is required to take out a licence, and pay for the same the sum of £4 14s. if his house be rated at or under £15 per annum, and proportionally higher duty if the rent be higher.

By stat. 33 Geo. 3. cap. 69. every retailer of spirits distilled from malt, corn, grain, or other British materials, and commonly known by the name of aquavitæ, in any place of Scotland other than the Highlands, is required to take out an annual licence, and pay for the same the sum of £2. And every wholesale dealer in such spirits in Scotland, not being a licensed distiller, rectifier, compounder, or retailer, is required to take out a licence, and pay for the same the sum of £3.

By stat. 28 Geo. 3. cap. 46. sect. 2. and 33 Geo. 3. cap. 61. sect. 2. it is enacted. That no person shall erect or work a still, for making spirits in Scotland, without first taking out a licence for that purpose ten days before, and paying to the officer of excise the proportion of duty directed by law.

By stat. 33 Geo. 3. cap. 61. sect. 10. every licence granted by virtue of that act, in time coming, shall be and continue in force from the 10th day of October yearly, for one year, and for no longer or shorter period : and by sect. 12. every person is required to renew such licence afterwards, from year to year, under the same terms, conditions, and regulations as the first, under the penalty of £200 ; and by sect. 4. a sixth part of the annual duty must be paid every two months in advance, until the whole be paid.

By stat. 28 Geo. 3. cap. 46. sect. 12 & 13. it is enacted. That when the property or possession of any licensed still shall be really and *bonâ fide* changed, the person or persons becoming entitled [170] thereunto shall forthwith, before he work them, give notice to the supervisor or officer of excise, and shall thereupon, and upon making oath of his property therein, be permitted to work such licensed still during the unexpired term of the licence :— But if the person becoming entitled to such stills shall not be desirous to work them, he shall, within three days after his title thereto shall have been verified, signify the same in writing to the proper supervisor or officer, and deposit with the officer the heads of the stills, and such of the utensils as such supervisor or officer shall select : and such stills shall not be again used until a new licence shall be granted, and the duty which would have become due for the unexpired term of the licence, computed from the time of giving such notice, shall cease, but no claim shall lie for repayment of any part of the duty paid.

By stat. 33 Geo. 3. cap. 61. sect. 5. it is provided. That no such licence shall be granted to any distiller, etc. until he shall have found security, by bond, to his majesty for £100, that he shall make regular payment of the whole annual duty, at the times and in the manner beforementioned, without any allowance, abatement, or deduction, on account of any loss, accident, or interruption, except through the destruction of the distillery, and total stoppage of the work by fire, or as is by this act, or the 28th Geo. 3. cap. 46. excepted and provided.

By stat. 6 Geo. 1. cap. 21. sect. 12. (the clause on which the eighth and ninth counts in the information are laid,) it is enacted. That all and every person or persons who, after the 1st August 1720, shall become distillers, makers, or sellers of or dealers in any such brandy, arrack, rum, spirits, or strong waters, shall, before he, she, or they take any such brandy, arrack, rum, spirits, or strong waters into his, her, or their custody or possession, make particular entry, in writing, of the several and respective warehouses, storehouses, rooms, shops, cellars, vaults, and other places intended by him, her, or them respectively to be made use of for the keeping of brandy, arrack, rum, spirits, or strong waters, either British or foreign, on pain of forfeiting the sum of £20 for every such warehouse, storehouse, room, shop, cellar, vault, or other place so to be made use of by such distiller, maker, seller, or dealer respectively, without making such entry as aforesaid, together with the brandy, arrack, rum, spirits, and strong waters which shall be found therein, and also the casks and vessels whatsoever containing the same.

By sect. 14. officers of excise are authorised to enter into all warehouses or other places made use of by any distillers, makers, or sellers of or dealers in spirits, and by tasting, gauging, or otherwise, to take an account of the quantity and quality of all spirits as shall be in their custody : and if any such distiller, maker, or seller of or dealer in spirits, shall hinder or refuse the said officers to enter into the warehouses

or other places to take such account, or shall let, hinder, or obstruct them in the execution of any of the powers and authorities by this act given, [171] the person or persons offending shall for every such offence forfeit £50.

By sect. 15, it is further enacted, That no brandy, arrack, rum, spirits, or strong waters, either British or foreign, shall be sold, uttered, or exposed to sale, either by wholesale or retail, but when the same shall be in some or one of the said warehouses, storehouses, rooms, shops, cellars, vaults, or other places so entered as aforesaid, upon pain of forfeiting the sum of 40s. for every gallon of brandy, arrack, rum, spirits, or strong waters as shall be so sold, uttered, or exposed to sale in any other place or places than those entered as aforesaid; and in that proportion for any greater or less quantity.

By sect. 16, where any brandy, etc. shall be sold in such entered places, the officers of excise are obliged, on request of the buyers or sellers, to give certificates or permits signed by them, expressing the quantities so sold, etc.

By sect. 17, it is further enacted, That no brandy, arrack, rum, spirits, or strong waters, exceeding the quantity of one gallon, shall be removed or carried from any part of this kingdom to another, by land or by water, without such permit or certificate from some or one of the officers of his Majesty's customs or excise, signifying and certifying the quality and quantity thereof, and that his Majesty's duties chargeable thereon have been duly paid and satisfied, or that the same had been condemned, or was part of such stock as aforesaid, on pain of forfeiting the brandy, arrack, rum, spirits, or strong waters which shall be found carrying from one place to another without such permit or certificate, together with the casks and vessels whatsoever containing the same.

By sect. 18, it is further enacted, That from and after the 1st of August 1720, all and every person or persons whatsoever, who shall have in his, her, or their custody any brandy, arrack, rum, spirits, or strong waters, exceeding the quantity of 63 gallons, shall be deemed and taken to be a seller of and dealer in brandy, arrack, rum, spirits, and strong waters, and subject to the survey of his Majesty's officers of excise.

By stat. 26 Geo. 3. cap. 64. sect. 29,* it is enacted, That no spirits shall be removed or sent from the place of their manufacture without being accompanied by a certificate subscribed by the licensed distiller or maker thereof, or his known and authorised agent, expressing that the same were made by him, and also specifying the quantity of such spirits, and the number of casks or packages in which the same are contained.

By stat. 28 Geo. 3. cap. 46. sect. 22,† it is enacted, "That no raw or unrectified spirits made from any of the materials aforesaid, for sale or consumption in that part of Great Britain called Scotland, shall be removed or sent from the place of the manufacture without being accompanied with a certificate, subscribed at such place, at the time of their removal, by the licensed distiller or maker thereof, or his known and [172] authorised clerk or agent, expressing that the same were made by such licensed distiller, specifying the kind and quantity of such spirits, the number of casks or packages in which the same are contained, the person to whom, and the place to which the same are to be sent, and limiting a reasonable time within which the same are to be removed and received; and that all such spirits which shall be removed or conveyed by land or by water from one part in Scotland to any other part in Scotland without being accompanied with such certificate, or which shall be found not to correspond or agree therewith, in all or any of the respects aforesaid, or shall be found removing or to have been removed contrary thereto, or after the same hath been expired, shall, together with the casks, vessels, or other packages containing the said spirits, be forfeited, and shall and may be seized by any officer or officers of excise."

By sect. 23, it is enacted, That no permit or permits shall be requisite for the first removal of raw or unrectified spirits in Scotland from the place or places where the same were made or manufactured, to any other place or places whatsoever in Scotland, any thing in this, or in any other act or acts of parliament to the contrary notwithstanding.

* This act was in force for two years after 5th July 1786.

† This Act was continued, in part, by four subsequent acts of 29 Geo. 3. c. 45. § 7; 30 Geo. 3. c. 37. § 9; 31 Geo. 3. c. 1. § 9, and 33 Geo. 3. c. 61. § 35; and made perpetual by stat. 35 Geo. 3. c. 89. § 1.

By sect. 32, it is further enacted, That on the 6th day of July in the year 1788, an account shall be taken by the proper officer of excise of the stock of British spirits then on hand at the several and respective licensed distilleries in that part of Great Britain called Scotland, and a return thereof shall be made in writing by such officers to the commissioners of excise in Scotland : and if such spirits, or any part thereof, shall be intended to be sent to that part of Great Britain called England, notice thereof shall be immediately given to such officer or officers, by such distiller or distillers, specifying therein the quantity and kind of spirits so intended to be sent into that part of Great Britain called England : and the said spirits, and every part thereof, shall thereupon be forthwith secured and locked up in a warehouse or warehouses to be provided at the expence of such distiller or distillers, and approved of by the said commissioners of excise in Scotland : each of which warehouses shall be secured under three locks and three keys, one of such locks to be provided by such distiller, and the other two locks to be provided by the surveyor, supervisor, or officer of excise of the division or place where such spirits shall be locked up, at the expence of such distiller or distillers : whereof one key of each place shall be kept by such distiller or distillers, and another by such surveyor or supervisor, and the third by such officer of excise, until the same spirits, and every part thereof, shall be delivered out to be shipped for England as aforesaid : and the said spirits shall not be delivered or taken out therefrom for any other purpose or purposes whatever, except as is hereinafter provided and excepted, nor without a permit or permits from the proper officer or officers of excise, certifying that the said spirits were made or distilled before the [173] said 6th day of July in the year 1788, and had been taken account of and locked up as aforesaid.

By sect. 34, it is provided and enacted, That if, after taking such stock as aforesaid, any distiller or distillers to whom such stock shall belong, shall not take out a licence for distilling under this act, for and during the year from the 5th day of July 1788, then and in that case no such spirits, nor any part thereof, shall after the 6th day of July aforesaid be removed or sent out from the possession of the said distiller or distillers without a regular permit or permits from the proper officer or officers of excise, who is and are hereby authorized and required to grant the same according to the directions and regulations of the several statutes in that case made and provided, any thing in this act contained to the contrary in any ways notwithstanding.

By stat. 33 Geo. 3, cap. 61, sect. 17, it is enacted, That if any licensed distiller or rectifier, or his or her clerk or agent, shall sell, deliver, or cause to be delivered to any compounder, dealer, or retailer, any certificate or certificates by him or her subscribed, as in the said act is mentioned, for the purpose of conveying or protecting any spirits in their removal from the stock or possession of any such compounder, dealer, or retailer, or other person than such licensed distiller or rectifier : or if any person or persons whatever shall make use of any such certificate or certificates, except for the purpose of conveying or protecting raw or unrectified spirits in their first removal from the place of manufacture, or plain rectified spirits, unmixed and uncompounded, in their first removal from the place where they were actually rectified, every such distiller, rectifier, or other person so offending, shall, for every such offence, forfeit and lose the sum of £50 together with all such spirits, and the package thereof, which shall and may be seized by any officer or officers of excise.

By stat. 24 Geo. 3, cap. 41, sect. 6, it is enacted, That from and after the 10th September 1784, no person or persons who now doth, or at any time hereafter shall deal in brandy, not being a retailer, nor a rectifier, nor a distiller, shall presume to deal in brandy without first taking out a licence, for which licence he, she, or they shall immediately upon taking out thereof, pay down for the same the sum of £5 : if such licence shall be taken out in any part of Scotland, other than within the limits of the city of Edinburgh, then such licence shall be granted under the hands and seals of the several collectors and supervisors of excise within their respective collections and districts, and the several respective duties for the same shall be paid to the collector of excise within whose collection such licence shall be granted.

By sect. 7, (the clause upon which the 1st and 4th counts in the information are laid,) it is further enacted, That all and every person or persons who shall take out any such licence as aforesaid, is and are hereby required to take out a fresh licence ten days at least before the expiration of twelve calendar months [174] after taking

out the first licence, before he, she, or they shall presume to make or manufacture any of the commodities hereinbefore mentioned for sale, and in the same manner to renew every licence from year to year, paying down the like sum for each and every new or renewed licence, as is by this act required for the first licence, in manner and at the places and times hereinbefore mentioned : and that if any person or persons shall, after the said 10th September 1784, presume or offer to make or manufacture any of the commodities hereinbefore mentioned, without first taking out such licence, and renewing the same yearly in manner aforesaid, he, she, or they shall respectively forfeit and lose the sum of £30.

By stat. 29 Geo. 3. cap. 63. sect. 7. (the clause upon which the 2d and 5th counts in the information are laid,) it is enacted, That from and after the 10th day of October 1789, no person or persons who now doth or do, or at any time hereafter shall deal in brandy, not being a retailer or retailers, nor a rectifier or rectifiers, nor a distiller or distillers, duly licensed, shall presume by him, her, or themselves, or by any other person or persons whatsoever employed by him, her, or them, for his, her, or their benefit, either publicly or privately, to deal in brandy, without first taking out such a licence for that purpose, in manner in that behalf directed in and by the said act of 24 Geo. 3. cap. 41 : and if any person or persons who now doth or do, or at any time hereafter shall deal in brandy, not being a retailer or retailers, rectifier or rectifiers, or a distiller or distillers, shall presume by him, her, or themselves, or by any other persons whatsoever employed by him, her, or them, for his, her, or their benefit, either publicly or privately, to deal in brandy without first taking out a licence for that purpose in the manner in that behalf directed by the said act, he, she, or they shall for each and every such offence forfeit the sum of £100.

By stat. 30 Geo. 3. cap. 38. sect. 9. it is enacted, That no person shall retail any distilled spirituous liquors or strong waters after the expiration of his licence, unless he shall take out a fresh licence, ten days at least before the expiration of such former licence, and so in like manner renew every such licence from year to year, on penalty of £50.

By stat. 33 Geo. 3. cap. 69. sect. 2. it is enacted, That from and after the 10th October 1793 all and every person or persons who shall retail any spirits made or distilled from malt, corn, grain, barley, beer, big, or other British materials commonly called and known by the name of aquavitæ in Scotland, shall take out an excise licence authorizing such person or persons to retail such spirits, which licences shall be severally granted by the respective persons, and in the manner required and directed by the act 30 Geo. 3. cap. 38. with respect to licences granted to retail dealers under the said act : and the persons to whom such licences shall be granted shall be subject and liable to all the rules, regulations, restrictions and provisions, penalties and for-
[175]-feitures contained and provided in and by the said act relative to such licences, except where the same shall be expressly altered by this act, and shall be granted to the persons who shall apply for the same, on the person or persons applying for the same first paying for such licence the several sums of money following : that is to say, for every licence which shall be granted to authorize any person or persons to retail such spirits within the limits of any royal burgh, burgh of barony or regality, in any part of Scotland, or in any place in any other part of Scotland other than in the Highlands of Scotland, there shall be charged the yearly sum of £2.

By sect. 8. it is further enacted, That every person or persons in Scotland who shall sell or deal in by wholesale any spirits made or distilled from melasses, sugar, or foreign materials, or any compound spirits, or distilled spirituous liquors, or strong waters, other than plain acquavitæ distilled from malt, corn, grain, barley, beer, big, or other British materials, not being a licensed distiller or distillers, rectifier or rectifiers, compounder or compounders, or retailer or retailers of spirits, shall be subject and liable to take out and pay for a licence for that purpose in the manner directed and required in the case of brandy dealers, or persons selling brandy or other spirituous liquors by the act 24 Geo. 3. cap. 41. and shall also be subject and liable to the same duty, and to all the rules, regulations, restrictions, provisions, penalties, and forfeitures contained and provided in and by the said act relative to brandy dealers, or persons selling brandy or other spirituous liquors.

By sect. 9. (the clause upon which the 3d and 6th counts in the information are laid,) it is further enacted, That every person or persons in Scotland who shall by

wholesale sell or deal in spirits made or distilled from malt, corn, grain, barley, beer, big, or other British materials, commonly called and known by the name of aquavitæ, not being a licensed distiller or distillers, rectifier or rectifiers, compounder or compounders, retailer or retailers of spirits, shall be subject and liable to take out a licence for that purpose, and to pay for the same the sum of £3 in the manner directed and required by and under such rules, regulations, restrictions, provisions, penalties, and forfeitures as are contained in the said act of 24 Geo. 3, cap. 41, relative to brandy dealers or persons selling brandy or other spirituous liquors.

By stat. 35 Geo. 3, cap. 59, sect. 7, (the clause upon which the 7th count in the information is laid,) it is enacted, That if any person or persons in Scotland shall retail any spirits made or distilled from malt, corn, grain, barley, beer, big, or other British materials, and which spirits are commonly called and known by the name of aquavitæ in Scotland, without first taking out an excise licence authorizing such person or persons to retail such spirits in the manner required and directed by the act 33 Geo. 3, cap. 69, and renewing the same yearly, so long as such person or persons shall continue to retail such spirits, he, [176] she, or they shall for every such offence forfeit and lose the sum of £50.

By stat. 11 Geo. 1, cap. 30, sect. 3, (the clause upon which the last count in the information is laid,) it is enacted, That no brandy, arrack, rum, spirits, or strong waters, shall be sold, uttered, or exposed to sale, either by wholesale or retail, but when the same shall be in some or one of the warehouses, storehouses, rooms, shops, cellars, vaults, or other places entered or to be entered in pursuance of the act 6 Geo. 1, cap. 21, on pain of forfeiting all such arrack, rum, spirits, or strong waters, which shall be sold, uttered, or exposed to sale contrary to the true intent and meaning of this act, together with the casks, bottles, or other vessels containing the same, over and above the penalty of forty shillings per gallon imposed for the said offence by the said act.

The defendant in error in his printed case suggested, that the new regulation adopted by the statute 26 Geo. 3, cap. 64, imposing the duty on the contents of the still, might in some measure be considered as a compact between the legislature and the Scotch distiller, by which, by taking out the licence and paying per advance a certain sum for each gallon of the contents of the still, he was to be freed from all other duties, and expressly allowed by the acts imposing the licence duty to send out his spirits upon his own certificate that the spirits were made by him under his licence, without the necessity of obtaining the permits which were required by the former laws.

The defendant in error made an entry in writing, as a distiller from corn or grain, at the proper office of excise, on the 27th day of October 1796, of his distillery and certain utensils therein, in terms of the statute. On the 18th November 1796 he granted a bond to the crown, with one sufficient surety, in the penal sum of £100, for the regular payment of duty on two stills of the capacity or contents of 99 gallons, to be licensed to him for distilling spirits at Gorbals of Glasgow for one year, from the 10th day of October 1796, to the 10th day of October 1797; and he also took out a licence as such distiller from the proper officer, for working these two stills during the time aforesaid.

The defendant, as such entered and licensed distiller, made due and regular payment in advance of the licence duty by law imposed on the capacity and contents of the still so licensed till the 10th day of June 1797, when, having resolved to give up business, he gave a notice in writing as the law directs, to the proper officer of excise of the division, that the said stills, with the utensils thereunto belonging, were sold and disposed of to one William Moffat, farmer at Milton near Glasgow, who made oath on the same day, before a justice of the peace, of his actual property therein; and did then also intimate to William Corbet, collector of excise, that he the said William Moffat did not intend to work the said stills; whereby the duty that would have become due for the unexpired term of the licence aforesaid, [177] granted to the defendant as such distiller, did cease and determine, and was no longer paid.

At the time the defendant thus sold off his stills, he had on hand 11,500 gallons of strong or unreduced spirits made under his licence; and as the whole duties for the stills in which these spirits were made had been duly paid, he conceived that he had a right to send them out, under his own certificate, to such persons as he

might sell them to, in the same way he might have done had his licence been still in force.

On the 16th June 1797 the proper supervisor and officer of excise took an account of the quantity of spirits remaining in the defendant's custody. This the defendant conceived that the officer had no right to do, distillers, under the then existing law, not being liable to survey: but as his designs were perfectly fair and honest, and he had no intention to do anything to injure the revenue, and as the survey intended to impose no additional duty on the spirits on hand, he not only submitted to the survey, but assisted the officer in making it; saving, however, his right to controvert the power of the officer to take an account of his spirits on hand, all of which had been made and distilled by him while he was a licensed distiller, and no part thereof had been purchased or received by him from any dealer or other distiller.

At the time of taking such account of his spirits, the defendant was acquainted by the said supervisor and officer, that his licence as a distiller having been given up by him, he now came, in their opinion, to be a dealer in spirits, and that he must make entry and take out a licence as such dealer, and send out no spirits but under excise permits.

As the law under which the defendant had distilled these spirits gave him a right to send them out by his own certificate, as by taking out his licence, and paying the licence duty for his still, he had paid the full duty for the whole spirits he had on hand, which had been distilled under said licence, as he could not take out a dealer's licence without paying for it, which would in effect have been paying an additional duty for spirits, the full duty of which had been already paid, and as he could not conceive that selling spirits distilled by himself could make him a dealer in spirits, though his licence was expired, more than while it was in force, (a dealer in spirits, in the common understanding of mankind, as well as in the eye of the law, being a person who buys and sells spirits,) he refused to take out a dealer's licence; but being willing to comply with anything required by the officer, whether warranted by law or not, provided it did not affect his patrimonial interest, he signified his willingness to take out permits to accompany such parts of his spirits as he might sell from time to time; he accordingly applied for permits to the proper officer, but they were refused on this pretence, that said officer had received no orders to that effect from his superiors, and that the defendant was not an entered or licensed dealer.

[178] In consequence of this refusal the defendant took a protest (in the schedule, hereunto annexed) against the said officer and other officers of excise for damages, and insisted that he should be at liberty to send away his said spirits under his own certificate, as maker or distiller thereof as formerly.

Accordingly the defendant did at different times, between the said 10th day of June and 10th day of October 1797, sell and send out several considerable quantities of his said spirits, accompanied with his own certificates of their having been made and manufactured at his distillery aforesaid, to different persons, dealers in and retailers of British spirits, without any excise permit; which parcels of spirits were taken, without objection, into the stocks of such dealers and retailers by the proper officers of excise, to whom the defendant's certificates accompanying the same were delivered.

In this way the defendant continued to send out his spirits till the 10th day of October 1797, at which time his former licence expired. The defendant did not renew his licence, and there remained of his spirits unsold, on the said 10th day of October 1797, 6600 gallons, which were still kept in the entered distillery where they had been distilled and made.

Soon after the said 10th day of October the defendant was required by the collector of excise to take out a licence as a spirit dealer, and as such to apply for excise permits to protect his spirits in their removal. A similar requisition was made by the supervisor of the district; but the defendant, considering himself not bound by law so to do, refused to comply, and continued to send out different parcels of the said spirits, accompanied by his own certificate, bearing them to have been made and distilled by him at his said distillery. The consequence was, that a quantity of the said spirits were, on their first removal from the said distillery, seized by certain officers of excise at Glasgow, by order of the collector, for not being accompanied with excise permits, and were returned into the exchequer for condemnation. The defendant claimed the spirits, and also brought an action of trespass against the officers.

In consequence of the spirits being returned into exchequer for condemnation, an information for penalties was filed on the 24th of November in Martinmas term 1797, by his majesty's advocate general, plaintiff in error, against the defendant, setting forth,

That one William Menzies, spirit dealer in Glasgow, for the whole time between the 10th day of June and the 10th day of October last past, was a dealer in brandy, (to wit.) at Edinburgh in the county of Edinburgh: and that he the said William Menzies, being such dealer in brandy, and not being a retailer, nor a rectifier, nor a distiller, did, within the time aforesaid, at Edinburgh aforesaid, in the county aforesaid, presume to deal in brandy without first taking out a licence for [179] that purpose, in manner mentioned by the statute (24 Geo. 3. st. 2. c. 41. § 7.) in that case made and provided, contrary to the form of the said statute, whereby and by force of the said statute he the said William Menzies, for such his offence, hath forfeited and lost the sum of £30 of lawful money of Great Britain:

That he the said William Menzies, between the said 10th day of June and the 10th day of October, last past, did deal in brandy, (to wit.) at Edinburgh aforesaid, in the county aforesaid, (he the said William Menzies not being a retailer, rectifier, or dealer,) without taking out such licence as in and by a certain act of Parliament, made in the 24th year of the reign of his present Majesty, (24 Geo. 3. c. 63. § 7.) intituled 'An act for laying certain duties upon licences to be taken out by makers of and dealers in excisable commodities therein mentioned,' is particularly directed contrary to the form of the said statute, whereby and by force of the said statute he the said William Menzies, for such his offence, hath forfeited and lost another sum of £100 of money aforesaid:

That he the said William Menzies, between the said 10th day of June and the said 10th day of October last past, did by wholesale sell or deal in certain spirits made or distilled from malt, corn, grain, barley, beer, big, or other British materials commonly called or known by the name of aquavitæ, in this part of the united kingdom, without first taking out a licence for that purpose, he the said William Menzies, not being a licensed distiller, rectifier, or compounder, or retailer of spirits, contrary to the form of the statute (33 Geo. 3. c. 69. § 9.) in that case made and provided, whereby, and by force of the said statute, he the said William Menzies, for such his offence, hath forfeited and lost another sum of £30 of money aforesaid:

That he the said William Menzies, between the said 10th day of October last past and the day of the exhibition of the information, was a dealer in brandy as aforesaid, (to wit.) at Edinburgh aforesaid, in the county aforesaid: and that he the said William Menzies being such dealer in brandy, and not being a retailer, nor a rectifier, nor a distiller, did, within the time aforesaid, at Edinburgh aforesaid, in the county aforesaid, presume to deal in brandy without first taking out a licence for that purpose in manner mentioned by the statute (24 Geo. 3. st. 2. c. 41. § 7.) in that case made and provided, contrary to the form of the said statute, whereby, and by force of the said statute, he the said William Menzies, for such his offence, hath forfeited and lost another sum of £30 of money aforesaid:

That he the said William Menzies, between the said 10th day of October last past, and the day of the exhibition of this information, did deal in brandy (he the said William Menzies not being a retailer, rectifier, or distiller) without taking out such licence as in and by a certain act of parliament, made in the 24th year of the reign of his present [180] Majesty, (29. Geo. 3. c. 63. § 7.) intituled 'An act for laying certain duties upon licences to be taken out by the makers of and dealers in excisable commodities therein mentioned,' is directed, contrary to the form of the statute in that case made and provided, whereby, and by force of the said statute, he the said William Menzies, for such his offence, hath forfeited and lost another sum of £100 of money aforesaid:

That he the said William Menzies, between the said 10th day of October last past and the day of the exhibition of this information, did by wholesale sell or deal in certain spirits made or distilled from malt, corn, grain, barley, beer, big, or other British materials commonly called and known by the name of aquavitæ, in this part of the united kingdom, without first taking out a licence for that purpose, he the said William Menzies not being a licensed distiller, rectifier, or compounder of spirits, contrary to the form of the statute (33 Geo. 3. c. 69. § 9.) in that

" case made and provided, whereby, and by force of the said statute, he the said William Menzies, for such his offence, hath forfeited and lost another sum of £30 of money aforesaid :

" That he the said William Menzies, between the said 10th day of June and the day of the exhibition of this information, did, by retail sell or deal in certain spirits made or distilled from malt, corn, grain, barley, beer, bigg, or other British materials commonly called and known by the name of aquavitæ, in this part of the united kingdom, without first taking out an excise licence, authorising him the said William Menzies to retail such spirits in the manner required and directed by an act, made in the 33d year of the reign of his present majesty, (35 Geo. 3. c. 59. § 7.) intituled 'An act for repealing the duties on coal, culm, and cinders, brought or carried coastwise in Scotland, and for granting other duties in lieu thereof,' is particularly directed, contrary to the form of the statute in that case lately made and provided, whereby, and by force of the statute he the said William Menzies, for such his offence, hath forfeited and lost another sum of £50 of money aforesaid :

" That between the 10th day of October in the year of our Lord 1796 and the day of the exhibition of this information, at Edinburgh aforesaid, in the county aforesaid, he the said William Menzies was a distiller or maker of brandy, arrack, rum, spirits, or strong waters, for sale ; and that he the said William Menzies, being such distiller or maker as aforesaid, did, within the time aforesaid, at Edinburgh aforesaid, in the county aforesaid, make use of a certain room or place for the keeping of brandy, arrack, rum, spirits, or strong waters, for sale, without making or having made at the office of excise within the compass or limits whereof such room or place was situated, a true and particular entry in writing of the said room or place so made use of by him, as he ought to have done according to the form of the statute (6 Geo. 1. c. 21. § 12.) in that case [181] made and provided, but neglected so to do contrary to the form of the said statute, by means whereof he the said William Menzies hath forfeited and lost another sum of £20 of money aforesaid :

" That between the said 10th day of June last past and the said day of the exhibition of this information, at Edinburgh aforesaid, in the county aforesaid, he the said William Menzies was a seller of and dealer in brandy, arrack, rum, spirits, or strong waters ; and that he the said William Menzies, being such seller and dealer as aforesaid, did, within the time aforesaid, at Edinburgh aforesaid, in the county aforesaid, make use of a certain room or place for the keeping of brandy, arrack, rum, spirits, or strong waters, for sale, without making or having made at the office of excise within the compass or limits whereof such room or place was situated, a true and particular entry, in writing, of the said room or place so made use of by him as aforesaid, as he ought to have done according to the form of the statute (6 Geo. 1. c. 21. § 12.) in that case made and provided, but neglected so to do contrary to the form of the said statute, by means whereof he the said William Menzies for such his offence hath forfeited and lost another sum of £20 of money aforesaid :

" That between the said 10th day of June last past and the day of the exhibition of this information, at Edinburgh aforesaid, in the county aforesaid, he the said William Menzies was a seller of and dealer in brandy, arrack, rum, spirits, or strong waters ; and that he the said William Menzies, being such seller of and dealer as aforesaid, did, within the time aforesaid, at Edinburgh aforesaid, in the county aforesaid, sell, utter, or expose to sale, by wholesale, a certain quantity, to wit, 800 gallons, of spirits or strong waters in a certain warehouse, storehouse, room, shop, cellar, vault, or other place, of which a particular entry in writing had not been made at the office of excise within the compass or limits whereof such warehouse, storehouse, room, shop, cellar, vault, or other place was situate, contrary to the form of the statute (11 Geo. 1. c. 30. § 3.) in that case made and provided, whereby, and by force of the said statute, he the said William Menzies hath forfeited and lost for every gallon of such spirits or strong waters so sold, uttered, or exposed to sale, as aforesaid, the sum of 40 shillings, amounting in the whole to the sum of £1600 of money aforesaid : 'wherefore his Majesty's said advocate-general prays the consideration of the Court in the premises, and that he the said William Menzies may, for his offences aforesaid, forfeit and lose the aforesaid several sums

" of £30, £100, £30, £30, £100, £30, £50, £20, £20, £1600, according to the form and direction of the aforesaid statutes : and that due process of law may be awarded against him the said William Menzies to appear here in court, to answer concerning the premises

[182] To the above information the defendant William Menzies, for plea, says, " That he is nowise guilty of any thing specified in the said information by him above supposed to have been done contrary to the form of the aforesaid statutes, in manner and form as by the information aforesaid is above supposed : and concerning this he puts himself upon his country : and Robert Dundas, Esquire, his Majesty's advocate-general, who prosecutes for his said Majesty, prays likewise for his said Majesty, that it may be inquired of by the country."

Upon trial of the above cause the following special verdict was found :

" The jury find for the defendant upon the first, second, fourth, fifth, and seventh counts in the information ; and as to the third, sixth, eighth, ninth, and tenth counts in the information, the jurors upon their oath say,

" That the defendant made an entry in writing, as a distiller from corn or grain, at the proper office of excise, on the 27th day of October 1796, of the following places and utensils, which were therein declared to be all the places and utensils to be used by him, till a new entry was made by him according to law : (to wit,) the distillery, one copper, one mash tun, four coolers, seven tuns for working, and one for holding wash : two stills and fleck stand : That the defendant, with one sufficient surety, did on the 18th day of November 1796, grant bond to the Crown in the penal sum of £100 for the regular payment of duty on two stills, of the capacity or content of ninety-nine gallons, to be licensed to him for distilling spirits at Gorbals of Glasgow, for one year, from the 10th day of October 1796, to the 10th day of October 1797 : and did take out a licence as such distiller from the proper officer, for working these two stills during the term aforesaid : That the defendant, as such entered and licensed distiller, did make due and regular payment in advance of the licence duty by law imposed on the capacity or content of the stills so licensed to and used by him until the 19th day of June 1797 : when notice in writing was given by the defendant to Thomas March, the proper officer of excise of the division, that the said stills, with the utensils thereunto belonging, were sold and disposed of to one William Moffat, farmer at Milton, near Glasgow, who made oath on the same day before a justice of the peace of his actual property therein : and did then also intimate in writing to William Corbet, collector of excise, that he the said William Moffat did not intend to work the said stills, whereby the duty which would have become due for the unexpired term of the licence aforesaid granted to the defendant as such distiller did cease and determine and was no longer paid : And the jury further say, that at the time when the defendant thus sold off his stills, and ceased to distil and pay licence [183] duty, he had on hand a large quantity, (to wit,) about eleven thousand five hundred gallons of strong or un-reduced British spirits, or aquavite, made or distilled, under his licence aforesaid, from malt, corn, or grain : which said spirits were then lying and kept in a cellar or place belonging to the defendant within his said distillery : That on the 16th day of June 1797 the proper supervisor and officer of excise did take an account of the quantity of the said spirits so remaining in the custody of the defendant : in the doing of which the defendant not only concurred, but assisted, saving, however, his right to contravert the power of the officer to take an account of his spirits on hand, all of which had been made and distilled by him while he was a licensed distiller, and no part thereof had been purchased or received by him from any dealer or other distiller : That at the time of the taking of such account of his spirits, the defendant was acquainted by the said supervisor and officer, that his licence as a distiller having been given up by him, he now came, in their opinion, to be a dealer in spirits, and that he must make entry and take out a licence as such dealer, and send out no spirits but under excise permits : with which requisitions the defendant refused to comply, except that on the 19th day of June 1797, he did apply at the permit office in Glasgow, for a permit to accompany part of the spirits aforesaid in their removal : but which permit, John Hall the officer then attending, declined or refused to grant, having received no orders for that purpose from his superiors, and the defendant not being an entered and licensed dealer : That thereupon the defendant did take a protest against

" the said John Hall and other officers of excise for damages, and insisted that he
 " should be at liberty to send away his spirits under his own certificate as a distiller
 " as formerly : That accordingly the defendant did at different times, between the said
 " 10th day of June and the 10th day of October 1797, sell and send out several con-
 " siderable quantities of his own spirits, accompanied with his own certificates of
 " their having been made and manufactured at his distillery aforesaid, to different
 " persons, dealers in and retailers of British spirits, without any excise permit, which
 " said parcels of spirits were taken, without objection, into the stocks of such dealers
 " and retailers by the proper officers of excise, to whom the defendant's certificates,
 " accompanying the same, were delivered : That at or after the 10th day of October
 " 1797, the defendant did not renew his licence as a distiller, and continued to have
 " on hand a large quantity, (to wit,) about 6600 gallons of strong or unreduced British
 " spirits or aquavitæ, made or distilled by him at his said distillery, under his licence
 " aforesaid, from malt, corn, or grain, which said spirits then remained kept in the
 " cellar or place within the defendant's entered distillery hereinbefore mentioned :
 " That soon after the said 10th day of October 1797, William Corbet, collector [184]
 " of excise in Glasgow, personally and repeatedly required the defendant to take out
 " a licence as a spirit dealer, and as such to apply for excise permits to protect his
 " spirits in their removal ; and Angus M'Donald, the supervisor of the district, enforced
 " that demand on the 25th day of October aforesaid, but the defendant thought
 " himself entitled to persist in his refusal to comply therewith : That after the said
 " 10th day of October 1797, the defendant continued to sell and send out different
 " parcels of his aforesaid spirits, accompanied with his own certificates of their having
 " been made and manufactured by him at his distillery aforesaid ; and that on the
 " first removal from the said place where they were manufactured, the said spirits,
 " contained in eight casks, were seized by Angus M'Donald, supervisor, and Archibald
 " Rowan and Thomas March, officers of excise in Glasgow, by the directions of the
 " collector, for not being accompanied with excise permits, and have been returned
 " for condemnation into this honourable court, where they have been claimed by
 " the defendant, who has also brought his action of trespass against the officers for
 " making these seizures : That against these proceedings protests were taken on the
 " 31st day of October 1797, and a petition was presented to the commissioners of excise
 " by the defendant ; and the jurors further say, that the licence aforesaid granted
 " to the defendant as a distiller, for the year from the 10th day of October 1796 to
 " the 10th day of October 1797 exclusive, expired at twelve o'clock of the night of
 " the 9th day of October 1797, and was not renewed : That no new entry was made
 " by the defendant of the warehouses, cellars, or places made use of by him for keeping
 " the spirits so made and manufactured by him as aforesaid, within his said distillery,
 " and which remained on his hand as aforesaid at the 10th day of June 1797, and at
 " the expiration of the licence so granted to him as a distiller : That the defendant
 " did not take out any licence as a dealer in British spirits or aquavitæ at any time
 " between the 10th day of June and the 24th day of November 1797, and that during
 " the said time he did not buy or purchase British spirits from any dealer or distiller,
 " and did not sell any spirits except what had been distilled by him while he was a
 " licensed distiller as aforesaid : And the jurors further say, that although no new
 " entry was made by the defendant as a distiller in spirits of the warehouses, cellars,
 " or places made use of by him for keeping the spirits so made by him as aforesaid,
 " after the expiration of his said licence as a distiller, neither the collector nor super-
 " visor, nor any other officer of excise, did seize the said spirits as being in an unentered
 " place, although they well knew that a considerable quantity of spirits was lodged
 " there ; but on the contrary, after the defendant had been interrupted in the sale
 " and removal of his spirits by the seizures aforesaid, he did tender the whole of his
 " spirits and casks containing the same, then [185] remaining on hand in the
 " aforesaid cellar, with two keys thereof, to William Corbet aforesaid, collector of
 " excise, under protest ; and that the said William Corbet did, on the next day after
 " such tender, offer back such spirits and keys under form of instrument, but the
 " defendant refused to accept of the said keys, upon which they were deposited with
 " the sheriff substitute of the county of Lanark as judge ordinary of the bounds.

" And if upon the whole matters aforesaid the Court shall be of opinion, that,
 " under the statutes in that case made and provided, the defendant was not subject

" or liable to take out an excise licence as a seller of or dealer by wholesale in aquavitæ, between the 10th day of June and the 10th day of October 1797, then the jury upon their oaths say, that the said defendant is not guilty of the offence in the third count in the information mentioned; but if the Court shall be of opinion, that, under the statutes in that case made and provided, the defendant was subjected or liable to take out an excise licence as a seller of or dealer by wholesale in aquavitæ, between the 10th day of June and the 10th day of October 1797, then the jury on their oaths say, that the defendant is guilty of the offence in the said third count in the information mentioned, contrary to the term of the said statutes, in manner and form as by the said information is charged against him the said defendant. And it upon the whole matter aforesaid the Court shall be of opinion, that the defendant was not subject or liable by law to take out an excise licence as a seller or dealer by wholesale in aquavitæ, between the 10th day of October 1797 and the 24th day of November then next following, the day of the exhibition of the information, then the jury upon their oaths say, that the defendant is not guilty of the offence in the sixth count of the said information mentioned; but if the Court shall be of opinion that he was so subject or liable, then the jury on their oaths say, that he is guilty of the offence in the said sixth count in the information mentioned, in manner and form as by the said count of the information is charged against him. And as to the eighth count of the said information the jury on their oaths say, that if upon the whole matter aforesaid the Court shall be of opinion, that the said defendant was not within the time in the said eighth count mentioned, to wit, between the 10th day of October 1796 and the day of the exhibition of the information, subject or liable by law to make entry of the room or place used by him for the keeping of his spirits, then the jury upon their oaths say, that he is not guilty of the offence in the said eighth count mentioned; but if the Court shall be of opinion that he was so subject or liable, then the jury say, that he is guilty of the offence in the said eighth count mentioned. And as to the ninth count of the said information, if the Court shall be of opinion that the said defendant was [186] not, within the time in the said ninth count mentioned, subject or liable by law as a seller of or dealer in spirits, to make an entry of the room or place used by him for keeping his spirits, then the jury on their oaths say, that he is not guilty of the offence in the ninth count of the said information mentioned; but if the Court shall be of opinion that he was so subject or liable, then the jury on their oaths say, that he is guilty of the offence in the said ninth count of the information mentioned. And as to the tenth count of the said information, if the Court shall be of opinion that the defendant, within the time in the said tenth count mentioned, was not by law subject or liable to make an entry of the warehouse, storehouse, room, shop, cellar, vault, or other place in which he sold the spirits in the said count mentioned, then the jury on their oaths say, that he the said defendant is not guilty of the offence in the said tenth count mentioned; but if the Court shall be of opinion that he was by law so subject or liable, then the jury say upon their oaths, that he is guilty of the offence in the said tenth count mentioned.

(Signed) " R. DUNDAS. JAS. MONTGOMERY."

This special verdict was twice argued before the barons of exchequer in Scotland, viz. on the 19th December 1798, and afterwards in the ensuing month: On the part of the plaintiff it was pleaded, that by the act 6 Geo. I. cap. 21. sect. 18. it is provided, " That all and every person or persons whatsoever, who shall have in his, her, or their custody any brandy, arrack, rum, spirits, or strong waters, exceeding the quantity of 63 gallons, shall be deemed and taken to be a seller of and dealer in brandy, etc. and subject to the survey of his Majesty's officers of excise." That, by the same act, all dealers in spirits, as well as makers thereof, are required to make entry of the places used by them for keeping their spirits: and that by the act 33d of his present Majesty, cap. 69. sect. 9. it was enacted, " That from and after the 10th day of October 1793, every person or persons in Scotland who shall, by wholesale, sell or deal in spirits made and distilled from malt, corn, grain, barley, beer, bigg, or other British materials, commonly called and known by the name of aquavitæ, in that part of the united kingdom, not being a licensed distiller or distillers, rectifier or rectifiers, compounder or compounders, retailer or retailers of spirits, shall be subject and liable to take out a licence for that purpose, and to pay for the same the yearly sum of £3."

The plaintiff admitted, that while the defendant continued to carry on his business as a distiller, and to keep and sell his spirits in that capacity, the entry made of his distillery, utensils, etc. rendered it unnecessary for him to make entry of the same places in the character of a dealer : that, during the same period, being a licensed distiller, he was entitled to keep and sell the spirits distilled by himself without taking out a licence as a dealer, and [187] to send out his spirits by his own certificate, without the necessity of a permit, by virtue of the act 28th Geo. 3. cap. 46. sect. 22 and 23. But the plaintiff maintained that, from the moment the defendant sold his stills to Moffat, and transferred to him the remaining period of his licence, and still more after the 10th day of October 1797, when the licence expired, and was not renewed, the defendant came into the very same situation as if he had never been a distiller, had no longer any right to send out his spirits by his own certificate, he being no longer a licensed distiller or maker of spirits : and that having more than 63 gallons of spirits in his custody, and selling the same, he was to all intents and purposes a dealer in spirits, and consequently bound to enter the places in which he kept such spirits as a dealer, to take out a dealer's licence, and to send out his spirits accompanied with permits from the proper officer.

On the part of the defendant in error it was pleaded that, although the act 6 Geo. 1. cap. 21. sect. 12. enacts, That all persons " who, after the 1st August 1720, shall " become distillers, makers, or sellers of or dealers in any such brandy, arrack, rum, " spirits, or strong waters, shall, before he, she, or they take any such brandy, arrack, " rum, spirits, or strong waters into his or their custody or possession, make the like " particular entry, in writing, of the several and respective warehouses, storehouses, " rooms, shops, cellars, vaults, and other places intended by him, her, or them re- " spectively to be made use of for the keeping of brandy, arrack, rum, spirits, or any " strong waters, either British or foreign, on pain of forfeiting £20 for every such " warehouse," etc.; yet it is evident that this enactment applies solely to persons, whether distillers or others, who should buy and sell spirits, and not to private persons, or to persons manufacturing their own spirits, and selling them, whose places for keeping such spirits were entered as distilleries in terms of the different laws imposing the duty on spirits distilled : accordingly, the clause in the act 6 Geo. 1. which immediately follows the words above quoted, proceeds to enact, That " no brandy, either " British or foreign, shall be brought into such warehouses, etc. without first giving " notice thereof ; " a provision in no shape applicable to spirits in the custody of the distiller or maker thereof, which cannot be said to be brought in but only to such spirits as a person shall purchase for sale.

It is farther clear from the 18th sect. of the same act, which enacts, " That every " person or persons whatsoever who shall have in his, her, or their custody any brandy, " etc. exceeding the quantity of 63 gallons, shall be deemed and taken to be a seller " of and dealer in brandy, etc. and subject to the survey of officers of excise." But persons having such quantity of spirits, although made subject to survey, so as to prevent or detect private sales, are not required to make an entry of the places made use of for keeping such spirits, or to take out a dealer's licence to enable the possessor to consume the same.

[188] Besides, this provision, taken literally, would apply even to private persons having above 63 gallons of spirits in their custody, for their own consumption, though such as neither buying nor selling could not be meant by the legislature to be held as dealers, or liable to make entry of the places in which they kept such spirits, so that it is evident that the whole provisions in the act were intended solely for persons who bought and sold spirits, the only individuals to whom, in proper language, the word " dealer " could be applied, and therefore not to persons selling spirits distilled by themselves.

This is still clearer from the act 24 Geo. 3. cap. 41. sect. 7. obliging dealers to take out licences, and the act 33d of his present Majesty, cap. 69. sect. 9. which imposes a duty of £3 sterling annually on every person taking out such licence, both of which acts expressly except distillers and rectifiers duly licensed. The enactment of the last of these statutes, which repeats the former, is in these words : " From and after 10th " October 1793, every person or persons in Scotland who shall, by wholesale, sell or deal " in spirits made and distilled from malt, corn, grain, barley, beer, bigg, or other " British materials, commonly called and known by the name of aquavitæ, in that

"part of the united kingdom, not being a licensed distiller or distillers, rectifier or rectifiers, compounder or compounders, retailer or retailers of spirits, shall be subject and liable to take out a licence for that purpose, and to pay for the same the yearly sum of £3."

From this view of the statutes it is clear, 1st. That the obligation to make entry of the places for keeping spirits, and of taking out a licence in order to be entitled to sell them, applied solely to persons dealing in spirits by buying and selling, and not to distillers and makers of spirits selling spirits made by themselves, whether before ceasing or after they have ceased to be licensed distillers.

When the duties on spirits manufactured in Scotland came, in the year 1788, to be altered, and instead of being payable upon the wash, low wines, or spirits, were imposed, by way of licence, on the still itself, payable annually, and calculated upon the supposed quantity that might be distilled in the course of the year, the necessity of keeping an account of the distiller's stock, or of obliging him to take permits from the officer for the quantities he might sell or send out, necessarily ceased : and accordingly, by act 28 Geo. 3. cap. 46. sect. 22. it is enacted, "That no raw or unrectified spirits, made from any of the materials aforesaid, for sale or consumption in that part of Great Britain called Scotland, shall be removed or sent from the place of the manufacture without being accompanied by a certificate, subscribed at such place at the time of their removal, by the licensed distiller or maker thereof, or his known and authorised clerk or agent, expressing that the same were made by such licensed distiller, specifying the kind and quantity of such [189] spirits, the number of casks or packages in which the same are contained, the person to whom and the place to which the same are to be sent, and limiting a reasonable time within which the same are to be removed and received : and that all such spirits which shall be removed or conveyed by land or by water, from one part in Scotland to any other part in Scotland, without being accompanied with such certificate, or which shall be found not to correspond or agree therewith in all or any of the respects aforesaid, or shall be found removing or to have been removed contrary thereto, or after the same hath been expired, shall, together with the casks, vessels, or other packages containing the said spirits, be forfeited, and shall and may be seized by any officer or officers of excise."

And by section 23d of the same statute it is enacted, "That no permit or permits shall be requisite for the first removal of raw or unrectified spirits in that part of Great Britain called Scotland, from the place or places where the same were made or manufactured, to any other place or places whatsoever in that part of Great Britain called Scotland, any thing in this or any other act or acts of parliament to the contrary notwithstanding."

When this act was passed, it is impossible that it should not have been foreseen that, as the distillers were only to take their licences for one year, and were to enjoy the full benefit of them, and even to reimburse themselves of the heavy duties they were to pay for obtaining the licence, they would necessarily continue distilling to the last hour of the time for which the licence was in force, so it must happen that, whether they should stop distilling at the end of the year, or at any earlier period, which, by the acts, they are at liberty to do, and which the defendant did in the present case, they must necessarily have on hand considerable quantities of the spirits which they had distilled under the licence : and material justice certainly dictated that, after having paid the full duty for all such spirits, they should be entitled to dispose of them without incurring any additional duty or burden whatever ; but this could not be the case if, the moment the licence for distilling ceased, they were to be held, with regard to the spirits on hand, as in the situation of dealers, and obliged in that character to take out and pay for a licence, which would subject to an additional tax the very spirits for which the full duty had been already paid. If, therefore, as certainly must be the case, the legislature is to be presumed to have proceeded on just and fair principles in framing the act, it is not possible to suppose that they could have it in their power to confine the right given to the distiller of selling his spirits without taking out a dealer's licence, and of sending them to the purchasers accompanied with his own certificate, to the period for which his licence was to be current, as such a proceeding would have been totally inconsistent with the principles upon which the licence duty had been imposed, which undoubtedly was, that on the distiller's

[190] paying a certain duty or composition upon each gallon of his still for a certain period, he was to be entitled to distil all the spirits that could be made by means of that still during the period of the licence, without being liable to any farther duty ; whereas if the moment his licence ceased he was to be obliged to take out and pay for a dealer's licence, a farther duty on the spirits would thus be indirectly imposed upon him.

Such being the evident intention of the legislature, the defendant contended, that the spirit of the act of parliament clearly supported his plea ; and that it would require very strong words indeed in the enacting clauses to induce the Court to give a construction to the act so contrary to its spirit, as well as to material justice, and the fairness and liberality which must be imputed to the legislature ; that there was nothing in the words of the act that could give rise even to a doubt of the defendant's construction of it being the just one. The words of the clauses which authorise the distiller to send out his spirits without a permit, and accompanied only with his own certificate, do not restrict his privileges to the period for which his licences subsist, or place him in the predicament of a dealer as to the spirits distilled under his licence from the time the licence shall expire. The privilege is evidently given, not with respect to the person but to the thing. By the expiration of the licence the right to distil was necessarily to cease ; but the power of selling what had been distilled was necessarily to continue till the spirits made under the licence were sold ; and consequently the words, " that no permit or permits shall be necessary for the first removal " of raw or unrectified spirits, in that part of Great Britain called Scotland, from the " place or places where the same were made or manufactured, to any other place or " places whatsoever in that part of Great Britain called Scotland, any thing in this " or any other act or acts of parliament to the contrary notwithstanding," must clearly apply to the first removal of all the spirits made under the licence, at whatever time such removal may be made, whether before or after expiry of the licence. This is the grammatical and natural construction of the words ; and had it been possible for the legislature to mean that a dealer's licence, and consequently permits with spirits removed, should become necessary the moment the licences expired, they would either have restricted the general words to the period of the duration of the licences, or have expressly declared that permits should be necessary for the first removal of the spirits after the licences expired. Indeed such a provision would, in that view, have been absolutely necessary. The preceding clause requires, that no spirits shall be removed or sent " from the place of manufacture without being " accompanied by a certificate, subscribed at such place, at the time of their removal, " by the licensed distiller or maker thereof, or his known and authorised agent, express- " ing that the same were made by such licensed distiller." In consequence of this enactment, certificates clearly must be necessary [191] as well after the expiry as before it ; and it never could be the intention of the legislature, that after the expiry of the licence both a certificate by the distiller and permits from the excise officer should be necessary. To prevent this the act contains no provision which of itself may serve to shew the understanding of the framers of the act, that spirits distilled under the licence, when first removed, whether while the licence was current or after it expired, were to require the certificate of the manufacturer, and to pass without permit.

Nor is it at all inconsistent with this reasoning that the act uses the words " licensed distiller or maker thereof," for though the plaintiff maintained that these words can only apply to the distiller while his licence continued in force, yet it is perfectly plain that the words can bear the meaning, and, to render the enactments consistent with themselves, must mean the person who, under the authority of a licence, had distilled or made the spirits, without regard to whether he is a licensed distiller at the period of removing them or not.

To these arguments, founded upon the words and spirit of the different acts of parliament, the defendant added the circumstances of his conduct, established by the verdict of the jury, as tending to demonstrate the fairness of his own intentions, and the impossibility to defraud the revenue ; which he humbly conceived ought to procure a judgment in his favour in the prosecution for penalties ; although the Court should think he had formed an erroneous opinion upon the law, especially as the conduct of the proper officers, who for some time after he had given up his stills allowed him

to remove his spirits on his own certificate, and took no steps to oblige him to take out a licence as a dealer, necessarily tended still further to satisfy the defendant that the construction he put upon the statutes was the just one.

On the first hearing the court of exchequer was equally divided, as one of the barons was absent through indisposition : but, after the second argument, judgment was given for the defendant according to the opinion of three against that of the other two judges.

The plaintiff in error thereupon brought this writ of error and assigned the common errors : praying that the judgment might be reversed, for which, in his printed case, he stated (J. Scott, R. Dundas, J. Mitford, G. Wood) the following reasons :

I. Because the defendant in error had by his own voluntary act, at and after the 10th of June 1797, renounced the character of a distiller, and ceased to pay duty as such from that period : of consequence was not entitled to any of the privileges legally attached to that character so renounced by him.

II. Because this character of licensed distiller so renounced *de facto* after the 10th of June 1797, was most completely extinguished *de jure* after the 10th of October 1797, when the defendant's licence (even upon the supposition of his having gone on distilling and paying duty up to that period) was wholly at an [192] end, and his character as a licensed distiller, he not having renewed his licence as such distiller, did entirely cease and determine.

III. Because when the defendant in error did, either *de facto* after the 10th of June, or *de jure* after the 10th of October 1797, cease to be a licensed maker or distiller of spirits, he then fell under the description of a dealer in spirits, by having in his custody above sixty three gallons, which by the stat. 6 Geo. 1. cap. 21. sect. 18. subjected him to the survey of the officers of excise : and as such dealer by wholesale he was required by the stat. 33 Geo. 3. cap. 69. sect. 9. to take out a licence and pay for the same the sum of £3 : his refusal to do which has occasioned the present prosecution and appeal.

IV. Because this act of the 33d Geo. 3. cap. 69. sect. 9. does expressly subject to the wholesale dealers' licence " every person or persons in Scotland who shall by " wholesale sell or deal in aquavitæ," (which it is proved by the special verdict the defendant did to a considerable extent both after the 10th of June and the 10th of October 1797,) with the single exception of such person or persons " not being a licensed " distiller or distillers, rectifier or rectifiers, compounder or compounders, retailer " or retailers of spirits." And it is apprehended that the expression not being is clearly indicative not of a past but of a present existing character, otherwise the words " not " being or having been " would have been used in this clause.

V. The privilege granted to a licensed distiller of sending out the spirits made by him from the place of their manufacture with his own certificate, instead of an excise permit, is in like manner confined to the person holding such character, and to the time during which only he possesses it : for the twenty second section of the act 28 Geo. 3. cap. 46. requires that this certificate shall be subscribed at the place of the manufacture and at the time of the removal of the spirits by him who is, and not who has been, the licensed distiller or maker thereof, or his known and authorised clerk or agent.

VI. The construction of this clause contended for by the defendant in error involves an absurdity so glaring as to prove it to be altogether ill-founded : for it would give the privilege of granting such certificates to two or more persons in the same year, and under one licence. Thus the defendant, who at the 10th of June 1797 transferred the property of his stills to Moffat, would continue after that date to grant certificates as the licensed distiller, while Moffat might have then begun to distil under the defendant's licence for the remaining four months, and would have been equally entitled to issue such certificates for what he distilled or remained on hand at the end of the licence : and supposing that in place of one transfer there had happened half a dozen of such transfers in the year, this privilege would have been exercised at the same time by six different persons assuming the same character.

[193] VII. It is also absurd to contend, that a person once licensed as a distiller continues so, and is entitled to grant such certificates all his life, or at least as long as he has a gallon of spirits remaining in his possession, which is another consequence of the argument maintained by the defendant in error. Upon this argument, indeed,

it is impossible to draw the line of distinction ; for if it is good for a single gallon of spirits remaining on hand, or for a week after the person has ceased to be a licensed distiller, it must extend to the greatest possible quantity, and to the longest possible period.

VIII. The defendant's interpretation of the law would be most injurious to the revenue and fair dealer, by opening a wide door to the commission of fraud ; for as licensed distillers were not under the survey of the officers of excise, nor was any account kept of their stocks, or permits requisite for the first removal of their spirits, a person who had ceased to be licensed with a large residue of spirits on hand might pretend to keep up that quantity for ever, without check or control, and thus might with impunity, and beyond the power of detection, take into his custody spirits illegally distilled or smuggled, and disperse them over all the country, under the cover of his own certificates, which he could grant to any extent and for any length of time, if the defendant in error is right in the construction put by him upon the statutes in question.

In support of the said judgment of the court of exchequer in Scotland, the defendant in error assigned (W. Grant, W. Adam, H. Erskine, J. Montgomery) the following reasons :

I. The acts of parliament requiring persons dealing in spirituous liquors to take out a dealer's licence do not apply to any persons but such as buy and sell spirits, such only being dealers in the proper sense of the word ; and accordingly these statutes expressly except distillers and rectifiers, who do not buy and sell spirits, but only dispose of the spirits which they have made in virtue of their licences to distil.

II. The circumstance of a distiller's licence being expired cannot prevent him from selling the spirits which had been made in his licensed distillery before the licence expired ; and by selling such spirits he cannot be considered as having become a dealer in spirits, a character which can belong only to persons who buy as well as sell spirits.

The enactment of the act 6 Geo. 1. cap. 21. sect. 12. requiring dealers to make an entry of the places for keeping their spirits, clearly gives the above description of a dealer : for it enacts, " That all persons who shall become makers, distillers, or sellers of or dealers in any such brandy, arrack, rum, spirits, or strong waters, shall, before he, she, or they take any such brandy, etc. into their custody or possession, make an entry in writing," etc. : a provision that can only apply to spirits bought or acquired from others, and afterwards sold ; and not to spirits distilled or made by the person who sells them, which cannot be said to be taken into the custody or possession of such per-[194]son ; and accordingly it must be admitted, that the licensed distillers are not subject to the enactment of this statute, unless where they shall become buyers and sellers of spirits : on the same principle they are excepted from the acts 24th and 33d of his present Majesty, obliging even persons who shall deal in spirits to take out a licence as dealers, though even a distiller, to buy and sell spirits, instead of only selling the spirits manufactured by himself, he would be bound to take out a dealer's licence.

III. If to make a person a dealer, so as to oblige him to make an entry and take out a licence in that character, it is necessary that he should buy and sell spirits : and if a distiller whose licence is in force be not bound to make an entry or take out a licence as a dealer, it cannot alter his situation in that respect that his licence to distil has expired. In selling the spirits distilled under his expired licence, he does not fall under the description of a dealer : he neither buys spirits, nor takes them into his custody, which is the criterion of the dealer given by the above statutes.

IV. To subject the distiller who has spirits on hand at the expiration of his licence, distilled in virtue thereof, to take out and pay for a dealer's licence, besides being unwarranted by the statutes requiring dealers to take out licences, would be highly unjust in itself, as well as inconsistent with the present distillery law : their object and purpose was to take from the distiller a duty or composition of a certain sum on every gallon of the extent of his still ; but if a distiller on the expiry of his licence could not sell off the spirits which he must necessarily have on hand without taking out a dealer's licence, the consequence would be, that every distiller stopping working, or giving up his licence, would be liable to an additional duty on the spirits on hand, and one which might be very considerable where the quantity of spirits on hand is

small. It will not be presumed that such could be the intention of the legislature in passing an act for the express purpose of substituting a duty on the contents of the still, in place of all the duties formerly levied on wash, low wines, or spirits.

V. Could any doubt of this remain, it would be removed by act 26 of his present Majesty, imposing the licence duty on the contents of the stills, which, while it provides that the spirits on their first removal from the place of manufacture shall be accompanied by a certificate by the distiller or maker thereof that they were made at his entered distillery, expressly provided that no permit shall be necessary to accompany such spirits in their first removal. These provisions, both in their spirit or letter, equally apply to the case of spirits in the possession of a distiller whose licence has expired, as to one whose licence is still in force, as the first removal of spirits must necessarily take place in both these circumstances; and in either of them the certificate is just that which the law requires it, being the cer-[195]-tificate of the maker or distiller of the spirits, that the spirits were made or distilled by him under his licence, whether at the time when the spirits were the first time removed and the certificate was granted, the licence was in force and had expired; and the object of the law is in either case equally obtained, as the purpose of the enactment was to enable the distiller to send out his spirits which he had distilled under his licence, and for which he had paid the full duty, and to prevent him from selling spirits not manufactured in his licensed still, and thereby avoiding the duties. The defendant therefore, in not making an entry as a dealer, and not taking out and paying for a dealer's licence, and in sending out his spirits without a permit, distilled under his licence, was not guilty of any of the offences charged in the plaintiff's information.

VI. It is established by the special verdict, that, between the 10th day of June and 10th day of October 1797, the defendant sold and sent out considerable quantities of spirits, accompanied by his own certificate, and without any excise permit, which parcels of spirits were taken, without objection, into the stocks of such dealers and retailers by the proper officers of excise, to whom the defendant's certificates, accompanying the spirits, were delivered; which conduct on the part of the excise officer, joined to its not being found by the verdict, that in any similar case, distillers stopping or not renewing their licences, and having quantities of spirits on hand, took out licences as dealers, or obtained excise permits for removing their spirits, is sufficient to shew that the defendant's plea is supported by the practice.

VII. In a prosecution like the present for penalties, so far as the intention of the defendant to comply with the law can enter into the question, the defendant is entitled to plead that the special verdict acquits him entirely from fraud, as the jury find that the defendant's stock of spirits had all been distilled on his licence, that no part of it had been bought or received from others, that the defendant allowed the proper officer to take an account of his spirits, and that he even applied for permits for the removal of his spirits, though not conceiving himself bound so to do, being desirous of complying with the demands of the excise officers, so far as they afforded a check against fraud, though he resisted them in so far as they intended to burden him with a further payment of duty on spirits which had already, in his opinion, paid the full duty to which they were subject by law.

But it was ORDERED and ADJUDGED, that the judgment given in the Court of Exchequer in Scotland be reversed;—and it is further ORDERED and ADJUDGED, that judgment be entered for the plaintiff in error. (MSS. Jour. *sub ann.* 1799.)

[196] CASE 10.—ANDREW HUME, Officer of Excise, who prosecutes as well for His Majesty as for himself,—*Plaintiff*; JAMES HAIG AND JOHN HAIG in Company, Distillers at Lochrin, in the County of Edinburgh,—*Defendants* (in Error) [11th June 1799].

[Mews' Dig. xiii. 1922.]

[The general provision in stat. 6 Geo. 1. c. 21. § 14. empowering officers to enter warehouses of distillers, and take an account of spirits, etc. was a regulation adopted not for the purpose of ascertaining the amount of the duties, but for preventing fraud by the introduction of smuggled spirits, etc. into the stock of such distillers; and this provision is not actually, or virtually repealed by the alteration of the duties in Scotland, made (first under 26 Geo. 3. c. 64.) by exonerating the spirits, and laying the duties on the content of the still. Neither is this act 6 Geo. 1. c. 21. nor any other act relative to the distillery, prior to 28 Geo. 3. c. 46. (a licence act on the same principle as 26 Geo. 3. c. 64 and made perpetual, with certain alterations, by 35 Geo. 3. c. 64.) expressly or impliedly repealed by the said act 28 Geo. 3. c. 46.; the 83d section of that act providing that all the regulations, provisions, etc. in distillery acts, in force at the time of passing an act, 24 Geo. 3. st. 2. c. 46. or contained in an act 26 Geo. 3. c. 73. should be continued and in force (with certain specified exceptions only).]

[The officers of excise have a right to make a survey for the purpose of taking such account, as incidental to the power of examination given them by § 26. of said stat. 26 Geo. 3. c. 64. and § 21. of said stat. 28 Geo. 3. c. 46.]

[Where, by an act, a duty is imposed with a retrospective date, depending on a fact which has taken place, and which is provided for by the alternative expressions of shall be, or shall have been found, it seems that the duty attaches from such retrospective date.]

[Judgment of the Court of Exchequer in Scotland reversed.]

[This and the foregoing case will serve, in some measure, to develop the principles of the statutes relative to the distilleries in Scotland; and to assist in the exposition of these or similar laws.]

The question in this case turning wholly upon the construction and intention of certain acts of parliament relating to distilleries in Scotland, the plaintiff in error, before entering upon the particular circumstances of his case, premised a short and general statement of the different statutes made upon the subject of distillery, and subjoined the several clauses of these statutes material in the consideration of the present question.

The first excise distillery duty was laid upon the spirits entirely when in the last stage, or completely manufactured, and was so low as 2d. per gallon. (12 Car. 2. c. 23 and 24.) Not long afterwards an additional duty was imposed (12 & 13 Will. 3. c. 11.) in the second stage backwards, or upon the low wines, from which the spirits were to be extracted; and in all the subsequent impositions prior to the 24th Geo. 3. part of the duty was, by law, laid on the low wines and part on the spirits, at so much per gallon, in order to check the frauds discovered in eluding such duties, by these charges being intended to balance [197] each other. In fact, however, after the 4th of queen Anne, c. 12. or 1705, the third stage of the operation was resorted to: the wash was ordered to be gauged in the vessel, and the duties were charged, not upon the actual number of gallons of low wines and spirits distilled, but according to a presumptive calculation from the wash, as producing one-fourth part thereof low wines, and three-fifths of these low wines proof spirits; thus 100 gallons of wash (of whatever strength) were presumed to yield 25 gallons of low wines, and these low wines to give 15 gallons of spirits. On this footing matters continued till the 1st of November 1784, when the act 24 Geo. 3. cap. 46. took place equally and universally in England and Scotland. By it (after a recital that great inconveniences had

arisen from the mode of charging the duties on low wines and spirits made for home consumption, and that the former laws had been found ineffectual for preventing of frauds and abuses), the mode of ascertaining and levying the distillery duties in both parts of the united kingdom was entirely changed, the tax being thereby laid on every gallon of fermented wash, without respect to the two last stages of low wines and spirits, except that for every 100 gallons of such wash charged with duty, the distiller was allowed a credit for 20 gallons of spirits, one to ten over hydrometer proof. This is the rule that, since the 1st of November 1784, has continued, and that still exists in England, where distillers are under the strict survey of the officers of excise, who keep an exact account of their stocks of spirits, no part of which can go out or be removed without an excise permit, on pain of forfeiture.

In Scotland the same modes of survey as in England, in all respects, continued in force till 1st October 1784 (24 Geo. 3. sess. 2. c. 46. s. 45.), when a different system for the Highlands was introduced by law, but was not carried into effect till after December 1785 (25 Geo. 3. c. 22.); and in the Lowlands they continued till the 5th of July 1786 (26 Geo. 3. c. 64.), when a system altogether novel in the laws or practice of the excise was there also carried into effect. The principle of this system (as originally established for the Lowlands in 1786, somewhat improved in 1788 (28 Geo. 3. c. 46.), and extended in 1793 (33 Geo. 3. c. 61.), was, that disregarding all idea of the quantity, quality, or value of the commodity manufactured, or of the materials from which it was made, the tax should depend upon, and be regulated entirely by, the cubical capacity or content of the vessels made use of in the two last stages of the process of distillation, viz. the one for extracting low wines from wash, and the other for extracting spirits from low wines. Connected with this first principle of the duty's being laid on the size of the still, and not on the quantity of wash, or of the low wines or spirits produced from it, there followed the disuse of all survey of the manufactured commodity by the excise officers, and of taking account of the stock, with a full liberty for the manufacturer to send out his spirits, and remove them to any part of the country under his own certificate, instead, of an excise permit. This system was introduced into the lowlands by the temporary act of 26th Geo. 3. cap. 64. upon a recital, "That the mode established by the laws and regulations now in force for charging and securing the rates and duties imposed upon wort, wash, and other liquors used in that part of Great Britain called Scotland, for the distilling of spirits for home consumption, hath not been found to answer the good purposes thereby intended within that part of the united kingdom, and it is therefore expedient to impose, in lieu thereof, a moderate duty upon the said wort, wash, and other liquors, to be ascertained by the size or content of the still there lawfully used in the making of low wines and spirits," etc. But in this act there was no express repeal of former laws regarding distillers, (except as to the size of stills, the strength of spirits to be sent out, and the substitution of distillers' certificates in place of excise permits,) and the general sweeping clause, sect. 45. provided, "That all the powers, etc. in 12th Car. 2. cap. 24. or any other law then in force relating to the revenue of excise or inland duties under the management of the commissioners of excise, should be extended to that act." In the next stat. of 28th Geo. 3. cap. 46. which has no such recital, no repeal of former distillery laws is to be found, except as to the duty on wash, size of stills, strength of spirits, and excise permits; on the contrary, besides a general sweeping clause, sect. 84. similar to that of sect. 45. of the 26th Geo. 3. cap. 64. the 83d section does expressly and anxiously provide, "That all the regulations, etc. in distillery acts in force at the time of passing the 24th Geo. 3. sess. 2. cap. 46. and in an act of the 26th Geo. 3. cap. 73. shall be continued in full force, and applied to the execution of this act, except where the same have been expressly altered, repealed, changed, or controlled by this act of 28th Geo. 3. cap. 46. or are repugnant to any of the matters, provisions, or regulations therein contained."

Upon the report of the committee on the Scotch distillery, the House of Commons, in a committee of the whole house, on the 13th of June 1798, came to the following among other resolutions:

"Resolved, That it is the opinion of this committee than an excise duty of one shilling and six pence be charged for every gallon of British spirits which shall have been found, on the first actual survey by the proper officer of excise, on or after

"the 13th day of June 1798, in the stock, custody, or possession of any distiller, rectifier, compounder, dealer in, or retailer of spirits, in that part of Great Britain called Scotland.

"Resolved, That it is the opinion of this committee that all spirits which shall be distilled in any part of Scotland, from and after the 13th day of June 1798, until the 10th day of April 1799, shall be charged with the said additional excise duty.

"[199] Resolved, That it is the opinion of this committee that it shall not be lawful to remove spirits from the works or manufactory of any distiller or rectifier in Scotland without a permit signed by the proper officer of excise."

These resolutions were, on the 15th of June, agreed to by the house, and a bill upon them ordered to be brought in, which passed into a law the 29th June 1798, and is the stat. 38 Geo. 3. cap. 92. hereinafter in part recited.

The following are the clauses of the acts alluded to, which are material in the present case.

By stat. 3 & 4 Wm. and Mary, cap. 15. sect. 1. it is enacted, That no common distiller or maker of low wines, spirits, or strong waters, for sale, shall, at any time from and after the first day of March 1691, set up, make use of, or alter any tun, cask, wash-batch, copper, still, or other vessel for the brewing or making of any worts, wash, low wines, spirits, or strong waters for sale, or shall keep or make use of any private or concealed warehouse, cellar, or other place for the laying of any worts, wash, low wines, spirits, or strong waters for sale, without first giving notice thereof at the next office of excise within the limits or jurisdiction whereof he or they do or shall inhabit, upon pain to forfeit the sum of £20 for every tun, cask, wash batch, copper, still, or other vessel so set up, used, or altered, and for every private or concealed warehouse, cellar, or other place so used as aforesaid: and that all and every other person or persons in whose occupation any house, outhouse, or other place whatsoever is or shall be, where any such private or concealed tun, cask, wash-batch, copper, still, or other vessel shall be found or discovered, shall also forfeit and lose the sum of £20: one moiety thereof to their Majesties, their heirs and successors, and the other moiety thereof to him or them that shall inform or sue for the same.

By stat. 8 & 9 Wm. 3. cap. 19. sect. 10. reciting, That whereas it is found by experience that, notwithstanding the penalties imposed by former acts, many distillers do erect and set up private backs, stills, and other vessels, by which his Majesty is much defrauded of his duties of excise, it is therefore enacted, That no common distiller or maker of low wines, spirits, or strong waters, for sale or exportation, shall at any time from and after the said 10th day of April, erect or set up any tun, cask, wash-batch, copper, still, or other vessel already erected or set up, nor shall have or keep any private or concealed tun, cask, wash-batch, copper, still, or other vessel, nor any private or concealed warehouse, storehouse, cellar, or other place for the brewing, making, laying, or keeping any worts, wash, low wines, spirits, or strong waters, without first giving notice thereof at the next office of excise within the limits or jurisdiction whereof he or they do or shall inhabit, upon pain to forfeit for every tun, cask, wash-batch, copper, still, warehouse, storehouse, cellar, or other place so erected or set up, [200] altered, or enlarged, kept private or concealed, the sum of £20: and that all and every person or persons in whose occupation any house, outhouse, or other place whatsoever is or shall be where any such private or concealed tun, cask, wash-batch, copper, still, warehouse, storehouse, or cellar shall be discovered or found, shall also forfeit and lose the sum of £50.

By stat. 24 Geo. 2. cap. 40. sect. 18. reciting the stat. 8 & 9 Wm. 3. cap. 19. sect. 10. it is enacted, That every distiller or maker of low wines or spirits for sale or exportation shall, ten days before he begins to distil any spirits, make a true and particular entry in writing, at the next office of excise within the limits of which his workhouses, storehouses, or other places are situated, of every still, copper, tun, wash batch, cask, or other vessel which he shall use for brewing, distilling, laying, or keeping worts, wash, low wines, or spirits, and also the casks or vessels which he shall use for brewing or keeping the after runnings or feints from the second extraction, (which shall not exceed two in number,) on pain of forfeiting £50, and shall shew to the officer every utensil so entered, who is to mark the same with a distinct and durable mark; and

every utensil used without being so shewn and marked, shall be deemed unentered : and if any person shall deface any such mark, he shall forfeit £20.

By stat. 6 Geo. 1, cap. 21, sect. 12, it is enacted, That all and every person or persons, who after the 1st of August 1720, shall become distillers, makers, or sellers of, or dealers in brandy, arrack, rum, spirits, or strong waters, shall, before he, she, or they take any such brandy, arrack, rum, spirits, or strong waters into his, her, or their custody or possession, make the like (*i.e.* a true) and particular entry, in writing, of the several and respective warehouses, storehouses, rooms, shops, cellars, vaults, or other places intended by him, her, or them respectively to be made use of for the keeping of brandy, arrack, rum, spirits, or strong waters, either British or foreign, on pain of forfeiting the sum of £20 for every such warehouse, storehouse, room, shop, cellar, vault, or other place so made use of by such last-mentioned distiller, maker, seller, or dealer respectively, without making such entry as aforesaid, together with the brandy, arrack, rum, spirits, and strong waters which shall be found therein, and also the casks and vessels whatsoever containing the same.

By sect. 14, it is enacted, That it shall and may be lawful for the officers of his Majesty's revenue of excise, or any of them, from time to time, and at all times by day and by night, (and if in the night time in the presence of a constable or other officer of the peace,) to enter into all and every the said warehouses, storehouses, rooms, shops, cellars, vaults, or other places made use of by any distillers, makers, or sellers of or dealers in brandy, arrack, rum, spirits, or strong waters, for keeping the same, and by tasting, gauging, or otherwise, to take an account [201] of the quantity and quality of all such of the said liquors as shall at any time be in their or any of their custody : and if any such distiller, maker, or seller of or dealer in brandy, arrack, rum, spirits, or strong waters shall hinder or refuse the said officer or officers to enter into his, her, or their said warehouses, storehouses, rooms, shops, cellars, vaults, and other places, or any of them, to take such account as aforesaid, or shall let, hinder, or obstruct the said officer or officers in the execution of any of the powers and authorities by this act given to him or them, the person or persons, offending therein shall, for every such offence, forfeit and lose the sum of £50.

By sect. 15, it is enacted, That from and after the said 1st day of August 1720, no brandy, arrack, rum, spirits, or strong waters, either British or foreign, shall be sold, uttered, or exposed to sale, either by wholesale or retail, but when the same shall be in some or one of the said warehouses, storehouses, rooms, shops, cellars, vaults, or other places so entered as aforesaid, upon pain of forfeiting the sum of 40s. for every gallon of brandy, arrack, rum, spirits, or strong waters as shall be so sold, uttered, or exposed to sale in any other place or places than those entered as aforesaid, and in that proportion for any greater or lesser quantity.

By sect. 16, it is further enacted, That, from and after the said 1st August 1720, where any such brandy, arrack, rum, spirits, or strong waters as aforesaid, shall afterwards be sold in the said entered places, or any of them, in great or small quantities, the officer or officers of excise of the respective divisions or places where the same shall be so sold, shall be obliged, and are hereby required from time to time, upon the request of the seller or sellers thereof, (without fee or reward,) to give to the respective buyers thereof certificates, in writing, signed by the said respective officer or officers, expressing the quantities so sold, and the name and names of the respective buyers and sellers thereof, and that the duty of such brandy, arrack, rum, spirits, and strong waters so sold has been paid, or that the same hath been condemned as forfeited, or was part of such stock as aforesaid, to satisfy the officer or officers of the excise of the respective divisions to which the same is intended to be carried, and that the duty thereof has been paid, or that the same had been so condemned, or was part of such stock, that the seizing thereof may thereby be prevented.

By sect. 17, it is further enacted, That, from and after the said 1st August 1720, no brandy, arrack, rum, spirits, or strong waters, exceeding the quantity of one gallon, shall be removed or carried from any part of this kingdom to another, by land or by water, without such permit or certificate from some or one of the officers of his Majesty's customs or excise, signifying and certifying the quality and quantity thereof, and that his Majesty's duties chargeable thereon have been duly paid and satisfied, and that the same had been condemned, or was [202] part of such stock as aforesaid, on pain of forfeiting the brandy, arrack, rum, spirits, and strong waters which shall

be found carrying from one place to another without such permit or certificate, together with the casks and vessels whatsoever containing the same.

By sect. 18. it is further enacted, That from and after said 1st August 1720, all and every person and persons whatsoever, who shall have in his, her, or their custody any brandy, arrack, rum, spirits, or strong waters, exceeding the quantity of 63 gallons, shall be deemed and taken to be a seller of and dealer in brandy, arrack, rum, spirits, and strong waters, and subject to the survey of his Majesty's officers of excise.

By stat. 11 Geo. 1. cap. 30. sect. 3. it is further enacted, That from and after the 24th June 1728, no brandy, arrack, rum, spirits, and strong waters, whether British or foreign, shall be sold, uttered, or exposed to sale, either by wholesale or retail, but when the same shall be in some or one of the warehouses, storehouses, rooms, shops, cellars, vaults, or other places entered or to be entered in pursuance of an act of parliament made in the sixth year of the reign of his present Majesty, intituled "An act for preventing frauds and abuses in the public revenues of excise and customs, stamp duty, and house-money," on pain of forfeiting all such arrack, rum, spirits, and strong waters which shall be so sold, uttered, or exposed to sale contrary to the true intent and meaning of this act, together with the casks, bottles, or other vessels, containing the same, over and above the penalty of 40s. per gallon imposed for the said offence by the said act of the sixth year of his Majesty's reign.

By stat. 25 Geo. 3. cap. 22. sect. 9. reciting, That for the more effectually securing to his Majesty's revenue the payment of the above-mentioned duties for all spirits which the owners of such stills shall be able to manufacture beyond the quantity corresponding as aforesaid to the respective sizes of the stills, it is enacted, That the officers of excise shall at all times have full liberty to enter into and survey the malt-barns and distilleries belonging to such licensed distiller, and to keep an exact account of the malt and spirits manufactured therein, and to charge with the usual duty all malt made or used therein, exceeding the quantity of 250 bolls in the year, and all spirits exceeding in quantity 1660 gallons annually; and that no spirits shall from and after the 1st day of December 1785, be allowed to pass or be carried from one place to another within the counties or districts aforesaid, to which counties or districts the sale of the spirits to be manufactured in the stills to be licensed under this act is hereby expressly restricted, without being accompanied with a permit from the proper officer, expressing the quantity so permitted to pass, and also mentioning that the same is the produce of a licensed still; that the owner or owners of such licensed still or stills shall, in consideration of the annual composition paid by him, her, or them, be entitled to demand free permits [203] in the course of the year for which such licences are held, for the quantity of spirits before expressed, as the produce of a still containing 40 gallons, and for a proportionable quantity, if the still be of a lesser size, but for no more, allowing them to pass anywhere within the said counties or districts; and in so far as permits are demanded for a greater quantity, they shall only be obtained on payment of the duties chargeable by law on the entered distillers and maltsters.

By stat. 26 Geo. 3. cap. 64. sect. 26. it is further enacted, That it shall and may be lawful for any officer or officers of excise in Scotland to enter, during lawful hours, into the stillhouse or other place where any still or stills (whether the same be licensed or not licensed) shall be kept, worked, or used, or where any wort, wash, low wines, or spirits are prepared or distilled, and to examine the same; and in case any still or stills shall be there found in a state capable of being worked, the same not having been duly licensed, or in case any wort, wash, low wines, or spirits shall be there found, contrary to the true intent and meaning of this act, every such still or stills, and the liquor therein, with all the utensils and implements thereto belonging or therewith used, and also such wort, wash, low wines, and spirits, shall be seized by any officer or officers of excise, and shall be lost and forfeited, and the said still or stills shall be destroyed in the manner hereinbefore directed.

By sect. 29. it is further enacted, That no spirits made from any of the materials aforesaid shall be removed or sent from the place of their manufacture without being accompanied by a certificate subscribed by the licensed distiller or maker thereof, or his known and authorised agent, expressing that the same were made by him.

and also specifying the quantity of such spirits, and the number of casks or packages in which the same are contained.

By sect. 39, it is provided, That nothing in this act contained shall extend or be construed to extend to repeal, alter, or change any act or acts now in force for the surveying and keeping a regular account of the stocks of rectifiers and compounders of spirits, and dealers, but that the said rectifiers, compounders, and dealers shall remain subjected to the surveys of the officers of excise, and to all other regulations made and provided by any law now in force, in the same manner as if this act had not been made : saving and excepting, that rectifiers and compounders, as well as makers or distillers, in that part of Great Britain called Scotland, may send spirits to any part or place in that part of the united kingdom, of whatever strength he, she, or they may think proper.

By sect. 45, it is further enacted, That all and every the powers and authorities, directions, rules, methods, penalties, and forfeitures, clauses, matters, and things, which in and by an act made in the twelfth year of the reign of king Charles the second intitled, "An act for taking away the court of wards [204] and liveries, and "tenures *in capite*, and by knights' service and purveyance, and for settling a revenue "upon his Majesty in lieu thereof," or by any other law now in force relating to his Majesty's revenue of excise or inland duties under the management of the commissioners of excise, are provided, settled, or established for securing, enforcing, managing, raising, levying, collecting, paying, mitigating, or recovering, adjudging, or ascertaining the duties or penalties thereby granted and inflicted, and for the preventing, detecting, and punishing frauds relating thereto, (other than in such cases for which other penalties, provisions, and regulations are prescribed by this act,) shall be exercised, practised, applied, used, and put in execution in and for the managing, raising, levying, collecting, mitigating, adjudging, ascertaining, recovering, and paying the several duties hereby granted, as fully and effectually to all intents and purposes as if all and every the said powers, authorities, rules, directions, methods, penalties, forfeitures, clauses, matters, and things were particularly repeated and again enacted in this present act.

By sect. 44, of said act, 26 Geo. 3. cap. 64.—By stat. 26 Geo. 3. cap. 73. sect. 71. and by stat. 28th Geo. 3. cap. 46. sect. 78. A penalty of £200 is imposed for obstructing officers of excise in the execution of the powers given by these or any other acts relating to distillers, etc.

By stat. 26 Geo. 3. cap. 73. sect. 3, it is enacted, That every distiller and maker of low wines and spirits shall, four days at least before he begins to brew any corn or grain, or mix any other materials for making wash, make a true and particular entry in writing at the next office of excise, within the limits whereof his stillhouse, storehouse, or other place shall be situate, of all coppers, tuns, backs, coolers, stills, casks, and vessels which he shall make use of for brewing, mixing, fermenting, distilling, laying, or keeping any wort, wash, or low wines, or any spirits or feints : and in such entry shall insert the day when he shall intend to begin first to brew any corn or grain, or to mix any other materials for making wash, and shall specify the particular purpose for which each such copper, etc. is intended to be used : and no such copper, etc. shall be used for any other purpose than that to which the same is in such entry specified to be intended to be used : and which entry shall be made out according to the schedule hereunto annexed, as the case may require, on pain of forfeiting £100, together with the wort, wash, low wines, spirits, feints, and other liquors which shall be found in any such copper, etc. at the time when the offence shall be committed, which may be seized by any officer of excise.

[The form of the entry is prescribed in a schedule annexed to the act.]

By stat. 28 Geo. 3. cap. 46. sect. 21. [made perpetual, with certain alterations, by stat. 35 Geo. 3. c. 89. § 1] it is further enacted, That it shall and may be lawful to and for any officer or of [205]-ficers of excise, in that part of Great Britain called Scotland, to enter by day or night into the stillhouse or other place or places where any still or stills (whether the same be licensed or not licensed) shall be kept, worked, or used, or where any worts, wash, or low wines or spirits are prepared, distilled, or kept, and to examine the same, and in case any still or stills shall be there found in a state of preparation for being worked, the same not having been duly licensed, or in case any worts, wash, low wines, or spirits shall be there found contrary to the

true intent and meaning of this act, every such still or stills and the liquor therein, with all the utensils and improvements thereto belonging or therewith used, and also such worts, wash, low wines, and spirits, shall be forfeited, and shall and may be seized by any officer or officers of excise, and the person or persons in whose custody or possession any such still, worts, wash, low wines, or spirits shall be found, shall forfeit £200.

By sect. 22. it is further enacted, That no raw or unrectified spirits made from any of the materials aforesaid, for sale or consumption in that part of Great Britain called Scotland, shall be removed or sent from the place of the manufacture without being accompanied by a certificate, subscribed at such place, at the time of their removal, by the licensed distiller or maker thereof, or his known and authorised clerk or agent, expressing that the same were made by such licensed distiller, specifying the kind and quantity of such spirits, the number of casks, or packages in which the same are contained, the person to whom, and the place to which the same are to be sent, and limiting a reasonable time within which the same are to be removed and received ; and that all such spirits which shall be removed or conveyed by land or by water from one part in Scotland to any other part in Scotland without being accompanied with such certificate, or which shall be found not to correspond or agree therewith in all or any of the respects aforesaid, or shall be found removing or to have been removed contrary thereto, or after the same hath been expired, shall, together with the casks, vessels, or other packages containing the said spirits, be forfeited, and shall and may be seized by any officer or officers of excise.

By sect. 23. it is further enacted, That no permit or permits shall be requisite for the first removal of raw or unrectified spirits in that part of Great Britain called Scotland, from the place or places where the same were made or manufactured, to any other place or places whatsoever in that part of Great Britain called Scotland, any thing in this, or in any other act or acts of parliament to the contrary notwithstanding.

By sect. 24. it is further enacted, That nothing in this act contained shall extend or be construed to extend to repeal, alter, or change any act or acts now in force for the surveying and keeping a regular account of the stocks of rectifiers and compounders, dealers in and retailers of spirits, in that part of Great Britain called Scotland ; but that such [206] rectifiers, compounders, dealers, and retailers, shall remain subject to the surveys of the officers of excise, and to all other rules and regulations made and provided by any law now in force relative to rectifiers, compounders, dealers, or retailers, saving and excepting that such rectifiers and compounders, as well as makers or distillers, in that part of Great Britain called Scotland, may send out, and that such rectifiers and compounders may receive British made spirits, of whatever strength he, she, or they may think proper, for consumption or sale, in that part of Great Britain called Scotland.

By sect. 32. it is further enacted, That on the 6th day of July 1788, an account shall be taken by the proper officers of excise of the stock of British spirits then on hand at the several and respective licensed distilleries in that part of Great Britain called Scotland, and a return thereof shall be made in writing by such officers to the commissioners of excise in Scotland ; and if such spirits, or any part thereof, shall be intended to be sent into that part of Great Britain called England, notice thereof shall be immediately given to such officer or officers, by such distiller or distillers, specifying therein the quantity and kind of spirits so intended to be sent into that part of Great Britain called England ; and the said spirits, and every part thereof, shall thereupon be forthwith secured and locked up in a warehouse or warehouses to be provided at the expence of such distiller or distillers, and approved of by the said commissioners of excise in Scotland ; each of which warehouses shall be secured under three locks and three keys, one of such locks to be provided by such distiller, and the other two locks to be provided by the surveyor, supervisor, or officer of excise of the division or place where such spirits shall be locked up, at the expence of such distiller or distillers ; whereof one key of each place shall be kept by such distiller or distillers, and another by such surveyor or supervisor, and a third by such officer of excise, until the same spirits, and every part thereof, shall be delivered out to be shipped for England as aforesaid ; and the said spirits shall not be delivered or taken out therefrom for any other purpose or purposes whatever, except as is hereinafter provided and ex-

cepted, nor without a permit or permits from the officer or officers of excise, certifying that the said spirits were made or distilled before the 6th day of July 1788, and had been taken account of and locked up as aforesaid.

Sect. 34. Provided always and be it enacted, That if, after taking such stock as aforesaid, any distiller or distillers to whom such stock shall belong, shall not take out a licence for distilling under this act, for and during the year from the 5th day of July 1788, and in that case no such spirits, nor any part thereof shall, after the 6th day of July aforesaid, be removed or sent out from the possession of the said distiller or distillers without a regular permit or permits from the proper officer or officers of excise, who is and are hereby authorized and required to grant the same [207] according to the directions and regulations of the several statutes in that case made and provided; any thing in this act contained to the contrary in anywise notwithstanding.

By sect. 83, it is further enacted, That all the powers, authorities, methods, rules, directions, regulations, penalties, forfeitures, provisions, clauses, matters, and things which in or by any act or acts of parliament relating to the making of spirits for exportation to foreign parts, or carrying such spirits coastwise, or to the duties upon wort or wash brewed or made for extracting spirits for home consumption, or relating to the duties upon low wines or spirits for home consumption, in force at the time of passing an act, made in the 24th year of the reign of his present Majesty, intituled "An act, etc. (24th Geo. 3. cap. 46. sess. 2.) or in or by the said act, made in the 26th year of the reign of his present Majesty, intituled "An act," etc. (26th Geo. 3. cap. 73.) are contained, provided, settled, or established for making, assessing, levying, collecting, paying, recovering, adjudging, mitigating, ascertaining, enforcing, or securing the rates or duties thereby imposed or hereby continued, and for preventing, detecting, and punishing frauds relating thereto, and not being expressly altered, repealed, changed, or controlled by this act, or not being repugnant to any of the matters, clauses, provisions, or regulations in this act contained, shall be and continue in full force, and be duly observed, practised, and put in execution throughout Great Britain, in and for the managing, raising, levying, collecting, paying, recovering, adjudging, mitigating, ascertaining, enforcing, and securing the said several duties by this act imposed or continued, and for preventing, detecting, and punishing frauds relating thereto, so far as the same are applicable thereunto respectively, as fully and effectually to all intents and purposes, as if all and every the said powers, authorities, methods, rules, directions, regulations, penalties, forfeitures, provisions, clauses, matters, and things had been expressly inserted and re-enacted in this act.

By sect. 84, it is further enacted, That all and every the powers, directions, rules, penalties, forfeitures, clauses, matters, and things which in and by an act, made in the 12th year of the reign of king Charles the second, intituled "An act for taking away the court of wards and liveries, and tenures *in capite*, and by knights' service" and purveyance, and for settling a revenue upon his Majesty in lieu thereof," or by any other law now in force relating to his Majesty's revenue of excise upon beer, ale, and other liquors, are provided and established for managing, raising, levying, collecting, mitigating, or recovering, adjudging, or ascertaining the duties thereby granted, or any of them, (other than and in such cases for which such penalties or provisions are made and provided by this act,) shall be practised, used, and put in execution in and for the managing, raising, levying, collecting, mitigating, recovering, and paying the said duties hereby granted, as fully and effectually [208] to all intents and purposes as if all and every the said powers, rules, directions, penalties, forfeitures, clauses, matters, and things were particularly repeated and re-enacted in this present act.

By stat. 33 Geo. 3. cap. 61. sect. 17, it is enacted, That if any licensed distiller or rectifier, or his or her clerk or agent, shall sell, deliver, or cause to be delivered to any compounder, dealer, or retailer, any certificate or certificates by him or her subscribed, as in the said act is mentioned, for the purpose of conveying or protecting any spirits in their removal from the stock or possession of any such compounder, dealer, or retailer, or other person than such licensed distiller or rectifier; or if any person or persons whatever shall make use of any such certificate or certificates, except for the purpose of conveying or protecting raw or unrectified spirits in their first removal from the place of manufacture, or plain rectified spirits, unmixed and

uncompounded, in their first removal from the place where they were actually rectified, every such distiller, rectifier, or other person so offending, shall, for every such offence, forfeit and lose the sum of £50, together with all such spirits, and the package thereof, which shall and may be seized by any officer or officers of excise.

By stat. 38 Geo. 3. cap. 92. [passed 29th June 1798.] intituled "An act to revive, continue until the 10th day of April 1799, and amend an act, passed in the last session of parliament, intituled 'An act for granting to his Majesty additional duties on distilleries in the several parts of the Highlands of Scotland therein particularly described, for a limited time, and for regulating the duties on distilleries in the respective districts in Scotland'; and for granting to his Majesty certain additional duties on spirits distilled for consumption, and a duty on unmalted grain used in distillation in Scotland; and for altering and amending certain other acts of parliament for the regulation of distilleries in Scotland;" Sect. 1. Whereas an act was made in the last session of parliament, [37 Geo. 3. c. 102.] intituled "An act for granting to his Majesty additional duties on distilleries in the several parts of the Highlands of Scotland herein particularly described, for a limited time, and for regulating the duties on distilleries in the respective districts of Scotland," which was to continue in force until one month after the commencement of the present session of parliament: And whereas by two acts made in this present session of parliament, the said recited act was further continued until the 1st day of May 1798: And whereas it is proper and expedient that the said first recited act should be revived and further continued, and that the same should be explained, altered, and amended, and that certain additional duties should be imposed upon British spirits distilled in Scotland for consumption in that part of the kingdom, and now in the stock, custody, or possession of any distiller, dealer, or retailer, and also upon all [209] spirits that shall be distilled for that purpose before a certain period, and that a duty should be imposed upon all unmalted grain used for distillation in Scotland, and that certain regulations and provisions should be made for better securing the said duties, as well as the former duties upon spirits, and upon licences for distilling spirits, and for the preventing of fraud and evasion thereof: may it therefore please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the said first recited act, and all the duties thereby imposed, and all the powers and provisions therein contained (except as hereinafter excepted) and altered, shall from and after the said 1st day of May 1798 be revived, and the same is hereby revived, and shall continue in force until the 10th day of April 1799.

By sect. 2. it is further enacted, That there shall be raised, levied, collected, and paid unto and for the use of his Majesty, his heirs and successors, a further duty of excise of one shilling for and upon every gallon, English wine measure, of British spirits, raw, rectified, or compounded, of the strength of one to ten over hydrometer proof, and so in proportion for any higher or lower degree of strength, which shall have been distilled for consumption in Scotland, and which shall be or shall have been found on the first actual survey by the proper officer of excise, upon or after the 13th day of June 1798, in the stock, custody, or possession of any distiller, rectifier, compounder, dealer in, or retailer of spirits, in any part of Scotland, to be paid by such distiller, rectifier, compounder, dealer, or retailer, over and above the licence duty on the capacity or content of the still, which has been paid or become payable by any distiller for or in respect of the distillation of such spirits.

By sect. 3. it is further enacted, That there shall be raised, levied, collected, and paid, unto and for the use of his Majesty, his heirs and successors, a further duty of excise of one shilling for and upon every gallon, English wine measure, of British spirits, of the strength of one to ten over hydrometer proof, and so in proportion for any higher or lower degree of strength, which on and from and after the said 13th day of June 1798, and until the 10th day of April 1799 exclusive, shall have been and shall be distilled in any part of the Lowlands of Scotland, for consumption in Scotland, or shall have been or shall be distilled for such consumption within certain other parts of Scotland particularly described in the hereinafter mentioned act of the 33d year, and in the hereinbefore recited act of the 37th year of the reign of his present Majesty, not exceeding the number of gallons hereinafter limited and restricted to be distilled, on and from and after the 5th day of July 1798, until the said 10th day

of April 1799, by or from each still within the boundaries therein mentioned ; such duty to be paid by the [210] distillers of the said spirits, over and above the licence duty on the still which shall have been or shall be paid, or become payable by such distillers for or in respect of the distillation of such spirits.

By sect. 4, it is further enacted, That the said additional duty by this act imposed on British spirits, as being found in the stock, custody, or possession of any distiller, rectifier, compounder, dealer, or retailer, shall be paid in manner following ; that is to say, one fourth part on or before the 5th day of September 1798, one-fourth part thereof on or before the 5th day of November 1798, one other fourth part thereof on or before the 5th day of December 1798, and the remaining fourth part thereof on or before the 5th day of January 1799, on pain of forfeiting double the amount of the said additional duty not so paid ; and that the said additional duty by this act imposed on British spirits which shall be distilled from and after the passing of this act, until the said 10th day of April 1799, shall be paid at the same times and in the same manner as the licence duty on the still is payable or paid by the distiller for every next subsequent two months in the Lowlands, and three months in the Highlands respectively, on pain of forfeiting double the amount of the said additional duty not so paid.

By sect. 5, it is further enacted, That from and after the passing of this act, the officers of excise, and each and every of them duly constituted and appointed, shall be, and they are hereby authorised and empowered, and have right by night or day to enter into and continue in every stillhouse, storehouse, warehouse, cellar, or other place made use of by any distiller, rectifier, or compounder, in any part of Scotland for making or keeping wash or spirits, and by gauging, measuring, or otherwise, to take account of the quantity of wash and of spirits in the stock, custody, or possession of every such distiller, rectifier, or compounder, and also of the quantity of wash and of spirits which shall from time to time be brewed or made, or distilled, rectified, or compounded by any such distiller, rectifier, or compounder, and to enter such account, as well of the wash as of the spirits, in a book or books to be kept by such officer or officers for that purpose.

By sect. 6, it is further enacted, That from and after the passing of this act, no spirits that shall have been found in the stock, custody, or possession of any distiller, rectifier, or compounder, or that shall be afterwards distilled, rectified or compounded by any distiller, rectifier, or compounder, shall be sent out of such stock, custody, or possession, or shall be removed from the house, building, or work wherein the same were made or manufactured, rectified, or compounded, or shall be carried from one place to another by land or by water, without a permit granted and signed by the proper officer of excise of the division, and specifying therein the quantity, quality, and strength of such spirits, and the package thereof, the person from whom, [211] the person to whom, and the place where the same are to be sent, and limiting a reasonable time within which the said permit is to be in force, on pain of forfeiting all such spirits as shall be sent out, removed, or carried, or found removing or carrying, without such permit as aforesaid ; which said spirits, with the casks, vessels, and other packages containing the same, and also the vessels and boats, horses, and other cattle, and carriages made use of in the removal or conveyance thereof, shall and may be seized by any officer or officers of excise, and shall be forfeited and lost, any law, custom, or usage to the contrary in any wise notwithstanding ; and if any licensed distiller, rectifier, or compounder shall send or carry, or knowingly permit or suffer to be sent or carried, any spirits from the house, building, or work wherein the same were made, manufactured, or rectified, or compounded, without such permit as aforesaid, every such distiller, rectifier, or compounder shall, over and above the forfeiture of the said spirits, forfeit and lose a sum equal to the duty chargeable or charged upon such spirits, in proportion to the quantity and strength thereof.

By sect. 22, reciting, That whereas contracts may have been made for the sale of British spirits before the same shall have been charged or become chargeable with the duty by this act imposed, be it therefore enacted, That in all cases where any spirits, whereon the duty by this act imposed shall be charged, shall have been, after the said 13th day of June 1798, or shall be delivered in pursuance of such contracts of sales, it shall be lawful for the distillers, rectifiers, compounders, dealers in, or retailers of such spirits, delivering the same, to charge so much money as shall be equivalent

to the duty by this act imposed in respect thereof, in addition to the price of such spirits; and such distiller, rectifier, compounder, dealer, or retailer shall be entitled, by virtue of this act, to demand and to be paid the same accordingly.

By sect. 23. it is further enacted, That if any person or persons shall obstruct or hinder an officer or officers of excise in the execution of any of the powers or authorities to him or them granted by this or any other act or acts of parliament relating to spirits, the person or persons so offending therein shall, for each and every such offence severally forfeit the sum of £200.

By sect. 26. it is further enacted, That all and every the powers, directions, rules, penalties, forfeitures, clauses, matters, and things which in and by an act, made in the 12th year of the reign of king Charles the second, intituled "An act for taking away the court of wards and liveries, and tenures *in capite*, and by knights' service and purveyance, and for settling a revenue upon his Majesty in lieu thereof," or by any other law now in force relating to his Majesty's revenue of excise upon beer, ale, and other liquors, are provided and established for managing, raising, levying, collecting, mitigating, or recovering, adjudging, or ascertaining the duties thereby [212] granted, or any of them, shall be practised and put in execution in and for the managing, raising, levying, collecting, mitigating, recovering, and paying the duties hereby granted, as fully and effectually as if all and every the said powers, rules, directions, penalties, forfeitures, clauses, matters, and things were particularly repeated and re-enacted in this present act.

On the 13th of June 1798, (the day when the committee of the whole house of commons came to the resolutions before stated,) the following letter was written by George Rose, Esq. secretary of the treasury, to the commissioners of excise in Scotland, and was received by them on the 17th:

"Gentlemen, The house of commons having this day come to a resolution for laying an additional duty upon the stock on hand of British spirits in Scotland, I am commanded by the lords commissioners of his Majesty's treasury to transmit to you a copy of the said resolution, and to direct you to cause an actual survey to be immediately made, and an account to be taken of the quantity and strength of all spirits in the possession of distillers, rectifiers, compounders, dealers and retailers; and that the officers leave a schedule of the quantity and strength with each trader, and give notice that it is for the purpose of being charged with an additional duty to be imposed by parliament. I am also to desire that you will cause an account to be made out and transmitted to me, as soon as you shall be enabled to do so, of all the British spirits found in their possessions, for the information of their lordships. I am," etc.

In obedience to these orders, the board of excise, on the 17th of June, issued a general letter to all their officers to proceed accordingly, and with as much expedition as possible. The stocks of the dealers in and retailers of British spirits were immediately taken in and about Edinburgh, and throughout all Scotland, without any difficulty or opposition: But several of the distillers set themselves in resistance to the execution of these orders. In particular when, on the morning of the 18th of June, the officers of excise went to the distilleries at Lochrin and Canonmills, near Edinburgh, to ascertain the quantities and strength of the spirits in the possession, of the distillers there, they were positively refused at both to be allowed to proceed, the traders telling the officers that they had no right to take such account. The same thing happened at several other distilleries in the country: and in the mean time every exertion was made by these distillers to send off the spirits they had on hand to private persons, in quantities under 63 gallons, in order to evade altogether the additional duty meant to be imposed thereon: while another part of their plan was to effect the same end by pouring their spirits into the possession of dealers and retailers after the stocks of such dealers and retailers had been taken, and under a collusive agreement betwixt these dealers and distillers.

[213] Under these circumstances, the commissioners of excise thought it necessary to state the case to the king's counsel in Scotland for their opinion, which they received in writing upon the 20th of June, and upon getting whereof, the board considered it to be their duty to enforce their own and the treasury orders by the following letter to all supervisors who had lowland distillers in their districts, dated 20th June 1798.—"Sir, The king's counsel having, after full deliberation, given their opinion

" that, under the laws at present in force, officers of excise are authorised and entitled
 " not only to enter into the places made use by of distillers for making or for keeping
 " their spirits, but also to ascertain the quantity and strength of all spirits found
 " therein ; the board direct that you proceed accordingly, and immediately on re-
 " ceipt of this letter, demand access to the stocks of all the distillers in your district,
 " and insist on ascertaining the quantity and strength of all the spirits found therein.
 " Should the distillers refuse access, or refuse to permit you to ascertain the quantity
 " and strength of their spirits, you are then empowered, and accordingly (if necessary)
 " must execute the directions of the board by force, proceeding in the same manner
 " as you would in case of any dealer attempting to prevent you from surveying ;
 " and at all events you will take care that the quantity and strength of the spirits
 " be positively ascertained. You will, at the same time, acquaint the distillers that
 " it is in consequence of the positive directions of the king's counsel that this is done ;
 " and that should they attempt resistance, they will be answerable for the conse-
 " quences, as the most speedy and vigorous prosecutions will be commenced for the
 " penalty incurred by the obstruction, notwithstanding you make good your survey
 " by using force." In obedience to these orders, Adam Whyte, surveyor, and other
 officers of excise, proceeded to the distilleries at Lochrin and Canonmills, the former
 belonging to the defendants in error, and attempted again to take the stocks of spirits
 therein, but they were obstructed by the distillers and their servants in so doing.
 This obliged them to have recourse to military aid, and by the assistance, and under
 the protection of a party of soldiers brought to and stationed in each work, they were
 at last enabled to complete their survey by the evening of the 22d of June, when they
 ascertained, in the most accurate manner possible, the number of gallons, and actual
 strength of all the spirits in the custody or possession of the said defendants in error,
 agreeably to which they made a charge against them, as soon as the total quantity
 was calculated at the strength of one to ten over hydrometer proof, of the additional
 duty of one shilling per gallon, imposed by the aforesaid act of 38 Geo. 3. cap. 92.

In the course of making this actual survey of their stocks, viz. on the 21st of
 June, the defendants in error and Messrs. Steins made application first to the court
 of session, and then to the court of exchequer, for an interdict or injunction against
 the [214] officers of excise from taking such account ; but the motion having
 been opposed on the part of the crown, it was unanimously refused by both Courts.

When the bill above mentioned was brought into the house of commons, petitions
 against it were presented both by the dealers in, and by the distillers of spirits, chiefly
 complaining of the hardship of subjecting their stock on hand to the additional and
 retrospective duty intended to be imposed. The petitioners were heard by counsel
 both in the house of commons and in the house of lords ; but, notwithstanding of
 this opposition, the bill received the royal assent on the 29th of June.

With this law all the dealers in and retailers of British spirits, and the greater
 part of the distillers in Scotland complied, by paying the additional duty on their
 stocks as found on the first actual survey by the proper officers of excise after the
 13th of June 1798 ; but some of the principal distillers having refused to obey, a
 prosecution was brought in the exchequer, at the suit of the plaintiff in error, against
 James and John Haig, distillers at Lochrin, the defendants in error, for the forfeiture
 of double duty, (under the 4th section of this act,) by their not having paid the ad-
 ditional so charged against them for 101.416 $\frac{3}{4}$ gallons of spirits, amounting to £5070
 16s. 9d. of which one fourth part was payable on or before the 5th of September,
 and another fourth part was payable on or before the 5th of November 1798.

To this information, the defendants having pleaded the general issue of not guilty,
 the cause came on to trial at bar in Candlemas term, on the 17th of January 1799,
 when the information was fully proved on the part of the plaintiff, either by ad-
 mission or witnesses : But the argument set up by the defendants was, that the
 survey of the officers having been made before the passing of the act 38 Geo. 3. cap.
 92. was not authorised or warranted by the laws then in force, for that since the
 passing of the act of the 26th of the king, whereby the mode of levying the duties
 on spirits distilled in Scotland was altered to a licence duty on the capacity of the still,
 and licenced distillers were allowed to send out and remove their spirits with their
 own certificates, instead of excise permits, no surveys had in fact been made upon
 the stocks of spirits in the possession of lowland distillers, nor had any account of

the quantity or strength thereof been taken or kept by the officers of excise, the same having been considered as illegal since the introduction of the licence system.—On the other hand it was contended by the plaintiff's counsel, that although such surveys had not been made, or account of the quantity of spirits taken or kept, except in some few instances, it was because the same were unnecessary, and not answering any useful purpose; not because the right of doing so was taken away, for that such right was expressly given by the 21st section of the act 28 Geo. 3. cap. 46.—that all former distillery laws were, by the 83d section, continued in force, except in so [215] far as they were expressly altered, repealed, changed, or controlled by, or repugnant to any of the matters, provisions, or regulations contained in this act of the 28 Geo. 3. cap. 46.; —and that if any doubt had remained on this point, it was now completely obviated by the last distillery act of 38 Geo. 3. cap. 92. (upon which information was laid,) for there the legislature took it for granted, that the officers had a right to make a survey on distillers, (as well as on dealers and retailers,) on or after the 13th of June, and sixteen days before that act passed; and the 5th section giving a power to officers from and after the passing of that act, to enter into and continue in stillhouses, etc. and take account, did not derogate from but confirmed this prior right, and was enacted, not for the purpose of giving them powers which they had not before, but for extending, after the passing of this act, the powers they formerly had to the cases, 1st, of continuing in, as well as entering into stillhouses, cellars, or other places made use of by distillers for making or keeping wash or spirits; 2dly, of gauging, measuring, or otherwise taking account of the quantity of wash and spirits in their possession from time to time, as brewed or made; and 3dly, of entering such account in a book or books to be kept by the officers for that purpose.

Many other arguments, from expediency, analogy, the intention of the legislature, practice in the excise, etc. were urged on both sides; and after a long hearing, the lord chief baron (with the concurrence of his brethren then present) told the jury, that as this was entirely a question of law, and not without difficulty, they had better return a special verdict, and leave the point of law for the more solemn and deliberate decision of the Court; but that if they chose to give a general verdict, he would now state his own opinion, and that of the other barons with whom he had conferred, "That the officers of excise were not entitled to make a survey upon the defendants on the 19th, 20th, 21st, and 22d days of June last, the same being before the passing of the act 38 Geo. 3. cap. 92.; and that the survey made by the officers on these days was not such an actual survey by the proper officer of excise as was sufficient to charge the defendants with the additional duty mentioned in the information." In consequence of this direction the lord advocate, counsel for the plaintiff in error, did tender a bill of exceptions to the opinion of the lord chief baron so delivered to the jury, who, notwithstanding, found generally for the defendants.—The bill of exceptions was afterwards sealed by the chief baron, and stated all the foregoing circumstances, and the evidence produced at the trial, in due form; —and the plaintiff brought his writ of error returnable in parliament, and assigned the common errors, to which the defendants pleaded *in nullo est erratum*.—And for the reversal of the said judgment of the court of exchequer the plaintiff in error assigned (J. Scott, R. Dundas, J. Mitford, G. Wood) the following reasons:

[216] I. Because the officers of excise had a right to make a survey upon the defendants and other distillers in Scotland on or after the 13th, and prior to the 29th of June 1798, under the then existing laws, for the purpose of ascertaining the quantity and strength of the spirits in their possession, so as to be charged with the additional duty imposed by the stat. 38 Geo. 3. cap. 92. sect. 2. The defendants in error were at the time not only licensed but entered distillers, and their distillery, where the officers made their survey, was an entered place, into which these officers had a right to enter and take account, under the general provision of the stat. 6 Geo. 1. cap. 21. sect. 14. which was a regulation not introduced for the purpose of ascertaining the amount of duties, but for preventing fraud by the introduction of smuggled spirits, etc. and is not virtually repealed by the alteration of the duties in exonerating the spirits, and laying them upon the content of the still, by 26 Geo. 3. cap. 64. Neither is that act of the 6 Geo. 1. nor any other act relative to the distillery, prior to the 28 Geo. 3. cap. 46., expressly or completely [impliedly] repealed by this licence

act ; for its 83d section does anxiously provide that all the regulations, provisions, etc. in distillery acts in force at the time of passing the stat. 24 Geo. 3. sess. 2. cap. 46. and in stat. 26 Geo. 3. cap. 73. shall be continued and in force, except 1st, Where the same are expressly altered, repealed, changed, or controlled by the 28 Geo. 3. cap. 46. ; such as the duty on wash, and every regulation for securing it, the size of the stills, the use of permits for removing raw spirits from the place of their manufacture, etc. ; or, 2dly, Where the same are repugnant to any of the matters provisions, or regulations in 28 Geo. 3. cap. 46. ; such as all fastenings, locks, seals, keys, etc. on still-heads, wash-pumps, charge and discharge cocks, furnance-doors, notices for opening and charging stills, prescribed time for being worked off, and to be worked so many months in the year, and days in the week, etc. weekly entry and payment of duty for wash distilled, keeping stock on the spirits made, and taking account **once in every three months, etc.**

II. Because the officers of excise had a right to make such survey, as incidental to the power of examination given to them by the stat. 26 Geo. 3. cap. 64. sect. 26. and 28 Geo. 3. cap. 46. sect. 21. which last declares, " that it shall and may be lawful " to and for any officer or officers of excise in Scotland, to enter by day or night into " the stillhouse, or other place or places where any still or stills (whether the same " be licensed or not licensed) shall be kept, worked, or used, or where any worts, " wash, low wines, or spirits are prepared, distilled, or kept, and to examine the " same." Under this clause it is clear that the officers of excise had a power to examine the warehouses, etc. of distillers, in order to discover if any stills, wash, low wines, or spirits were there kept, contrary to the true intent and meaning of that act ; and many cases may be conceived wherein, in [217] order to discover this, it would be absolutely necessary to take account both of the quantity and strength of the spirits ; unless, therefore, a power to do so were included in the power to examine, the intention of the clause might be altogether defeated.

III. Because the stat. 38 Geo. 3. cap. 92. (upon which the information against the defendants in error is laid) does expressly recognise and declare this to be the just contruction of former acts, by authorising (sect. 2. and 3.) the survey of distillers' stocks, not only of what spirits were found in their possession upon or after the 13th of June 1798, but of what was distilled on, and from, and after that date. Now it is clear that this act (which received the royal assent on the 29th of June 1798), must have been framed upon the supposition that such a survey might be lawfully made, and that its provisions might otherwise be defeated in an important point. It is to be treated therefore as a legislative exposition of the former acts, and amounts to a declaration that, under the authority of those acts, the survey might be made for the purpose for which it was made.

Objection. That this act, by sect. 5. gives the officers of excise a right to enter and take account of spirits in the stock, custody, or possession of distillers, rectifiers, or compounders, not from and after the 13th of June, but " from and after the " passing of this act."

Answer. This clause does not derogate from but confirms the officers' prior right to survey, and was enacted not for the purpose of giving them powers which they had not before, but for extending, after the passing of this act, the powers they formerly had to the cases, 1st, of continuing in, as well as entering into stillhouses, cellars, or other places made use of by distillers for making or keeping wash or spirits ; 2dly, of gauging, measuring, or otherwise taking account of the quantity of wash and spirits in their possession, from time to time, as brewed or made ; and, 3dly, of entering such account in a book or books to be kept by the officers for that purpose.

IV. Because, even supposing the officers' right to make a survey upon distillers on or after the 13th, prior and to the 29th of June 1798, to have been taken away by, or to be doubtful under former laws, it is submitted, with confidence, that the additional duty claimed by the information did attach under the stat. 38 Geo. 3. cap. 92. sect. 2. upon the spirits found in the defendants' possession in June last, and that the survey then made, whether legally or regularly made or not, was sufficient in law to found the charge of the additional duty upon, it having been an actual survey made by the only person who can be denominated the proper officer of excise, he being the officer under whose survey the defendants were, and it being the only survey to which the act can possibly refer ; and if it be that survey to which the act

refers, (whether legally or illegally made at the time,) it is conceived to be quite sufficient to charge the [218] defendants with the additional duty, and that the court of exchequer ought to have given that direction to the jury.—It is clear that if a charge of additional duty had been made in consequence of a survey prior to the 13th of June 1798, the plaintiff could not have maintained his action, under the stat. 38 Geo. 3. cap. 92.; and that if made in consequence of a survey posterior to the 29th of June 1798, the defendants could not have set up any legal defence: The question therefore comes, if this duty does not attach in consequence of a survey *de facto* made in the intermediate period? and it is apprehended that it does, in the same manner as the additional wine duties of 1795 and 1796 attached on surveys made before the acts passed: see 35 Geo. 3. cap. 10. and 36 Geo. 3. cap. 123. That the present duty was not payable in consequence either of the resolutions of the house of commons, or of the orders of the treasury, prior to the passing of the act, is admitted, as these resolutions might not have been made law; but being enacted with a retrospective date, depending on a fact which had taken place, and which was provided for by the alternative expression of shall be, or shall have been found, it seems clear that such duty does attach from thence.

V. Because the construction contended for by the defendants in error is productive of two important effects. In the first place it renders the act of the 38th of the king completely nugatory for sixteen days, notwithstanding its express words to the contrary, in respect to the further duty meant to be imposed both upon the stock on hand at or immediately after the 13th of June, and upon the spirits distilled after that date and before the 29th. 2dly. This act is by such construction not only rendered nugatory for sixteen days as to lowland distillers, and rectifiers, and compounders, but is made most partial and unequal as to highland distillers, dealers, and retailers, who (it is admitted by the defendants in error) are clearly liable to this additional duty of one shilling for every gallon of spirits they had in their possession on or after the 13th, while the lowland distillers claim an exemption from it till after the 29th of June, before which time they would have taken care to have had the whole of their stock out of their possession, and thereby would not have paid a single farthing of a most salutary tax, which was certainly intended by the distillery committee, and by the legislature, to affect the makers equally with the dealers in and retailers of spirits over all Scotland. If it had not been so intended and understood, why did the lowland distillers oppose the bill in its progress through both houses of parliament, which was quite unnecessary if they had a good legal defence against paying on their stock on hand till after the act passed, before which day all their stock would have been out?

The defendants in error argue,

1st, From the usage in the lowland distilleries in Scotland since the 5th of July 1786, when the first licence act com-[219]-menced, and from that date it is alleged these distillers were not surveyed, nor any account of their stocks taken or kept by the officers of excise.

Answer.—It is true that the lowland distilleries were not, since July 1786, surveyed as formerly, or any account taken or kept of the spirits they made, because such surveys were then become unnecessary, and not calculated to answer any good purpose, the whole of the duty being now laid upon the capacity of the still, and none upon the spirits or materials from which they were made, and no excise permits required. At the same time it is to be observed, that, in point of fact, the officers of excise did, at any time when it was thought necessary for the sake of the revenue, or the discovery or the prevention of fraud, enter into the warehouses or places made use of by distillers for keeping as well as for making spirits, and examine the same; and although the taking of stock was discontinued after the commencement of the licence law, because the officers of excise were not empowered to grant permits with spirits on their first removal, it does not follow that their right to do so, whenever it was necessary, or could answer any useful purpose, was at an end.

2dly, From the opinions of the commissioners and other officers of excise, and respectable persons upon this point, as contained in the appendix to the distillery committee's report of June 1798, from which it is probable that various extracts will be given in the case for the defendants in error.

Answer.—It is submitted, 1st. That such opinions, even though they had been

clearly and unequivocally given against the right of survey, can have as little influence as usage in determining a mere question of law, because these opinions may be completely erroneous, and the persons who formed them altogether mistaken : - But, 2dly, it will be found, when these extracts are carefully examined and compared with other passages, that they all go merely to statements of the fact of what had happened in practice since 1786, and of the consequences of that fact ; and that they do not amount to an express declaration of what was the law, even in the opinion of the witnesses examined before, or of the authors of the papers given in to the committee.

3dly, From an alleged contract betwixt government and distillers under licence, whereby all former laws were understood to be repealed, all restraints and excise cheques taken off, and the manufacturers of spirits left at liberty to distil any quantity and in any manner they chose, and to keep and send out their spirits without any interruption from or interference of the officers of excise.

Answer.—Where such a contract or legislative declaration is to be found it is not easy to discover. In no act of parliament does it appear, and it is very strained to infer it merely from the preamble of the stat. 26 Geo. 3. cap. 64. reciting, " That " whereas the mode established by the laws and regulations [220] now in force " for charging and securing the rates and duties imposed upon wort, wash, and " other liquors used, in that part of Great Britain called Scotland, for the distilling " of spirits for home consumption hath not been found to answer the good purposes " thereby intended within that part of the united kingdom, and it is therefore ex- " pedient to impose, in lieu thereof, a moderate duty upon the said wort, wash, and " other liquors, to be ascertained by the size or content of the stills there lawfully " used in the making of low wines and spirits," etc. Therefore it goes on to discontinue, for two years, from 5th July 1786, the several rates and duties now payable in Scotland on the distillation of spirits, and to substitute, in lieu thereof, other duties on the content of the still ; but there is not in this act, (which was but temporary,) nor in the subsequent one of 28 Geo. 3. cap. 46. (which was made perpetual, and in which there is no such preamble,) any clause whatever repealing all former laws, restraints, and cheques. On the contrary, it is expressly enacted by the 9th section, " That " no distiller shall erect, work, use, or have in his, her, or their possession any still " or stills, upon any pretence whatever, in any house or place, other than the house " or place previously entered by him, her, or them at the proper office of excise, ac- " cording to the several laws in that behalf made and provided, on pain of forfeiting " the sum of three pounds per gallon of the capacity of such still or stills ; " by the 14th section, " That no licence shall be of effect till produced to and indorsed by the " proper officer of excise of the division, and that such production shall be deemed a " sufficient entry of such still or stills ; " and by the 26th section, " That it shall and may " be lawful for any officer or officers of excise in Scotland to enter, during lawful hours, " into the stillhouse or other place where any still or stills (whether the same be licensed " or not licensed) shall be kept, worked, or used, or where any wort, wash, low wines, or " spirits are prepared or distilled, and to examine the same ; and in case any still shall be " there found in a state capable of being worked, the same not having been duly licensed, " or in case any wort, wash, low wines, or spirits shall be there found, contrary to the true " intent and meaning of this act, such still, and the liquor therein, with all the utensils " and implements thereto belonging, or therewith used, and also such wort, wash, " low wines, and spirits shall be seized by any officer of excise, and forfeited."

4th, The defendants in error have supposed that the plaintiff in error must be drove to the absurdity of maintaining that all the distillery acts prior to the year 1786 are either repealed or are in force ; and if the latter, that he must take the whole and apply them to the licence system, to which they are perfectly incongruous.

Answer.—The plaintiff in error does not conceive that he is reduced to this dilemma upon the argument he has had the [221] honour to maintain ; and that there is a clear distinction established in the 83d section of the 28 Geo. 3. cap. 46. betwixt such distillery laws as were then to continue in force, and those that were thereby altered, repealed, changed, or controlled, or repugnant thereto, as more particularly stated in the observations made under the first reason in this case.

The defendants in error contended that the general clause, § 45. of stat. 26 Geo. 3. cap. 64. so far from keeping alive the various regulations contained in the different statutes passed while the duty continued to be levied on the wash, low wines,

and spirits, and particularly the right of surveying and taking account of the distiller's stock, related only (as do similar clauses in all the revenue acts,) to the mode of levying, recovering, and managing the duties, and by referring to all former statutes relative to the excise in general, and not to the distillery laws in particular, was so worded as to guard against the possibility of being understood to lay the distiller under any regulation as to the management of his works, not specially authorised by the act itself.

So perfectly (they added) was this understood, that, from the moment the act passed, the officers of excise, who, under the former mode of levying the duties, had constantly attended the distilleries, surveying and keeping account of the stocks, totally discontinued that practice, and attended occasionally for no other purpose than to examine and see that no unlicensed stills were used, no materials distilled but in the still licensed for such materials, or the act in any other respect transgressed, in terms of the specific powers committed to them by the 26th section of that act.

This first licence act having been declared to be in force only for two years, a new law became therefore necessary in the year 1788, and an act was passed accordingly (28 Geo. 3. c. 46.). By that statute the licence duty on the cubical contents of the still was considerably increased; in other respects there is no material alteration in the law; the rules and regulations are almost transcripts from the 26 Geo. 3. with regard to entries, licences, and powers of officers, with this difference, that they are entitled, by section 21. of this statute, to enter the stillhouses, etc. by day or night, for the purposes specified in section 26. of the former statute before recited, which admits their right to enter at lawful hours only, though it is clear, that had all the former laws as to officers entering and taking account been still in force, no such provision would have been necessary, as by those laws, entry by night as well as day was authorised.

This act also contains the same anxious clause as in the former statute, (§ 24.) "That nothing in this act contained shall extend or be construed to extend to repeal, alter, or change any act or acts now in force for the surveying and keeping a regular account of the stocks of rectifiers and compounders, dealers in and retailers of spirits in that part of Great Britain called Scot-[222]-land," etc. A provision tantamount to a declaration of the legislature itself, that all former acts were thereby repealed so far as they regarded the surveying and keeping account of the stocks of distillers.

Upon the faith of the former existing laws with regard to the exportation of spirits from Scotland to England, great quantities had been made by the Scotch distillers for the English market; but the English distillers having complained to the legislature that the equalizing duty of 2s. per gallon appointed to be paid on Scotch spirits when brought to England, was too low, and that a higher rate ought to be immediately imposed. In February 1788, some months prior to the expiration of the experimental act in July 1788, there was passed an act of 28 Geo. 3. cap. 4. which subjected Scotch spirits sent to England in an additional duty of 6d. per gallon upon their importation. This put an end to the trade from Scotland to England, and the Scotch distillers, unable longer to continue the contest with the English, stopped payment.

When this event took place the price of spirits rose; and the distillers' creditors in Scotland, having on hand large quantities of grain and other materials, continued the trade without loss till the expiration of the licences on the 5th July following, when their stocks of spirits came to be considerable; as they were at this period to cease to be licensed distillers, and no longer to enjoy the character and privileges as such, it became necessary in the new act (which was to commence from that date) to provide for the disposal of the spirits thus on hand, and which was accordingly done by § 32. of the said act, already stated in the commencement of this case.

This act (it was observed by the defendants in error) likewise contains various regulations with regard to distillation for exportation. In particular directing the surveying and taking account of the stocks of all spirits distilled for exportation, thus again demonstrating the understanding of the legislature, that the right of the officers to survey and take account of the spirits distilled for home consumption was at an end.

By the act 33 Geo. 3. (c. 61.) the licence duty on the contents of the still was raised. The regulations of this act are nearly similar to those of the 26th and 28th of the

king with regard to distillers, with this difference, that the rectifiers and compounders, are thereby included with the distillers under the rules of licence. It is enacted (§ 8.), that no still licensed for distilling spirits from British materials shall be used for making such from melasses, &c. (§ 9.) That no still licensed for distilling or rectifying spirits shall be used for compounding or mixing spirits, and *vice versa*; and (§ 11.) that no person who is a compounder shall have a licence for distilling or rectifying; and that no distiller or rectifier shall be a compounder.

It being thus provided that distillers may be rectifiers but not compounders, and that rectifiers and compounders are to work [223] by licence as well as distillers, the act of course omits the enactments in the 39th section of the 26th, and the 29th section of the 28th of his present Majesty, subjecting rectifiers and compounders to stock survey.

On a contemplation and comparison of the whole body of acts relative to distilleries in Scotland, the defendants in error insisted, that neither by the letter nor the spirit of the statutes, which introduced the payment of duties by way of licence on the capacity of the still, any gauge or survey of the officer could be legally attempted, nor any entry or examination whatever made but in terms of the specific powers thereby originally committed, continued, and at length made perpetual; and accordingly, in practice, all attempts to survey or take account of stock were discontinued from the passing of the first act imposing the duty on the contents of the still.

In spring 1797 an attempt was indeed made by the managers of the revenue in Scotland to introduce the surveying and taking of stock, but which was successfully resisted by the distillers, and their exposition of the law thus further confirmed. Some time after the duty of £54 per gallon was imposed (by 37 Geo. 3. cap. 17.) upon the contents of the lowland still, the market of the lowland traders had been in a manner taken entire possession of by the highland distillers, from the illicit introduction of spirits manufactured within their bounds at a trifling duty. Government were convinced that new regulations and additional duties upon the highland manufacture were absolutely necessary for the preservation of the trade in the lowlands; but before such were brought to maturity, and even after the highland line was limited, and an additional duty laid on, but not commencing till six months after passing a new bill for that part of Scotland, the lowland distillers, having no sale for their spirits, were totally unable to make the large advances of their duties agreeably to the law.

In this situation the lowland distillers made applications to the board of excise and to the lords of treasury, who, upon a favourable report from the commissioners, agreed to the request made by the distillers of authorising the board of excise, in May 1797, to permit the deposition of spirits with them for security of the licence duties for the space of six months, viz. from the 10th June to the 10th December following, under the same regulations as are established with regard to rum imported from the West Indies: An official copy of the treasury warrant, to the foregoing effect, was transmitted to the board of excise; and though it was evident that its only object was to indulge the fair trader, whose manufacture lay dead upon his hand, while it secured government from the possibility of loss, yet, in the orders issued by the board of excise, instead of merely directing, in terms of the treasury warrant, that each distiller should deposit a quantity of spirits equal to six months' duties, they commanded the officers to take possession, under the keys of the excise, of [224] the whole spirits in the distilleries of Scotland, and to take account and ascertain the strengths of all to be afterwards manufactured, and to remove them as soon as run from the stills into casks, which were ordered in the like manner to be sent to the cellars of the excise, no part of which to be again taken therefrom, but with an excise permit.

The instructions contained various other harsh conditions not authorised by the treasury warrant.

This attempt to graft upon the indulgence of the lords of the treasury a revival of the system of surveying, which had been so long at an end by the law, and discontinued in practice, was resisted by the distillers. They remonstrated to the board of excise, but in vain. No answer was given to their application. At last, after a lapse of two months, Adam White, supervisor of the bounds, by a letter to the respondents and the other distillers, required them instantly to comply with the general

orders of the board before referred to, under this certification, in case of failure, that writs of extent for seizing and confiscating their whole property would be forthwith applied for.

The distillers again denied the right of the board to impose this condition, and refused to comply with it. The consequence was, that a motion was made in the court of exchequer (11th July 1797) for writs of extent. This the distillers opposed. —The Court were of opinion that, by the existing law, the board of excise had no right to order the survey.

The matter was however settled by an agreement with the lord advocate on terms which it is unnecessary to mention farther, than that subjecting the distillers to survey was no part of it : and thus the distillers were further confirmed in their opinion that, under the then existing laws, they could not be subjected to survey.

In consequence of the inequality of taxation between the highland and lowland distillers, the market of the latter, as already observed, had been inundated with spirits smuggled from the northern line : and at length, from the various complaints made by the lowland manufacturer, it was determined in the house of commons that the various papers which had been presented to them during the preceding session should be fully investigated, and a committee were thereupon appointed, with instructions to inquire into the best mode of levying and collecting the duties upon the distillation of corn spirits in Scotland, and to report to the house.

A long investigation accordingly took place, which was followed by a report of the committee, (11th June 1798,) which, after giving a progressive account of the various modes adopted at different periods of imposing and levying the Scotch duties, and after stating certain inconveniences of the mode adopted by the 24 Geo. 3. cap. 46. which, from the necessary strictness and constancy of survey, " gave great opportunities to the distiller to elude the vigilance, or purchase the connivance of the [225] " excise officer," proceeds to state that these circumstances induced the legislature to introduce a new principle first attempted in the Highlands by the 25th of the King cap. 22 ; and, secondly, to establish that system of licence throughout all Scotland, by the 26 Geo. 3. cap. 64. By this means, say the committee, " an ascertained revenue " could be secured to the public, and the manufacturer delivered from the interruption " and inconvenient interference and inspection of the officers of excise."

The above, and various other passages in the report, were quoted to demonstrate the understanding of the committee of the house of commons, that, as the law then stood, surveying or taking account of stock was not warranted.

During the sitting of that committee, an attempt was made by the officers of excise to make an actual survey of the distillers' stocks, in order to enable them to lay before the committee an exact state of the spirits on hand, but the distillers having resisted the attempt as illegal, it was abandoned on the part of the officers ; and an estimated report of the supposed quantities was made up and laid before the committee.

The report of the committee was laid before the house of commons on the 11th June 1798 ; and the resolutions of the house in a committee of supply, (as stated in the commencement of this case,) passed accordingly.

[What proceedings took place subsequent to these resolutions till the trial of the present information, has been already stated.]

The defendants rested their whole defence on two grounds : 1st, That the alleged actual survey on the 19th, 20th, 21st, and 22d of June was illegal, unwarranted by the law as it stood at the time, and could not therefore be the foundation of any charge for duties on the statute that afterwards passed.

2dly, That the survey itself had not been made with sufficient accuracy to render it an actual survey in terms of the said act : And, lastly, That supposing the survey to have been warranted by law, and regular and complete in all respects, yet the jury ought not to find a verdict for penalties innocently and *bona fide* incurred by the defendants, in the belief that the survey was illegal, however the jury might have found a verdict for the single duties, if a simple action of debt for recovering them had been brought, which it was the duty of the advocate-general, in justice to the state as well as to the defendants, to have done. In support of this defence, and in affirmance of the judgment of the court of exchequer in Scotland, the defendants stated (W. Grant, W. Adam) the following reasons :

I. The duties, for non-payment of which the information for penalties was ex-

hibited by the plaintiff in error in this case, were imposed by the act 38th of his present Majesty, cap. 92, which lays a duty of one shilling upon every gallon of British spirits distilled for consumption in Scotland, "which shall be or shall have been found on "the first actual survey by the proper officer of excise, upon or after the 13th of June 1798, in [226] the stock, custody, or possession of any distiller, rectifier, compounder, "dealer in, or retailer of spirits, etc. By the words "first actual survey by the proper "officer " must be meant, not merely a survey actually made by an officer of excise, but a survey legally made under the authority of the law; for the legislature cannot be presumed to sanctify or give any consequence or effect to an illegal act. The act provides, that from and after passing thereof the officers of excise shall be entitled, by gauging, measuring, or otherwise, to take an account of the quantity of the spirits in the hands of the distiller; but it does not declare that any survey made or account taken before the passing of the act shall be legal; and as the survey on which the charge in the information is founded was made before the passing of the act, it is perfectly clear that the opinion of the barons of exchequer, that the officers of excise were not authorised by law to make such survey, and that the same was not such actual survey as by and under the provisions of the statute was sufficient to charge the defendants with the duty, must be well founded, unless it can be shewn by former acts existing and in force at the date of said survey that the officers of excise were authorised to make the same.

11. The imposition of taxes on the subject being entirely the creature of statute, and the same being the case with all penalties, provisions, and regulations for levying and enforcing the duties, the officers of the revenue appointed by virtue of those acts can have no power to enter the premises of the manufacturer, or to do any thing when there, however expedient or even necessary for securing and enforcing the duties imposed by law, except in so far as express powers and authorities are given them by the statutes imposing such duties. Neither has the legislature at any time, however anxious to check frauds against the revenue, given any arbitrary or discretionary powers to the officers of themselves to devise checks or extend those actually given by the existing laws. It has, on the contrary, from a proper regard to the liberty of the subject, introduced, by special laws, the regulations appearing to be necessary for those purposes, expressly committing and accurately describing such powers to the officers as have been thought necessary from time to time. Thus downwards from the act of the 12 Cha. 2, which first introduced the system of excise, and authorised the appointment of gaugers and other officers, the statute book displays a series of regulations for imposing and levying the duties, fixing and defining the powers of the officers; beginning with the simple power of gauging and charging the duty authorised by that act, and ending in the complicated system that in the course of a century had taken place, and which existed in the year 1786, when the mode of levying the duties on the contents of the still was introduced. From that moment not only the necessity of those various checks and regulations, and amongst others the surveying, taking, and keeping an account of stock, entirely [227] ceased, but became absolutely inconsistent with the mode then adopted of levying the duties by the contents of the still. The distiller being now thus allowed for that duty, or rather that composition for duty to distil whatever quantity of spirits he chose, and to send them out upon his own certificate, no more powers were necessary to the officer, or consistent with the state of the law, than that the officers should be at all times permitted to enter the places and storehouses where spirits were made and kept to examine the same, in order to be satisfied that no stills were used but such as were licensed, nor any materials made use of in such stills but those for which the licence was granted. Such, accordingly, were the powers given by the first licence act of the 26th of his present Majesty. It proceeds on the preamble that the former laws had not been found to answer the good purposes thereby intended, it therefore put an end to the then existing rates and duties, imposes a duty on the contents of the still, describes and enacts a variety of rules and regulations calculated for this mode of levying the duties, and expressly authorises and hereby virtually limits the power of the officer "to enter, during lawful hours, into the stillhouse or other place "where any still or stills (whether the same be licensed or not licensed) shall be kept "worked or used, or where any wort, wash, low wines, or spirits are prepared or dis- "tilled, and to examine the same." The insertion of this clause demonstrates the

understanding of the legislature, that the powers of the officers by the former laws, which had been repealed as not answering the purpose, were at an end. Without this clause the officers could not have entered even to examine; and to say that they could, under the laws of licence, have not only entered, but take an account of the stock, is not more absurd than it would have been to contend that they could have insisted on the notice appointed by the former laws before the distiller proceeded to work, or that they could have put fastenings on the stills and furnaces, and kept them locked, not to be opened but on previous notice; or to have insisted on the distillers submitting to the numberless checks introduced by the brain of the laws of survey which the licence act itself had abolished in the lump as not answering the purpose, and which were totally inconsistent, and impracticable as well as unnecessary to the levying of the duties thereby introduced. On the above clause alone, therefore, the powers of the officers must rest;—but, independently of the spirit and object of the act, which are both inconsistent with the taking and keeping an account of stock, the words of the clause can by no sound construction be made to import it, as the word “examine” when applied to the stills, wash, and spirits, and expressly connected with the object of discovering whether unlicensed stills and unlawful materials had been used, can never apply to gauging of the quantities and ascertaining the strength of spirits, with a view to ascertain and keep an account thereof, under an act which gave the distiller a power [228] to make, keep, and send out as much spirits as he pleased without regarding the quantity or strength, so the act of 26th of his present Majesty (and the same observation applies to all the subsequent acts down to that on which the information is laid) not only virtually and by implication repealed and put an end to the powers of the officers under the former laws, but gave them powers applicable to the new law which not only by their spirit and purpose, but by the words in which they are granted, are exclusive of the power of surveying and taking an account of stock.

III. If the special enactment of the statutes imposing the licence duty, with regard to the powers of the officers to enter and examine, do thus exclude the officers’ right to survey and take account of stock, the appellant can derive no aid from the general clause, common to these and every other act imposing duties of excise, referring to the powers, etc. which by the act 12 Charles 2. or by any other law now in force relating to the excise, are provided and established for managing the duties thereby granted, and declaring that they shall be practised for levying, etc. the duties under the licence acts.—For, in the first place it is perfectly well known and understood that this general clause relates only to those powers for managing, levying, and prosecuting for penalties and forfeitures common to every act imposing excise duties, and does not extend to the special powers or regulations in any of the former acts which are and must be totally inapplicable.—The plaintiff therefore might as well maintain, that under that general clause the officer could have insisted on locking and fastening the still-heads and furnaces, requiring twelve hours’ previous notice before the distiller begins to work, or enforcing any other similar regulations, as that he could have insisted on surveying and taking an account of the stock, without a special power given by the act itself. 2dly, The general clause inserted in the licence acts is thus qualified, “other than in such cases for which other penalties, provisions, and regulations are prescribed by this act.”—Supposing therefore that the general clause could have had the effect of introducing into the act powers to the officers of surveying and taking account conferred by the former excise laws as applicable to a totally different mode of levying and imposing the duties, the above exception would exclude the application of those former laws as to surveying and taking account of stock, because the act itself ascertains and limits the power of officers to entering and examining the stills, wash, and spirits, for the special purpose of detecting the use of unlicensed stills and unlawful materials, and thus excludes the power of surveying and taking account of stock, which is not only a different power, but one inapplicable and inconsistent with the mode of levying the duties introduced by the act as effectually as if it had been in express words excluded. And, lastly, the legislature has demonstrated its own sense of the matter by introducing this special clause, giving powers to the officers to enter and examine, as such a clause was totally unnecessary and [229] superfluous if the former laws authorising surveying and taking account of stock had still been in force, or those powers had been intended to be given to the officers

by the general clause referring to the act 12 of Charles 2, and the other excise laws then in force. The inefficacy of the general clause to keep in force former special regulations may be illustrated by the licence act of the 28th of the King itself; for though it contains the general clause in common form, yet there is also inserted a special proviso, which, according to the plaintiff's interpretation of the general clause, would have been unnecessary.—That the powers, authorities, regulations, etc. contained in the acts of the 24 Geo. 3, cap. 46, as well as those contained in 26 Geo. 3, cap. 73, in so far as "not expressly altered, repealed, changed, or controlled by this" act, or not being repugnant to any of the matters, clauses, provisions, or regulations "in this act contained, shall be and continue in full force, and be duly observed, etc. and put in execution throughout Great Britain in and for the managing, etc. and securing the said several duties by this act imposed or continued, and for preventing and punishing frauds, etc. are given, as if expressly inserted and re-enacted."

IV. The sense of the legislature, that by adopting the plan of laying the duty by way of licence on the contents of the still, the right of surveying and taking an account of stocks was not only rendered unnecessary but superseded, is fully evinced by every act imposing the licence duty. By the first, and various subsequent licence acts, the duty was only laid upon distillers, and not on rectifiers and compounders; and these acts contained a clause declaring that the right of surveying and taking the stocks of rectifiers, compounders, and dealers should still continue in force; and when by a subsequent licence act the licence on the contents of the still was extended to rectifiers, the three other description of traders, viz. compounders (who, though now under a licence duty, could not send out their compounds but by excise permit) and dealers as well as retailers, were still continued under the fetters of survey.—Thus did the legislature proceed in the most unambiguous manner, not only on the supposition that the right of survey was to be at an end with distillers and rectifiers from the moment they were put under the licence duty, but that the general clause referring to the powers of former acts was to have no effect to preserve or keep in force the right of surveying those descriptions of persons; so that it is as impossible, upon the supposed intention of the legislature, or the words they have used, to found an argument in support of the existence of the power of survey under the licence acts as to distillers and rectifiers, as it would be to deny its existence with regard to compounders, dealers, and retailers, as to whom it is in the most express manner reserved.

V. By the act 24 Geo. 3, cap. 41, intituled "an act for laying certain duties on" licences to be taken out by the makers of [230] and dealers in excisable commodities therein mentioned," certain duties by way of licence was laid upon all different descriptions of makers of excisable commodities, and in particular distillers and rectifiers were obliged to take out a licence, at the rate of one halfpenny per gallon chargeable on the contents of every still. Afterwards when the act 26 of the King put an end to the duties on low wines and spirits, and laid the whole duty on the content of the still, the necessity of the distillers taking out the halfpenny licence was necessarily superseded; but it continued to be taken out by rectifiers as formerly. When by the act of 33 Geo. 3, cap. 61, the rectifiers were subjected to the duty on the content of the still, in the same manner as distillers their halfpenny licences, as makers of excisable commodities were then current; but it being the object of the law to take them from under the excise as well as the distillers, and to free the rectifiers altogether from survey, it therefore became necessary to put an end to their current licences as makers of excisable commodities. In order, and for that purpose only, to remove any pretext for surveying them as makers of excisable commodities, the 19th section of the said act did accordingly provide, "That from and after the said 5th July 1793, all licences which, before the said 5th July 1793, shall have been granted" by the commissioners of excise in Scotland, or by the collectors or supervisors of excise "in Scotland, or any of them, to any rectifier of spirits in that part of Great Britain, by virtue of or under the authority of an act of parliament, made in the 24th year of his present Majesty, intituled 'An act for laying certain duties upon licences to be taken out by the makers of and dealers in excisable commodities therein mentioned,' and which shall be then unexpired, shall, on the said 5th July 1793, become, and be null and void to all intents and purposes whatsoever; any thing in the said

"licences expressed, or in any act or acts of parliament contained to the contrary thereof in anywise notwithstanding."

The act makes no provision that they should not take out the halpenny licence in time to come, because the imposition of the larger licence duty necessarily superseded it: Neither did it give them a right to draw back the halpenny licence duty for the year then running, either in whole or in part. The clause therefore could have no meaning or effect but to prevent any pretence for keeping them under survey as makers of excisable commodities, which they ceased to be as soon as, by the act before quoted, they became allowed to rectify as much as they could in their rectifying stills, and to send their spirits out by their own certificates, a mode of working and selling totally inconsistent with surveying and keeping an account of their stock.

VI. As in every case, practice and the general understanding of the country are the best interpreters of the law, to these the defendants are entitled to resort in support of the interpretation the court of exchequer has put upon the laws under which the [231] pretended legal survey was made on which the information was founded. It has been seen that, in the examinations before the committee of the house of commons it was admitted by the revenue officers who were examined, as well as by the report of the commissioners of excise to the lords of the treasury, that in consequence of and upon the "fundamental principle of the duties being laid upon the size of the still, "and not on the quantity of wash, or of the low wines or spirits produced from it, "there followed a complete exclusion of all survey of the manufactured commodity "by the excise officers, and of the right of taking account of the stock," etc. And "the bill of exceptions bears, that never since the passing the act of the 26th of his "present Majesty, laying the duty upon the contents of the still, had the officers of "excise made any survey upon the defendants, by gauging or taking an account "of the quantity or strength of the spirits made by the defendants, in the casks or "other vessels belonging to them, before their removal from the distillery wherein "they were made and manufactured; and that the licensed distillers in the Lowlands "of Scotland had uniformly, during the whole period since the passing of the said "act, refused to permit such surveys to be made, considering such surveys to be "illegal, an interruption to their carrying on their business, and not warranted by "law." It was also given in evidence, that the commissioners of excise, after endeavouring to force a survey, as a condition of their giving effect to the orders of the treasury for taking spirits in security of the licence duties due by the distillers who had stopped payment, they were obliged to desist from the attempt as illegal.—The inveterate usage, therefore, strongly supports the defendants' argument as to the law; and as the fact as to the usage as well as the understanding of the officers of the revenue, contained in the report of the committee of the house of commons, were in the view of the legislature when the act of the 38th of his present Majesty was passed, and as that act gave the right of surveying and taking account to the officers of excise from the date thereof, it is manifest that the legislature, when they imposed the duty of the shilling per gallon on all spirits found in the hands of the distiller at the time of the first actual survey, could not have in view any survey to be made with regard to distillers, except under the act they were then passing, though as to the dealers, who were then under legal survey, such surveys might have been made between the report of the committee and the passing of the act.

VII. Supposing the survey, on which the information was founded, though made before passing the act, could have been held to have been made by authority of law, it was not an actual survey, for the officers did not produce the specification of the gauges of the casks or utensils from which the general amount of the spirits was said to be calculated, which was absolutely necessary to prove and support an actual survey; and it may be [232] presumed that the jury founded their verdict upon this ground, as well as on the want of legal right of survey on the part of the officer.

VIII. This is not an action of debt for recovering of the simple duties, which it ought to have been if those managing the business of the revenue had duly attended to the interest of the state; but an action for penalties, by which, if the action had, been successful, a large sum would have been lost to the revenue, in order to enrich the informer, real or nominal, and a ruinous mulct imposed on the defendants for nothing more than an error in point of law, into which they had been led by the

officers of the revenue themselves : although, therefore, the jury could have been satisfied that the defendants had been mistaken in point of law, it is not to be presumed they would have found a verdict for penalties. It cannot therefore be presumed that the direction of the Court, if erroneous, produced a verdict for the defendants, nor ought such error, therefore, be sufficient to set the verdict aside.

After hearing counsel, this day, to argue the errors assigned in this cause, the following questions were put to the judges :

Whether the survey so made by the officers was such actual survey as by and under the provisions of the act of the 38th of his present Majesty, cap. 92, was sufficient to charge the defendants in error with the further duty imposed by that act ?

Whether the officers of excise were authorised by law to make the survey, stated in the information, on the days therein mentioned ?

Whereupon, the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the judges present upon the said questions, delivered their unanimous opinion upon the said questions in the affirmative.

It was then ORDERED and ADJUDGED, that the judgment given in the Court of Exchequer in Scotland be reversed : and it is further ORDERED and ADJUDGED, that the said Court of Exchequer in Scotland do award a *venire facias de novo*, and proceed according to law : and that the record be remitted to the said Court of Exchequer in Scotland. (MSS. Jour. *sub ann.* 1799.)

[233] CASE 11. JOHN KNIGHT,—*Plaintiff*; HENRY HALSEY, ESQ.—*Defendant*
(in Error) [19th June 1800].

[It being the rule of law that hops are tithable after they are gathered from the bind, a custom to set out the tithes by the tenth row, or by the tenth hill where the rows are unequal, leaving the binds uncut and the poles standing, cannot be supported.]

[Judgment of the Court of K. B. affirmed.]

[See *Tyers v. Walton*, 7 Bro. P. C. 18. Tithes, ca. 7; and see 2 Bos. & Pull. 172. for all the cases on this subject, as alluded to by the Judges in giving their opinion.]

7 Term Rep. K. B. 86. 2 Bos. & Pull. 172.

The cause of litigation between the parties was, by the course of proceeding, brought before the house by writ of error, on a judgment given for Mr. Halsey (the defendant in error) in an action brought against him by Mr. Knight (the plaintiff in error) for not taking away the tithes of hops in question : that action was brought by the order of the court of chancery, and in a suit instituted by Mr. Halsey. The plaintiff in error considering the case in itself, as distinguishable from all others, for its elucidation entered into the following history of its origin and nature.

The hop, as an herb, is perhaps unquestionably indigenous here, it being found in places where there is no presumption of its having been an article of cultivation. When it was first cultivated is wholly unknown ; but at any rate it must have been much earlier than has been generally supposed, as the statutes of the fifth and sixth of Edward the sixth, (c. 5.) made for putting land in tillage, expresses, that that act should not extend to any land set with saffron or hops, or sown with hemp, flax, wood, or madder.

That hops were in cultivation in the parish of Farnham, in Surrey, (from whence this cause came,) at a very early period, is plain from this fact, that although the vicar takes all the tithes of wood, and all small tithes, except hops, and also of hops planted in orchards and gardens, and land which has been woodland, yet the lessee of the impropriate rector has always (as is understood) taken, and has been adjudged by the court of exchequer to be entitled to the tithes of all hops planted in fields.

It does not appear that any difference existed in the parish of Farnham as to the manner of tithing hops before the reign of king James the second ; and to that time the custom or usage appears to have been, that the lessee of the great tithes had, for

the tithes of his hops, the tenth row when equal, or else the tenth hill; that those were left standing with the hop binds uncut, and the impropiator, or his lessee or agents, had convenient time to come and cut the binds at the time of picking [234] the hops, and pick the hops upon the grounds; but about the beginning of that king's reign the occupiers began to insist that they had a right to cut the binds of the tithe hops when they set them out, and that the impropiator or his lessee should not pick them on the grounds. This occasioned the filing of a bill in the court of exchequer, about Michaelmas term, in the second year of James the second, by Anne Chitty, executrix of the will of her husband, who was farmer of the rectorial tithes, against William Reeves, gentleman, for an account of the tithes of his hops, as not having been set out in conformity to the custom or usage above mentioned, the plaintiff insisting on the custom to set out the tithes with the binds uncut, the defendant insisting he had a right to cut the binds. (See Wood's *Exch. Tithe Causes*, i. 251.) Witnesses having been examined on both sides, the cause (which was brought on *ex parte* on the second) came on to be actually heard on the 9th day of June 1687, and the Court, on hearing counsel on both sides, and reading several of the depositions, decreed to the following effect:—It fully appearing to the Court that the custom, usage, or practice of paying tithe hops, in that parish, for above sixty years past hath been that the impropiator or his lessee hath had the tenth row when equal, or else the tenth hill; that the same hath been left standing with the hop binds uncut; that the impropiator, or his lessee or agents, have always had convenient time to come and cut the binds and pick the hops upon the grounds; and it further appearing, that if the owner of the hops should take down the poles, and cut the binds of the tithe hops when he cuts his own, the tithe of hops would be much prejudiced, and made worth little or nothing, it being the nature of hops to spoil if they lie twenty-four hours upon the ground before they are picked, and it being impossible for the impropiator, or his lessee or agents, to have persons to pick the tithe hops of the whole parish, who generally pick altogether, and have very great quantities growing, before they are spoiled, in case the owner should cut the binds of the tithe hops when he cuts the nine other parts: The Court was of opinion, and declared the said custom, usage, and practice to be reasonable, and fitting to be observed; and the Court also declared, that in case there was not any such usage the tithe of hops ought to be paid in kind, viz. the tenth part of the whole after picking: therefore the Court decreed that the defendant should account for and pay to the plaintiff the full value of the tithes, or tenth part of the hops which he had growing within the said parish of Farnham during the time in the bill set forth.

From the time of making this decree to the time of Mr. Halsey's buying the lease of the rectorial tithes, the tithes of hops in fields in the parish of Farnham were generally compounded for at the rate of twenty shillings an acre; but when the tithes were set out the usage approved by the decree was followed.

Mr. Halsey, after he became farmer of the rectorial tithes, requiring a composition of three pounds an acre (clear of poor's [235] rates) to be paid him for his tithes of hops, or to have those tithes set out in kind, and this composition being considered as very exorbitant, and Mr. Knight being apprized of the above-mentioned custom or usage, and conceiving it might be supported, he determined to set out the tithes of his hops in the year 1795 in conformity to it; and occupying then only one field called Round Close, and the rows in it being unequal, he set out the tithes by the tenth hill (reckoning only every hill which bore hops) and left the binds uncut; and in order that Mr. Halsey might be fully apprized of this, Mr. Knight gave him previous notice that the tithes would be so set out. Mr. Knight afterwards proceeded to pick his nine-tenth parts, and left the tenth part standing for Mr. Halsey, and he refusing to pick them, or take them away, Mr. Knight, to entitle himself to his action at law, gave him notice to remove them.

In consequence of this Mr. Halsey, on the 3d of November 1795, filed his bill in the court of chancery against Mr. Knight, for an account of the single value of the tithe of his hops, taken in that year in the parish of Farnham, and to be paid what should appear to be due on the taking of the account, and for an injunction to restrain Mr. Knight from commencing and proceeding in any action at law against him for not taking away the hops which had been set out for the tithe. In this bill notice was taken of the custom or usage insisted on by Mr. Knight, and all the different

arguments contained in the respondent's reasons in the case, in this house, of Tyers and Walton, (7 Br. P. C. p. 18.) were introduced by way of charges of so many matters of fact, to shew, that the tithing hops by the tenth row or tenth hill was unfair and injurious to the tithe owner, and it was charged as a fact, that the setting out the tithes of hops by measure, after they were picked, was the fairest and most equal method, and liable to the least inconvenience. Mr. Knight, in his answer, controverted all these allegations, and mentioned as one reason why the tithing of hops, by measure, after they were picked was not the best, that the measuring of hops after they were picked tended to injure, and bruise, and discolour them, particularly in wet weather, and occasioned a considerable waste and loss of time, and an extraordinary expence in the maintenance of the pickers for so much longer time, and prevented the hops from being removed in wet weather into dry places so soon as they might otherwise be, and he insisted on his right to commence an action against Mr. Halsey for suffering the hops which had been set out for his tithe to continue on the ground, and hoped he should not be restrained by the injunction of the Court from commencing and prosecuting such an action.

To this answer Mr. Halsey replied, and he proceeded to examine witnesses in support of the allegations in his bill, and Mr. Knight also examined witnesses in support of his answer. Some of Mr. Halsey's witnesses proved, that the setting out the tithe of hops by the tenth hill was the fairest, and most for the [236] benefit of the hop-planter and tithe owner, and that great damage was done to hops by measuring them. The evidence given on the part of Mr. Knight proved these facts very strongly; and also proved, that the tithe of hops in Farnham had formerly been set out, in conformity to the custom or usage insisted on by him, and it disproved the allegations of inconvenience alleged in the bill.

On July 10 and 11, 1796, the cause came on to be heard before the lord chancellor, when the decree and proceedings, and proofs in the cause of Chitty against Reeves, and the proofs taken in the cause were read. And after a full argument it was decreed, that the injunction granted in the cause should be dissolved, that the bill should be retained for twelve months, and that Mr. Knight should proceed to trial of an action to be brought by him against Mr. Halsey at the then next assizes for the county of Surrey; Mr. Halsey, by his counsel, agreeing to appear and plead thereto; and his lordship reserved the consideration of the costs of the suit until after the trial should be had, and gave the usual liberty to apply to the Court.

Under this decretal order Mr. Knight, the plaintiff in error, as of Trinity term 1796, brought his action at law in the court of king's bench against Mr. Halsey, the defendant in error; and by his declaration declared (amongst other things) to the following effect, viz. that he the said plaintiff, on the 1st of August 1795, was possessor and occupier of the said close called Round Close, in the parish and rectory of Farnham, in the said county, whereon hops were then growing, and that the said defendant was the farmer of and intitled to such hops. That the said plaintiff, according to the usage and manner of tithing of hops in and throughout the said parish lawfully used, did divide, separate, and set out the tenth part of the said hops so then there growing in the said close from the other nine parts thereof, and then left the same for the use of the said defendant, as such farmer as aforesaid, to take and carry away the same, whereof the said defendant had due notice, and thereupon it became and was the duty of the said defendant, as such farmer as aforesaid, to take and carry away the said tithe within a reasonable and convenient time, yet the said defendant did not take away the said tithe, but suffered the same to remain after notice incumbering the same close; to which declaration the said defendant pleaded the general issue not guilty; and thereupon issue was joined.

This action was tried at the summer assizes for the county of Surrey, when a verdict was found for the plaintiff; but the court of king's bench afterwards set aside this verdict, and granted a new trial. (7 Term Rep. K. B. 86.)

The action was accordingly brought again to trial at the assizes holden at Kingston, in and for the county of Surrey, on March 23d 1797. Upon this second trial, the counsel for the plaintiff, to maintain the issue aforesaid on the part of the plain-[237]-tiff, gave in evidence to the jurors impanelled to try the same the following facts, viz.

That the plaintiff, on the 1st day of August, in the year of our Lord 1795, was possessor and occupier of the said close called Round Close, in the parish and rectory

of Farnham, in the said county, whereon hops were then growing, and that the said defendant was the farmer of and intitled to the tithe of such hops. That within the parish and rectory of Farnham aforesaid for above sixty years before the 12th day of July, in the fourth year of the reign of the late king James II., when the tithes of hops were not compounded for, the manner of setting out tithes of hops within the said parish was as follows : that is to say, the occupiers, owners, and proprietors of lands within the said parish planted with hops, have used to set out every tenth row whenever hops have been planted in equal rows, and where the same have not been planted in equal rows, every tenth hill of the said hops so growing in the said lands, and thereby to separate and divide the tenth part from the other nine parts of the said hops, and there to leave the same standing with the binds uncut for the use of the impropiator of the said rectory, or his lessee or farmer for the time being to come upon the said lands, and in a convenient time there to cut the said binds of the said tithe hops so set out as aforesaid, and to pick the said tithe hops, and carry away the same. That from the time when the occupiers used to set out their tithe in manner aforesaid till the year 1795, when the defendant became farmer thereof (being a period of one hundred years) the tithes of hops were compounded for throughout the parish at the rate of twenty shillings by the acre. That the defendant is entitled to tithe of hops of the close in question, being field land. That in the said year, 1795, the said hops so then growing in the said close were planted in unequal rows. That on the seventeenth day of August 1795, the plaintiff gave the defendant a notice, that he was about to set out the tithe in kind. That in consequence of a notice from the defendant that he would take his tithe in kind, the tithe thereof was set out accordingly in the said close called Round Close by every tenth hill, leaving the binds uncut, and the tithe marked with a hole dug in the ground, and was fairly set out, and all the hills not bearing hops passed over and not counted. That on the second day of September following, the plaintiff gave the defendant notice in writing that the tithe in question was so set out. That on the 20th day of October following, the plaintiff gave a notice in writing to the defendant to take away the said tithe so set out as aforesaid. That the defendant did not take the same away, but left the tithe so set out standing with the binds uncut, incumbering the plaintiff's land, for the space of time in the said declaration mentioned. That tithe of hops may be fairly set out by the tenth hill. That such setting out is the most convenient mode, and least liable to fraud ; and the general manner of measuring hop-grounds is to spread the manure [238] over the whole ground, for many hills will be weak, and many will die ; and it is impossible to foresee which. That hops will sometimes intermingle on poles on the same hill, but seldom between one hill and another ; and where they happen to do so, they are easily separated, and without any mischief or injury thereto. That the manner of picking hops in the parish of Farnham is not to pick them into measures of a bushel each, but they are picked, in the first instance, into three sorts, called the bright, the middling, and the brown, of different qualities and values : which three sorts grow upon the same bind, viz. the bright are the finest and best, the middling the next best, and the brown of an inferior quality ; the difference in value between the bright and the brown is in the proportion of seven pounds ten shillings for the bright, and three pounds three shillings for the brown per hundred weight. That hops are thus divided into three sorts in the first picking from the binds, into three different bags or baskets at the same time, each containing, upon an average, eight or ten bushels, and their respective contents are denoted by small round black specks or streaks made on the sides thereof at different distances : but the bags or baskets are not all of the same measure. That the pickers pick in families, as it is called, viz. in parties in unequal numbers, some of which families pick much quicker than others, but all cease picking at the same time, either on account of the approaching rain (which would soon spoil the hops when picked) or at meal times. That the average price of picking to be paid by the planter is twopence per bushel to each family of pickers separately and distinct from the others. That hops in the parish of Farnham are never measured, the pickers being paid according to the quantity, denoted by the specks or streaks aforesaid ; but when the bags are full, or at their respective times of giving over work, the hops that are picked are immediately turned over from the bags to a surplice or sheet and carried from the ground to the oast to be dried. That it would be extremely prejudicial to measure them after

picking, because it would render it inconvenient to pick them into three sorts as aforesaid, and in such case it would employ the pickers an hour and a half a day extra—the flower of the hops would be bruised, and the bright hops turned to brown, to the great injury of the planter as well as the tithe owner himself; whereas, by setting out the tithe by the hill, with the binds uncut, in manner above mentioned, the tithe-owner, as well as the planter, may pick his hops into three sorts as aforesaid, at his own convenient time, and enjoy all the other conveniences above enumerated, as well as be enabled to take a tithe of the binds, together with the hops, at the time of picking. It also appeared, upon the reading of the answer of the plaintiff to the bill filed by the defendant against him in the court of chancery, that the plaintiff had admitted that he believed it might be true that the introduction and first cultivation of hops in the said parish of Farnham, and [239] elsewhere in this kingdom, were, with reference to what is termed the legal time of memory, modern, and within the time of memory.

Upon the evidence so given, the counsel for the plaintiff desired the justice before whom the said trial was, to inform the said jurors, and to declare to them the law of and concerning the premises; and that this usage and manner of tithing hops within the said parish of Farnham, was a good and valid usage and manner of tithing hops within the said parish of Farnham, and fitting to be observed, for the reasons aforesaid: but the said justice, before whom, etc. affirmed to the said jurors, that although the plaintiff had proved the practice of tithing hops within the said parish of Farnham, as stated by him, as far back as his evidence went, and had proved that it was the most convenient practice; yet the verdict of the jury, as the law stood, ought to be for the defendant; and for that reason then and there directed the jury to find for the defendant; and the said jury then and there, upon that direction, gave a verdict for the defendant.

Whereupon the said counsel for the plaintiff, inasmuch as the matter aforesaid shewn by him, and produced and given in evidence as aforesaid, would not appear by the said verdict of the jury, requested the justice before whom the said trial was had according to the form of the statute in that case made, to seal a bill of exceptions to the said opinion and direction of the said justice, containing the matters aforesaid, and which the said justice accordingly signed.

In Michaelmas term 1797, the postea being returned to the king's bench, judgment was given for the defendant in error against the plaintiff in error upon the said finding of the said jury. Upon this judgment the plaintiff in error brought the present writ of error in parliament, and assigned the common errors: in support of which and that a *certiorari* *facias* to try the said action *de novo* ought to be awarded, the following reasons were stated (J. Mansfield, W. Adam) on his behalf.

I. Although the common law does in general prescribe that there should be an uniform mode of setting out tithe, where no particular mode of setting out is established by custom: yet the custom of a particular place may authorize or require a different mode from that in general prescribed by the common law, if such custom be in itself reasonable. And it has never yet been decided that the mode of setting out tithe of hops by the tenth measure, as contended for by the defendant in error, is the only legal mode of setting out such tithe, nor is the particular mode contended for by the plaintiff in error unreasonable.

II. It has been determined (Stebbs v. Goodluck, Moor, 913.) that the tenth land of grain may be set out standing for the tithe of grain; and in Hide and Ellis, Hob. 250, it is stated as coming from the court, that in many places they set out the tenth acre of wood standing, and so of grass.

[240] III. The evidence in the former cause of Chitty and Reeves, and in the litigation between the present parties, is uniform to shew, that in the parish of Farnham the tithe of hops, when set out, was set out by the tenth row if equal, or else the tenth hill. How long that custom or usage had actually prevailed, it is not now possible to make out, but if it was not an immemorial custom (which is not so devoid of foundation as has been generally supposed) it might at least have had its commencement at a time when it was competent to the rector and vicar, with the consent of the patron and ordinary, to make a binding agreement that the tithe should be set out in the way it has been. It was on supposition of some agreement so made, accompanied with the usage, that the court of exchequer in the suit instituted some

time since by the vicar claiming the tithe of hops planted in fields, adjudged the tithes of hops to belong to the rector, though the vicar took those in the rest of the parish.

IV. The evidence adduced by the plaintiff in error proves two essential things. First,

That the tithes of hops may be set out fairly by the tenth row or hill : and secondly, that the obliging the occupiers of lands in Farnham (where hops are in the picking of them managed in a peculiar manner) to set out the tithes of the hops by measure would be difficult, attended with additional expence and great delay, and very injurious to the hops themselves, and materially affect their prices when sold.

V. The prior cases of *Gee v. Perch*, *Bliss v. Chandler*, and *Walton v. Tyers*, were totally different from the present : and the defences were in them all so unfounded, and the manner in which the defendants themselves had before set out their tithes was such, that the Court could not do otherwise than decree an account of the tithes as having been substracted : and no one of the cases made it necessary for the Court to declare that, by law, hops were to be picked before the tithes were set out.

In support of the verdict and judgment, the defendant in error assigned (*J. Scott, W. Garrow*) the following reasons :

I. That the common law rule for setting out the tithe of hops in many instances hath been determined, and more recently after the most solemn argument hath been adjudged, and is now clearly settled, that the tithe shall be set out by measure after the hops are picked from the bind or stem, for that hops are not tithable until after they are picked, at which time, but not before, the tenth part is severable from the other nine parts.

II. To the validity both of a *modus decimandi* being a compensation which must have originated prior to the time of legal memory, and also of a composition real being a compensation which may have originated since that æra, but not after the restraining statutes passed in the reign of queen Elizabeth, a consideration or *quid pro quo* is indispensably necessary. A compensation, be it either ancient or modern, whereby part of the thing is given in lieu of the whole, or whereby a thing is given [241] in a less perfect state than the law enjoins it to be given, unless something be added to make it equal to the value of the real tithe, carries internal evidence to destroy itself, and is considered as being rank, and therefore void. The compensation here contended for by the plaintiff in error, whether commencing in ancient or modern times, whereby nothing more than the tenth part of the hops before picking is to be given, without adding any thing to make it equal to the greatly advanced value of the real tithe, which the law enjoins, shall be set out after picking, or for the considerable costs the occupier incurs in bringing the article into the more perfect state, and to the benefit of which the tithe owner is by law entitled, clear of all expence, must be *felo de se*, and, as being rank, is void.

III. A custom must be presumed to be as old as the time of legal memory, and when that presumption is refuted by any circumstance that shews that it could not have existed during the whole of that period, the custom is destroyed. No mode of tithing hops can have existed from the time of legal memory, because the cultivation of hops within the kingdom is of a date long subsequent to it, and of this all the courts of Westminster-hall have taken judicial notice, and in consequence have uniformly decided against all customs that ever have been attempted to be set up relative to the tithing of hops.

IV. The mode of tithing contended for by the plaintiff in error cannot be supported as a local custom peculiar to the parish of Farnham, because, besides the evidence which the records of the judgments of courts of law furnish against its antiquity generally throughout the kingdom, it is stated on the bill of exceptions that the introduction and first cultivation of hops within the parish and rectory of Farnham is, with reference to the time of legal memory, modern, and within the time of memory.

V. Notwithstanding the evidence adduced by the plaintiff in error, these facts cannot be denied—that the hops on different hills as well as in different rows are so unequal both in quantity and quality, that the tenth of either of them bears no proportion to the tenth of the whole produce—that tithing by the hill or row is liable to great frauds—that taking the tithe by either of these modes would in all cases be very inconvenient, and in many quite impracticable—whilst, on the other hand,

the fairness, convenience and justice of setting out the tithe by measure after picking, in experience have been so fully proved, as to render this mode of tithing part of the common law of the land.

VI. A custom to set out the tithe by the tenth row if equal, or by the tenth hill if unequal, ought not to have been permitted to be proved in this cause, because the plaintiff in error has not in his declaration stated that there was any such custom, or that he had set out his tithes which are the subject of his complaint according to any such custom, and therefore the existence [242] of such custom could have no relation to the matter in issue between the parties.

Counsel having been heard in this cause, the following question was put to the Judges:

"Whether upon the matter set forth in the bill of exceptions the direction to be given to the jury ought to have been to find a verdict for the plaintiff or for the defendant?"

And the Judges, having taken time to consider the said question, were heard on Friday the 9th of May last, and this day to deliver their opinions *seriatim* thereupon: * And due consideration had of what was offered on either side in this cause:

ORDERED and ADJUDGED, that the judgment given in the court of king's bench be, and the same is hereby affirmed; and that the record be remitted, etc.

JAMES JONES AND ELIZABETH, his Wife,—*Appellants*; THOMAS MARTIN, Clerk,
— *Respondent* [26th January 1798].

[After the Report of this Case, in [6 Bro. P. C.] 437. *d. seq.* was printed off, Mr.

Best, one of the Counsel for the Appellants, obligingly communicated the following Note of the Opinion of Lord Loughborough, C. as delivered in the House of Lords.—The Editor would have felt himself very happy to have had more Obligations of this Sort to acknowledge; as such Communications would have rendered this Work more worthy the Attention of the Profession, than he can now entertain any hope of its proving.]

"The consequences would be bad if this decree (of the Court of Exchequer) were to pass into a precedent. But I shall determine without particular regard to general consequences. I will take the case on its own circumstances. Cases in Equity, on such subjects as the present, do not often govern each other: they rest for the most part on the facts of each particular case.

"This covenant was stated by the counsel for the Respondent to be vague and idle, unmeaning and insecure. It is not, however, an unusual covenant in settlements. Many marriages are entered into on such covenants; and they are not [243] inexpedient ones; they are entitled to a favourable consideration. Such a covenant holds out a prospect that the party who marries into a family, shall continue a member of that family. And it provides, as it were, a pledge that he shall be considered, and may consider himself, part of such family, till the death of the person who enters into the covenant. Then, it does not confine or restrict the father's power; he may alter the nature of his property from personal to real, or he may give scope to projects, or indulge in a free and unlimited expence—but he must not be allowed to entertain mere partial inclinations and dispositions towards one child before another. If his partiality does rise so high, and he will make a difference, he must do it directly, absolutely, and by a gift surrendering all his own right and interest: he must give out and out: he must not exercise his power by an act which

* Seven of the Judges present, [Chambre, B. Le Blanc, J. Lawrence, J. Thompson, B. Grose, J. Heath, J. and Macdonald, C. B.] delivered their opinions for the defendant, and one [Rooke, J.] for the plaintiff in error. See 2 Bos. & Pull. 178 for their opinions at length.

" is to take effect, not against his own interest, but only at a time when his own interest will cease.

" The failure of the Appellant's father in his engagements, might reasonably pique the Respondent's father ; but this is not a sufficient reason or excuse for what he has done—indeed it has nothing to do with this case.

" The greater part of the real property which belonged to the Respondent's father, was for the purpose of carrying on a trade, which he had long been engaged in : he moreover enjoyed a place of considerable profit—when he sold off the malting and fishing-houses, he performed an act of economy—when he ceased to trade, it was bad property—he could only let them, instead of using them for traffic : accordingly he sold them peaceably as opportunity offered.

" In 1783 sentiments not favourable to the Appellants entered into the old gentleman's mind. I do not pretend to say whether by suggestion or not, and he proceeded to carry certain intentions into execution : but still he continued in the enjoyment of all his property till the time of his death. After his death it appeared that the clear residue of his personal estate amounted to £90, and the share of the Appellants under the covenant was of course £45. This naturally excited great surprise, and in the event produced the present bill, and the subsequent proceedings. It was soon discovered that £4675 stood in the son's name in East India stock : and it was traced to be the produce of £4448 Bank stock which had been sold out by the Respondent in 1789, and invested by him in East India stock. The Bank stock had been transferred, at different times, from the father to the son : this transfer was not an absolute gift, for the father had the dividends ; not of the East India stock, for that transaction had been carefully kept back by the son from the father's knowledge ; but the father received out of the dividend on the East India stock, a sum equal to what the dividend would have been in the Bank stock, and the Respondent appropriated the surplus of the dividend [244] to his own use. This change from Bank to East India stock is admitted to have been clandestinely made by the son, and without the father's knowledge.

" The transfers from the father to the son were, not to put the son into the unqualified and absolute possession of the stock, but on certain terms, and under certain trusts : these trusts were not, however, reduced to writing, nor were any means used to secure the father in the receipt of the dividends. Then the question is this, ' Has the Court any evidence by which it can trace what was the trust on which the transfers were made ; and what was the real nature of the transaction ? ' For it must not now be contended with me in argument that this was an absolute gift without any trust. Then what was the trust ? I will refer your Lordships to the Respondent's letters : one is dated the 2d August 1783 : the next is the 3d of August (the day after). This letter shews that the father had given his own directions that the transfers should be made in the son's name, and that the dividends were to be paid to the father and the mother for their lives and the life of the survivor : and it is to be observed that such was the provision of the covenant in the marriage articles. The letter of the 10th of February 1786 is a most material and remarkable one : in this letter your Lordships will observe a confidential disclosure made by the Respondent to Mr. Newland, and a degree of consultation with him for the purpose of learning what more could be done to secure the son—in what ? What does the son himself call it !—not ' my stock ; ' but his expression is ' the stock which stands in my name : ' and he adds, ' I presume nothing more is requisite towards ascertaining it to be my legal property. ' And then he says, ' in one of your letters with which I was favoured, you signify that you place the dividends of my stock as they become due to my father's account : now will not this wear the appearance of his having an interest in the stock ? '

" It is plain that the Respondent felt the transaction strongly and acutely ! and that the suspicion which he entertained as to the validity of what had been done recoiled on his mind every moment :—as an honest man he never could call this stock his own.

" So again as to the father's letters. They do not say ' Given to my son ; ' no such thing—but ' entered in my son's name. ' And again, ' What money I have in the Bank is in my son's name. ' ' The £300 of mine turn'd over in his name, and the interest mine as long as I live. '

" When this transaction is unmasked, the whole object appears to have been, that the stock should be found in the son's name at the father's death, to defeat the father's covenant in the Appellant's marriage articles.

" A great deal of reasoning and disguise is made use of in the declarations, but the whole scheme and intention is apparent [245] to gloss over the transaction. The Respondent had no right in equity to change the nature of the stock as he did—the private transfer was a breach of honour and confidence. The father did not mean to part with his property in his stock; had he wanted any part of it in the course of his life, he might have called upon his son for what his wants required; who, perhaps, would not have been very well pleased with such a requisition.

" The covenant did not prevent the father from giving the stock out and out; but if he chose to keep it, he kept it, applicable to the general engagements he had entered into, for his family. Lord Cowper said in the case of *Turner v. Jennings*, [2 Vern. 612, 685. 1 Eq. Ab. 152, c. 6.] that if the father was permitted to act according to the facts of that case, it would put an end to the custom of London: so of such a covenant as the present: here, also, the property continued to answer all the father's own purposes during his life. If a father will be partial, and will give a preference, he must give it against himself, and not make a mere reversionary gift. He should immediately feel himself so much the poorer for his gift. If he is willing to suffer that, let him then yield to the impulse of his partiality; but if a father may effectuate his preference by any thing short of this, it will furnish perpetual opportunity for subterfuge and scheme to defeat and disappoint these covenants, which ought to be most honourably observed.

" If the son had become bankrupt, I rather think his creditors might have taken the stock; for they might have said, as against the father, 'You have allowed your son to appear as the owner of this property.'

" If the father had become bankrupt, his creditors would have had a clear case of it.

" Suppose the son to have died in the father's life time, might not the father have called on the son's representative for a retransfer of this stock? He would have had no other evidence of the trust than the evidence present in this cause, coupled with his receipt of the dividend from time to time (which indeed would have been strong evidence). The father therefore must have made out this transfer to have been a transfer in trust for himself; and I think that he would have reached that point in a Court of Equity.

" Upon the whole I therefore conclude that so much of the decree below as declares that the East India stock, and the dividends thereon, made no part of the father's personal estate at the time of his death, be reversed: and being reversed, that in taking the account, the said East India stock, and the dividends thereon, be considered as part of the testator's personal estate, and subject to his covenant in the marriage articles."

[On July 11, 1798, the order of the House of Lords was made an order of the Court of Exchequer. On February 18, 1799, the De-[246]-puty Remembrancer made his report, by which he charged the defendant with £2850 18s. 8d. (being the amount of the difference between the dividends on the Bank stock sold, and the dividends on the East India stock received, during the testator's life; and of the dividends of the East India stock received after his decease), and also with the sum of £4675 East India stock. To the half of which former sum, and half of the produce of the East India stock, the complainants became entitled by the judgment of the House of Lords. The Court of Exchequer, on confirming the Remembrancer's report, refused to allow interest on the dividends so received by the defendant.]

[247] APPENDIX II.

[This Appendix contains some Cases between the Years 1719-20, and 1760, omitted by Mr. Brown in his Collection. — They are extracted from Eight Volumes of Cases, in the House of Lords, formerly in the Possession of Mr. Justice Foster, which were most obligingly lent to the Editor of this work by JOHN DISNEY, Esq. of the Inner Temple.]

CASE 1.—WILLIAM MORISONE, of Preston-Grange, Esq.—*Appellant*; THE RIGHT HONOURABLE JOHN VISCOUNT ARBUTHNOT, — *Respondent* [27th March 1728].

[Mews' Dig. vii. 706. See *Cooper v. Cooper*, 1896, L. R. 5 Ch. 203.]

[An obligation procured from an infant, by the father of his intended wife, in fraud of marriage articles publicly agreed to by the infant and his friends, is absolutely void.]

[See *ante*, vol. iv. title Fraud, cases 1. and 6. and the Notes there. [4 Bro. P. C. 144, 163.]]

On a treaty of marriage (in the year 1711) between the Respondent, then an infant of the age of seventeen years, and Jane, afterwards Viscountess of Arbuthnot, the Appellant's second daughter, after several meetings between the appellant and respondent, at which the respondent's nearest relations were the treaters for him, it was agreed, that the appellant should pay to the respondent 50,000 merks Scots, (or £2777 15s. 6½d. English money,) at different terms, as his daughter's marriage-portion. And in consideration thereof, and of the marriage, the respondent was to secure to his lady, in case there should be male-issue of the marriage, a jointure of 4000 merks per annum; and in case there should be no issue-male, a jointure of 5000 merks per annum; and in this last event, if there should be but one daughter of the marriage, the respondent was obliged to provide such daughter the full sum of 50,000 merks, the portion that came to him by her mother.

These conditions being, with divers others, openly treated and agreed to, marriage-articles were (on August 22, 1711), fairly made out and executed by the appellant and his daughter, afterwards the respondent's lady, and by the respondent, in the terms [248] treated and agreed on; and in those articles there was a special clause obliging the respondent, when he should come of age, to ratify and confirm the settlement in all its parts. And though, by the deed, several parcels of the marriage-portion were payable before the respondent should come of age, yet the payment of these sums was suspended until the respondent should be of age, and ratify the marriage-articles as aforesaid. These articles were executed with great solemnity, and witnessed by divers persons of distinction, friends of either party, and the marriage ensued.

After the respondent came of age he did, by a deed of ratification, (dated 4th July 1715, reciting the said marriage-articles in so far as he stood bound thereby to settle the aforesaid jointure and other provisions upon his lady,) ratify and confirm the said marriage articles, and the same was accepted of by his lady. And this deed of ratification was registrated according to the laws of Scotland.

On the night before the execution of the marriage-articles (viz. the 24th August 1711) the appellant, taking advantage of the respondent's minority, without the knowledge or privity of any of the respondent's friends or relations, and notwithstanding the appellant's agreement to give his daughter 50,000 merks portion, prevailed upon the respondent to sign a writing in the words following, viz.

"Be it known to all men by these present letters, us John Viscount of Arbuthnot, Lord of Inverberve, Baron of Arrot, etc. Forasmuch as we are really resolved to marry Mrs. Jane Morisone, second lawful daughter to the much honoured William Morisone, of Preston-Grange, and for that effect to enter into and subscribe a contract of marriage, past betwixt us and several of our friends on the one part, and the said Mrs. Jane Morisone, our said promised spouse, with consent of her said

" father, on the other part, wherein the said William Morisone, of Preston-Grange, is to be bound to pay to us, our heirs, or assigns, in the name of tocher-good or marriage portion, the sum of 50,000 merks Scotch, at the years and terms therein mentioned, for the which we are to grant a suitable jointure to our said promised spouse conform to our quality, and the said marriage-portion, and the fee of our whole real estate, with the title of honour and dignity, to the heir-male to be procreate betwixt us and the said Mrs. Jane Morisone, our said promised spouse; and now seeing we are convinced, that the said William Morisone will be at the expences and charges of a considerable sum of money before our said marriage be completed, settled, and ended, and that our friends and relations will have no less sum of money in the said contract matrimonial than the said sum of 50,000 merks, money aforesaid, in name of marriage portion, although we are satisfied that the said Laird of Preston Grange did never condescend and agree to more (for our tocher-good) [249] than the sum of 40,000 merks, money aforesaid; yet, notwithstanding, for several onerous and divers causes, and at our earnest desire and serious request, the said William Morisone, of Preston-Grange, hath consented to subscribe the said contract of marriage for the said tocher good as 50,000 merks, money aforesaid, upon the express granting of this our obligation underwritten: Therefore witt ye us to be engaged and obliged, upon our honour, and have bound and obliged, like as we bind and oblige us, our executors and successors, to subscribe and deliver to the said William Morisone, of Preston-Grange, his heirs and assignees, a sufficient, good, and valid exoneration and discharge of 10,000 merks, money aforesaid, as a part of the said 50,000 merks to be insert in our said contract of marriage, and that so soon as and immediately after we come to our majority of twenty-one years complete; and that under the penalty of 2000 merks, money aforesaid, of liquidat expences, presently modified in case of failzie by and attour the premises."

This obligation was so secretly obtained that it was executed only in the presence of the appellants's servant, who wrote it, and the respondent's valet.

When the respondent came of age, thinking himself injured by this obligation, so clandestinely obtained from him under age, and at a juncture when his engagements to his lady obliged him to comply with it, he thought fit to revoke the same (31st January 1715-16), and all other deeds whatsoever granted to his prejudice while a minor, by a deed of revocation, according to the forms of the law of Scotland, which was recorded the 2d of February following; and very soon after brought his action of reduction, before the Lords of Session, against the respondent, to have the said obligation reduced and annulled, for that the same was granted by him when a minor, without consent of his guardians. 2dly, That it was *contra fidem tabularum nuptialium* to elicit such a writing clandestinely, contrary to a solemn contract entered into in presence of all the respondents's friends.

To which action the appellant appeared, and the respondent produced the said marriage articles, and ratification aforesaid of the same, with the said deed of revocation.

At the first hearing of this cause, the respondent's counsel insisted that the appellant should take a day for producing the said obligation, or that their lordships should grant certification.

The appellant's counsel insisted that the respondent ought, *ante omnia*, to depone *de calumnia*, i.e. That he had reason to prosecute that suit, because, at the time of granting the obligation, the respondent promised on his honour to do nothing contrary to it.

But the lords over ruled the appellant, and granted certification against the obligation called for and reduced, and decreed to be extracted at the ordinary's sight.

[250] Against the said interlocutor the appellant petitioned the whole lords, setting forth, that, by stat. 125. act. par. 9 Jac. I. all parties are bound to swear *de calumnia in initio litis*, if required: That by the form of the writing complained of, it appeared the respondent had drawn in the appellant to this transaction, and that the appellant had not urged the respondent to it; that therefore he apprehended the respondent could not swear *de calumnia*, or give his word of honour that he had just cause to insist, and consequently he, the appellant, conceived he was entitled to demand his oath of calumny, and therefore praying that, *ante omnia*, the appellant should swear *de calumnia*.

To this petition it was answered on the part of the respondent, that the statute referred to, in express words, obliges only such persons as are present to swear *de calumnia*; and makes provision that when parties are absent their procurators shall swear, upon their belief and opinion, that the argument founded on the words of the writing complained of is of no force, because the same address that could persuade an infant to do a deed prejudicial to his interest, would induce him to agree to any sort of recital; wherefore the recital could be no evidence, and left the case upon the general foot of a clandestine transaction, into which the respondent, an infant, was drawn contrary and derogatory to the overt treaty, to which his friends and guardians were witnesses.

The lords having advised the above petition and answers, found, that the appellant ought to take a term in the exhibition; and at the same time found, that the Viscount ought to give his word of honour upon the appellant's allegiance.

Against this interlocutory the respondent reclaimed, setting forth, that as no particular fact was or could be put to his oath, in an oath of calumny, the matter on which the appellant wanted he should swear could be nothing else possibly but a matter *in jure*, viz. Whether a minor or infant over-persuaded to do an act to his prejudice, could lawfully insist to be relieved from the effect of that act done in minority? and as the respondent (were he present) could swear to that matter only as he should be advised by his lawyers, who were then willing to give their oaths that a minor leased might lawfully revoke his act, there could be no occasion to bring the respondent from the country to swear to a point of this nature; the rather, that as circumstances then were, the rebellion being on foot, the country was in great confusion, and no communication open between the north country, where the respondent then was, and Edinburgh, whither he must come to depone: therefore praying that the cause might be proceeded in, and that the respondent might not be obliged to swear *de calumnia* contrary to the form of the act of parliament above mentioned, which obliges such as are present only to swear.

To this petition answers were given in on the part of the appellant: And the lords having advised the said petition and [251] answers, with the act of parliament above mentioned, found, that the point on which the parol of honour was prayed being *in jure*, the respondent was not bound to give it, and remitted to the lord ordinary, in the cause, to assign a day.

When the cause was called before the lord ordinary, the respondent's counsel insisted that the appellant might take a day for producing the obligation called for, or that his lordship would order the certification to be extracted.

The appellant's counsel prayed a competent time for producing, and his lordship sustained process, and assigned a day to the appellant for producing the obligation called for, with certification.

The cause being again called before the lord ordinary, the respondent's counsel prayed the appellant might produce the obligation called for in terms of the above interlocutor, which being accordingly produced, the lord ordinary made *avisandum* therewith to the whole lords.

The cause being remitted to the Lord Cullen, ordinary, the counsel on both sides appeared (30th June 1716) before his lordship. The respondent's counsel insisted that the obligation produced ought to be reduced and made void; for that it was elicited from him in his minority to his prejudice, and in fraud of the marriage settlement that was openly and fairly, by the assistance of the friends on either side, agreed to and executed.

It was answered for the appellant, that *deceptis non decipientibus subreniunt jura*, so that minors are not restored against all deeds done by them, but only such wherein they are over-reached; and in the present case, by the recital of the writing prayed to be reduced, it was plain the minor deceived the appellant, and not he the minor; seeing it bears that the appellant was never willing to give more than 40,000 merks, and that it was at the minor's desire, and to please his friends, that the appellant had been induced to put 50,000 merks into the marriage-articles, and therefore the minor cannot have the benefit of that circumvention; and this being instructed by the recital of the obligation, *in dubio pro scriptura judicandum*. 2dly, The obligation being prior to the marriage-articles could not be *contra fidem tabularum nuptialium*:—3dly, Though the private transaction between the respondent

and the appellant might be voided if it contained any thing prejudicial to the interest of third parties contractors, yet in this case, where it affects nothing but the interest of the respondent himself, he cannot have relief against his own deed :—And, 4thly, Minority alone is not a sufficient ground for restitution, unless the party can further allege lesion, which cannot be done in this case, because, by the writing complained of, it appears that the appellant, from the beginning, was to have given no more than 40,000 merks, and it cannot be said the respondent hurt himself by accepting of that sum, which, nevertheless, is all the effect of that writing.

[252] It was replied by the respondent to the first, That the recital of a deed done by a minor to his prejudice is no manner of evidence : and where it is manifest there has been a deception, if it is questioned from whom it had its rise, the law presumes it was not caused by the infant : and in this case it is not so much as offered to be proved that the proposition of granting the writing complained of came from the respondent and not from the appellant.

To the 2d, Though the obligation complained of is in date a day prior to the execution of the marriage articles, yet it was manifestly framed after the treaty was concluded : and bearing an express relation to, and derogation from, those very articles, must be deemed to be contrary to that *bona fides* that ought to prevail in such settlements.

To the 3d, The interest of the wife and children were virtually affected by any thing that impairs the husband's or parent's estate : and though there were no prejudice to any person but the respondent only, the inducing him to a private settlement, hurtful to himself, contradictory to the ouvert treaty, is in itself fraudulent, and what must afford relief to a minor leased.

To the 4th, The giving away 10,000 merks, part of what the appellant contracted to pay, is direct lesion : for, on the supposition that the appellant would not have consented to the marriage but in view of being discharged of paying those 10,000 merks, it is evident he could not have demanded a jointure to his daughter, suitable to the whole portion of 50,000 merks, nor a provision of 50,000 merks to the only daughter of the marriage, under the description of her mother's tocher-good, (which are the words of the marriage-articles :) But as he insisted for and obtained those conditions, the striking off one-fifth part of the sum promised as his daughter's portion, which was the cause of those provisions, whilst the respondent remains subject to the obligations that, by the articles, were brought upon him, is a manifest lesion and prejudice.

This debate the lord ordinary undertook to report to the whole lords.

But before reporting of the same the appellant's counsel applied for some time, until they should have instructions from the appellant, who was then at London, and their lordships delayed the reporting of the cause.

22d November 1716. On the report of the Lord Ordinary to the whole lords, their lordships, having considered the above debate, with the obligation produced, they, by their interlocutor, sustained the reason of reduction founded upon minority and lesion, and *contra fidem tabularum nuptialium*, and repelled the defence that the appellant refused to engage to give more than 40,000 merks of portion, conform to the paper granted by the Viscount of Arbuthnot to the appellant, till the paper produced was granted, and that the granting of [253] that paper was at the desire of the Lord Arbuthnot, and not proposed by the appellant, as not relevant to elide the reasons of reduction.

The appellant offered another petition to the lords, complaining of the said interlocutor upon the grounds abovementioned : To which petition the respondent gave in his answers : and the same, with the petition, being advised by the lords, and specially, that it was not alleged in the petition that the paper granted by the Viscount was proposed by him to the appellant to accommodate differences between them, as to the tocher to be given by Preston-Grange, and not proposed by Preston-Grange to the Viscount, their lordships sustained the reasons of reduction founded upon minority and lesion, and *contra fidem tabularum nuptialium*, and repelled the defence that the defender refused to engage to give more than 40,000 merks of portion, conform to the paper granted by the Viscount to Preston-Grange, the defender, till the paper produced was granted, as not relevant to elide the reasons of reduction, and therefore reduced and decerned, and declared the aforesaid

obligation to have been from the beginning, to be now, and in all time coming, null, and of none avail, strength, force, or effect with all that has followed, or may follow thereupon.

Against which degree the appellant thought fit, the last session of parliament to offer his petition of appeal, after he had acquiesced in the same for eleven years, and frequently promised payment in order to defeat the respondent's diligence, to preserve his preference against other creditors of the appellant.

No counsel appearing for the appellant the appeal was dismissed with £80 costs Counsel for the respondent, Dunc. Forbes, C. Talbot.

[254] CASE 2.—THE COMMISSIONERS AND TRUSTEES OF THE FORFEITED ESTATES,
—*Appellants*; MAJOR-GENERAL GORDON,—*Respondent* [February 1719].

[Where, by an act of attainder, it is enacted that if Major-General Thomas G. Laird of A. should not surrender by a certain day, he should stand attained; —the name of the Major-General G., who was indeed Laird of A., was Alexander, and not Thomas;—Alexander is not attained by the act.]

[Decree of the Court of Session in Scotland affirmed.]

[See Foster's *Crown Law*, 81, and 1 P. Wms. 612. It is remarkable that the Report in the latter is incorrect in several particulars, though Mr. P. Williams was himself counsel for the Respondent.]

Alexander Gordon, the Respondent, was, the 25th of February 1681, infeoffed, and thereby became seised in fee of the lands of Auchintoule, and others, in the shire of Bamf, in Scotland, and has ever since continued seised, and in the possession thereof.

One Peter Gordon, was the 11th of November 1713, seised in fee of the lands of Leathers, and others lying in the shires or counties of Aberdeen and Bamf; and also was, the 12th of November 1713, seised in fee of the lands of Thomas Toun and Smallburn in trust for the respondent, who has ever since continued in possession thereof, and received the rents and profits of the same.

By an act (1 Geo. 1. st. 2. cap. 42.) intituled An act for the attainder of George Earl of Marischall and others, it was enacted, that if, amongst others, Major-General Thomas Gordon, Laird of Auchintoule, should not render himself to one of his Majesty's justices of the peace on or before the last day of June 1716, he should stand attained of high treason from the 12th of November 1715.

By another act in the same year, (cap. 50.) intituled An act appointing commissioners to enquire of the estates of certain traitors, etc. all lands, tenements, etc. whereof any person attained was seised, possessed of, or interested in, on the 24th of June 1714, were vested in his Majesty for the use of the Public; and afterwards, (by an act of the fourth year of his said Majesty's reign, (4 Geo. 1. cap. 8.) intituled An act for vesting the forfeited estates in trustees, etc.) were vested in the commissioners, the appellants, to be sold for the use of the Public.

The appellants did seize and survey the said lands of Auchintoule, and others above mentioned, belonging to the respondent, under colour that the respondent Alexander Gordon of Auchintoule, was meant to be attained, by the attainder of Major-General Thomas Gordon, Laird of Auchintoule.

[255] The respondent did, in pursuance of the act 5 Geo. 1. cap. 22. intituled An act for enlarging the time for determining claims upon the forfeited estates, (§ 7. 8.) present exceptions against the said survey or seizure to the lords of council and session in Scotland, setting forth his title to the premises in question, and that Major-General Thomas Gordon, nor any other attained person was seised of the said premises the said 24th of June 1715, and therefore prayed the said estate might be decreed to him.

The appellants put in their answers, setting forth, that Major-General Gordon, Laird of Auchintoule, was attained by the aforesaid act, who is the respondent; and that although there may be an error as to the name of Thomas in place of Alexander, yet the other additions of Major-General and Laird of Auchintoule do sufficiently describe the respondent to be the person by that act attained, and cannot be applied

to any other person alive but to him ; and that the misnomer in such a case, where the person is otherways fully described, cannot make void an act of attainder in parliament.

This cause coming to be heard before the lords of session, their lordships pronounced the following interlocutor or decree :

" The respondent, Major-General Alexander Gordon, of Auchintoule, is seised " and possessed of the lands of Auchintoule, and others in the exceptions mentioned, " in his own right, and that the said Major-General Alexander Gordon, of Auchintoule, " does not stand attainted by the said act attainting George Earl of Marischall, etc. " and that Major-General Thomas Gordon, of Auchintoule, mentioned in the said " act of attainder, was not seised or possessed of, or interested in, or intituled unto the " said estate of Major-General Alexander Gordon in his own right, or to his own use, " or any other person in trust for him, on the 24th of June 1715, or at any time since ; " and that the Public, by the attainder of Major-General Thomas Gordon, has no right " or interest in the said estate of Major-General Alexander Gordon, of Auchintoule, " and therefore sustain the exceptions presented for the said Major-General Alexander " Gordon, and decerned and declared accordingly."

Against this decree the appellants brought their petition and appeal, praying (R. Dundas, T. Bootle), that the same might be reversed for these reasons :

That though by the said act of attainder Major-General Thomas Gordon stands attainted, yet the respondent, though his name be Alexander, was the person intended to be attainted, for the addition of Gordon of Auchintoule, sufficiently denotes the respondent was intended, and the mistake in the christian name is not of moment where the person is otherwise sufficiently described, and had the respondent been designed in the said act Gordon, Laird of Auchintoule, no doubt he would thereby have been attainted, the addition of the christian name was unnecessary, and *utile pro inutile non citiatur*.

To this the Respondents answered (W. P. Williams, W. Hamilton),

[256] I. That it was plain by the act of attainder mentioned, that Thomas Gordon, Laird of Auchintoule, and not Alexander was attainted ; that it did not concern the respondent to shew there was then one Thomas Gordon, Laird of Auchintoule, who might be by that act attainted, and since Thomas Gordon was attainted it seemed impossible for any court to transfer the attainder of Thomas to this respondent, whose name is Alexander, without reversing the attainder of Thomas, and in place of him attainting Alexander : which would be a reversing the attainder of one man without a writ of error, or any legal proceeding, and attainting another man without a bill of indictment, or any other form by law required : and since that act proceeds only to attain persons as a penalty for their not appearing at a day by the act limited, how could this respondent think himself concerned to appear in obedience to that act where he did not find his name mentioned, but a quite different man ? And no question but such a misnomer must be looked upon as a sufficient reason upon a writ of error for reversing an outlawry.

II. That whatsoever might be said in case the christian name had been omitted, and Gordon of Auchintoule attainted, that cannot concern this case, because there the difficulty might be, whether the person was sufficiently described without mentioning the christian name : but that is not the case where the christian name is added, for then the designation is full, and if it be mistaken, denotes a person as different from the respondent as thereby described, as Thomas is from Alexander, and there the mistake cannot be rectified by alleging *quod constat de persona*, because such allegation is directly contrary to the act of attainder, and by the same reason Alexander might be executed upon a judgment against Thomas, and consequently one man might lose life, estate, and honour by a prosecution carried on against a person to him unknown.

To the second objection of the appellants, That by the act 4 Geo. 1. cap. 8. " All " convictions, outlawries, attainders, made since the 24th of June 1715, and before " the 1st of June 1716, not reversed, or for reversing whereof no writ of error hath " been, or shall be allowed before the 24th of June 1718, shall be sufficient and effectual " in law for ever ; and no judgment or any writ of error or plea shall any ways operate " to the prejudice, or to the invalidating of such convictions, outlawries, and attainders, " and no writ of error shall be admitted upon the same," and consequently that

the respondent was not at liberty to plead this error in bar of the said act of attainder :

It was answered for the respondent, that this act related only to convictions, outlawries, or attainders by the common law, and in the common law courts, against which writs of error might be brought, and not attainders by act of parliament, for no writ of error could lie against such attainders ; but suppose it did, the only consequence would be to render the attainder [257] irreversible, but then that must be against the person attainted, which is Thomas Gordon, and not the respondent, who does not bear that name, and who is not by that act attainted, and unless that were the case the argument can be of no use to the appellants.

The respondent concluded by saying, That in case Thomas Gordon had been attainted by verdict on an indictment, or by outlawry, Alexander Gordon could have brought no writ of error to reverse it, nor need he do so in respect to himself, for he had not been thereby attainted.

After hearing counsel, the opinion of all the judges was required on the question, " Whether, if Major-General Alexander Gordon Laird of Auchintoule had been brought to the king's bench bar and execution prayed against him, the Court would have awarded execution." The judges were of opinion, That the said Court could not award execution against Alexander, because in awarding execution they must pursue " the act of parliament on which the judgment is founded."

The Decree of the Court of Session was accordingly confirmed.

CASE 3.—HIS MAJESTY'S ADVOCATE FOR SCOTLAND ON BEHALF OF HIS MAJESTY,
—*Appellant* ; ALEXANDER late LORD PITSLIGO,—*Respondent* [28th January
1750-51].

[An act of attainder against Alexander Lord Pitsligo is valid against Alexander Lord Forbes of Pitsligo ; it not being alleged or proved that any other person was known by the name or title of Lord Pitsligo : and it being proved that Alexander Lord Forbes of Pitsligo was described and known by himself and others, in legal and parliamentary proceedings, sometimes by the name of Lord Forbes of Pitsligo, and sometimes by that of Lord Pitsligo : For the description in the act, though incomplete in point of strict form, is not repugnant to truth.]

[Decree of Court of Session reversed.]

[See Foster's *Crown Law*, 79-88.]

By stat. 19 Geo. 2. cap. 26. intituled An act to attain Alexander Earl of Kelly, etc. it is recited, That the several persons therein named, and, amongst others, the respondent, by the name of Alexander Lord Pitsligo, did, on or before the 18th day of April 1746, in a traitorous and hostile manner, take up arms and levy war against his Majesty within this realm, contrary to the duty of their allegiance, and were fled to avoid being apprehended and prosecuted, according to law, for their said offences : And therefore it is enacted, That if the said [258] Alexander Lord Pitsligo, etc. shall not render themselves to one of his Majesty's justices of peace on or before the 12th day of July 1746, and submit to justice for the treasons aforesaid, then every of them the said Alexander Lord Pitsligo, not rendering himself, and not submitting to justice as aforesaid, shall, from and after the said 18th day of April 1746, stand and be adjudged attainted of high treason to all intents and purposes whatsoever.

1746, July 13. The respondent not having complied with the conditions of the act, became attainted of high treason.

He was then, and had been long before, as his ancestors had also been, seised of a real estate called the lands and barony of Pitsligo, from whence his title of honour was taken, and which was forfeited by his attainder.

In consequence of this attainder, and by virtue of the authority given to the court of exchequer in Scotland by stat. 20 Geo. 2. cap. 41. the said lands and barony of Pitsligo were surveyed by order of that court, and seised for the use of his Majesty.

1748, December 14. To these lands and barony a claim was given in before the

court of session by John Dickie clerk to the signet, for and on behalf of the respondent, by the name of Alexander Lord Forbes of Pitsligo, setting forth, that his ancestor was ennobled by letters patent, bearing date the 24th of June 1633, and created a baron by the stile and title of Lord Forbes of Pitsligo, which title was now descended to the claimant.

That Sir Alexander Forbes of Foveran, having acquired right to the estate of Pitsligo, by purchasing in the incumbrances upon it, did resign the same into the hands of his late Majesty King George I. in order that a new infeftment might be granted to the claimant; that a charter was accordingly granted by his said late Majesty bearing date the 26th of July 1725, conveying to the claimant, by the name of Alexander Lord Forbes of Pitsligo, the said lands and barony, to hold the same to him, *in libera baronia feodo et hereditate in perpetuum*, upon which he was infeft regularly, and the respondent by his said claim insisted, that none of the persons attainted by the act before recited, were seised or possessed of, or interested in, or entitled unto the said estate, and therefore prayed that the same might be adjudged to belong to him the said claimant.

In support of this claim, several writings were produced on the part of the claimant, in which he had been named and described by the same title given by the patent.

To this claim the appellant, in behalf his Majesty, gave in answers, in which he admitted the patent of creation, as stated in the claim, but alleging, that the respondent was the person meant, and sufficiently described by the act, notwithstanding every word of the description in the patent was not transcribed into it, and for this purpose insisted that Pitsligo was his true proper title; that the present lord and all his family, ever since the creation of the title, have considered it as such, and that he [259] and his ancestors have been on all sorts of occasions named and described by the title of Lord Pitsligo; and to shew this the appellant did in his answer specify several instances, wherein the respondent and his ancestors, claiming title under this patent, had acted, been known, and distinguished by the title of Pitsligo in acts of parliament, rolls, and minutes of parliament, private deeds and instruments, suits, proceedings, and adjudications, or judgments in courts of justice, viz.

On the 27th of June 1749, the cause came on to be heard by all the lords, when it was argued for the respondent, that in all judicial proceedings, especially in those inferring the highest penalties, the christian name and surname of the party ought to be truly set forth; that names of dignities are parcels of the name, and that the respondent's name and title being Alexander Lord Forbes of Pitsligo, he was not affected by an act attainting Alexander Lord Pitsligo, that not being his name.

His Majesty's advocate relied on the following facts and arguments:

1st, That the respondent and his ancestors had been commonly known and described by the appellation of Lord Pitsligo, and had by that name signed their private letters.

2dly, That they had been so named in the acts of the Scots parliament, appointing commissioners of supply and visitors of colleges, etc. of which several instances were quoted.

3dly, That they had been so named in the rolls or minutes of the parliament of Scotland, when their attendances happened to be marked down in the list of lords barons.

4thly, That they had been so named in adjudications (or judgments by default) obtained against the estate of the family in the court of session, (of which fifteen instances were specified,) and that many of the bonds on which those adjudications proceeded were granted and subscribed by the single title Pitsligo; and that in the conveyance or disposition made to the respondent in 1723, by Sir Alexander Forbes, of Foveran, upon which is founded the charter of the estate in 1725, the respondent is many times named Alexander Lord Pitsligo, and not once Alexander Lord Forbes of Pitsligo, whence it was argued that the name or title of Lord Pitsligo being that by which the respondent and his ancestors had been known, and which they had assumed to themselves, it could only apply to the respondent, and consequently that he was properly described by that name in the act of attainder.

To this it was replied on behalf of the respondent:

To the 1st, That however, in cases of common persons, a name acquired by reputation might be sufficient, yet that rule did not hold as to names of dignity, which being names of record, were not subject to alteration by usage or common parlance.

And as to the respondent's subscribing letters by the word Pitsligo, that it was usual for persons to write their names short, [260] and often their christian names by the initial letters, and yet it could not be contended that, if a person was so described in an outlawry or act of attainder, such description would be good, though agreeable to his usual manner of subscribing.

To the 2d: That the acts appointing commissioners of supply, etc. were penned with great inaccuracy. The same peers are sometimes named by different titles, and peers' eldest sons by their titles of courtesy: Sometimes different christian names are given to the same persons, and at other times it was totally omitted; and several persons are described without christian name or surname, by relation only to another person, as the factor or chamberlain of such gentleman or lady: Of all which particular instances were specified, and it was argued that such descriptions would be held erroneous in any common process, and much more so in penal proceedings.

To the 3d: That the rolls or minutes of parliament referred to were no other than short notes of the clerk or his deputy, intended only to mark what members were present; that accordingly they were very incorrectly taken down; sometimes the same peer was named by different titles, thus Lord Hay of Yester, was sometimes styled Lord Hay, and at other times Lord Yester; and the same diversity appeared with respect to the titles of Lord Chrickton of Sanquhar, Lord Herries of Terregles, Lord Lindsay of Byers, and many other peers.

That these minutes never mention the christian names of any of the members, and describe some by their offices, and others by their boroughs, without any name at all.

That it could not be imagined that such inaccuracies could alter the titles of peers; but the respondent and his ancestors, as well as those lords who had similar titles, had taken care to insert them properly, as conferred by the crown, in all acts of record; such as retours or inquisitions *post mortem*, grants, confirmations, or remissions from the Crown, and ratifications in parliament; of which various instances were produced.

To the 4th: That with respect to adjudications obtained against the estate of the family by the designation of Lord Pitsligo, it was observed that adjudications were judgments in absence or by default, obtained at the instance of creditors; but that in adjudications, as well as in deeds, the designations being both ways, no inference could be drawn either the one way or the other.

That deeds or grants between particular persons are not vitiated by mistaken or erroneous designations, where the identity of the persons appeared from circumstances, the law permitting a latitude in such instruments, which is not indulged in criminal proceedings, where the person to be affected must be identified by inserting his true name in the record, and not by any thing collateral.

Upon this debate the lords gave no opinion, but directed informations to be given by both parties, which was done accordingly.

[261] And lists were exhibited for the respondent; 1st, of designations of peers taken from the minutes of parliament which verified what was before asserted as to their names being very incorrectly set down in those rolls or minutes. 2dly, Of ratifications in parliament to lords having titles similar to the respondents. 3dly, Of the grants, confirmations, escheats, and remissions to such lords. 4thly, Of inquisitions *post mortem*, or retours, of such lands to their ancestors; in all which the full titles are inserted according to their creation: and also instances were specified from the supply acts to verify what had been asserted as to the defective or erroneous descriptions of commissioners therein named.

The cause came on again to be argued before the court of session on the 16th of November 1749, when the lords of sessions proceeded to give judgment: twelve of them being present, were equally divided in opinion; the lord president, and five other judges declaring, that the respondent was attainted by the said act of parliament, but the other six being of the contrary opinion, their opinion prevailed, since by the constitution of that court the lord president has no voice, but in case of an equal division of the other judges.

The interlocutor pronounced was in these words: "The lords having heard the claim of Alexander Lord Forbes of Pitsligo, with the answers made thereto

"by his Majesty's advocate, condescendances of writings produced, and parties procurators thereon, they find that by the act of parliament of the 19th of his present Majesty, intituled An act to attain Alexander Earl of Kelly, and others therein named, of high treason, if they shall not render themselves to one of his Majesty's justices of the peace before the 12th day of July 1746, and submit to justice, the said Alexander Lord Forbes of Pitsligo is not attained, and therefore sustain his claim, and order the sheriff depute of the shire of Aberdeen, or other proper officer, to cause possession to be delivered to the claimant of the lands, barony, and others by him claimed, and decern and declare accordingly."

From this interlocutor the appellant, on behalf of his Majesty, presented his petition of appeal; and urged (D. Ryder, W. Murray) the following reasons for the reversal of the said interlocutor.

I. For that Pitsligo is the strict and proper title created by this patent - it is the name of the place erected long before into a barony, from whence the title in question was taken, and has always been so understood by himself, his ancestors, the legislature, and all that have had any transactions with them.

II. Because if this was a doubtful point, or if the surname alone, or with the addition of the place, was to be deemed in strictness the title of honour, yet as the respondent has been constantly known by the title of Pitsligo, and with a certainty that leaves no possibility of doubt that he was meant by that description, and the act has called him by the same title which other acts and records of parliament have confessedly given him, [262] as well as his own most deliberate transactions, and there is no falsity in the description, it is humbly presumed this act must have its effect.

The objections that have been made all arise from the supposed legal effect of misnomers, either in conveyances, proceedings in courts of justice, or similar acts of parliament, in all which it is said misnomers have been fatal.

One answer to all of them is, that here is no misnomer, whether the title be considered upon the mere foot of the construction of the patent, or of a title that he has been known by.

But to consider each distinctly :

As to conveyances - The general tenor of the cases prove the contrary, and shew it is immaterial by what name either the grantor or grantee are called, provided they are described so as to be clearly known.

As to proceedings in courts of justice :

It is the known law, that a defendant in suits at law may be named by that name which usage has given him, though not the name of baptism or of his parents : or (if it is the case of a corporation) that is created by the patent or prescription, by which alone it is made to exist.

And this rule extends even to criminal prosecutions of all kinds : so that if the defendant pleads in abatement, a misnomer though to indictment for the highest crime, it may be effectually answered by an averment in the application, if the truth is so that the defendant is commonly known by that name.

As to any cases where the want of an addition has been held fatal, they are not applicable to the present case, which depends on the construction of an attainder, not by judgment of a court of justice, but by act of parliament, and to which the act of the 1 Hen. 5. cap. 5. that alone makes additions necessary, most clearly does not extend.

But the construction of an act of parliament depends on no forms : the sole question is, What it means ! If the meaning is plain, the judges are bound to declare that meaning to be the law, whenever a case within it comes regularly before them, whether that meaning be expressed in technical terms or not : and therefore it is that the most penal laws have been construed, even beyond the words, to answer the intent.

As to the supposed parallel cases upon other acts of attainder, they will be found to be essentially different from the present, as containing descriptions, not only contrary to, and inconsistent with, the real names, but unsupported by any colour of usage.

By the respondent the following reasons were assigned (A. Hume Campbell, Al. Forrester) for affirming the interlocutor complained of :

I. For that in all judicial proceedings the true name of the party must be set forth, and the omission of it cannot be supplied by any evidence to prove the identity of the person.

[263] II. The true names of peers created by patent are such only as the crown confers by the patent, and the omission of any constituent part of such name is as fatal as the omission of the whole, the remainder not being the true name.

III. The title conferred by patent is Lord Forbes of Pitsligo; the act attaints Alexander Lord Pitsligo, titles materially different. The records differing so essentially, no collateral evidence can be called in aid, to prove the person enobled and the person named in the act to be one and the same.

Objection I. The distinguishing title or name of dignity in the respondent's family is the name of Pitsligo; the name of the barony by which they were enobled, and upon which their peerage principally rests.

Answer. The family was neither enobled by the name of Pitsligo, nor by the name of Forbes; their peerage does not principally rest upon the one nor the other, but upon both together; as appears by the letters patent, which are conclusive upon this point.

Objection II. In case of a common person, a conviction or outlawry is good by the name of reputation, or that by which he hath been commonly known, though not his name received at baptism, and ought to hold in the case of a peer.

Answer. The defence is obvious. A common person may gain a name by reputation, a peer's name arises by record only.

Objection III. Acts of parliament are to be interpreted according to the intention of the legislature, and therefore an attainder by acts of parliament comes not within the narrow rules of construction that hold in outlawries and other judicial proceedings.

Answer. The intention of the legislature is the proper rule to discover what is the subject matter to which an act of parliament relates; but when that appears, the rules of law, applicable to such subjects, take place and govern the application and operation of such acts: this therefore being an act to attain certain persons by name, must be governed by the rules of law in similar judicial proceedings: and accordingly your lordships, after taking the opinion of all the judges, solemnly determined, that an act of parliament, attainting Major-General Thomas Gordon, Laird of Auchintoule, did not attain Major-General Alexander Gordon, Laird of Auchintoule [see the preceding case], although no doubt was or could be made of the person intended by the legislature.

But the interlocutors complained of were reversed and the claim disallowed.

[264] CASE 4.—CAPTAIN ALEXANDER HAMILTON,—*Appellant*; DUTCH EAST INDIA COMPANY,—*Respondents* [30th March 1732].

[Mews' Dig. viii. 323. 1 Scots R. R. 185. See Piggott, *Foreign Judgments*, 2nd ed., 36, 37.]

[The Sentence of a foreign Court of competent jurisdiction is evidence of *res judicata*, and is not to be called in question in a collateral cause in the Courts of this Kingdom.]

[Interlocutor of the Court of Session affirmed.]

Upon the unfortunate loss of the ship *Adelaar* and her cargo, all belonging to the Respondents, which was wrecked upon the coast of the island of Barra, in Scotland, in May 1728, on her voyage to the East Indies: some part of the silver and other effects saved out of the said ship were brought into the Court of Admiralty in Scotland.

And the property thereof being adjudged to the respondents after a long expensive suit, and a very great deduction for salvage, when they expected to have received the small remainder of their effects, the appellant arrested or stopped the same, in the hands of the Court, for satisfaction of Damages he pretended to have suffered to the amount of £9575 15s. sterling, by the violent seizure and confiscation of a ship

and cargo belonging to him at Malacca, a Dutch settlement in the East Indies, anno 1712, condemned by a sentence of the Court at Malacca on pretence of having Amphion (*i.e.* opium) on board contrary to the law of that settlement; which sentence of Malacca was afterwards confirmed by the superior Court of Batavia, upon the appellant's appeal to that court; though the appellant insisted that the said sentence was contrary to the law of nations, and contrary to the treaty of Commerce between king Charles I. and the States General, anno 1667, still subsisting.

These circumstances were stated in the following manner by the appellant in his printed case on the present appeal to the House of Lords.

" In the year 1711 the appellant resided at Madras, in the East Indies, and he, together with other persons then residing there, fitted out a ship called the *Satisfaction*, on a voyage to Rhio, under the command of the appellant.

" The appellant arrived safe at Rhio with the said ship, but being obliged to stay there some time to dispose of his cargo, he thought proper in the mean time to send out a small vessel to trade to Atcheen, in the island of Sumatra, under the care and direction of James Macdowall, one of the owners of the ship the *Satisfaction*.

" The ship in her way to Atcheen was to pass along the coast over against Malacca, a fort belonging to the Dutch East India Company in the territories of the king of Johore, and that king having notice of such intended voyage, desired that some chests of copper might be taken on board for his use, and [265] landed for his account at Malacca, to which proposal the appellant agreed, and the said copper was accordingly put on board for the use of the said king of Johore.

" The said ship proceeded on her voyage, and came to anchor over against Malacca; and as there was no intention to go into Malacca, nor any other view of anchoring there, but to put the said copper on shore, the master immediately gave notice of his having the copper aboard for the king of Johore, and desired allowance to unload it, and allowance being given by the governor, the same was unloaded accordingly.

" During the time the said ship was at anchor in order to unload the said copper, an English ship was passing from Bengal having a quantity of amphion or opium on board, and Mr. Macdowall, after talking with the master of the ship at what price the same was to be sold, apprehending he might dispose of it to good advantage at Atcheen whither he was bound, he made an agreement for the purchase of some of the amphion, and had the same delivered to him, and put on board his ship.

" The said Mr. Macdowall with the said ship had only anchored about three miles from shore, and as he had no design of trading with the Dutch, so he never was within their jurisdiction, but continued still at anchor, and having unloaded the copper, he was preparing to proceed in his voyage to Atcheen; but Mr. Macdowall was not a little surprised to find his voyage stopped by a number of soldiers from Malacca, with some servants of the Dutch East India Company, who came on board his ship, then at anchor and ready to sail, and seized the said ship, and by force carried her within the boom or harbour.

" Mr. Macdowall immediately complained to the governor of such violent assault committed upon a subject of Great Britain while in peace and alliance with the States General; but in place of redress very extraordinary methods were used to persuade some of the ship's crew to give evidence, that the master of the ship had been carrying on an unlawful trade, and particularly had imported opium into Malacca. Two of them were almost whipped to death, on pretence of drawing from them a discovery: at last a sentence was, on January 19, 1712, pronounced by judges appointed by the East India Company, whereby (upon a recital that a passage was attempted to the Boom, and that according to the Boom-books the pole money was paid,) they declared 18 chests of amphion, 1535 pounds of sandell-wood, 167 pounds shellack, 26 pounds agalla-wood, together with the vessel, to be confiscated according to the repeated orders and commands of their honours the high justices, and the statutes published there, particularly that of the 1st of August 1708, and appointed the amphion to be sent to Batavia, and there sold by order and direction of their honours the high justices of India, and the proceeds of the same, [266] together with the returns or proceeds of the other merchandize and vessel to be divided after useance as follows: one half for the Company, one third for the fiscal and licent master, and one sixth for the poor.

" By this sentence it was not pretended that the ship had been within the Boom,

" or brought any opium within it, without which there could be no importation, but only that a passage was attempted.

" Mr. Macdowall thereupon appealed to the high Court of Batavia, and the appellant went thither himself; but his application there was as fruitless as Macdowall's at Malacca. The Court there (on a recital of their having considered the cause of the committed fraud and contravention of the law of 1711, and reciting the sentence at Malacca,) affirmed the same with costs, without hearing, or allowing the witnesses offered for the owners to be examined, scornfully telling them, English oaths were not to be regarded in the East Indies; and thus the appellant was stripped of a very considerable property.

" The pretence of this, as the appellant was informed, was a regulation at Malacca in 1708, ordering all ships that traded to Malacca to enter into the river, but in case they were not to unload, to abide in the road, and not to run any goods; and forbidding all ships with opium on board to enter the river, under the penalty of forfeiting the ship and cargo.

" But the appellant apprehends, supposing there had been such an order, that it could have no authority over a British subject who had no notice of it, especially since it was no more than a private order, not authorized or approved of by the States-General, and the rather since it is inconsistent with the treaties of commerce subsisting between the English and Dutch, particularly in the year 1668, whereby all officers are prohibited from even searching any British ship lying in a bay, except upon suspicion of her carrying any contraband goods to the enemies of the States; and when such contraband goods are found, which are particularly recited, of which opium is none, such contraband goods only are to be forfeited, but neither the vessel nor any other part of the cargo is liable to be confiscated. But supposing this is a good regulation it would not reach the appellant, for the ship did not enter the river, but was at anchor above three miles distant from the fort: he had no run goods; he had no temptation to import the opium he purchased into Malacca; it was then selling at Atcheen, for which place the ship was bound, sixty per cent. at least above what it gave at Malacca.

" A Dutch East India ship being cast away on the island of Bana, and some part of the effects being fished up, the respondents claimed these effects, and brought an action before the judge of the admiralty in Scotland, against the persons who had fished the same up, and had a decree in their favour.

" [267] The appellant apprehending this to be a proper time to have reparation made to him for the injury he suffered at Malacca, attached, or arrested, these effects, and brought his action against the respondents, before the judge of the admiralty, for satisfaction of the value of the said ship and cargo."

The respondents first objected to the competency or jurisdiction of the court of admiralty, for that the respondents being subjects of a foreign independent State were not bound to answer in any court in Scotland.

And secondly, adhering to that objection, the respondents insisted that the ship and goods were not illegally taken from the appellant, but that they were regularly confiscated and, (as the sentence given at Malacca declares,) according to the statutes published there, and in particular one of the first of August 1708. So that the appellant's present claim had been determined by a competent court, from which there lay no appeal, to the high court of admiralty in Scotland, and who, therefore, could not, without violating a principle of law received by all nations, review or alter the proceedings and determination of a foreign court absolutely independant.

But the judge of the court of admiralty by his interlocutor (January 23, 1729-30) repelled the objection to the jurisdiction, and found the court competent; and further repelled the defence of *res judicata* founded upon the decree of the court of Malacca, and the other decree of the court of Batavia. And in regard of the exceptions taken by the pursuer (appellant) to the said decree as contrary to the law of nations and treaty in the year 1667, sustained process at the pursuer's (appellant's) instance, upon the arrest of the effects belonging to the defenders (respondents) then lying in court, unless the defenders (respondents) should, in support of the said decrees founded upon by them, produce the statute in the year 1708 referred to in the decree of the court of Malacca, and the other law in the year 1711 referred to in the decree of the court of Batavia, or such other statutes and regulations as in law or equity may be found sufficient

to maintain the said decrees confiscating the pursuer's (appellant's) effects; and for that end assigned to the defenders (respondents) procurators the 10th day of March then next for producing of the said writs.

As this interlocutor manifestly impeached the authority of the courts of the States General, and therefore could not be complied with without giving up the validity of their sentences, and admitting in consequence that the effects of the company may be arrested in any place in Europe, until the company shall prove the justice and legality of the many sentences which the judges in India have already given or may hereafter give, it became impossible for the respondents to comply with the directions of this interlocutor, by producing the several acts which were the foundation of the several judgments in India, and thereby give up the authority of *res judicata* and submit the legality or forma [268] lity of these sentences, as well as the justice and force of the laws on which they were founded, to the cognition of the court of admiralty in Scotland.

Therefore a petition was presented to the judge of the admiralty for the respondent setting forth the several reasons which moved them to insist that no action should be admitted in Scotland, and praying to have the said interlocutor varied, and to have it found that the East India Company of Holland were not liable to the jurisdiction of the court of admiralty, and to admit the *exceptio rei judicatæ* founded upon the decrees of the courts of Malacca and Batavia.

To which petition answers being given by the appellant, the judge by his interlocutor refused the desire of the petition, and in respect the petitioners did not produce any statutes or regulations sufficient to support their two decrees, — repelled the defence of *res judicata*, and admitted the appellant to bring proofs of his demand.

And, by another interlocutor, found it proven by the decree of the court of Malacca, the 19th of January 1712, and the decree of the Court of Batavia upon the appeal of the pursuer (appellant) confirming the said decree of Malacca, both produced by the defenders (respondents), that the ship or vessel therein specified, with the particular goods therein belonging to the pursuer (appellant), were by the defenders (respondents), their servants, or others under their command, in their name, or by their assistance and rathabition seized, confiscated, and condemned for the use of the said company and their fiscal in the Indies, and of their poor, conform to the proportions in the said decree of the court of Malacca contained, and found it proven by the testimonies of witnesses, and abstracts from the pursuer's (appellant's) books, that the said goods and ship were worth £1749 5s. sterling; and found the defenders (respondents) liable in payment thereof to the pursuer (appellant), and ordained them to pay the appellant £174 18s. sterling for costs.

Upon this the respondents applied to the court of session, and obtained a suspension, or injunction, to stay further proceedings of the admiralty Court, and also commenced an action of reduction to set aside the said decree of the Court of admiralty:

I. For that the said court was incompetent, having no jurisdiction in the case, and that it was iniquitous to make the company liable for the seizure of the said ship and cargo by their officers and servants, when it was neither alleged nor proved that the seizure was made by their orders, or the whole proceed applied to their use.

II. For that the cause having been judged and determined by the Courts of Malacca and Batavia, their sentences could not be reviewed or reversed by the court of admiralty in Scotland, which has no jurisdiction over these courts, and that this plea or exception (of *res judicata*) is by the law of nations available in all courts, it being an established maxim *quod res judicata pro veritate* [269] *habetur*. And though, when a decree pronounced in one country, is sought to be carried into execution in another, the judge, whose interposition is demanded, ought not to afford it without a previous enquiry into the justice of the sentence; yet, when a decree is actually executed in the country where it was pronounced, it becomes then of no further use than to protect the person who has had satisfaction under it from restitution, which it does with the same effect whether such restitution is sought in the nation where the sentence was pronounced, or in any other, it being a perpetual rule without any limitation that *res judicata exceptionem parit perpetuam*.

And when the Court appeared to be of opinion in this matter with the respondents, the appellant then first bethought himself of alleging that his ship was seized *in alto*

*mar*i, without the limits of the jurisdiction of the Courts of Malacca and Batavia, and therefore these courts were incompetent; and that though the sentence of a competent court should afford an effectual plea against restitution, and bar all enquiry into the justice of the decree, yet there was no reason for allowing the same privilege to the sentence of an incompetent court; and that where the competency is controverted, evidence for clearing it ought to be directed to be brought.

But the respondents replied, that this new allegation was contrary to the appellant's own shewing in the state of his case in the Court of Admiralty, wherein he set forth that the ship was seized at anchor in the road of Malacca, where she had broken bulk, and delivered out some goods; and insisted, that the sentence in the Indies by the supreme court of an independant state, which could not be reviewed or reversed by the court of admiralty in Scotland, was evidence of the competency of the court where it was pronounced, as well as of the justice and legality of the proceedings.

Whereupon the Lords of Session, (July 24, 1731,) by their interlocutor, sustained the reason of suspension of *res judicata*, and repelled the objection of incompetency and iniquity.

And the cause being afterwards argued (July 27) before the Lord Grange, ordinary, his lordship, by his interlocutor, suspended the letters, (*i.e.* stayed proceedings,) *simpliciter*.

Against which interlocutor a petition was preferred for the appellant, praying a review, and that the lords would find the decrees of Malacca and Batavia did not exclude an enquiry by their lordships into the competency of these Courts, and into the justice of their decrees; and to allow the appellant to prove that the courts of Malacca and Batavia had no jurisdiction over him:—And answers having been put in for the respondents,

Their lordships, by their interlocutor, (December 23, 1731,) adhered to their former interlocutor, and refused the desire of the petition.

Against these three interlocutors of the 24th and 27th of July, and the 23d of December 1731, the appellant appealed, and [270] prayed (C. Talbot, R. Dundas, W. Hamilton,) that the same may be reversed for the following reasons, amongst others:

I. For that no judgment can have the force of *res judicata* in a country where it is not authoritative; and no judgment can be authoritative in a place where the judge that gave it hath no jurisdiction, and certainly the judges of Malacca have no jurisdiction in Great Britain.

II. That it doth not appear that the judges of Malacca had any jurisdiction over the appellant or his ship; they could have none unless the appellant was guilty of some forbidden or unlawful traffic: such unlawful trading is not proved; and if they had no jurisdiction their sentence cannot be *res judicata*.

III. That, by the law and practice of Holland itself, no sentence of a foreign judicatory is held as *res judicata*, and there is no reason for allowing a greater authority to their decrees than they allow to those of other nations.

IV. That the giving authority to such decree, without the least evidence that it had any just or equitable foundation, would open a door to such violent and piratical practices, as must prove destructive to the trade of Great Britain, and render it precarious.

The respondents relied (P. Yorke, D. Forbes) on the arguments formerly offered to the court of session, and herein-before stated; and

The interlocutors complained of were accordingly affirmed.

CASE 5. DAVID VISCOUNT OF STORMONT, (Son and Heir of David, late Viscount of Stormont, deceased.)—*Appellant* : JOHN HENDERSON, & Al. Tenants in the Four Towns of Lochmaben. — *Respondents* [19th April 1732].

[1 Scots R. R. 186.]

[The Crown's kindly tenants of the Four Towns of Lochmaben, and their next of kin succeeding to them, are irremovable by the Heritor of the Lands, being a grantee of the Crown : And such right is assignable by the said tenants.]

[Interlocutors of the Court of Session affirmed.]

The Respondents stated the following case :

The lands of Heightae, Smallholme, Heck, and Greenhill, commonly called the four towns of Lochmaben, in Com. Dumfries, being part of the property of the Crown, have been time out of mind possessed by the respondents and their ancestors, as kindly irremovable tenants, and they have been acknowledged as [271] such by the Crown in ancient times, and in different reigns : by the parliament itself both in a legislative and judicative capacity ; and by the former constables or keepers of his Majesty's castle of Lochmaben, who, under that title only, and not as proprietors, levied the rents of the lands in question, which were appropriated for the support of the castle.

The keepers of this castle did early impose hardships, and endeavour to levy exactions upon the tenants, which gave rise to several complaints to the Crown.

By a petition and complaint to King James VI. of Scotland, the tenants of the said lands complained, That, notwithstanding of their being kindly tenants and occupiers of his Majesty's farm lands and tenandry assigned to his Majesty's house of Lochmaben, they were wrecked and spoiled by thieves, and extorted by the constables of the castle of Lochmaben, etc. : Whereupon his Majesty, by his sign manual, (12th June 1592,) ordered the keeper of the castle of Lochmaben to desist and cease from molesting, troubling, or using of any violence against those his tenants, and to suffer and permit them peaceably to occupy their possessions, as they the keepers should answer to his Majesty upon their disobedience.

By another sign manual (1602,) bearing that his Majesty understanding that his poor tenants of his proper lands of Heightae, etc. are, and had been greatly oppressed, particularly by the constables and keepers of the castle of Lochmaben, and compelled to pay several duties, and do services, which they and their predecessors were never in use to pay or do. Therefore his Majesty strictly commands the constables of the said castle, present and to come, that they in no manner of way, burthen or charge his said tenants and inhabitants of his said proper towns and lands to pay any duty or do any service, further than they and their predecessors were in use to pay and do in time past.

By a sign manual from King Charles II. (June 1664,) bearing, that his Majesty understanding, that the poor and kindly tenants of his proper crown lands of Heightae, Smallholme, Heck, and Greenhill, have been exorbitantly raised in their rents and services, contrary to the express warrants of his Majesty's grandfather, *annis* 1592 and 1602, granted to their predecessors upon weighty and good considerations, declares his royal intention, That the said tenants should have been protected, and these warrants obeyed as constant leases according to the true meaning thereof ; and further, his Majesty renews the said warrants and leases, and authorises the said tenants and their successors to possess and enjoy their respective lands, they paying and performing yearly the rents and services paid and performed by their ancestors, *anno* 1602, and prohibits and discharges the keepers of the castle of Lochmaben, or any who shall pretend right to the said crown lands in all time thereafter, under all highest pain to exact more rent, or remove them from their ancient possessions so long as they thankfully performed the same.

[272] That the Earl of Annandale, keeper of the said castle, having settled the rents of the said lands in way of jointure to his lady, which without consent of the Crown he could not lawfully have done, she and the Viscount of Stormont, her second

husband, applied to parliament, and obtained an order or decree directing the tenants to pay their rents to her.

A new valuation was made (in 1667.) of the value of the lands in the county of Dumfries by the commissioners of the land tax, whereby the respondents' interest, which had never been taxed before, was rated, on account of their being kindly tenants and irremovable, at one-fourth more than the appellant's, viz. at 2400 merks, and the appellant's only at 1800 merks.

From that time downward till the year 1692, the respondents and their ancestors, to prevent distress upon their lands, paid the whole land tax, and got allowance of the appellant's proportion in discharge of their rents. But from that period the appellant's father refused to make the respondents such allowance, and threatened to remove them from their possessions if they did not submit to the payment of the whole, which at last obliged the respondents to bring their action (1720.) before the court of session against the appellant's father, to recover payment of his part of the land tax so paid by them, in the first place, for declaring their immunity from paying his proportion of that tax for the future, and that they were the Crown's irremovable tenants.

Pending this suit the appellant's father brought a cross action for removing the respondents from their possession, and having it declared that they were removable at pleasure.

The respondents insisted they were the Crown's irremovable tenants, subject only to pay their rents to the appellant according to ancient usage,—that they had possessed immemorially :—that their right has been acknowledged by the several orders from the Crown above recited, and that their ancestors and purchasers from them had been, from time to time, admitted and inrolled in the court books of the appellant, and of those under whose right he claims.

The court of session decreed, that the appellant should relieve the respondents of his proportion of the land tax from the time his suit was commenced, but absolved him from prior payments, in regard the respondents had voluntarily submitted to them.

And upon the question of right, the Lords, by their interlocutor (24th November 1726,) found, That the pursuers of the said declarator, (*i.e.* the respondents, plaintiffs in the action of declarator,) had such a right of property to the lands, that they could not be removed, and might dispose their right to extraneous persons.

Against this interlocutor the appellant's father preferred a petition, and the respondents put in answers.

The Lords, by their interlocutor (27th December 1726,) found, that the pursuers of the declarator have such a right in the lands, [273] that they cannot be removed, and may dispose their rights to extraneous persons.

Against which interlocutors the present appeal is brought ; but the respondents hope (C. Talbot, C. Areskine, R. Dundas,) the same shall be affirmed for these among other reasons :

1st, For that the respondents and their ancestors have enjoyed their possessions by this tenure of kindly irremovable tenants of the Crown, time out of mind, and long before charters or feoffments were in use in Scotland.

2d, For that their right to possess their lands, without being removed, has been constantly acknowledged by the Crown.

3d, For that the respondents' ancestors, and purchasers from them, have always been admitted and enrolled in the court books of the manor without the least objection to their title.

4th, For that on account of their being irremovable tenants, they have been rated to the land tax, which could not have been done, if they had been ordinary moveable tenants.

Objection 1. —That all rights of property in Scotland, are constituted either by charter, infeoffment, or leases, at least by some title in writing, whereas the respondents have no such title under which they can claim.

Answer. —Here the appellant seems to mistake the point of law : In the earliest times proprietors of lands had no titles in writing, but their rights were known and ascertained by their possession and inrollments in the king's courts, or in the courts of the other over lords, and when the estate descended to an heir, or was transmitted

to a purchaser, the title of the ancestor or author was cognesced by a jury, and the verdict of that jury gave them a full right.

That although since the feudal law was fully adopted into the law of Scotland, titles have generally been constituted by writings, it affords no objection against the respondents, whose right is more ancient than that period of the law of Scotland ; and there yet remain other ancient rights of the same kind, such as the udal rights in Orkney, where there are no titles in writing, but lands are, by possession only, transmitted from father to son. The titles of the tenants or rentallers of the bishoprick of Glasgow, of the monastery of Paisley, and of those who held under the keepers of the king's castles of Dumbarton and Stirling, were of the same nature till of late : and several of the bishop's tithes are held and enjoyed upon no other foot to this day.

Objection 2. That the property of the lands in question belonged to the Lord Maxwell, and by his forfeiture did return to the Crown : were afterwards dissolved from the Crown, and granted to George Earl of Dunbar, who surrendered the same in favour of the Earl of Annandale, from whom the appellant's title proceeds.

Answer. It is denied that the lands in question ever belonged, in property, to Lord Maxwell, or that they came to the Crown by his forfeiture ; they remained perpetually with the Crown [274], as the Crown's own property, and the respondents' ancestors continued still the Crown's kindly irremovable tenants. The heretable right of keeping the castle did indeed belong to Lord Maxwell's family, and by his forfeiture did return to the Crown, and was afterwards granted to the Earl of Annandale, which appears by the appellant's own title, particularly by Lord Maxwell's service as heir to his ancestors, by which he is retoured heretable keeper of the castle, but not proprietor of the lands in question.

Objection 3. That the Earl of Annandale, the appellant's author, obtained a decree of removing against some of the tenants in the lands in question, *anno* 1613, and another decree of the same kind, *anno* 1634, which is an evidence that the tenants were not irremovable.

Answer. These decrees were obtained in absence and by default against some inhabitants of the town of Lochmaben, the nature of whose right and possession is not known, but against none of the respondents' ancestors : and as these decrees were obtained only in default, they never took any effect, and they were part of the encroachments which gave rise to the several complaints made to the Crown.

Objection 4. That the appellant's father obtained another decree of removing against several of the tenants, *anno* 1665, to which action they appeared by their counsel.

Answer. This appears to have been only a collusive action, brought by the Viscount of Stormont to turn the Earl of Annandale out of the possession of the rents ; for although, at first, there was an appearance of arguing for some of the tenants, yet, so soon as the Earl of Annandale made himself party to the suit, the counsel who pretended to appear for the tenants withdrew their appearance, and desired, that judgment might be given as in default ; and immediately after, the Viscount, to quiet them, granted an obligation to the tenants, never to remove them or their heirs, and so this decree took no further effect, and is now barred by prescription. Nor has any decree, obtained in default, the least effect, after parties appear and plead upon their rights, as the respondents have now done.

Objection 5. That by act of parliament (Jas. VI. parl. 11. ca. 69.) it is declared that rentals set by the King of lands belonging to him, in property, (excepting few rentals sent to them and their heirs,) shall be of no further effect than a naked liferent ; and that, after the rentaller's death, the King may dispose of their possessions.

Answer. The act of parliament has no relation to this case ; it concerns rentals or written leases intended to be granted by the Crown, after that time, to rentallers, without expressing heirs, these are declared to be only rights for life ; but the respondents' tenures are much more ancient ; the right of the heirs has been acknowledged by the Crown in the several deeds above-recited, and particularly by the sign manual, *anno* 1664 : [275] and though the appellant pretends this sign manual was stopt in exchequer, that does no way appear : nor could it possibly be true, seeing such sign

manual is not a writing of that nature which required its being passed in exchequer, but had its full effect by the king's subscription.

That, as late as the year 1692, when a question arose between the appellant's father and the respondents concerning their being subject to the land tax, the appellant's father insisted, that they were irremovable tenants, and ought to be taxed on that account ; whereby he directly acknowledged their right to be such as they now plead.

Objection 6.—That, *anno* 1690, the tenants obtained an order of parliament directing the commissioners of the land-tax to take off their assessment because they were only tenants ; and if that order has had no effect, the respondents have themselves to blame.

Answer.—The order was just notwithstanding of their being irremovable tenants, since 'tis not the tenants but the proprietors who are to pay the land-tax ; nevertheless that order has had no effect ; the tenants have still been assessed, the appellant's father insisted they should be assessed, and he prevailed ; for, by that decree, it is adjudged. That they should bear a proportion of the land-tax according to the assessment made *anno* 1667.

The appellants stated the following case :

Several questions arose in this cause below, which are now reduced to this single point, viz. Whether the respondents' tenants of the lands in question, and their next of kin succeeding them, are irremovable by the appellant, (who is heretor of those lands,) and may assign their right to whom they please ?

King James the Sixth, upon the attainder of John Lord Maxwell, did, by charter (January 15, 1610), grant to George Earl of Dunbar, Lord Home, and his heirs male, the lands of the four towns of Smallhome, Heightae, Heck, and Greenhill, and other lands in Lochmaben, and the hereditary custody of the castle of Lochmaben, and the office of steward of Annandale, and all the right, title, and interest which his Majesty or his predecessor had, or might have to the said premises, paying yearly the rent of £53 10s. Scots money, and 32 mairts, in name of fee-farm, together with all other rents and services due and accustomed for the same lands ; and 24s. for increase of rent ; and one red rose for the offices of steward of Annandale, and keeper of the castle of Lochmaben, if demanded ; in which charter it is mentioned that the said premises formerly belonged to the said Lord Maxwell, or part of them were the annexed property of the Crown, and were dissolved by act of parliament, *anno* 1594, to the intent his Majesty might set the same in fee-farm.

And by the said charter the said premises were erected into a barony by the name of the Barony of Lochmaben.

These lands descended from the Earl of Dunbar to Home, of Slegden, as his heir, who resigned the same to John Murray, of Rampatrick, afterwards Earl of Annandale ; whereupon,

[276] By charter from King James the Sixth, (July 1, 1612,) the same premises were granted to the said Earl of Annandale.

The said earl (in 1613) obtained a decree, in absence, before the lords of council and session, against the tenants of the said four towns, to remove them from their possessions.

The Earl of Annandale, upon his own resignation, (July 13, 1625,) obtained a charter from King Charles the First, of the same premises, (amongst other things,) paying yearly the rent of £300 Scots, and 32 mairts, in name of fee-farm, deducting £40 13s. 4d. and the said 32 mairts, for his yearly fee, for keeping the said castle of Lochmaben.

The said earl obtained another decree, (March 13, 1634,) in absence, before the lords of session, against his tenants of these lands, for removing them out of possession.

David Viscount of Stormont (in 1665) having married the Countess of Annandale, who had her life-rent in the said premises, they brought an action of removal against several of the tenants of these lands, who insisted that the viscount and his lady claiming under the Earl of Annandale, who had no right himself to the said lands, but only to the office of keeper of the castle of Lochmaben, they could only crave the accustomed rents payable *virtute officii*. And that the tenants (then defenders) and their predecessors being ancient kindly tenants to the king and his royal predecessors, King James the Sixth, by two warrants, the one dated *anno* 1592, and the other *anno* 1602, discharged the keeper of the castle of Lochmaben from troubling

the said tenants, or raising their rents, so long as they paid their accustomed rents ; and that the same was also ratified by his then present majesty King Charles the Second, by a signature dated 30th June 1664 : and that the said defenders had made a new address to his then Majesty, which was referred to his majesty's advocate in Scotland, to the end he might consider their pretensions, and if he found them just, and that his Majesty was concerned therein, that then he should appear for them, and therefore the defendants craved the concurrence of his majesty's advocate.

To which it was answered for the said viscount and his lady, that the said warrants in 1592 and 1602 only restrained the then keeper of the castle of Lochmaben from raising the then tenants' rents, or removing them, but did not affect the viscount and his lady, who held the lands in question, under a grant from the Crown, subsequent to the said two warrants, and antecedent to the last mentioned warrant, which could have no effect because the Crown was then divested of the said lands.

After which his Majesty's advocate appeared for his Majesty's interest ; and it was ordered by the lords of session, that he should see the process, and be ready to dispute at the next calling.

And the said action being called again, in presence of the lords, the 18th July 1665, the defendants' procurators declared, that they passed from their appearance and defence ; and pro [277]-tested that they might be marked absent, and as if they had never appeared and made any defence.

Whereupon the lords of session decreed the defendants and their undertenants to remove themselves, and their goods and cattle, from the said lands, to the effect the said pursuers, and others in their names, might enter and peaceably enjoy the same as the said viscountess's own proper life rent lands.

The defendants in this suit gave up all their pretensions of being irremovable tenants to the Crown, and suffered judgment to pass against them by default upon an agreement made with Lord Stormont. In pursuance of which his lordship, 17 days afterwards, viz. August 4, 1665, gave them a writing under his hand, setting forth, That notwithstanding a decree of removing, obtained at his instance before the said lords of session, against the tenants of Heightae and others, yet he, for himself, his heirs, and successors, declared and promised that, during his lady's right of life-rent, or the right of property to the said lands, he would noways remove the said tenants and possessors of the said lands, nor their nearest of kin succeeding to them, from their possessions, nor heighten their rents, they always paying their rents, mails, and duties they had been in use to pay in the years 1659, 1660, and 1661.

The said Lord Stormont obtained a charter (August 22, 1666), from King Charles the Second, containing a *novodamus* of the said lands and offices in the same terms, and under the same feu duties as are mentioned and reserved in the charter to the Earl of Annandale, *anno* 1625.

The said Lord Stormont soon after died, and his son and heir David Lord Stormont (the appellant's father, then an infant), succeeded to him.

In 1679 the tenants brought an action against the appellant's father, setting forth, that they being kindly tenants of the lands in question to his Majesty and his predecessors by a long tract of possession, past memory of man, for payment of service to his Majesty's castle of Lochmaben, and the deceased Viscount and Viscountess of Stormont, pretending right to the said lands, brought an action against the said tenants for removing them from their possessions, and that the said tenants appearing and debating for their interest, it was transacted that, for fortifying the said viscount's right, he should have his decree of removing, and the tenants should retain their possession : and that accordingly the said viscount gave the declaration in writing under his hand, dated August 4, 1665, before mentioned :—and that, by virtue of the said declaration, the said tenants and their successors had good and undoubted right to possess the said lands, for payment of the accustomed duties, and noways to be removed from their possession, nor heightened in their rents, or payment of taxes, more than the rest of the said viscount's tenants ; and the lords of session decreed accordingly.

[278] In the year 1692 (when there was a dispute between the appellant's father and the tenants about paying the public taxes), they again pleaded the right given them by this declaration, and that making them pay the taxes was contrary to the terms of it.

The respondents having brought an action before the lords of session, on behalf

of themselves and the rest of the tenants of the said four towns, against the appellant's father, to have it found and declared that they are his Majesty's kindly and irremovable tenants, and several other conclusions consequent thereupon : the said viscount brought his cross action of removing and declarator, to the end they might be decreed to remove from their several possessions, or that it might be declared that they are removable tenants :—and the said causes coming to be heard.

The lords, by their interlocutor, (November 24, 1726,) found the tenants, pursuers of the first declarator, had such a right of property to the lands of the four towns of Lochmaben that they could not be removed ; and that they might dispose their right to extraneous persons.

Against this interlocutor the appellant's father presented a reclaiming petition ; and answers being given in thereto by the respondents.

The lords by another interlocutor, (December 27,) found, that the tenants, pursuers, had such a right to the lands that they could not be removed, and might dispose their right to extraneous persons.

Against these two interlocutors the appellant's father brought his appeal the last session of parliament ; and, since his death, the same has been revived by the appellant, his eldest son and heir, who humbly conceives, and is advised, he is aggrieved thereby.

The respondents insisted (P. Yorke, D. Forbes), that they and their predecessors were antient kindly tenants of the Crown, and had held their possessions time immemorial without any written title, and could not be removed nor heightened in their rents any more than copyholders in England, and that they had power to assign this tenant-right as they please. And to support this pretence they produced a petition to King James the First, from his poor tenants of these lands, complaining that, notwithstanding their being his Majesty's kindly tenants, they were extorted by the constables of the castle : upon which followed an order signed by the King, dated 11th June 1592, whereby his Majesty ordained the keeper of the castle of Lochmaben to desist from molesting the complainers, but to suffer them to occupy their rooms and possessions without further trouble or impediment. And another warrant, dated 1602, setting forth, That his Majesty understanding that his poor tenants of the said four towns were oppressed by the keepers of the castle of Lochmaben, and compelled to pay duties, and do services which they and their predecessors were never in use to pay or do, wherefore his Majesty [279] commanded the keepers present and to come, that they in no way burthen or charge his said tenants and inhabitants of the said four towns and lands to pay duty or service, further than they and their predecessors were in use to pay and do in time past. And also another warrant of King Charles II. dated 30th January 1664, setting forth, That his Majesty understanding the kindly tenants of the said four towns had been exorbitantly raised in their rents and services, contrary to the express warrant of his Majesty's royal grandfather, therefore his Majesty declared, that the said tenants should have been protected, and the said warrants obeyed as constant leases, and thereby renewed the said warrants and leases ; and authorised the said tenants and their successors to possess and enjoy their respective lands, they paying and performing yearly their rents and services paid by their ancestors *anno* 1602, and prohibited the keepers of the castle of Lochmaben, or any who should pretend right to the said crown lands in all time coming, to exact more rent or services from the tenants thereof than they were in use to pay the time of the said warrants, nor remove them from their antient possessions so long as they should thankfully perform the same ; and further insisted upon the right given them by the declaration of the appellant's grandfather, 4th August 1665.

To which the appellant answers, that if the respondents' predecessors had been antient kindly tenants of the Crown, that would not give them a right of being irremovable by the grantee of the Crown, much less of assigning their right of kindly tenancy ; for such a right would contradict a fundamental principle of law which says, there can be no perpetual assignable estate in land without feoffment, *nulla seizina, nulla terra* ; and neither the law of copyhold in England, nor any thing similar to it, takes place in Scotland. And though kindly tenants, who have long enjoyed from father to son, are well known in Scotland, yet it never was adjudged, it never was said by any writer upon the law of Scotland, that such tenants, by the

continuance of this favour, acquired an absolute right against the heritors of the lands. And it is an established rule that kindly tenants cannot assign; because the only title they have to the lord's favour is their being kindred to the antient possessors, which is inconsistent with the notion of the power of assigning.

And as to the two warrants of King James VI. *anno* 1592 and 1602, they neither give a new right, nor confirm any old one, and amount to no more than a command to the constable of the castle of Lochmaben not to oppress the tenants. The warrant from King Charles II. ordering the two former warrants to be observed as leases, was obtained upon a misrepresentation, for the Crown had then no right to the lands, and for that reason, when the warrant was brought to the exchequer, it was stopped, and never passed the seal: But supposing these warrants amounted to leases, yet, undoubtedly, they give no power [280] to assign: and by no law no leases are assignable unless they contain a power of assigning in formal words.

The appellant admits the declaration given by his ancestor in the year 1665; and that, by virtue thereof, the possessors at that time, and their next of kin succeeding to them, have a right to enjoy according to the terms of it; but the right given by this declaration is expressly confined to their kin succeeding, and gives no power to assign.

This declaration is the respondents' only title, for their allegation of having held of the Crown by immemorial favour, cannot be proved, because it is contradicted by the three decrees in 1613, 1634, and 1665. And if it was proved, yet it never was allowed in Scotland to give an irremovable right; and though it gave a right in the amplest manner, it is extinguished for ever by their acceptance of the written title from the appellant's grandfather in the year 1665, which was evidently given them because they consented to let a decree go against them as his moveable tenants.

In the year 1679 they founded upon this declaration as their title, and obtained a decree that they had a right to enjoy their lands in pursuance thereof.

By these interlocutors the respondents are established in a right which hath no name nor any foundation in law, and is incompatible with the right established in the appellant and his ancestors by charters and infeftments, by virtue whereof they have been in possession of the lands in question above 100 years. Nor do the interlocutors ascertain upon which of the respondents' pretensions the Court founded the right decreed to them.

But the interlocutors complained of were affirmed.

[281] CASE 6.—JOHN HOGGAN, Provost of the Borough of Kinghorn, & Al.—*Appellants*; WILLIAM WARDLAW, COLONEL JAMES ST. CLAIR, & Al.—*Respondents* [10th March 1724].

[1 Scots R. R. 212.]

[A written agreement between certain Electors, (being part of the magistracy or town council of a burgh in Scotland,) binding themselves to act in concert with each other, on pain of being esteemed infamous, is unlawful; and an election made in consequence is void.]

[Interlocutors of the Court of Session reversed.]

By the sett or constitution of this borough it is appointed, *inter alia*, that the council shall consist of merchants, sailors, and brewers to the number of seventeen, and of five deacons:—that annually, upon Monday before Michaelmas, the said council of twenty two shall choose six new counsellors in the room of six who go off:—That upon Wednesday immediately after Michaelmas yearly, the old and new counsellors and deacons shall choose the provost and two baillies; and that out of this council and deacons the treasurer shall be chose at Martinmas yearly.

Some of the respondents being in the magistracy or town council of this borough, at and preceding the election at Martinmas 1732, were resolved, if possible, to continue the management of the same in their own hands, for ends and purposes which are very obvious; but being sensible they had not the inclinations of the inhabitants,

they (October 3, 1732) entered into and executed an unlawful bond and covenant, whereby, amongst other things, they obliged themselves each, under the penalty of 500 marks, and of being esteemed infamous and unfit for society, to act in concert with one another, and to give their votes plum, at the election of magistrates, (which was to be next day,) to such persons as the major part of them should think most worthy for managing the borough till the next election at Michaelmas 1733, and then to stand by one another, without any difference or dissent, and to vote plum with one another, not only for such persons as the major part of them should judge proper, but also to vote out such members of the council as the major part of them should think fit ; and to stand by and assist one another, to the utmost of their power, not only in the choice of council and magistrates, but in every other cause whatsoever ; and that the cause of any one should be held as the cause of the whole.

Notwithstanding whereof the respondents were in a great measure disappointed of their election at Michaelmas 1732, by the assistance of an old and new council who did not favour their interest. Yet nevertheless, and in pursuance of the said association, the confederates never would attend any meeting, or make [282] up a quorum of the town council ; but when, by the absence of other counsellors, they were sure to make a majority to carry on their several illegal and unwarrantable practices, particularly with respect to Mr. Man, one of their number, whom they kept in the council at the election of 1732, though he was not qualified to be a counsellor, being apprehensive that without him they could not attain the end of their unlawful confederacy, and impose such a magistracy upon the borough, at the election in 1733, as would best suit their purposes.

The confederates, to the number of eleven, made part of the meeting in which the magistrates and counsellors assembled, on Monday preceding Michaelmas 1733, to choose new counsellors, when the appellant, Hoggan the provost, took a protest against Mr. Man's being allowed to sit in council. But the said eleven, or some of them, took the council-book by violence from the town-clerk, to prevent his entering the protest, and tore the papers when he was going to enter the protest on a loose schedule, and great disturbance and outrage being continued for several hours, made it impossible for the appellants and respondents to proceed jointly, which obliged the appellants, the provost, two bailies, and the counsellors who concurred with them, to remove to another part of the room, and having required the other counsellors to join with them, they regularly elected six new counsellors, agreeable to the constitution and usage of the borough.

But the eleven confederates, in pursuance of the same illegal covenant, made choice of three new counsellors only, in place of six required by the constitution or sett, that they might not remove from the council any of their associates, and because they could not find any one person more in town who would concur in their arbitrary and illegal proceedings.

On the Wednesday after Michaelmas (1733), being the anniversary for choosing magistrates, the appellants were elected into their several offices by the town council, legally and regularly constituted, took possession of their said offices, and enjoyed and exercised the same :—But the respondents, with the assistance of the three new counsellors chosen by them, elected themselves, and voted two of their associates to be bailies ; and the respondent Wardlaw, who is a subscribing witness to their bond of association, to be provost, though he did not reside in the borough ; and they appointed their other confederates to be of the council ; and, under colour of this pretended election, brought an action of reduction and declarator before the court of session in Scotland, to have it found and declared that they were duly elected, and that the appellants might be decreed to desist from troubling them in the exercise of their (pretended) offices.

The appellants brought the like action of declarator of their right ; but as several of the respondents were at that time out of Scotland, and that, by reason whereof, their process was not returnable in court till after the lapse of 75 days, the appellants [283] appeared to the suit of the respondents, and insisted that they were the persons legally elected into those offices ; and that their election was preferable to the pretended election of the respondents.

The cause was argued before the whole lords ; and the appellants insisting and offering to prove that the respondents, or most of them, had entered into an unlawful

confederacy and combination to vote in the said elections, and had executed a writing to the purport before mentioned, they prayed the proper process to compel the recovery and production thereof.

The lords, by their interlocutor, granted the usual process for recovering any obligation or other writing entered into before or since the election of 1732, in relation to the election of 1733, by the respondents, or part of them, or by any other person who had right to elect, or had been elected.

The appellants took out and served the said process upon sundry persons, particularly upon John Sinclair, (commonly called Lord Sinclair,) eldest son of — Lord Sinclair, deceased, and upon William Wardlaw and Thomas Miller, two of the respondents.

Lord Sinclair appeared in court, and being solemnly sworn and examined upon oath, deposed and exhibited one paper, marked by the lord examiner, and deposed he had no other paper in relation to the matter in question, nor knew nor suspected where any paper might be; which paper, so exhibited, is executed by nine of the respondents, and by other four of their associates.

William Wardlaw deposed he had no writing in relation to the election of 1733, but acknowledged he had seen a writing relating thereunto, which was put in my Lord Sinclair's hand some time the week before, but that it was not in his, the deponent's hands, since he was summoned. And the writing produced by Lord Sinclair being shewn to him, he deposed, that 'twas the same that he had seen before, and that he knew of no other paper in relation to the matter in question.

Thomas Miller deposed, and exhibited a writing on stamped paper, marked by the lord examiner, that he never had any other writing in relation to the matter in question, except the writing produced by the Lord Sinclair; and that the paper then exhibited was drawn out on and writ on stamped paper from the other produced by the Lord Sinclair.

The last writing bears date the 30th October 1732, and is executed by the whole thirteen who executed the other writing produced by Lord Sinclair, and by two more of the respondents; and the Lord Sinclair, the said William Wardlaw, and other two are subscribing witnesses thereto.

The cause came thereafter to be argued before the whole lords, when it was insisted upon for the appellants, that the general convention of royal boroughs in Scotland having, by an act [284] passed in that assembly, directed all the boroughs to transmit to the said convention the several setts or constitutions of such boroughs, to be a rule by which all controversies in elections of magistrates should from that time forward be determined, the sett or constitution of the borough was, amongst others, transmitted to and recorded in the books of the said General Convention, as well as in the town books of Kinghorn, and acquiesced in without any objection till now.

That this confederacy entered into by the respondents was not only contrary to the freedom of election, but inconsistent with the constitution of every society and incorporation, where every matter should be determined by the free voice of the majority; whereas, by this association was erected a new society, the majority of which, though the minority of the council, was to determine the whole. That at the said election of 1732 they broke in upon the said constitution by continuing James Man a counsellor *ex officio*, that is, by his being treasurer the preceding year, though he was utterly incapable by reason of his being a tradesman, and no deacon or merchant; and that, by the said constitution, the treasurer is not of the council in virtue of his office: But the town council being constituted at Michaelmas, one of the constituent members thereof is elected treasurer at Martinmas thereafter, which makes no addition to the number of twenty-two, of which the council consists: whereas, by the arbitrary continuing of Mr. Man, the council is made to consist of twenty-three, that they might take the advantage of his supernumerary vote; and that, with the same reason, they might extend the number of the council to forty, or reduce it to ten.

That the whole proceedings of the respondents in these elections were null and void, because they were carried on without the concurrence of any of the magistrates, who are a necessary part of the quorum.

It was pleaded for the plaintiffs, (now respondents,) that there is no original or authentic constitution of the borough extant. That they did not admit the authority

of the constitution dated in the year 1710, though authorised by the general convention of boroughs ; and even since the date thereof it has not been observed always in every particular.

That the concert was a voluntary resolution to act jointly in making choice of such persons as the majority of them should judge to be fittest for the service ; and if such concert can lawfully be made verbally, it does not much alter the case that the same is reduced into writing ; that every previous engagement does not destroy the freedom or liberty of election, though entered into under a penalty.

That the penalty annexed was an idle addition, and such as probably would not be effectual to produce any action : and that the other expression, by which the breach of this contract should be rendered infamous, etc. imports no more than what is ordi[285]-narily implied in every verbal concert or engagement, and therefore the adding of such penalty cannot have such effect as to annul the whole acts and proceedings of those who entered into this concert.

That it was no act of force or violence committed by the respondents when, being deserted by the clerk, they retained the council-books : or supposing it were true that they would not suffer him, in their presence, to write any minutes as the acts and proceedings of the council, other than what they did direct, those circumstances could not be of weight sufficient to annul their proceedings.

It did not appear in the proceedings in the court below that the bond or written concert had any influence upon the elections, by any previous meeting to discover the opinion of the plurality of those who signed the same, all having freely, and of their own accord, voted for the persons elected at Michaelmas 1733 : and therefore, though the entering into the bond should be supposed, strictly speaking, illegal and unwarrantable, it cannot affect the election to the prejudice of the borough.

Which debate being considered by the said lords, they, by their interlocutor of the 3d of January 1733-4, found, the bonds produced are *contra bonos mores*, unwarrantable and unlawful.

The cause was again argued before their lordships, when the appellants prayed to be absolved from this action, in respect of the interlocutor already pronounced.

But their lordships, by interlocutor, (January 4, 1733-4,) found, that the bonds produced are not, *per se*, relevant to annul the election against provost Wardlaw, and other magistrates chosen with him *anno* 1733.

The appellants (on the 15th) petitioned the Court, praying to vary their interlocutor : but their lordships adhered to the above interlocutor of the 4th of January.

And by another interlocutor of the 26th, their lordships having again considered the debate, writings produced, and former interlocutors in the cause, they found that the objections proponed for the defenders (now appellants) are not sufficient to void and annul the election of the plaintiffs (now respondents) magistrates and counsellors of the borough of Kinghorn, at Michaelmas last, for the year thereafter, *in totum*, and remitted to the ordinary to proceed accordingly.

The appellants objected, at a hearing before the lord ordinary, that the two pretended baillies elected by the respondents were incapable of acting as magistrates by reason of their being subscribers of the said unlawful bond.

His lordship, by interlocutor, (February 1,) *int. al.* found, that in respect of the interlocutor of the whole lords, the exception against the baillies was not sufficient, *per se*, to annul their election.

[286] And by another interlocutor (of the 6th) *int. al.* found, decerned, and declared, conform to the several conclusions of the libel.

And upon a reclaiming petition put in (on the 8th,) for the appellants, the lords adhered to their former interlocutor, and refused the desire of the bill.

Against these six interlocutors last recited the appellants have brought their appeal, and assigned (R. Dundas, W. Murray) the following reasons for their reversal.

I. For that the election of such of the respondents as pretended to have been elected counsellors the Monday before Michaelmas 1733 was null, because the electors were not a quorum of any sort, and acted without the concurrence of any magistrate, which has been adjudged to be absolutely necessary : and the election of magistrates the Wednesday after Michaelmas was illegal, because made by counsellors unduly chose, and not by half the number of new counsellors which the sett or constitution requires.

II. For that the sett recorded in the books of the convention of royal boroughs, and in the town books of Kinghorn, in the year 1710, is the only rule whereby to judge of the constitution of this place, and a law which the corporation itself can never alter, neither have they attempted to do it. The minutes of every election begin with a reference to it : viz. This being the day appointed by the sett of this borough, etc. And though it may be true, that, as against the crown, a corporation cannot give itself a constitution which is not strictly warranted by prescription and immemorial usage, yet they are themselves estopped from claiming franchises in a different manner than they have set them out upon record, or than they have in any solemn way consented to their being established and fixed.

III. For that as the elections in almost all the royal boroughs in Scotland have, ever since the union, and since the foresaid act of the royal boroughs, proceeded upon the footing and according to the tenor of the setts or constitutions recorded in the books of the convention of royal boroughs, in pursuance of their act and authorised by them, the breaking in upon those constitutions, so recorded and authorised, and ever since acquiesced in without complaint, would manifestly shake loose the foundations of all elections of royal boroughs in time coming, and leave their proceedings to be arbitrary and precarious according to the humours of any magistracy in possession and, in the present case, the respondents do not oppose any other fixed constitution to this sett, but only incertainty and arbitrary will which suited better with the purposes of that association into which they had entered.

IV. Though the respondents had not gone contrary to the sett, yet their election is null and void, because it was carried on by illegal and immoral means. The voters were not free agents, but under the influence of a bond by which they engaged, in effect, to submit their own consciences and the rights and privileges [287] of the borough to the pleasure of the majority of the league, and thereby invested six men with the whole power of the corporation.

V. For that the judgment of the court of session seems absolutely inconsistent, they having by one interlocutor found the bond of association immoral, unwarrantable, and illegal; and yet by their other interlocutor found, that such immoral, unwarrantable, and illegal bond, was not sufficient to void an election carried on directly in consequence thereof.

The respondents relied (D. Forbes, J. Strange) on the arguments urged before the court of session in support of the interlocutors.—But

The six several interlocutors complained of were REVERSED, the election of the respondents declared null and void, and the respondents to be at liberty to proceed before the lords of session upon that part of the libel which calls in question the election of the appellants.

[288] [In consequence of the arrangement adopted by Mr. Brown, the following three Cases, which were contained in his original volumes of Reports in Parliament, were omitted in the copy prepared by him for the present publication : a circumstance which could not be detected till the whole was completed, and the Index prepared. They are now inserted for the purpose of rendering this Work complete to the end of the year 1800.]

CASE 7.—WILLIAM PAUL, AND CHRISTOPHER CLITHERO, ESQRS.—*Plaintiffs* ;
SIR JOHN SHAW, BART.—*Defendant* (in Error) [29th January 1710].

[Prisage is an ancient duty in specie on goods imported, and may be granted away by the crown : but goods chargeable with this duty are not thereby exempted from the payment of other duties.]

On the trial of an action of *indebitatus assumpsit*, brought in Michaelmas term 1705 by the Plaintiffs against the Defendant for the sum of £6000, the jury found a special verdict ; stating that the plaintiffs were lessees or farmers under Sir W. Weller's patent from the crown of the duty of prisage wines, which was an ancient duty belonging to the crown of one ton of wine for every ship importing 10 tons and under 20 ; and of two tons for every ship importing 20 tons or above ; payable

in specie, both by Englishmen and denizens, and to be taken, one ton before, the other behind the mast. That the defendant Sir John Shaw was collector of the duties on wines imported into the port of London, and that the sum for which the action was brought was deposited in his hands to the intent that, if the prisage wines were chargeable with the new subsidy of tonnage, a duty laid by an act 9 & 10 W. 3. c. 23. then the same should remain in his hands for the queen's use ; but if those wines were not so chargeable, that then the money should be restored to the plaintiffs. That prisage wines had paid several duties ; viz. the impost laid by the act of 1 Jac. 2. c. 3., the additional impost by the act of 4 & 5 Will. & M. c. 5., and the duty of £25 per ton payable by the act of 7 & 8 W. 3. c. 20 ; and that these several duties had constantly been submitted to and paid by the farmers of the prisage. The jury also found the act of tonnage made 12 Car. 2. c. 4. and a particular clause therein which declares and enacts, that prisage wines ought not to pay tonnage or custom, and should not be charged with the payment of any custom, subsidy, or sum of money imposed upon wines by that act, or any thing therein contained.

[289] The single question upon this verdict was, Whether prisage wines were chargeable with the new or second subsidy laid by the act of 9 & 10 W. 3. ? And, after argument, the court of Exchequer, on the 28th November 1707, gave judgment (Mr. Baron Price dissenting), that prisage wines ought not to pay this duty.

To reverse this judgment, a writ of error was brought in the exchequer chamber ; and the case having been several times argued before the judges of the courts of queen's bench and common pleas ; and they having taken time to consider of it, in Hilary term 1709 gave their opinion, that prisage wines ought to pay the duties ; therefore the judgment of the court of exchequer was reversed accordingly.

Whereupon the plaintiffs brought a writ of error in parliament to reverse this judgment of reversal, and on their behalf it was admitted, that prisage wines had paid the old impost of 1 Jac. 2., the additional impost of 4 & 5 W. & M., and the £25 per ton upon French wines, 7 & 8 W. 3. ; but then it was insisted that the two former duties were laid upon the farmers of the prisage wines by express words ; and that they acquiesced under the latter duty because it was considered rather as a prohibition than a duty. That by the act 12 Car. 2., which grants a subsidy of tonnage and poundage, it is declared and enacted, that prisage wines ought not to pay tonnage or custom ; and a farther subsidy of tonnage being granted by 8 & 9 W. 3. for two years and three-fourths, the prisage wines were all the time held and allowed to be freed and exempt from that subsidy. That in the act 9 & 10 W. 3. on which the present question arises, there are the same clauses of relation to 12 Car. 2. as in 8 & 9 W. 3. respecting the rates, the collection, and the allowances ; and that the additional subsidies were demanded for prisage as well as other wines only under the general words in the late subsidy acts, that every ton of wine imported by way of merchandize should pay the subsidy. That prisage wines could not be said to be imported by way of merchandize, because they were taken after the importation and breaking of bulk out of the wines imported, and being thus in their own nature a custom it was incongruous to have a custom out of a custom ; but, if that could be, it must be by special and not by general words. That 1 Jac. 1. c. 33. and all the former statutes which gave tonnage and poundage, had the same general words ; and yet at no time for above 500 years was custom ever demanded for prisage wines, though they were almost always in farm during that period. About the year 1650 was the first demand of custom for prisage wines that could be found ; but then the farmer prevailed, and had the custom taken allowed him out of his rent. This custom was again demanded about the year 1658 ; but the parliament in 1659 declared, that prisage wines ought to pay no tonnage or custom, and resolved, that the customs which had been taken of the farmer, should be deducted out of his rent. That, after the Restoration [290] the parliament was of the same opinion, as appears by the last clause in the act of 12 Car. 2. ; and therefore, and as the plaintiffs had already, upon great consideration, obtained a judgment in their favour, it was hoped that judgment would be affirmed, and the reversal thereof reversed.

On the other side it was contended, that the general words of the act 9 & 10 W. 3. extended to all wines ; viz. " over and above all subsidies of tonnage and poundage, " over and above all additional duties and impositions whatsoever, due or payable

"for or upon any wines, goods, or merchandize, there shall be raised, levied, and "paid one other subsidy called tonnage, for and upon all wines, etc." But that the proviso in the act 12 Car. 2. giving the exemption to prisage wines, extended only to the duties which were imposed by that act : and it would be absurd to construe this exemption to acts not then in being, so as to discharge any duties granted by subsequent acts. That in the acts 9 & 10 W. 3. there was no proviso for exempting prisage wines more than any other wines ; and the clause in that act referring to the act 12 Car. 2. related only to the methods of collecting this new duty, as the tonnage and poundage were to be collected for the benefit of the crown by that act, but could not introduce any exemption without express words for that purpose, which were not to be found in the act. That in the act of 1 Jac. 2. there is a particular clause, saying, "That the merchant importer shall not be charged with the duties arising "on prisage wines : but that the same shall be paid by the farmer of the prisage wines." And there is the same clause in the act of 22 Car. 2. c. 3. which plainly shewed the judgment of both those parliaments to be, that prisage wines were chargeable with the duties imposed by those acts : for though they do not by express words charge the duties, yet they take notice that the duties were charged, and settled by whom those charges are to be paid. Should it be objected, that prisage wines did not pay the duties imposed by the act of coinage 18 Car. 2. c. 5. and that therefore they ought not to pay the duties imposed by the act 9 & 10 W. 3. it might be answered, that the coinage duty being given over and above all former duties, it was apprehended by the collectors of those duties that prisage wines were not charged with that additional duty, because, in truth, they were at that time charged with no former duties ; yet that matter never received any judicial determination, save only when the act 9 & 10 W. 3. gave those additional duties over and above all former duties. And it being agreed that at that time prisage wines, as well as other wines, paid three several former duties, the words, over and above, most plainly laid the additional charge on them. As to the objection that the subsidy laid by this act was on wines imported by way of merchandize, and that prisage wines originally belonging to the crown could not be said to be so imported : it was answered, that the whole cargo is imported by way of merchandize, and [291] the former is to take the prisage wines after importation ; but that the words imported generally, and imported by way of merchandize being, used promiscuously in the several acts above mentioned for one and the same thing, and being consequently of equal force and signification, no great weight could be laid upon those expressions. That the deposits which at the time of the commencement of the present action amounted only to £6000 were now increased to £15,000 and upwards : and should the plaintiffs in this case prevail, it was justly to be apprehended that they would then carry on their claim of exemption to the duties given by the act 4 & 5 W. & M. and 7 & 8 W. 3. for which there would be the same pretence as in this case, though they had been long since submitted to and paid ; and then the crown might be obliged to return out of the customs paid very large sums of money to the increase of the public debt : and therefore it was prayed, that the judgment given in the exchequer chamber might be affirmed.

Accordingly, after hearing counsel on this writ of error, it was ORDERED and ADJUDGED, that the judgment given for the reversal of the judgment in the exchequer should be affirmed : and that the said writ and transcript annexed should be remitted to the court of exchequer, to the end that the said Sir John Shaw might have execution upon the said judgment, in like manner as if no such writ of error had been brought into the House. (Jour. vol. 19. p. 206.)

CASE 8.—EDWARD WILLIAMS,—*Appellant*; JOHN BELL LANE, ESQ. AND THE RIGHT HONOURABLE MARY VISCOUNTESS LANESBOROUGH,—*Respondents* [23d February 1726].

[A claimant under a marriage settlement without notice of prior incumbrances shall not be compelled to a discovery.]

Sir George Lane in the year 1649 purchased from Thomas Dutton, Esq. son and heir of Sir Thomas Dutton, Knt. the manor and lands of Ratheline, and other lands, in the county of Longford, in Ireland: and being thereof seised and possessed, was, in 1650, during his attendance upon king Charles II. in foreign parts, ousted and dispossessed of the said manor and lands, by means of the then rebellion in that kingdom; and continued so dispossessed until the year 1660.

[292] On the restoration of the King, and in the 12th year of his reign, A.D. 1660, an act passed in the parliament of England, wherein it was enacted, "That the said Sir George Lane, his heirs, trustees, and assigns, should have, hold, and enjoy, and should be, and was thereby adjudged to be, in such actual seisin and possession of the said manors of Ratheline and Lisduffe, with their appurtenances, as he was in on the 15th September 1650, and should and might enjoy all other the lands, tenements, and hereditaments wherein the said Sir George Lane had any estate, in possession, reversion, or remainder on the said 15th day of September 1650, in as large, ample, and beneficial manner, to all intents and purposes, as he the said Sir George Lane, or any other person or persons in trust for him, or to his use, had held or enjoyed, or of right ought to have held or enjoyed the same; and that all acts, ordinances, orders, attainders, records, and other matters and things whatsoever, had, made, transacted, or done to the prejudice of him the said Sir George Lane since the said 15th day of September 1650, should be, as against the said Sir George Lane, his heirs and assigns, void and null, to all intents and purposes, as if the same had never been made."

By an act of parliament passed in Ireland in the 14th year of king Charles II. (commonly called the act of Settlement) it was enacted, "That it should and might be lawful to and for Sir George Lane, Knt. his heirs and assigns, to have, hold, possess, and quietly enjoy, to the use of him the said Sir George Lane, his heirs and assigns, all the lands, tenements, and hereditaments, wherein the said Sir George Lane had any estate in possession, reversion, or remainder on the 15th day of September 1650; and also all the castles, manors, lands, tenements, and hereditaments, which he the said Sir George Lane, or any other persons in trust for him, or to his use, had purchased of or from Thomas Dutton, Esq. son and heir of Sir Thomas Dutton, Knt. deceased: and also of and from Sir John Norton, of Rotherfield, in the county of Southampton, Bart. situate, lying, and being in the counties of Longford and Leitrim, containing by estimation 2600 acres of profitable land, be it more or less: Saving unto all and every person and persons, bodies politic and corporate, their heirs, executors, successors and assigns, (other than to the king's majesty, his heirs and successors; and other than to the said Thomas Dutton, and Sir John Norton, or any of them, or the heirs, executors, administrators or assigns of them or any of them: and other than such person and persons, their heirs, executors or assigns, as did or might claim to the use of, or in trust for them or any of them: and other than to such person and persons, their heirs, executors, and assigns, who should not be adjudged innocent, according to the qualifications of that act,) all such estate, right, title, and interest, either in law or equity, as [293] they or any of them had, before the making of the said act."

And in another act of parliament passed in Ireland in the 17th year of his said majesty's reign, commonly called the act of explanation, is contained a clause, enacting, "That Sir George Lane, and several other persons therein named, and all others particularly provided for in the said former act, and not particularly mentioned in this act, and other special provision made for them, their heirs, executors, and assigns, should hold and enjoy to them, their heirs, and assigns, all and singular the lands, tenements, and hereditaments, in and by the said former act settled,

"granted, disposed, and confirmed, or mentioned, meant, or intended to be settled, granted, disposed and confirmed, to them, their heirs and assigns, and not already decreed away by such decrees as were hereby confirmed; and all other the benefits and advantages of this act, and the benefits and advantages in and by the said former act mentioned in any particular clause, or other proviso relating to them, or any of them, their heirs or assigns; the benefit of reprisals by the said former act granted only excepted."

In pursuance of these several acts Sir George Lane, on the 19th February 18 Car. 2., exhibited his claim to the said manor and lands before the commissioners appointed for putting the said acts in execution, and on the 10th of March following that claim was heard before the said commissioners; and it then appearing that the said lands were seized and sequestered in the time of the then late rebellion in Ireland, and thereby forfeited and vested in his said Majesty, to the uses in the several acts mentioned. The commissioners thereupon decreed, that the said Sir George Lane was lawfully entitled unto the same, to him and his heirs for ever, in free common soccage, subject to a quit rent of £29 3s. 4d. per annum, payable into the exchequer in Dublin: and, on the 26th of May following, the commissioners certified this judgment under their hands and seals; whereupon the premises were granted and confirmed to the said Sir George Lane, his heirs, and assigns, for ever, by letters patent, bearing date the 18th July, 18 Car. 2.

Sir George Lane being so seized by indentures of lease and release, dated the 3d and 4th May 1676, in consideration of the marriage of his son James with Mary Compton, and of £2000 to him paid, settled the said lands and manor of Ratheline on trustees, to the use of himself for life, remainder to his said son James for life; remainder to trustees to preserve contingent remainders; remainders to the first and other sons of that marriage in tail male with remainders over.

On the 13th December 1683, Sir George Lane, having first been created Lord Viscount Lanesborough, died: upon whose death his said son James, (then Lord Viscount Lanesborough) being heir at law of his father, and also a purchaser under his [294] own marriage settlement, took possession of the said manor and lands of Ratheline, which his father had enjoyed to the time of his death, and received the rents and profits thereof, without molestation, for upwards of 30 years.

But on the 3d July 1718 the appellant filed his bill in the court of chancery in Ireland, against Lord James, pretending himself to be heir at law of Sir Thomas Dutton, and as such entitled to the manor and lands of Ratheline, and also to the lands in the county of Leitrim; and therefore prayed a discovery of the purchase deeds, and that Lord James might account for the rents and profits of all the said lands, and deliver up to him the possession thereof.

To this bill Lord James put in a plea and answer, and pleaded in bar to the appellant's claim, the said marriage settlement, marriage, and the portion paid, without notice of any of the matters in the appellant's bill. That Sir George Lane about the 13th December 1683 died seized and possessed of the premises; and thereupon Lord James entered into possession, and had enjoyed the same ever since. That Sir George Lane was, on the 15th December 1650, in possession, and then ousted, and so continued until 1660. He also pleaded the three several acts of parliament, decree, certificate, and letters patent before stated; and by his answer said, he believed that the £2000 marriage portion was paid to his father; and that he, Lord James, never was in the possession, or received the rents and profits of the lands in the county of Leitrim.

This plea being argued on November 14, 1719, before the then Lord Chancellor of Ireland, the same was allowed; and thereupon the appellant replied, and witnesses having been examined on both sides, the cause was heard on 15th February 1722, before the commissioners for the custody of the great seal of Ireland, when, the appellant's claim appearing vexatious, the Court ordered his bill to be dismissed; and in case he gave any further trouble, to pay the costs of the suit.

But the appellant, notwithstanding this decree, procured the cause to be re-heard on the 19th July 1723 before the then Lord Chancellor, who was pleased to order and adjudge, that the said former order should be affirmed.

The appellant being still dissatisfied, applied for, and obtained a further hearing

on the 7th May 1724, when offering to read other evidence and proofs, than what had been either read or offered to be read on the former hearing and re hearing, the Court declared they could see no reason to permit such proofs to be read on this further hearing, and therefore refused the same.

Soon afterwards the said James Lord Viscount Lanesborough died ; but before his death he made his will, dated the 15th of October 1722, and thereby devised to the lord bishop of Bath and Wells, Hatton Compton, Robert Dormer, and James Middleton, [295] Esqrs., *inter alia*, the said manor of Ratheline, in trust to permit the respondent Mary Viscountess Lanesborough to receive the rents and profits thereof during her life ; and the testator thereby declared his will to be, that his trustees should, with all convenient speed after the decease of the respondent Mary Viscountess Lanesborough, convey, settle, and assure the said premises to the use of the respondent, John Bell Lane, for life ; remainder to his first and other sons in tail male, remainder to George Fox Lane, Esq. for life, with several remainders over.

After Lord James's death the appellant thought proper to appeal from all these several orders ; and on his behalf it was contended that the marriage settlement pleaded by the late Lord Lanesborough ought, as to him and the respondent Lane, his heir and devisee, to be considered as a voluntary settlement, the lands in question being no part of the lady's jointure ; and it not appearing that Sir George Lane, from whom the estate moved, received any part of her portion, so that there was no reason to consider Lord James as a purchaser for a valuable consideration ; besides, his saying that he believed the portion was paid to his father was not sufficient in this case ; for he, being the husband, was entitled to the portion ; and whether it was paid to his father or to himself was a matter lying within his own knowledge ; the averment of payment ought, therefore, in a plea of this nature, to have been positive ; it being very different from the case of a purchase made by an ancestor, where it may be sufficient for the defendant to say he believes, and hopes to prove, that the consideration money was paid by the ancestor. That, from the several acts of parliament pleaded by Lord James, it appeared that his father neither had or could have the least right to any of the lands in question, but such as he had purchased from Thomas Dutton and Sir John Norton, which of itself was sufficient notice ; and it became incumbent on Lord James, and his lady's friends, to have enquired what estate or interest Sir John Lane had purchased from Dutton and Norton, which if they had done it would have appeared that he had only bought a redeemable or defeazable estate. Since, therefore, the acts so pleaded gave Sir George Lane a title only to the lands by him purchased from the said Thomas Dutton and Sir John Norton, without mentioning any lands in particular ; and since Lord James had not proved, or even in his plea averred, that the lands in question were comprised in such purchase, the appellant was well entitled to a discovery of the purchase deeds, and of all the lands and denominations comprised therein, and if so the plea ought not to have been allowed, nor the appellant's bill dismissed. That Sir Thomas Dutton and his sons, and also the appellant and his mother were protestants and nowise forfeiting persons, consequently not affected by the vesting clauses in the acts of settlement and explanation ; and it appearing that Sir George Lane had only an incumbrance on the lands in question, and came [296] first into the possession thereof under a lease made by Sir Thomas Dutton, he ought not in equity to be allowed any greater benefit of his grant or patent, than to protect his incumbrance thereby, and after satisfaction of such incumbrance, and the expiration of the lease, that grant or patent ought to be considered as taken in trust for the heirs of Sir Thomas Dutton. That the length of time was sufficiently accounted for by continual claims, and well excused by infancy, coverture, and such like disabilities in the intervals ; and, for a considerable space, was well answered by the said old lease. And lastly, that the court of chancery ought to have permitted the appellant to prove his exhibits *reus vocce*, and to enter his proofs as read ; that he might have been the better able to lay open his case and proofs fully upon this appeal. It was therefore hoped, that the said several decrees or orders would be reversed and the plea overruled ; so that the appellant might be at liberty to seek for a full discovery and relief against the respondent Lane the devisee, who was now come into the estate as a mere volunteer.

On the other side it was only said, that if the appellant was regular in his appeal, yet, for the several reasons contained in Lord James's plea, the respondents conceived

that the several orders appealed from were equitable and just, and ought therefore to be affirmed.

Accordingly after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the several orders or decrees therein complained of, affirmed. (Jour. vol. [23], p. 47.)

[297] CASE 9.—ANN ROTHERAM, Widow, one of the Sisters and Co-heirs of Richard Benthall, deceased, ELIZABETH BELL, Widow, and JOHN TURNER, and SARAH his Wife, which Elizabeth and Sarah were Daughters and Co-heirs of Elizabeth Langley, deceased, the other Sister and Co-heir of the said Richard Benthall,—*Appellants*; RALPH BROWNE, MARY BROWNE, EDWARD BROWNE, and ELIZABETH BROWNE, an Infant, —*Respondents* [25th March 1747].

[Mews' Dig. i. 328.]

[Where a bill is filed to set aside a conveyance for fraud, imposition, and want of consideration, and for other relief; and the court dismisses the bill so far as relates to the conveyance, but gives the plaintiff liberty to proceed at law as to the other matters, and in the mean time retains the bill, as to those matters: if the plaintiff neglects to proceed at law, within a reasonable time, and suffers his bill to be absolutely dismissed for such neglect, he cannot afterwards complain of the decree by way of appeal.]

There having been for many years a great intimacy and friendship between the said Richard Benthall and one Elizabeth Browne, his kinswoman, of whose fortune he for many years had the disposition and command, he on the 28th July 1717 made his will, and after reciting that he stood indebted to his loving friend and kinswoman Mrs. Elizabeth Browne, spinster, in £1050 or thereabouts, for the greater part of which money she had no security; he therefore, as well in consideration thereof, as of the great love, affection, and kindness which he bore to her, devised to her all his personal estate, and the estate in question, for her life.

Afterwards, by indentures of lease and release, dated the 18th and 20th October 1718, the release being quadrupartite and made between the said Richard Benthall of the first part, the said Elizabeth Browne of the second part, John Matthews, clerk, of the third part, and Richard Alport, Henry Crompton, and Thomas Weld of the fourth part, reciting that the said Richard Benthall stood indebted to Matthews, as surviving executor of Ralph Browne deceased, in the principal sum of £1000 secured by a recognizance in nature of a statute merchant, and that the premises after mentioned stood charged on mortgage with £1200 payable to Thomas Lyster; and also reciting, that he then stood indebted to the said Elizabeth Browne in £1050 upon an account stated, bearing even date with the release; and that the said Richard Benthall and Elizabeth Browne had agreed that the premises therein mentioned, and the equity of redemption thereof, and all his [298] interest therein subject to the payment of the said sums of £1200 and interest, and £1000 and interest, should in consideration of the said sum of £1050 be granted to the use of the said Elizabeth Browne in manner after mentioned. It was thereby witnessed, that in consideration of the said sum of £1050 so due to the said Elizabeth Browne, and of 5s. paid by the said Alport and Crompton, the said Richard Benthall did convey the manor of Benthall and other lands therein mention, to hold to the said Alport and Crompton and their heirs, to the use of the said Elizabeth Browne for life, remainder to the said Alport and Crompton and their heirs, upon trust to preserve contingent remainders; and after the decease of the said Elizabeth Browne then, as for and concerning all the premises, or such part thereof as the said Elizabeth Browne should think proper, to the use of the said Alport and Crompton and their heirs during the life of such

person only as the said Elizabeth Browne by any writing or writings to be executed by her in the presence of two or more credible witnesses, or by any writing purporting a last will and testament to be by her executed in the presence of three or more credible witnesses, either absolutely or conditionally, should direct, limit, and appoint, in trust and to and for the sole use of such person so to be named; and for want of such appointment, and as to such part whereof there should be no appointment made, and also as to what the said Elizabeth Browne should have made an appointment of as aforesaid, from and after the death of such person for whose use and benefit the said Elizabeth Browne should make such appointment, to the use of the said Thomas Weld, his executors, administrators, and assigns, for 500 years; to raise portions for the daughters and younger sons of the said Elizabeth Browne not exceeding £1000, to be raised and disposed of as she should by writing appoint, and subject thereto to the use of the heirs of the body of the said Elizabeth Browne; remainder to the use of such person or persons, his, her, and their heirs, and for such estate and estates, and in such manner and form as the said Elizabeth Browne, whether sole or married, and with or without the consent of any husband she should marry, should by any writing, or by her last will in writing, to be executed in the presence of three or more credible witnesses either absolutely or conditionally direct or appoint and chargeable with any sum not exceeding £1000, and it was thereby agreed that every appointment made by Elizabeth Browne, by virtue of the powers therein contained, might from time to time be revoked and a new appointment made; and for want of such appointment, then to the use of the said Elizabeth Browne, her heirs and assigns, for ever. And in this indenture was contained a proviso, that in case the said Elizabeth Browne should at any time afterwards be minded to sell any part of the premises towards satisfaction of all or part of the said sums of £1200 and £1000 and interest, it should be lawful for her, whether sole or married, and with or without the consent of any husband she should have, to sell the inheritance [299] of such part of the said premises as should be needful for that purpose, and after payment of the money to be raised by such sale in discharge or towards discharge of the said sums and interest; that from thenceforth the premises to be sold should enure, and the said Alport and Crompton, and their heirs should be seised thereof to the use of such purchaser or purchasers and their heirs.

Mrs. Browne afterwards paid off the £1000 to Matthews, and the £1200 to Lyster; and took assignments of those debts to trustees to keep the securities subsisting.

By deed poll, dated 3d November 1718, executed by the said Elizabeth Browne, reciting, that by the said deed of settlement she was entitled to the reversion and inheritance of the premises to her and the heirs of her body; and for want of such issue, to the use of such person as she should appoint; and for want of such appointment, to herself in fee; she the said Elizabeth Browne in pursuance of all and every the powers reserved to her for that purpose by the said recited indenture, did, by the said deed poll, executed in the presence of three witnesses, appoint, limit, and grant all the said premises and the reversion and reversions thereof expectant on her death, in case she died before her intermarriage with the said Richard Benthall, upon him, his heirs and assigns for ever; chargeable with the payment of £300 to her brother John Browne, £200 to her brother Ralph Browne, and £200 to her sister Mary Browne; but in case the said Richard Benthall married her, then she declared that the said appointment and every thing therein contained should be void.

By another deed poll dated the 11th March 1719, executed by the said Elizabeth Browne in the presence of three witnesses, reciting the indenture of the 20th October 1718, and the last mentioned deed poll, she the said Elizabeth Browne for good and valuable considerations, and in execution and performance of the power reserved to her in and by the said indenture of release, did appoint, limit, and direct, that all the said premises should after her decease be held and enjoyed, and should remain, continue, and be to the use of the said Richard Benthall for life: and she did thereby assign and set over all the said premises to the said Richard Benthall and his assigns for his life: and after the several deceases of her and the said Richard Benthall, then to the heirs of the body of the said Elizabeth Browne lawfully to be begotten: remainder to the use of her brother John Browne and the heirs of his body lawfully to be begotten, upon condition that the said John Browne, his heirs, executors, or assigns, should within twelve months after the decease of the survivor of them the

said Richard Benthall and Elizabeth Browne, in case of her death without issue, pay £500 to her sister Mary Browne, and £500 to her brother Ralph Browne, in manner therein mentioned : and in default of issue of her brother John Browne, to the use of her brother Ralph Browne and the heirs of his body, chargeable with the payment of the further sum of £500 to her said sister Mary Browne, as [300] therein mentioned : remainder to the use of her sister Mary Browne, and the heirs of her body ; remainder to the use of such person and persons for such estate and under such provisoes, conditions and limitations as she, whether sole or married, with or without the consent of any husband she should happen to have, should by any deed or writing or by her last will executed in the presence of and attested by three credible witnesses, devise, direct, limit, declare, or appoint the same. And in this deed poll was contained a proviso, that it should be lawful for the said Elizabeth Browne at any time during her life by any writing to be executed by her in the presence of two or more witnesses, to revoke and disannul all or any part of the use and uses, estate or estates, provisoes and conditions by her thereby created, limited, or intended : and that the same should at her will and pleasure be void and of no effect to all intents and purposes, and of no more signification than if the said deed poll had never been made.

On the 5th May 1720 Richard Benthall died unmarried and without issue.

In Trinity term 1721 Elizabeth Browne levied a fine of the estate in question, and continued in quiet possession thereof for 15 years and upwards : but in Michaelmas term 1736 the appellant Ann Rotherham, and Elizabeth Langley, as sisters and co-heirs of the said Richard Benthall, brought their bill in the court of chancery against the said Elizabeth Browne, charging, that the said Richard Benthall proposed to mortgage the premises to her for a term of years, or for her life, or otherwise, to secure the said £1050, and that a treaty of marriage being on foot between them they agreed that a deed should be prepared to be a security for the said £1050 if the marriage did not take effect, and to be a provision for her and the issue of that marriage if it did take effect : and that he left it to the said Elizabeth Browne and her brother to get such deeds prepared as would answer that intent, and to employ an attorney as they thought fit : that by their direction and management such deeds were accordingly prepared ; and that in confidence of their being drawn pursuant to the agreement, the said Richard Benthall, without consulting any person learned in the law, but such as were employed by and in the interest of the defendant, executed the said deeds of October 1718 : that the said conveyance was obtained from the said Richard Benthall by fraud and undue influence ; and that in all events the same could be considered only as a security for the said £1050, and therefore the bill prayed an account of the said Richard Benthall's personal estate, and to have the title deeds relating to his real estate delivered up, and a reconveyance thereof.

To this bill Mrs. Browne put in a plea and answer ; and as to so much thereof as sought to impeach her title to the estate in question, or any account of the rents thereof, she pleaded the said several deeds, fine, and non-claim : and as to so much of the bill as prayed any account of Richard Benthall's personal estate she pleaded his will : and by her answer denied all circum-[301]-stances of fraud and imposition on the said Richard Benthall, or that it was his intention in case the intended marriage between them did not take effect that she should, upon payment of the £1050, be considered as a trustee of the estate in question for the said Richard Benthall and his heirs.

On the 11th November 1737, this plea was argued and over-ruled with regard to the real estate, and directed to stand for an answer as to the personal estate with liberty to except ; save as to the account of the personal estate.

The said Elizabeth Browne afterwards suffered two recoveries of the estate in question : and by two deeds executed by her, the one dated the 2d May 1737, and the other the 24th January 1737, the uses of those recoveries were declared to herself in fee.

In March 1737 Mrs. Browne made her will, and thereby devised the estate in question to her brother John Browne and his heirs, chargeable with a legacy of £500 to her sister Mary Browne, and made him executor ; and on the 9th April 1738 she died.

Upon her death the appellant Ann Rotherham, and the said Elizabeth Langley brought their bill of revivor against the said John Browne, and against Edward Browne as the eldest brother and heir at law of the said Elizabeth Browne, and against

Ralph Browne and Mary Browne, as claiming sums of money out of the said estate ; to revive the suit, and have the benefit prayed by their original bill. And soon afterwards they filed a supplemental bill against the same persons, stating the recoveries suffered by Elizabeth Browne after putting in her plea and answer to the original bill and the execution of the deeds declaring the uses thereof ; and insisting that no legal estate passed by those recoveries ; or if they did pass, that it was only in trust for and ought to be reconveyed to them : and the said Edward Browne afterwards dying, the plaintiffs filed a bill of revivor against Ralph Browne, jun. as his eldest son and heir at law.

On the 6th June 1741 the cause was heard before the Lord Chancellor Hardwicke ; and on the 16th of the same month his lordship was pleased to decree, that the bill of the appellant Ann Rotheram, and the said Elizabeth Langley, so far as it sought to set aside the conveyances, or any of them, under which the respondents claimed the estate in question, or to have a reconveyance thereof, on the head of imposition, want of consideration, or mistake, should be dismissed without costs : but as to any other relief sought by the bill, it was ordered that the same should be retained for a year, and the plaintiffs in the suit were to be at liberty within that time to bring an ejectment ; and it was likewise ordered, that all the deeds and writings relating to the premises in question, which were in the custody for power of any of the parties should be produced before the master, upon oath, on or before the last day of Michaelmas term then following, and any of the parties were to be at liberty to inspect the same, and take copies thereof ; and in case such ejectment should be [302] brought, such of the deeds and writings as either side should give notice for, were to be produced at the trial ; and on such trial the defendants in the cause were not to insist on any incumbrances, or satisfied terms, or the statute of limitations : and they were likewise to admit on such trial that the several sums of £300, £200, and £200 mentioned in the deed poll of the 3d November 1718 were paid within 12 months after the said Richard Benthall's death according to that deed, to the end that the title might come properly in question ; and after the trial any of the parties were to be at liberty to apply to the Court ; but in case no such trial should be had within the said time, it was ordered that the bill should be wholly dismissed without costs.

Pursuant to this decree the respondents, and the persons under whom they claimed, produced all the deeds in their custody or the appellants' inspection ; and the said Elizabeth Langley dying soon afterwards, the appellant Elizabeth Bell, together with John Bell her husband (since deceased), and the appellants John Turner and his wife, on the 19th December 1741, filed their bill of revivor to revive the suit : but the appellants not thinking proper to bring any ejectment, suffered their bill to be absolutely dismissed on the 8th July 1743.

John Browne, the devisee under the will of the said Elizabeth Browne, afterwards died ; having made his will, dated the 8th July 1741, and thereby devised the estate in question to the respondent Ralph Browne in tail, with remainder to the said Mary Browne in tail, with remainder in fee to the respondent Edward Browne : and Ralph Browne the younger, the heir at law of the said Elizabeth Benthall, having also died, the respondent Elizabeth Browne, the infant, was his heir at law.

The appellant conceiving the decree to be erroneous appealed from it ; insisting that no other consideration appeared on the face of the deed of October 1718 than the sum of £1050, which was by no means an adequate and valuable consideration for the absolute purchase of the estate in question, proved to be £500 a-year, and worth £12,000 to be sold, and was only incumbered with a mortgage of £1200 and £1000 due on a statute merchant : and even this £1050, the only expressed consideration, was so far from being paid, or even allowed, to Richard Benthall at the time of executing the conveyance, that he, on that very day, gave Elizabeth Browne a promissory note for the same sum, payable on demand ; and there was no sufficient proof in the cause of any other consideration, and if there had, no such proof ought to be admitted as evidence. That these deeds absolutely divested Richard Benthall of all his right to the estate ; and as soon as they were executed, left him destitute even of a maintenance, and under the precarious and unhappy situation of being dependent on Elizabeth Browne, or, in case of her death, on her representatives for a subsistence, which could certainly never be his design or intention. That if framing the deeds in this manner,

and so as to have this operation, was the effect of accident or mistake, they ought in equity to be rectified; but if it was not the effect of mistake or accident, it was an imposition upon Richard Benthall: and wherever deeds are framed, either through accident or design, materially and substantially different from the real intent of any of the parties, a court of equity ought to extend its aid: the giving relief in such cases being one of the chief branches of its proper and original jurisdiction.

On the other side it was said, that the appellants' case seemed to depend either upon a title at law derived under the deed poll of the 3d November 1718, or upon a right to be relieved in equity against the deeds executed by Richard Benthall, under which the respondents derived a title. But it was insisted, that the appellants had no legal title to the premises: because the appointment of the 3d November 1718 in favour of Richard Benthall was either duly revoked by the deed of 11th March 1719, by virtue of the original powers reserved to Elizabeth Browne in the deed of October 1718: or else, the estate and interest derived to Richard Benthall under that appointment, was duly barred by the fine and non claim, and the recoveries suffered by Elizabeth Browne: she having a legal power to bar any interest or estate in remainder which lay behind the estate tail, and thereby to make herself tenant of the premises in fee simple. That the legal right to the premises being properly triable at law, and the decree having given the appellants liberty to bring an ejectment, and having removed all impediments to a trial of that right upon the merits of the case, the appellants had a proper opportunity of trying their title at law, if they thought fit; but having declined such trial, and suffered their bill to be wholly dismissed, they had no just reason either to complain of the decree, or to expect any further indulgence. And as to any right in equity to be relieved against the deeds under which the respondents claimed, it was contended that there was no just foundation for any of the objections which had been made.

The first pretence set up for this purpose was, that the deeds of October 1718 were left to be prepared, and were prepared by the direction or management of Elizabeth Browne, or her brother, or their agents, and executed by Mr. Benthall without consulting any person but such as were in their interest, and were obtained from him by unfair means and influence. But none of these allegations were supported by proof: on the contrary, it appeared from the evidence, that Mr. Benthall was not only a person of very good sense, but had been bred to the law and was conversant in business: that he himself gave the instruction to his own agent whom he usually employed in his affairs: that the whole transaction was his own voluntary act, begun, carried on, and completed with deliberation and perfect knowledge of what he did, and without the least ingredient of fraud or undue influence whatsoever; and that after the execution of these deeds they were left in his custody.

[304] The next pretence was, that the deeds were proposed only as a security for the £1050, and that Mr. Benthall was to have the estate subject thereto if the treaty of marriage did not take effect: but if it did, then the deeds were to be in the nature of a marriage settlement: and that Mr. Benthall executed them in confidence: that they were drawn pursuant to such proposal and agreement—but there was no proof of any such proposal or agreement: it was contrary to the plain words and manifest meaning of the deeds, and there was no provision by covenant or otherwise for a redemption of the premises on repayment of the £1050: and though there was an account stated, and a note signed for this sum, yet that was done only to evidence the debt, which was immediately discharged by the conveyance. The deeds took no notice of any marriage, but were formed upon a plan which could not answer either of these purposes: nor did the circumstances or proofs in the cause shew, that the parties intended the deeds to have this particular effect or operation: but the whole was calculated to put the estate in Mrs. Browne's power at all events.

Still it was objected, that the £1050 was not an adequate consideration for the purchase of the equity of redemption of this estate: that therefore the deeds must be considered as a security only for that sum, and could never be intended to put the estate in Mrs. Browne's power at all events: and that the deeds must have been so drawn by mistake. To this it was answered, that the deeds were not founded upon a strict purchase for a valuable consideration, but were of a mixed nature, partly founded on consideration, and partly voluntary, proceeding from friendship and affection to Mrs. Browne, which were the joint motives of the settlement. That Mr. Benthall

meant and intended to settle this estate upon her, and to put it in her power at all events : that he always understood he had done so : and as she had entirely trusted him with her whole fortune without any security, he might be thereby induced to settle and put his estate into her power : which she afterwards owned with proper gratitude, by suffering him to receive the rents as long as he lived. That his knowledge of having divested himself of all power over the estate appeared beyond contradiction by his frequently declaring it to several people, and upon various occasions : but particularly about six months before his death, when upon a tenant's applying to him for a new lease, he declared it was out of his power : for he had settled it upon his cousin Betty Browne, and all the men in England could not take it from her : and upon further discourse he declared, that she might give it to her brother if she thought fit : and about three months afterwards she again declared, that he had settled all his estate upon her : that all was too little : and that if he had as much more she deserved it, and should have it all. That from these, and several other circumstances proved in the cause, it was evident that Richard Benthall knew he had settled his [305] estate on Mrs. Browne, and had put it out of his own power, and intended so to do : and as there was not the least proof of any undue means in obtaining the deeds, that there was no foundation for a court of equity to relieve the heir at law against them.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED that the same should be dismissed, and the decree therein complained of affirmed. (Jour. vol. xxvii. p. 87.)



REPORTS of CASES upon Appeals and Writs of Error in the House of Lords. By P. Dow, Barrister-at-Law. Vol. I.

FROM SCOTLAND.

CRAIGDALLIE, and Others,—*Appellants*; AIKMAN, and Others,—*Respondents*
[June 14, 1813].

[3 Scots R. R. 1. See final judgment in 2 Bligh. 529 (1820); 3 Scots R. R. 607. See also *A.-G. v. Pearson*, 1817, 3 Mer. 353–420; *Shore v. Wilson*, 1842, 9 Cl. & F. 355; *A.-G. v. Gould*, 1860, 28 Beav. 485; *A.-G. v. Bunce*, 1867, L. R. 6 Eq. 563; *A.-G. v. St. John's Hospital, Bath*, 1876, 2 Ch. D. 554; The Nonconformists' Chapels Act (7 & 8 Vict. c. 45).]

[Whether the use of a chapel purchased, at the time of the secession from the Church of Scotland in 1737, by and for a body of men adopting the secession principles, and for that reason, adhering or submitting to the secession judicatory, was, merely on account of that act of adherence or submission, without any special contract on the subject, for ever after to be regulated and directed by the judicatory in question, notwithstanding a departure by that judicatory from the principles which led to the original adherence, and in opposition to the wishes of a great proportion of the purchasers, who still held their original principles.]

This was an appeal from the Court of Session under the following circumstances.

Mr. Wilson minister of Perth, was one of the four clergymen who seceded from the Church of Scotland, and were consequently deposed from their [2] livings in 1740. A considerable number of Mr. Wilson's congregation still adhered to him, and purchased a piece of ground on which they built a chapel, where he might continue to exercise his ministry. This was accomplished by voluntary contributions recommended at a general meeting of the whole congregation. Most of these were in very small sums, the highest not exceeding £21, and many contributed by their personal labour, by the use of their carts and horses for so many days, weeks, and months; and the minister's stipend was paid, repairs made, and debts paid off, by contributions at the church doors.

The secession having arisen merely from a difference of opinion upon a particular point, the seceding clergymen still retained the plan of church government, by which the national church was regulated, and formed themselves into a church judicatory accordingly. The congregations which separated from the established church on the same principles submitted to this judicatory, and among these was the congregation at Perth.

Four of the money contributors, Messrs. Millar, Davidson, Brown, and Craigdallie, were chosen by the congregation as managers, and to them the ground on which the chapel was built, was disposed in the following words, "I, Thomas Gall, do hereby sell, alienate, and dispoise, to, and in favour of, the said Colin Brown, James Davidson, John Millar, and James Craigdallie, for themselves, and as trustees for and in the name of the whole subscribers and contributors to the building of a meeting-house for Mr. William Wilson, minister of the gospel in [3] Perth, and the congregation

" who submits to his ministry, and in the name of the whole contributors, towards a stipend for the said Mr. William Wilson, in the said congregation, and to the successors of the aforesaid contributors, who shall continue to contribute for the purpose before mentioned, and to the assignees of the managers and trustees, who shall be chosen and appointed as such, from time to time by a general meeting of the said contributors, heritably and irredeemably all and whole, etc. etc." A back bond or defeasance was executed by these trustees, by which they declared " that they claimed no further right, title, or property to the said dispositions and investments, or lands, or grounds therein contained, than the other subscribers according to their several proportions, etc. etc."

The secession sect in 1745 split into two parts, in consequence of a dispute about the lawfulness of a clause in an oath imposed on persons elected into the magistracy in some of the royal boroughs. A minority of their clergy held it to be unlawful, separated from those who still adhered to all the original principles of the secession, and formed a distinct sect known by the name of Anti-Burghers. Mr. Brown, who was then the clergyman of the Perth congregation, and a majority in point of number (as was alleged), joined the new sect, and gave up the chapel to the rest, containing a majority of the original money contributors, who adhered to the old Burgher sect and principles.

In 1795 another dispute arose among the Burgher seceders, respecting the power of the magistrate to suppress heresy, and other points. The synod by a [4] majority sanctioned the new or innovating doctrines. Mr. Jarvie was at this time minister of the Perth congregation, and Mr. Aikman his colleague or assistant. A majority of the money contributors, along with Mr. Jarvie, adhered to the original principles of the sect. Mr. Aikman and a majority of the congregation adopted the new doctrine, and adhered to the synod.

In this state of things, the question arose to which of the parties the chapel belonged. Mr. Aikman and his followers claimed it, as being a majority of the congregation, but chiefly as submitting to their church judicatory, the associate synod : such submission being, as they alleged, the essential distinctive mark of the community for which the property was originally acquired. Mr. Jarvie and his adherents on the other hand, claimed the property as adhering to the original faith of their sect, but chiefly as constituting according to them the representatives of a majority of the original contributors in money towards the purchasing of the ground and the building of the chapel. The question came on first before the Sheriff of Perth, from whose Court it was in the usual manner removed to the Court of Session. Lord Armadale, Ordinary, after some preliminary steps, made *ariscandum* of the cause to the whole court : which, on advising the same, on the 16th November, 1803, pronounced the following interlocutor : " On report of Lord Armadale, and having advised the mutual informations in the cause, the Lords find that the property of the subjects in question is held in trust for a society of persons who contributed their money [5] for purchasing the ground, and building, repairing, and upholding the house or houses thereon, under the name of the Associate Congregation of Perth : and so far repel the defences against the declarator at the instance of Matthew Davidson, and others ; and find that the management must be in the majority, in point of interest, of the persons above described ; and before farther answer in the cause, remit to the Lord Ordinary to ascertain what persons are intitled to be upon the list of contributors aforesaid, and whether the majority aforesaid stands upon the one side or the other, and thereafter to do as to his Lordship shall seem just."

Against this interlocutor, a short petition was presented on the part of Mr. Aikman and the other Respondents, who joined with him in behalf of their party, and on advising it with answers for the Appellants, on the 1st February, 1804, the following interlocutor was pronounced : " The Lords having resumed the consideration of the petition, and advised the same with the answers and whole process, they alter their interlocutor of the 16th of November last, and find that the property of the subjects in question is held in trust for a society of persons who contributed their money either by specific subscriptions, or by contribution at the church doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes,—such persons always by themselves, or along with others joining with them, forming a congrega-

"tion of christians continuing in communion with, and subject to the ecclesiastical discipline of, a body of [6] dissenting protestants, calling themselves the Associate Presbytery and Synod of Burgher Seceders; and remit to the Lord Ordinary to proceed accordingly."

The cause being thus returned to the Lord Ordinary, he pronounced an interlocutor, "finding that Mr. Aikman and his adherents had the preferable and exclusive right to the ground in question, and to the church and other buildings erected thereon, and decerned and declared accordingly."

In pronouncing the interlocutor of 1st February 1804, and another adhering to the same, on 28th June 1805, the judges of the Court of Session then present were equally divided in opinion, seven, including the Lord President being for the Appellants; but as the constitution of the Court did not admit of the President voting, except when the other judges were equally divided, the question was necessarily taken as having been decided against the Appellants by seven against six.

Sir Samuel Romilly and Mr. Grant, (for the Respondents) argued that from the words of the instruments conveying the property, from the acts of the contributors and congregation, and from the trifling amount of the separate sums subscribed, it was clear that the contributors never intended to claim a right of property in the subjects in question for their own behoof, as separate from the congregation, and its subordination to the rules of the sect. That taking the original contributions in money, the contributions in labour of different kinds, and contributions at the church doors, the interests were [7] a great deal too minute for calculation. It would be impossible to ascertain the persons in whom they vested, and if it were possible, it would be necessary to divide a farthing into various parts, in estimating the amount of each individual's interest. The property was designed as a permanent provision for a pastor and congregation, subject to a certain ascertained ecclesiastical jurisdiction. Mr. Aikman and his adherents clearly answered this description, and therefore were entitled to hold the subjects in question, while the Appellants, having refused obedience to the rules of the sect, had evidently forfeited all right to the property in dispute. The most perfect toleration had been established in Scotland by the acts of 1690, chapters 5, 27, and 28; and 10th of Anne, chap. 7, as far as regarded protestant dissenters: that every reasonable and necessary measure which the different systems of these dissenters might require for carrying the principles of their persuasion into effect was and must be lawful: that courts of justice must recognize and enforce the rules under which each sect of dissenters had chosen to be governed, and enforce subordination to the discipline which they had enjoined: that the only inquiry was, in the case of an individual congregation, by what rules it had consented to be governed; and in the case of a congregation belonging to a sect, by what general rules the sect was governed;—and these being found, courts of justice were bound to enforce them.

These principles had been recognized and acted upon by the most enlightened Scottish judges, in the cases of Auchincloss and Paterson, 1790;—Bryson and Bain, 1752;—Wilson and Jobson, 1771.

[8] In order to show that the same principles were recognized by the English courts, Lord Mansfield's speech in the House of Lords in the case of the Chamberlain of London v. Evans, 4th February 1767;—Rex v. Barker, 3d Burrow, 1265;—Loyd's case (the King and Josham); 3d Term Reports, 575;—2d Burn's *Ecclesiastical Law*, 184; (the King v. Francis), were also cited.

It was also argued, that the Appellants having never been enfeoffed in the subjects in question, had no right to pursue their action of removing against the Respondents who were in possession, (Baton v. Macintosh, 1757; Sutherland v. Graham, 1759; Fac. Col. nos. 69 and 195.)

Mr. Adam and Mr. Horner for the Appellants, on the other hand, contended; first, that by the true construction of the instruments of conveyance, the property was not intended to be mortified for the use of the spiritual congregation, but that it was intended to remain vested in a temporal society formed of the contributors, and distinct from the religious association, though subsisting along with it, and promoting its purposes; and that the property was to be managed and disposed of according to the pleasure of the majority of the temporal society. Secondly, that if unalienable endowments for a permanent ecclesiastical body such as this could be created and enforced, the system would be in effect a national establishment, acknowledged and

supported by the law, like an established church : that the Seceders were entitled by law to the most perfect toleration, was admitted ; but the Respondents claimed a great deal more — they claimed to have their system recognized by the law, and sup-[9] ported as an establishment, or in the manner of a regular corporation : that fallacious analogies were drawn in favour of the Seceders, from the resemblance of their church government to that of the established church, from which they had seceded — that the law could only recognize them in their individual capacity, and deal with the property as belonging to individuals whose rights would be protected as in other ordinary cases : that according to the principle contended for by the Respondents, the Associate Synod might convert the building in question into a Roman Catholic chapel, or deal with it in any manner they thought proper ; and that to establish such a principle would be pregnant with the most absurd and dangerous consequences.

In answer to a question by the Chancellor, it was stated from the bar, that the law of Scotland was not so strict as that of England, in requiring all parties interested to be brought before the court ; but that all the adherents of either party in the cause, would be bound by the decisions of their Lordships as much as if they had been actually named in the pleadings, and had joined in the suit.

Lord Eldon (Chancellor), June 14, 1813. The question here to be decided was the right to a certain meeting house employed for religious purposes. The case appeared to have very much distracted the judges in Scotland, as the point had been repeatedly decided by the narrowest possible majority ; viz. by calling in the President to give his casting vote, the rest of the Court being equally divided. [10] Under all the circumstances, it seemed to him, that the cause must be remitted to the Court of Session, as it was impossible to apply these interlocutors in their present state. He then read the interlocutors of the 16th November 1803, and that of 1st of February 1804. (*vide ante*.) and called their Lordships' attention to the difference. The first found that the property was held in trust for a society of persons, who contributed their money for purchasing the ground, and building, repairing, and upholding the house and houses thereon, under the name of the Associate Congregation at Perth. The second interlocutor varied the terms of the description, " finding the property of the " subjects in question to be held in trust for a society of persons, who contributed their " money either by specific subscriptions or by contributions at the church doors for " purchasing the ground, and building, repairing, and upholding the house or houses " thereon, or for paying off the debts contracted for these purposes : " but the material variation was in the subsequent words, " such persons by themselves, or along with " others joining with them, forming a congregation of Christians continuing in com- " munion with, and subject to the ecclesiastical discipline of, a body of dissenting Pro- " testants, calling themselves the Associate Presbytery and Synod of Burgher Seceders." The case did not appear to him to bear upon the doctrine of toleration, as had been stated, but it was undoubtedly a case of very great importance.

The ground was purchased, the meeting house built and repaired, the debts were discharged, and the minister's stipend was paid by subscriptions : [11] several of them by persons who did not join the society, but who wished well to it as a religious institution, by contributions of materials, labour, and contributions at the church doors. From this statement their Lordships would see the extreme difficulty of applying these interlocutors.

With respect to the law of the case, the property might be in individuals, though the trust were carried on for their use in communion. But the Court differed here, for by the first interlocutor (16th November 1803) the property was declared to be in those who advanced their money, and by the second (1st February 1804) the property was also declared to be in those who advanced their money, but with this material difference, that they should lose their right to it when they ceased to be members of the society. Now, upon the first interlocutor, it would be extremely difficult to find out after the lapse of nearly a century, from 1733 to 1806, when this cause was decided in the Court below, who were the persons who originally advanced their money ; with this additional difficulty in the second interlocutor, that the contributions at the church doors and subscriptions had been going on through the whole of the period above mentioned, the interlocutors saying nothing about heirs or representatives.

His Lordship here stated some of the principal facts before mentioned, and which it is unnecessary to repeat, and then proceeded thus : The gentlemen who had separated as above mentioned considered themselves as the only genuine Presbyterians, and resolved to demand from the candidates for the ministry an acknowledgment of the national covenant [12] of Scotland and the solemn league and covenant of which their Lordships had heard a great deal as matter of history, and this constituted a principle of distinction between them and the established church. But a difference arose as to the nature and extent of the acknowledgment, particularly as to the power of the civil magistrate in the suppression of heresies : and in 1795, a proposition upon this point was submitted to the Associate Synod of Burgher Seceders, which led to a second division of the sect.

About the year 1737, this congregation of persons adhering to Mr. Wilson, the seceding minister, was formed at Perth, and the building in dispute was at first prepared for a minister and congregation holding a particular description of religious opinions. The congregation acceded to the Associate Presbytery and the ecclesiastical discipline of the sect ; but, when it did so, it was clear that this was under the persuasion, on the part of the congregation, that the Presbyteries, and Synods would continue in the same principles which formed the ground of the secession.

He had before stated, that a difference took place in or about the year 1795, relative to the acknowledgment of the power of the civil magistrate in religious matters, and the nature and kind of the obligation of their covenants ; and it was at length determined by a majority of the Synod, that a declaration should be prefixed to their formula, that they did not require an approbation of it in its offensive sense. Some protested against this decision, and a few declined the authority of the Synod altogether. Among these was Mr. Jarvie, minister of the Perth [13] meeting-house, to whom Mr. Aikman had been appointed assistant or colleague. Mr. Aikman and a majority of the congregation continued in their adherence to the Synod, while a considerable portion of the congregation, including, as was alleged, a majority of the contributors, adhered to Mr. Jarvie, and hence arose the present question ; to which of the two parties the meeting-house belonged ?

Here then were a number of persons contributing by money, labour, and materials towards the purchasing a piece of ground, and building a meeting-house to continue to be enjoyed in common as long as they could agree in the same religious persuasion, and adhering to a synod and certain church judicatories, as long as these judicatories continued to maintain their original religious principles. But a difference of opinion having taken place, and the congregation having divided, one party said, " We are the majority, and the house belongs to us ; " while the other party said, " The house belongs to us, as we are a majority of the contributors." The mere money contributors insisted in their suit, that they ought to have the power of directing the use of the house when a difference arose. Mr. Aikman and his party insisted that they had the right to direct the use of the building as they adhered to the Synod and the ecclesiastical authorities to which the congregation had acceded in 1737, since which time the Perth meeting was not a separate congregation, but one of many associated congregations subject to the ecclesiastical judicatories to which they had submitted.

There appeared to have been a good deal of argu-[14]ment below, respecting the English law on questions of this nature ; but he would venture to say, that the English law had been much misunderstood. Some of the Scotch Judges who pronounced for the Respondents appeared to have divided, not so much according to former cases, as according to what was considered as the more liberal opinion, while others said that this opinion was in strict conformity with former decisions. It appeared to him, however, from the early cases, that the Scotch Judges would not permit a suit for the execution of a trust to be carried on in the name of an associate congregation of this description, and had refused to recognize the Associate Presbytery and Synod, as a permanent body ; but they had endeavoured to relax this principle, till they came the length of the last interlocutor, pronounced by this narrow majority. Suppose the whole of the contributors or congregation had altered their opinions, could the Synod have altered the property ? The only answer of the judges to this was, that when that question arose they would dispose of it, but he was afraid it must be disposed of now,

as it seemed to be involved in the principle of their decision. Suppose the contributors or congregation were equally divided, how could these interlocutors be applied in that case? The very principle of majority was then gone. Suppose $\frac{99}{100}$ had altered their opinions in respect to adherence to this Synod, would they by this means have forfeited, not only their right to form a part of the congregation, but also their property? He should therefore respectfully submit it to the judges below to review their opinion, not merely as to the principle of their decision, but also as to the practicability of applying [15] their own interlocutors. Mr. Hope, (now Lord President,) and Mr. Macnochie, who had drawn a very able paper on this subject, had contended that a share of the property belonged to all who had contributed at the church doors towards the minister's stipend, and Hope afterwards insisted upon it in judgment, and yet there was nothing about this in the interlocutors. But when it was considered that this society had been formed in 1733, and subscriptions soon after entered into for purchasing the ground and building the house; when it was considered that the contributions had been going on quarterly for nearly a century, and applied through the whole of this space of time to repairs and to the payment of debts connected with this property, contracted 40 or 50 years ago, he would ask again, who were the persons entitled under these interlocutors? Who were the majority of them who were to direct the use of this property? Independent of any other consideration then, the extreme difficulty, if not impossibility, of applying these interlocutors as they stood, rendered it highly desirable that the matter should be reviewed. But if the judges below still adhered to the principle, it was this principle, that, because in 1737 a society then agreeing in their religious opinions adhered to a Presbytery or Synod then holding the same opinions with themselves, the property belonging to that society should be held in trust, not for those who adhered to their original principles, but in trust for those who adhered indeed to the Synod, but who did not adhere to their original principles; that was a proposition very difficult to be maintained in law. But, [16] if the Court below should still adhere to that principle, then the objection arose, How could the principle be applied in practice? It was true the court could not take notice of religious opinions, with a view to decide whether they were right or wrong, but it might notice them as facts pointing out the ownership of property.

With respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C, etc. forming a congregation for religious worship; if the instrument provided for the case of a schism, then the court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que* trusts, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorised him to say that the court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights.

If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the court [17] might act upon it; but there must be evidence of such a contract, and here he could find none. He proposed therefore that the cause should be sent back with two findings, of this nature:—1st. That the ground appeared to have been purchased and the house built for "a society united, and proposing to continue united, in religious opinion. 2d. That "it did not in point of fact appear how this property was to be applied, in case the "society should happen to differ and separate."

He was the more anxious to have this judgment reviewed, as some of the Scotch Judges who acceded to it admitted that it was contrary to former decisions, and also on account of the difference of opinion that prevailed in the Court below, and the very important nature of the case; and this case was peculiarly important because it must be deeply interesting to the feelings of great numbers, a circumstance which

rendered it highly desirable that it should be finally settled in the most distinct and satisfactory manner.

The cause was accordingly remitted for review with the above findings.

Agent for Appellants, J. CHALMER, Abingdon-street.

Agent for Respondents, A. MUNDELL, 45 Parliament-street.

[18] FROM THE IRISH CHANCERY.

GORE, ESQ.—*Appellant*; STACPOOLE, ESQ. and Others,—*Respondents*; and STACPOOLE,—*Appellant*; GORE, and Others,—*Respondents* [Feb. 17, 1813].

[Mews' Dig. vii. 361; xiv. 1354. See *Blake v. Foster* 1813, 2 Ball & Beatty, 387, 565; *Bowen v. Evans*, 1844, 2 Jo. & Lat. 257; *Bandon (Earl) v. Beecher*, 1835, 3 Cl. & F. 508; Sugden *V. & P.* (14th ed.) p. 110.]

[Sale of mortgaged estates for payment of mortgage and judgment debts, under a decree of court fraudulently obtained in 1733 by collusion between the tenant for life and others, to the prejudice of those in remainder, questioned in 1796 by the tenant in tail three months from the time when his title accrued, established in the Irish Chancery in 1801, set aside by Lords in 1813 as to part which was sold to a person cognizant of the fraud, and strong doubts expressed by Lord Redesdale, if the case had come before them whether it would not have been also set aside as to that portion which was purchased by one not actually cognizant of the fraud, but who might have discovered it by inspecting the proceedings on the face of which it was apparent.]

This was an appeal from a decree of Lord Clare in the Irish Chancery, pronounced under the following circumstances.

General Francis Gore being seised in fee or entitled under a lease for ever of or to certain estates in the county of Clare in the year 1715; mortgaged the same to Joseph Damer of Dublin, for a sum of £6010; and in the following year borrowed from Damer a further sum of £1058, for which he gave a bond and warrant of attorney, and judgment was soon after duly entered up.

General Gore by his will dated the 20th October, 1721, having directed that all his debts, mortgages, and incumbrances, should be paid out of his personal estate; and, if that should be insufficient, [19] then that his real estate should be liable thereto, "devised all his real estates to his son, Arthur Gore, for life; remainder "to the said Arthur Gore's eldest son, Cusack Gore, for life; remainder to the first "and other sons of the said Cusack Gore in tail male; remainder to the testator's "grandson, Francis Gore Fitzarthur, (father of the Appellant,) for life; remainder "to the first and other sons of the said Francis Gore Fitzarthur, in tail male; remainder "to every other son and sons of the said Arthur Gore, in tail male; remainder to "the testator's second son, Francis Gore Clerk, for life; remainder to Francis Gore, "the son of the said Francis Gore Clerk for life; remainder to the first and other sons "of the said last mentioned Francis Gore, in tail male; remainder to the testator's "youngest son, George Gore, for life; remainder to the first and every other son "of the said George Gore, in tail male; remainder to the testator's right heirs for "ever;" and appointed his said son, Arthur Gore, sole executor of his will. General Gore died in 1724, without having altered or revoked his will, and without having paid off the above-mentioned mortgage and judgment debts.

In the year 1730, Arthur Gore died, having by his will appointed Robert French and others his executors.

Cusack Gore, the eldest son of Arthur Gore, had died in his father's life time, so that at the death of Arthur Gore, his second son, Francis Gore Fitzarthur, the father of the Appellant, became entitled to an estate for life under the will of General Gore, in the mortgaged estates. Francis Gore Fitz-[20]-arthur, at the death of his father, was a minor, and Robert French obtained letters of guardianship of his person and estates.

The interest in the mortgage and judgment debts having come by assignment and bequest into the hands of William Curtis, of Dublin, he, in the year 1731, together with the executors of the original Mortgagee and Joseph Mariott, his trustee, exhibited their bill of foreclosure in the Court of Exchequer in Ireland, to which they made Francis Gore Fitzarthur, the minor, tenant for life, with the executors of Arthur Gore parties dependants; but none of the subsequent remainder-men were made parties. To this will the minor, by his guardian and the executors, put in their several answers, in which the limitations in the will of General Gore were distinctly set forth. The answer of Francis Gore Fitzarthur was, according to the custom in Ireland, signed by his Attorney, Edmond Hogan. On the 10th of April, 1733, the cause came to a hearing in the Exchequer, where the following decree was pronounced: "that an account should be taken of the sums due on foot of said mortgage and judgment, and that the same with interest should be paid within six months from the time of confirming, the report to be made by the Chief Remembrancer of the said Court in pursuance of the said decree, and that in default thereof the equity of redemption of the said mortgaged premises should be foreclosed and the said estates sold, and that out of the money arising from the sale, the Chief Remembrancer or his deputy should pay to the said William Curtis the sums which should be [21] so reported due, with interest and costs: that the remainder should be paid to said defendants, and that all proper parties should join in deeds of conveyance to the purchaser."

The deputy Remembrancer having made his report of the sum due under the mortgage and judgment, amounting to £9585 13s. 7d. the cause was heard on the report and merits, on 19th June, 1733, and the Court made a final decree thereon as follows: "That defendant should pay to said William Curtis the said sum of £9585 13s. 7d. with interest and costs within six calendar months from the time of confirming said report: and in default thereof, that said mortgaged estates should be sold: that out of the money arising from the sale, said William Curtis should be paid the amount of the sums decreed to him, and that the surplus thereof should be paid to said defendant, Francis Gore Fitzarthur, Appellant's said father."

At time of filing the bill and pronouncing the decree, the Rev. Francis Gore, second son of the testator, General Gore, and Francis Gore, his son, to whom remainders were limited by the will of the General, were both *in esse*; but neither of them, nor any persons except as before stated, were made parties to the foreclosure cause.

No proceedings were had upon the final decree till May, 1746, soon after Francis Gore Fitzarthur (the Appellant's father) came of age; the decree was then revived, and the mortgaged estates put up to sale by the deputy Remembrancer of the Court of Exchequer, in November, 1747, where in pursuance of a previous arrangement between Francis [22] Gore Fitzarthur, and John Purdon, a barrister, the latter purchased the estates at £13,400 which, as the Appellant alledged, was far below their value, though even that sum exceeded the mortgage and judgment debts and interest by a sum of £1500: this surplus which remained after payment of the mortgage and judgment debts was paid to the tenant for life.

Francis Gore Fitzarthur had been engaged in a contested election in 1745, immediately after his coming of age; and his affairs becoming embarrassed, he employed this John Purdon, and Edmond Hogan, attorney at law, as confidential Counsel and Agent to manage his affairs.

That Purdon had purchased the estate as trustee for Francis Gore Fitzarthur, was proved by a written declaration of Purdon to that effect, signed by two witnesses, and by their borrowing £3459 on their joint security from Messrs. Keane and Latouche, Bankers, Dublin: for the purpose of making the necessary deposit.

In order to complete the purchase, Purdon agreed with Hogan, who had been Attorney for Francis Gore Fitzarthur when a minor, and had signed his answer to the foreclosure bill, to sell to him (Hogan) a part of the mortgaged premises for a sum of £3771 16s. 8d. He also agreed with John Stacpoole of Craig Brien, in the County of Clare, for the sale of another part of the mortgaged estates, for the sum of £7136 4s. 9d. By an article in writing, dated 30th April 1748, Purdon covenanted with Hogan, to procure a sale to be made by all proper parties to the said Edmond Hogan of the [23] lands of Claurode-more and the Liffords, being part of the mortgaged estates; and by a subsequent memorandum, the tolls and customs

of Claurane were agreed to be sold to Hogan for a further consideration : the whole together amounting to between £4000 and £5000.

Purdon executed a conveyance to John Stacpoole, of Craig Brien, of that part of the mortgaged estates which had been purchased by him, but no legal conveyance was executed to Hogan : they both however, took possession : and Purdon himself entered into possession of that part of the mortgaged estates which remained unsold, under pretence of keeping the lands as a security against his liability for the money borrowed from Messrs. Keane and Latouche to pay the deposit.

Francis Gore Fitzarthur died in July, 1796, and in the month of November, in the same year, his son, Francis Gore, the Appellant, who was entitled to the remainder in tail in the equity of redemption of the mortgaged estates under the will of General Gore, filed his bill in the Court of Chancery, in Ireland, against the representatives of Purdon, Hogan, John Stacpoole of Craig Brien, and of Curtis, the mortgagee, together with those claiming interest in the estates under and through these persons—stating the above facts, and praying “to be decreed entitled to a redemption and reconveyance of the aforesaid mortgaged estates, notwithstanding the aforesaid decrees and the proceedings had thereon : that all proper accounts should be taken from such periods as to the Court should seem meet ; and that such of the defendants as should be in equity bound [24] to do so, should, upon payment of such sum of money, (if any,) as should appear due on the taking of such accounts, reconvey said estates to the Appellant ; or that he might be decreed to be entitled to said estates, or to possession thereof upon such other terms as to court should seem equitable.”

Simon Purdon, the representative of John Purdon, being conscious it would appear that he had no just defence, came to a compromise, and delivered to the Appellant the unsold lands, into the possession of which John Purdon had entered as before stated.

The representatives of Hogan, (Stacpooles of Lifford) put in their answers, relying upon the sale and covenant by Purdon to Hogan, under whom they claimed : and further stated a recovery suffered of the premises in question, and subsequent charges thereon for portions for children and by marriage settlements.

In February, 1800, George Stacpoole, of Lifford, filed his cross bill, stating the facts, and contending, that as the Appellant's father had joined with the Chief Remembrancer of the Court of Exchequer in conveying the estates to Purdon, this ought to be considered as a covenant and warranty, binding on his heirs : and that, if the conveyance should be found to be defective, he (George Stacpoole) ought to be indemnified out of his personal estate and effects.

The original and cross causes came on together before Lord Clare in November, 1801, and his Lordship decreed that the Appellant's bill should stand dismissed without costs, as against George Stacpoole, of Lifford, and those claiming under Hogan : and [25] should stand absolutely dismissed as against George Stacpoole, of London, the representative of John Stacpoole, of Craig Brien : and that as to the other Defendants the cause should stand over.

The decrees of dismissal as to the Stacpooles of Lifford, representatives of Hogan, and Stacpoole of London, were enrolled in 1802.

The cause came on again to be heard for further directions in Nov. 1803, before Lord Redesdale, who pronounced a decree, declaring, “That as none of the persons in being, and entitled in remainder after the death of the Plaintiff's (Appellant's) father, were made parties to the proceedings in the cause in the Exchequer, although the parties to such cause had notice of General Gore's will, the same being set forth in the pleadings : and as the Plaintiff's (Appellant's) father was tenant for life only of the estates under such will : the proceedings in that cause did not in any manner bind the rights of the parties entitled to such estates in remainder, and such proceedings were on the face of them erroneous and wanting the necessary parties to give them force and effect, and that the same, under the circumstances, ought to be deemed fraudulent, collusive, and void, as against the Plaintiff, and all persons entitled in remainder, under General Gore's will, after the death of the Plaintiff's father,” etc. etc.

The decree, after a summary recital of the facts and state of the case, went on to order that the legal estate in all the mortgaged lands and premises should be conveyed

to the Plaintiff, (Appellant,) except as to those sold to Hogan, of whom the [26] Respondent, George Stacpoole of Lifford, was the representative ; and to John Stacpoole, of Craig Brien, of whom George Stacpoole, of London, was the representative, the bill having been dismissed as to them by Lord Clare, and the decree of dismissal enrolled, so that it could not be reheard in the Court below.

Gore appealed against the decree of Lord Clare, as far as respected the Respondent George Stacpoole of Lifford, the representative of Hogan, but suffered it to remain undisturbed as far as respected Stacpoole of London, apparently because the ancestor of the latter, Stacpoole of Craig Brien, seemed to have been a purchaser for valuable consideration without notice under a decree of Court.

Mr. Hart and Mr. Leach for the Respondents in the original cause, and Appellants in the cross case, defended the decree of Lord Clare on the ground on which his Lordship was stated to have pronounced it ; viz. the length of time elapsed since the original decree in the Exchequer, which ought not now to be impeached. Though the decree was irregular, the Appellant was bound by lapse of time, and they cited Lloyd and Jones, 9th Vesey, 37, to show the practice of the courts to be conformable to Lord Clare's decrees.

In reply to Lord Redesdale, who observed that one of the tenants in tail was in that case in suit, Mr. Hart said that the decree there was equally irregular, because there were intervening estates of inheritance ; and yet it was thought improper to disturb a long-standing title under a decree of Court. [27] In the present case no fraud was intended, as there was no object which fraud could have materially affected.

The Rev. Francis Gore, and Francis Gore his son, were the only remainder-men in *esse* at the time of the decree ; and they being only remainder-men for life, their interests were in this instance too distantly affected to render it essentially necessary to make them parties. The purchase was for a fair and *bonâ fide* consideration ; a recovery had been suffered of the lands, and they were subject to marriage settlements made *bonâ fide*, and without notice of the Appellants' claim ; and to portions for younger children. The Appellant, if he intended to impeach the decree, ought to have done it by a bill in the nature of a bill of review, and Mitford's *Treatise on Pleading* was cited to show that such was the course for persons not bound by the former decree.

Mr. Richards and Sir S. Romilly (for the Appellant in the original cause, and Respondents in the cross cause) argued, that it was evident that Hogan had full notice of the limitations in General Gore's will, as he, according to the Irish custom, signed the answers in which these limitations were set forth. It was also proved that Francis Gore Fitzarthur had, two or three years after the contested election, in 1745, become so weak in his understanding that he was subject to various impositions, so that it was at last necessary to vest his estate in trustees by Act of Parliament, to prevent his ruin. The decree in the Exchequer was obtained by fraud and collusion, between the tenant for life in possession, John [28] Purdon, and Edmund Hogan ; and it evidently proceeded on the supposition that Francis Gore Fitzarthur had the fee-simple, or first estate of inheritance in the mortgaged estates ; so that the Judges were clearly imposed upon. Two of the remainder-men, the Rev. Francis Gore and his son, being in *esse* at the time of filing the bill of foreclosure, ought to have been made parties, to enable them to redeem the mortgage if they thought fit. The surplus of the purchase money, above payment of the mortgage and judgment debts, had been paid to the tenant for life, Francis Gore Fitzarthur, pursuant to the same plan of fraud and collusion ; instead of being brought into Court, according to the custom in Ireland in such cases, for the behoof of all parties. The purchase having been made by Hogan, with a full knowledge of all these circumstances, was fraudulent ; and therefore all dispositions of the property made by him, and those claiming under him, were vitiated by this fraud. The recovery and marriage settlements did not alter the case ; and one of these settlements was made *pendente lite*, and therefore with notice. The estates indisputably belonging to Hogan and his representatives, were at any rate charged with these settlements and portions, and sufficient to answer their purposes. The legal estate was never conveyed to Hogan or his representatives : and as the Appellant's title did not accrue till the death of his father, and as he filed his bill about three months after, the lapse of time cannot

prejudice him. He could not have taken any steps to have secured the application to its proper uses, of the surplus purchase money, after payment of the mortgage and judgment debts, as [29] that would have been a recognition of the validity of the sale. Francis Gore Fitzarthur could not pass any thing more than his life interest in the mortgaged premises : and nothing in these transactions ought to be permitted to injure the Appellant, or to deprive him of his just rights.

Lord Redesdale stated the case, and after adverting to the facts, that Hogan signed the answers, and must have known that Francis Gore Fitzarthur was only tenant for life : that the bill had not been amended by adding parties, but that the cause proceeded in such a way as to leave the judges in the belief that Francis Gore Fitzarthur was the absolute owner, and that the decree of foreclosure was pronounced, and the surplus of the purchase money ordered to be paid to the said Francis Gore Fitzarthur under this impression, he observed that it was impossible not to see that there was in course of these proceedings the most cautious suppression of facts with which the Court ought to have been made acquainted. The sum too which should have been paid out of the estates, so as to affect the interest of the remainder-men was only £7068, the original amount of the mortgage and judgment debts, as the interest ought to have been kept down by the tenant for life, and such should have been the directions of the Court. His Lordship also adverted to the dismissal of the Bill by Lord Clare, as against George Stacpoole of London, the representative of Stacpoole of Craig Brien, which he believed was done on the ground, (in addition to the lapse of time,) that John Stacpoole, of Craig Brien, [30] was a purchaser under decree of Court for valuable consideration without notice of the fraud. He very much doubted, however, whether this was a protection, as he held it clear, that a purchaser under such circumstances was bound to see that, at least as far as appeared on the face of the proceedings before the Court, there was no fraud in the case. That case however had not been brought before their Lordships, and therefore it was unnecessary to say any thing further upon it. The case of Purdon's representatives, having stood over for want of parties, came before him (Redesdale) ; but he could give no decision on the case of Hogan's representatives, as the decree of dismissal had been enrolled, and could therefore only be altered by appeal to their Lordships.

It had been objected by the Respondents, that the purchase was made by Hogan, under the decree of the Court. The answer to that was, that he acted with full notice of the fraud. Another objection was, that the proper course would have been to file a bill in the Exchequer, to set aside the decree on the ground of fraud. The answer to that was, that the decree neither did nor could bind the remainder-man at all, but only the tenant for life. The clearest title could not be used by a person cognizant of any fraud affecting it ; and by the register statute even a registered deed could not be used against an unregistered deed, if the person in whose favour the registered one was made knew of the prior unregistered deed. Some of the claimants came in, under marriage settlements, for jointures and portions. It was sufficient in answer to [31] this, that Hogan left undisputed property to answer all such claims and purposes, and therefore, as to this cause, they might all be considered as volunteers. One of the cases however was rather stronger than the rest : it was a marriage settlement made after the dismissal of the bill by Lord Clare ; but still it was a transaction *pendente lite*, since it was still a question for their Lordships' consideration, whether the bill had been rightly dismissed, and the parties thus having notice, must take the settlement subject to all its legal and equitable consequences. Such a circumstance could never be allowed to intercept the course of justice.

Lord Eldon (Chancellor). On the best consideration which he could give the subject, he had no doubt but the decree in the Exchequer did not bind any remainder-man, for it was clear equitable law, that in order to make a foreclosure valid against all claimants, he who had the first estate of inheritance must be brought before the Court, and even then, the intermediate remainder-men for life ought to be brought before the Court, to give them an opportunity of paying off the mortgage if they thought proper. A bill of review in the Exchequer, to set aside its decree, could not have answered the purpose of the Appellant, for as to him this fraudulent decree was an absolute nullity. And as to the lapse of time, he thought the Appellant had sued in proper time, unless he had given such encouragement to the Respondents to believe themselves secure, and induced them to improve and deal with the property as if it

had been securely their own, as would [32] make it a fraud in him to prosecute the present claim. This had been alleged by the Respondents; and was the only material point on which his noble friend had not touched. He was of opinion, however, that there was no foundation in the case, for any objection on that ground.

The judgment of Lord Clare was accordingly reversed, with proper directions relative to the conveyance of the legal estate to the Appellant, accounting for the rents, and repayment of the purchase money, with interest to Hogan's representatives.

Agent for Appellant, PINKETT, Temple.

Agent for Respondents, J. PALMER, Gray's-Inn.

FROM SCOTLAND.

WATT, Merchant,—*Appellant*; MORRIS, and Others,—*Respondents*
[May 10, 1813].

[Mews' Dig. xiii. 1158. 3 Scots R. R. 7.]

[Whether a vessel can be deemed sea-worthy for a foreign voyage without knees?]

In 1794, the Appellant freighted the *Jenny and Peggy*, a vessel lying at St. Andrew's, to Riga or St. Petersburg, and back to Dundee or Newburgh, in Scotland. The owners (the Respondents) engaged "that she should be completely fitted and found " to proceed on the voyage in four days thence;" and further represented her as so firm and perfect, that she was capable of carrying iron or the weightiest commodity. After the Appellant had freighted the [33] vessel, he was applied to on the part of the Respondents to insure £700 on her bottom. The Appellant agreed, and the policy was subscribed on the 6th Sept. 1794—"Beginning the adventure upon the said " vessel at and from the port of St. Andrew's to the port of Riga, or St. Petersburg, " in ballast, and from either of these ports to the port of Dundee and Newburgh." The question was whether the vessel was sea-worthy.

It appeared that she had been originally only 80 tons burthen when built in 1785—that she had been lengthened in 1794 14 feet, so as to be 113 tons burthen. The new parts of the vessel were not fastened with knees, which are usually placed in vessels intended to carry cargoes: and the reason as stated by the ship-builder was, that none were to be had at St. Andrew's, where the vessel had been lengthened.

As soon as the vessel had left the harbour, it was found that she wanted several things indispensably necessary for the voyage, and the Master was obliged to put into Dundee, a place out of his course, where he took in some fuel and cordage. The old rigging did not suit her new size, and she sailed so heavily as to fall greatly behind all the other Baltic vessels. She was also very leaky, and from these causes and the want of ballast the Master put into Kettero, a harbour on the coast of Norway, and stopped likewise at Elsinour and Copenhagen, at which last place he took in a supply of fuel, candles, and a chart of the Baltic: all which stoppages occasioned very considerable delay, and the Appellant was thereby deprived of his option of going to Riga, and [34] therefore proceeded to St. Petersburg direct. The vessel did not appear by evidence to have undergone any repairs at St. Petersburg. She was lost on the voyage homewards on the Shetland coast.

An action was commenced in the High Court of Admiralty in Scotland, by the owners against the Respondent, for payment of the £700 upon the policy. The defence was that the vessel was not sea-worthy, nor "completely fitted and found" for the voyage at the time of her leaving St. Andrew's harbour. A proof was taken, and the evidence as to her sea-worthiness was contradictory, but it was allowed on all hands that the new parts of the vessel had no knees. The Judge Admiral (Baron Hepburn) sustained the defences and assolized the defender, stating "that he was " clear the ship was not sea-worthy from her want of knees." Upon petition by the owners this interlocutor was altered by the next Judge Admiral, the successor of Baron Hepburn, who decreed against the defender. A petition was presented

against this last interlocutor, to which, however, the Judge adhered. These Judgments were then brought under the review of the Court of Session by suspension, when Lord Hermand, Ordinary, by an interlocutor of the 18th Feb. 1803, "found " the letters orderly proceeded in, and decerned."

The cause thus went on in the usual course; the interlocutors, four by the Lord Ordinary, and two by the whole Court, being all against the Appellant. From these he appealed to the Lords for the following reasons:

1. Because in every contract of insurance there is [35] an implied warranty on the part of the assured, that the ship insured shall be tight and staunch and properly constructed and equipped, so as to be able to encounter the ordinary perils of the voyage, and in the present instance this obligation is confirmed by the express engagement of the Respondents in their letter of affreightment; but it appears in evidence, that the vessel in question was defective in the most important and necessary parts of the fabric of a ship, the main-hold beams in the centre, where she had been cut asunder and lengthened to the extent of 14 feet, not being in any manner bound to her sides, or supported or strengthened by knees, which in every operation of lengthening and raising the deck of a ship is essentially necessary to render her sea-worthy and safe; no new anchor having been provided, although it is obvious that an anchor which was sufficient for a vessel of 80 tons, (the burthen of the *Jenny and Peggy* before she was lengthened), was insufficient for a vessel of 113 tons, which was her burthen after she was enlarged; and it appearing in evidence that a new cable of a larger size was provided, for which a new anchor was to have been got (but which was not got) at Elsineur; and no new masts, sails, ropes, or cordage having been provided, though it is equally obvious that sails and rigging which fitted a vessel of 80 tons burthen could not be adequate for a vessel of 113 tons; and it even appears from the certificate of the repairs, that "the ship had no stove or fire place in the cabin," which of itself was essential in a voyage to the Baltic at this season of the year, the lives of the [36] crew depending upon it, when the weather was such as to make it impossible to use the stove upon deck, which is often swept away in a storm.

2. Because, admitting, what is however denied, that the Captain did procure some knees for the vessel at Petersburg, the contract is nevertheless avoided, the implied warranty attaching at the commencement of the risk when the ship sailed from St. Andrew's.

3. Because the Captain, in consequence of the insufficient equipment of the vessel, was obliged to deviate from the voyage insured; and because the very loss, for which the Respondents ask indemnification, was in all probability occasioned by their own neglect, and their breach of a condition precedent.

J. A. PARK.

RALPH CARR.

Mr. Park (for the Appellant) ridiculed the idea of a ship being sea-worthy for such a voyage without knees. It had often been a question at Guildhall, whether the knees were rotten or sufficient, but it had never been conceived that knees were unnecessary. She wanted besides sails and cordage, and was not "completely fitted" and found "for the voyage out and homeward according to the warranty.

Mr. Adam and Mr. Horner (for the Respondents) argued, that Watt knew the state of the vessel, and made no objection; that it appeared in evidence that a ship might be sea-worthy without knees; that the [37] Berwick smacks which were remarkably good vessels had no knees.

Chancellor. These are the vessels that carry the fish.

Adam. Yes, fish and passengers: that the lengthening of the ship rather strengthened her; that she was not lost from any defect in herself, but in a severe storm, in which many excellent ships were lost; that there was no proof that she had not got knees at St. Petersburg; and that the *onus probandi* lay upon the Appellant.

Mr. Park in reply stated, that he had seen the Berwick smacks at sea, and that they appeared to be very good vessels, but they were solely employed in the coasting trade, and not intended for heavy cargoes. As to the *onus probandi* resting with the Appellant, their Lordships would consider that this was a question of warranty, and it was the rule of law, that the warranty must be complied with. Even if Watt had known the state of the vessel (which, being no seaman, he did not), it would not have altered the case. The ship ought to have been sufficient at her sailing from

St. Andrew's; but if they thought any repairs at St. Petersburg would avail them, the *onus probandi* under their warranty lay upon them. So in the case of a horse: if a man knew that a horse was blind of an eye, and wished to try him, he was still not obliged to keep him, if warranted sound, as the warranty must be complied with. Their Lordships he was satisfied would do nothing to overturn this fixed principle of law.

Chancellor. The single question is whether the [38] ship was sea-worthy. I am of opinion she was not sea worthy.

Decision of the Court below reversed.

FROM SCOTLAND.

BRUCE,—*Appellant*; OGILVY,—*Respondent* [May 28, 1813].

It was stated in the last case that the vessel called the *Jenny and Peggy* had been wrecked on the Shetland coast. The inhabitants of these islands had a peculiar notion of law in regard to wreck, whether derived from Norwegian tradition, or from whatever other source, Mr. Horner, who opened the case, did not know. They conceived that one third belonged to the Admiral, one-third to the proprietor of the estate where the cargo was cast ashore, and the remaining one-third to those who could get it.

Certain persons who had acquired this last kind of right to a quantity of tallow which had formed part of the cargo of the *Jenny and Peggy*, sold it to Bruce and Ogilvy, the parties in this cause, who carried on trade in partnership, in some place in one of the Shetland islands, for £57, which was alleged to be far below its value.

Watt, the owner of the cargo, having discovered how it had been disposed of, brought his action for the spoliation, in the Admiral's Court, against ten defenders, of whom Bruce was one. The matter [39] was compromised by Watt assigning his interest in the cargo to the defenders for £3000, of which Bruce paid £333.

The partnership of Bruce and Ogilvy having been dissolved, the latter brought his action against the former for two sums, amounting together to about £100. Bruce alleged that the compromise with Watt was on the partnership account, and that Ogilvy was liable to him for a third of the above sum, which he had paid to Watt, and which more than covered his debt to Ogilvy: he therefore pleaded compensation. The Court of Session decided in favour of Ogilvy, the Pursuer, and Bruce appealed.

Ogilvy had alleged in the Court below, that he was no party to the compromise, and that it was not entered into on the partnership account. Bruce offered to prove that it was, and gave in a printed condescendence of the facts, which the Court must of course have thought not sufficient to make out his case, as they rejected the proof. A question had been raised whether the spoliation did not vitiate the whole transaction, but from the manner in which the action in the Admiral's Court terminated, nothing appeared to have turned upon that.

Lord Eldon (Chancellor). The Court below appears to have taken it for granted that the Respondent could prove every thing he said, and that the Appellant could prove nothing. The interlocutors must be reversed, and a conjunct probation ordered to be allowed, unless the parties can settle the matter in some other way.

[40] FROM SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND, —*Appellants* ;
 WATSON, —*Respondent* [Mar. 26, 1813].

[Mews' Dig. xii. 503 ; 3 Scots R. R. 10. See *Yorkshire Bank Co. v. Beatson*, 1880, 5 C. P. D. 127 ; and as to warranty of horse (p. 45), *Howard v. Sheward*, 1866, L. R. 2 C. P. 148 ; *Brady v. Todd*, 1861, 9 C. B. N.S. 592.]

[Agent for the Bank of Scotland, also carrying on the business of a banker on his private account, receives money, for which he gives a receipt, which does not purport on the face of it to be given for the Governor and Company of the Bank of Scotland. Agent becomes insolvent. Question whether the Bank is bound by the act of its agent, the holder of the security supposing that he was dealing with the Bank of Scotland ?]

In 1792, James Smith, and John and Collin Smith, his sons, were appointed agents for the Bank of Scotland, at Brechin, where they transacted the business of the Bank ; and also private banking business of their own, though (as was alleged) without the knowledge of the Bank, till the year 1803, when they became bankrupt. The vouchers which were given by Smith and Sons, as the Agents of the Bank, were discharged by the Bank ; but they refused to discharge those which did not purport to be granted by Smith and Sons as their agents. The Respondent, therefore, brought an action in the Court of Session, averring in the summons (declaration) " that he had lodged " with the Bank of Scotland £60 sterling, conformable to receipt, dated at the Bank-office, at Brechin, and signed by James Smith and Sons, who were at that time agents " there for the said bank," and concluding for decree against [41] the Appellants, for payment of the said sum of £60 with costs.—The evidence in support of the demand was an unstamped document, in the words and figures following—

" Bank-office, Brechin, 25th March 1803.

" £60.

" Received from Mr. James Watson, Brechin, sixty-pounds sterling, at his credit, " bearing interest at the rate of three per cent. on demand, or four per cent. if not re- " turned in six months.

" SMITH AND SONS."

The Court decided first in favour of the Appellants, but afterwards finally decided against them, upon which they appealed.

The question in this case turned upon two points, 1st. Whether this receipt being unstamped was a good foundation for an action ?—2d. Whether supposing no stamp was required, or that it were stamped, it was such an instrument as would bind the Bank of Scotland ?

In support of the first objection to the document, on the ground of its not being stamped, Sir S. Romilly and Mr. Leach, for the Appellants, contended that by the Stamp Acts, 31st G. 3. c. 25—37th G. 3. c. 136—44th G. 3. c. 98, such documents as the present, unless stamped, could not be pleaded or given in evidence, or admitted in any court, to be useful or available in law or equity, as an acknowledgment of debt. It was true, that there was an exception in favour of receipts given by [42] bankers for money lodged with them merely for safe custody : but in this instance, it appeared on the face of the instrument, that interest was allowed, which rendered the receipt an agreement, and brought it within the general rule.

In regard to the second point, it was contended, that there was nothing on the face of the instrument, or in the circumstances of the case, that afforded any ground for the allegation, that the Bank was bound by this instrument : that it did not purport to bind the Bank : that there was no evidence to show that the money had been applied to the purposes of the Bank, or that the Respondent understood himself to have received the Bank security : and that, at any rate, the Smiths were limited agents, and that the Bank could not be bound where its agents had exceeded their

authority. The Bank had by public advertisement, and by placards in the Agents' Offices, apprised the public of the limited nature of the authority of these agents—That, some time before the present document was given, the Bank had reduced its rate of interest to 3 per cent. upon a deposit, however long it remained; but, that the Smiths in their private banking concern had continued the old rate of interest, allowing 4 per cent. when the money was suffered to remain for six months, and that the present document was of this last description.

Though this document, then, had been legally stamped, it still could not have bound the Bank without further evidence to show that it was given by the Smiths as the Bank Agents, or in short that it was a transaction with the Bank. It was absurd to say that the Bank was bound merely because the [43] instrument had been given at the Bank-Agency-office, as this would make them liable for every transaction, however extravagant, that took place within its walls. As to the instrument bearing the words "Bank office, Brechin," this could not render the Bank liable; for the receipts given by the Smiths, confessedly *privato nomine*, had the words in question.

Assuming then that the Smiths were limited agents, the Appellants referred to the case of Fenn and Harrison, 3d T. Rep. 757, and to Erskine B. 3. T. 3. Sect. 35, who had these words: "A mandatory must follow the precise rules prescribed by his employer: for all his power is from the commission, and whatever he does *ultra fines mandati* is without authority, and cannot bind his constituents." A factor cannot pledge goods of his principal, his duty is to sell (Newsom and Thornton, 6th E. Rep.). The doctrine held by some of the Judges below, that the Appellants, though they did not know of the private banking of Smith and Sons, were answerable for the consequences of this *culpa lata*, on the ground that it involved them in the charge of culpable negligence, was utterly irreconcilable with any principle of law, besides that it proceeded upon the supposition of a fraud on the Respondent by the Smiths, which was not proved.

The Attorney-General (now Vice-Chancellor), and Mr. Adam, for the Respondent, argued, that the document in question was a good one within the exception of the Stamp Acts, which exempted bankers' receipts for money deposited with them [44] from the duty: that the clause of interest could not make any difference in the case, as bankers' receipts in Scotland usually had such a clause; and the Bank of Scotland would have been bound by the custom to pay interest, even though no interest had been mentioned in the document; and that, at any rate, the instrument was a good one against the Bank, since if a stamp was required the Respondent had only to pay the penalty, £10, and get it stamped.

As to the second point, the words "Bank of Scotland's-office" was written in large letters on a board over the window of the place where this transaction took place, and naturally led the Respondent as well as other persons to conclude that, when they deposited their money there, they had the security of the Bank of Scotland. The Respondent did so imagine: he paid in his money *bona fide* to the Bank; and as the agents had a general authority in matters of this kind, the Bank was liable, though the document did not on the face of it purport to be the security of the Bank. The Respondent conceiving that the agents had a general authority, and no sufficient notice of the contrary having been given, was satisfied that the agents had power to bind the Bank by documents of this kind. The case of Fenn and Harrison rather favoured the argument of the Respondent, and in that case it had been stated by some of the Judges that the warranty of a horse by a servant would bind the master, though the master had desired him not to warrant: because the servant had a general authority.

Lord Eldon (Chancellor). If Justice Buller had [45] a horse to sell, and thought he would be bound by the warranty of his servant, though desired not to warrant, he would have gone to market himself to see his horse sold. But the Judges appeared to have made a distinction between horse dealers and others. If Tatersal sent his servant to sell, and the servant contrary to his instructions warranted, Tatersal might be bound: but another person (not a horse dealer) would not be bound by the unauthorised warranty of either Tatersal or his servant, or of his own servant, he having only given a particular authority.

Attorney-General and Mr. Adam. But the agents here having a general authority, their acts bound their principal, though unauthorised. This had been decided in

a variety of cases. The general authority might be limited by proper notice, as in the case of a notice put up in his office by a carrier, or a notice in the newspapers. But the mere circumstance of a general notice given was not conclusive, but only created a presumption that the individual had notice of the limitation. The general notice was merely admitted as evidence, and it was left to the jury to say, whether under the circumstances, the individual had notice; and unless this was found, the general notice itself was not sufficient. Though an advertisement was inserted in the newspapers in 1789, this was previous to the Brechin establishment, and not notice of the limitation to the people there; the advertisement was never repeated. The placards in the office, stating the limitation of the agents as to forms and otherwise, were not sufficient notice. They had not [46] been pointed out to the attention of the Respondent. He had never read them, and the most important of them was so discoloured with smoke as to be hardly legible. The limitations upon the agents applied to other instruments. The agents were left to their discretion as to the form of receipts, by which the Bank should be bound. The Bank itself did not consider its rules and forms indispensable, for at the agents' office an accountant's name was not signed even to their promissory notes, though required by their notices, it having been proved that there was no accountant at Brechin, and neither at the agents' nor at the Bank office, at Edinburgh, was the Bank-seal, (which was also required by their rules) affixed to their receipts. The Bank therefore had no right to insist upon rules which had evidently fallen into desuetude.

Lord Eldon (Chancellor). Would not a Scotch Judge be as much surprised to receive a Bank of Scotland note in this form, as any of us would be at receiving a Bank of England note in this way?

Attorney-General and Mr. Adam. The general law was unquestionably in favour of the Respondent. The granting of receipts was an act for which Bank Agents were usually appointed, and it was not therefore *ultra fines mandati*. It was *qua* Agents that the fraud was practised, and therefore the Bank was liable under the well-known obligation of *quasi ex delicto*. (For the principles of the liability of masters for servants, they here cited Blackstone, vol. 1. b. 1. chap. 14. p. 429. —Voet, ad Tit. ff. de Instit. Act.—Stair, b. 1. Tit. 12–19. Bank-[47]ton, b. 1. Tit. 8th. 30 and 36.—*Principles of Equity*, vol. 1. b. 1. part 1. p. 63.—Paisley Banking Company against Scott, etc. 20th June, 1798.) The Respondent, in his minute to the Court of Session, distinctly offered to prove, by persons of all descriptions, in and about Brechin, that no one had ever heard of the private banking of the Smiths, or knew, or supposed that these people had ever in their lives issued from the Bank office a document which did not bind the Bank of Scotland. Though the obligation to pay interest at 4 per cent. after having been scored out of the receipts for some short time, subsequent to the regulation of the Bank to receive their rate of interest, was afterwards allowed to remain no inference unfavourable to the Respondent ought to be drawn from that circumstance, because the Bank might vary its rate of interest again; and there was nothing in this that ought to have roused the suspicion of the Respondents and others, who considered themselves as dealing with the Bank.

Sir S. Romilly in reply. The stamp acts expressly subjected to the duty documents bearing interest as this did. The Judges of the Court of Session had evidently proceeded upon the supposition, that a fraud had been practised on the Respondent by the Smiths, of which, however there was no proof. There was no evidence whatever to show, that the Respondent and others in his situation considered themselves as dealing with the Bank of Scotland, and not with the Smiths as private bankers; that he could not believe the Judges [48] to have said some things which had been attributed to them. They had been stated as speaking of their own knowledge, of what was the practice of the Bank, making themselves witnesses. The object of this action was to make a limited agent liable as a general one, and that too upon a document in which the agent did not represent himself as such.

Lord Eldon (Chancellor). There were two questions in the case: 1st. Whether the document was such as would bind the Bank, supposing it stamped, or that it did not require a stamp:—2d. Whether it was invalid on account of its not being stamped. A few words as to the last point first—It had been said, that the receipt carrying interest was an agreement, and therefore ought to have been stamped: to which it was answered, that Bankers' receipts were excepted, and that the rate

of interest was usually inserted in the Scotch Bank receipts : and that these Banks would have been liable by the custom to pay interest, though the rate had not been inserted. He did not however consider himself called upon in the present case to decide that point.

As to the other point, there was nothing in this document that showed it to be that of the Bank of Scotland, unless their Lordships were prepared to say that " Bank-office, Breechin," meant the same thing as the words " For the Governor and Company of the Bank of Scotland." There was nothing peculiar that he knew in Bank Agency, to take it out of the rule that the agent could not bind his principal beyond the limits of his authority [49]. The Chief Justice (Ellenborough) had sat at the table at the hearing of this case, and had observed that if it had come before him, it would not have occupied more than ten minutes. There were other cases, it was said, depending upon it, but of that they could take no notice : though, from the nature of the transactions, he should rather suppose that each of them must be governed by its own peculiar circumstances. There were a variety of considerations and circumstances stated, to raise a presumption in favour of the Respondent : but all of them appeared to him insufficient to show that this was an instrument by which the Bank could be bound. It was his opinion, therefore, that the judgment of the Court of Session ought to be reversed.

Lord Redesdale concurred in that opinion. The question as to the necessity of a stamp, had better perhaps be left open, since there was no necessity for deciding it in this case : but as to the instrument on which the action was founded—suppose the Bank had become insolvent, and that Smith had remained solvent, could the holder have by such an instrument as this succeeded in an action against the estate of the Bank ? It was clear he could not.

The judgment of the Court below was accordingly reversed.

Agent for Appellants. CHALMER.

Agents for Respondent, SPOTTISWOODE and ROBERTSON.

[50] FROM SCOTLAND.

REDFEARN, ESQUIRE,—Appellant ; FERRIER, SOMERVAIL, and Others,—

Respondents [June 1, 1813].

[3 Scots R. R. 15. Explained in *Scottish Widows Fund v. Buist*, 1876, 3 Rettie, 4th ser. 1078. Adopted in *Heritable Reversionary Co. v. Millar* [1892], A. C. 598.]

[Whether a latent equity can prevail against an intimated assignation.]

Lord Eldon. This is a most important case, especially as it concerns the interests of the commercial part of the community in both kingdoms.

David Steuart, merchant in Leith, was ostensible owner of a share in the Edinburgh Glass-house Company, which is not a corporate, but a private society. By the regulations of this company, their shares could be held by individuals only, and therefore the share in question stood in the company's books in the name of Steuart individually, though purchased by him for the house of " Allan, Steuart, and Company," in which he was a partner. That partnership was dissolved, and another formed under the firm of " David Steuart and Company," of which Steuart and Somervail were the only partners. The share in question remained with this new company, who purchased an additional portion of glass-house stock : thereby raising the amount of the share to £20000. This last partnership was dissolved in 1796, David Steuart having become bankrupt.

The share had always remained in the name of David Steuart, without any intimation having ever been given to the Glass-house Company that Somer-[51]-vail or any other person had any concern with it. In August, 1797, Steuart borrowed £1400 from the Appellant, and to secure the re-payment, assigned to him this share : " surrogating and substituting Redfearn in security as aforesaid, in his full right and place " in the premises, with power to sell the share at any time after the term of payment, " upon giving two months notice to Steuart, the cedent."

Somervail had heard of the intention of Steuart to assign the stock, and wrote to

him on the subject, but without effect. The assignation was intimated in the proper manner to the Glass-house Company the day after it was made, but it did not appear that any entry was, in consequence, made in their books. It was admitted, that in this transaction Redfearn acted *optima fide*; that he actually advanced the money, and had no notice that any other person than Steuart had any concern with the share in question.

After this transaction had been completed, Mr. Somervail insisted upon his alleged preferable claim to the whole of the share, as being the property of the partnership, and subject to its debts. In the year 1800, Mr. Archibald Geddes, the manager of the Glass-house Company, raised an action of multiple poinding (corresponding to the English Bill of Interpleader) to have the right ascertained, when the bond and assignation, and instrument evidencing the intimation, were produced. On the 29th June, 1801, the Lord Ordinary (Craig) pronounced an interlocutor in favour of the Appellant. Against this interlocutor, a representation was made on the part of Mr. Somervail, on which parties were ap-[52]-pointed to be heard; but Somervail did not appear, and suffered decree to go in absence. Somervail however kept the matter open by two or three short representations, and at length brought an action of reduction for setting aside the assignation; and after his death, the process was carried on by his representatives. The two actions were conjoined and heard together before the Lord Ordinary (Craig), who on the 11th January, 1803, again pronounced in favour of the Appellant. This interlocutor having been repeatedly adhered to by the Lord Ordinary, the pursuers preferred their petition to the Court, who having advised the same with answers, pronounced against the Appellant; and upon a petition by the Appellant to alter this interlocutor, they adhered to it, and remitted to the Lord Ordinary to proceed accordingly. The Lord Ordinary then pronounced in favour of the representatives of Somervail. From these last interlocutors, Redfearn appealed to the Lords.

Sir S. Romilly and Mr. Thomson (for the Appellant). The question was a most important one, especially to the commercial part of the community. Their Lordships must of course decide according to law; but if this decision of the Court below should be allowed to stand, the greatest possible opening would be afforded to fraud and deception. A person appearing to all the world as the only owner of a transferable subject, after having disposed of it for valuable consideration to a purchaser who could not by any diligence discover the fraud, had only to allege a secret trust to defeat the whole transaction.

[53] By the law of Scotland, the assignation, though valid in the hands of the assignee as against the cedent (assignor), from the moment it took place, was not valid as against third persons until intimation had been given to the Company. When this intimation was given, the share became the complete legal property of the purchaser, and was valid not only against creditors, but also against any prior assignee, who had given no intimation.

Their Lordships would find from the proceedings, that Somervail himself had no doubt whatever but Steuart had full power to dispose of the share; for he knew of the intention a considerable time before it was executed, and might have prevented it by applying to the Glass-house Company if he thought he had any right to do so. He had written to Mr. Steuart, stating that he intended so to apply, but did not do it, because he was sensible that Steuart had the full power of disposition. It was argued on the other side, that no assignment could be made of a personal right (*chose in action*), except subject to every equitable demand on the property; and that the Appellant could only take the share in question subject to the preferable claim of Somervail, and they cited several text writers and cases in support of this doctrine. But they had made a total mistake in two points: First, this was not a personal right or mere *chose in action*, but was assignable like the shares of any great joint stock company, such as the Bank. Bank stock was indeed in some sense a *chose in action*; but it was as transferable as any moveable by delivery. Secondly, if it were a *chose in action*, it would be subject only to the demands [54] of the debtor in respect of it, but not to those of a third person. A bond assigned by the obligee is subject to the demands of the obligor upon it, but not to those of a third person. This rule was perfectly rational; the assignee might go to the debtor and ascertain what claims he might have upon the matter assigned; but it was impossible he could use the

same precaution in regard to all mankind. The passages from the text writers, and the cases cited by them, referred entirely to the demands of a debtor in respect of a security so assigned by his creditor. By the common law of Scotland, the creditor was bound to give notice to the debtor of such an assignment. It was a solemnity necessary to complete the validity of the transaction.

They had argued on the other side in the Court below, that this share was a trust for the partnership; but if any trust at all, it was a secret trust, and the question was, whether their secret trust could prevail against the Appellant's open claim. They ought to have intimated the trust to the Glass house Company, which in this case was the debtor, in order to give it validity. This they had not done. The partnership was dissolved too at the time of the assignation, and even if Redfearn had had notice of the alleged secret trust before, he would have been justified in considering the share as belonging to David Steuart alone, after the dissolution of the partnership. But suppose the partnership had not been dissolved, and Redfearn had notice of the trust (which he had not in fact), still the assignation of this share would have been good against the partners, as it was made by one of themselves for valuable consideration, and there was no [55] pretence for saying that the transaction was vitiated by fraud. By the Law of England one partner might no doubt bind the firm under the above circumstances; and he cited Erskine, B. 3. T. 3. sect. 20., where it was stated as the Law of Scotland, that a partner so disposing of the partnership property was answerable to the other partners, but that the purchaser was secure.

It was admitted that David Steuart appeared to be the sole owner of this share, and that he assigned over the security absolutely, for, by the Law of Scotland, after intimation the property was as completely transferred as a moveable by delivery. By the formal notice to the Company following the assignation, the cedent (assignor) was entirely denuded of the property. It was a remarkable feature in the Law of Scotland respecting matters of this kind, that though the cedent divested himself by assignation, yet, if the subsequent intimation was delayed, he might make another assignation, and if this was regularly intimated, it would prevail against the prior assignation where that solemnity had been neglected.

The right of a creditor might be qualified by a counter-claim, entering into the nature and essence of the obligation, as in the case of a bond creditor giving a back bond. The obligation on the debtor was minus the counter-claim on the creditor. There was another class of obligations of a different description. Of that kind was the claim of a prior assignee without intimation, which was good against the cedent, but not against a subsequent assignee who had completed his right. Of this description [56] too, were the various claims of creditors, who had not used the proper diligence, and such, in the present case, was the claim of the partnership of Steuart and Company, a claim which had not been intimated, and was of no validity against an assignation which had been intimated.

Mr. Leach (for the Respondents). It was admitted that the share in question was the property of David Steuart and Company; and though the partnership had been dissolved, it was the property of the partnership until the whole of its debts were paid. Suppose it were a case of English law. - The equitable right of the Company stood in the name of Steuart alone, and he attempted to assign it for his own purposes. What would be the effect, if Bank, South Sea, or any other stock were assigned in this way? If it rested in mere assignment, without transfer in the books, what would be the right of the assignee? The assignor would be a trustee for the assignee, to execute for him all the beneficial interests that he could part with. But suppose the assignor had no beneficial interest, the assignee in that case would be merely a second *cestui que* trust, with an interest subject to the prior equitable claim. Here then was a prior equity in the Respondent, Somervail; and the Appellant could only demand what should remain to Steuart after winding up the partnership concern.

The law of Scotland was originally the same with that of England, with respect to the assignee of a bond. The assignee was *procurator in rem suam*, and could only sue upon the bond in the name of [57] the assignor, or principal. Now, however, by the law of Scotland, the assignee might sue in his own name; still, however, nothing was transferred but a right of action, and the liberty to sue in his own name instead of that of the principal. But they contended on the other side that the absolute property was transferred by their assignment, as much as that of moveables

by the delivery, or land by the conveyance : and that they held it in the same way against all secret trusts. This was the question to be examined.

Chancellor. By what suit could Somervail have enforced his claim against his partner Steuart ?

Mr. Leach. In England it must have been by bill in equity, as one partner could not bring an action against another. The Court of Session being a compound court of both law and equity must have some mode of settling the rights of partners, as against each other. What that form was he could not then state.

Chancellor. The Court of Session had completely reduced the deed, considering it as an absolute legal transfer. At any rate it ought not to have been entirely reduced, for even if the view taken of it by the Respondent should be correct, Mr. Redfearn had, in respect of it, a claim upon what might remain to Steuart after closing the partnership accounts.

Mr. Leach. They had no objection, on the part of the Respondent, to a declaration that it should only be reduced *pro tanto*. All they contended for was, that the share in question ought to be subject to their prior claim as far as that claim went.

[58] Lord Redesdale. The question was, whether the intimated assignation did not extend to a complete transfer : and whether the security was not therefore the same as if a complete sale for valuable consideration had taken place. The action went to the total reduction of the bond. Could they have succeeded in the multipounding without the reduction.

Mr. Leach. The Scotch Court thought not : and, here the bill of interpleader did not decide the right of the parties : but only put the right in a train of being decided by some other process.

Chancellor. It appeared by the articles of partnership of the Glass-house Company, that the partnership of Steuart and Company could not be owners on the books. If, then, the Glass-house Company made it a part of their contract that their shares should be held only by ostensible individuals, and that none of these secret trusts should be set up, would not the Glass-house Company lose the effect of that provision if the individual could not absolutely assign ?

Mr. Leach. No doubt but a company might make a provision that their shares should be held by individuals not only in name but in interest, as in the case of some of the Fire Companies here. But as he understood the articles of the Glass-house Company, the provision was merely that each share should stand in the name of an individual, without reference to the interest, any farther than that it should be represented on their books by an individual. It was not likely that trusts should be excluded, since, by such a regulation, the Company would deprive themselves of one obvious mode of [59] increasing their capital. It was alleged on the part of the Respondents, and not denied, that Steuart never pretended that he purchased for himself alone : and that the Glass house Company were aware of the trust. But he submitted, that as the articles were not introduced into the pleadings, they ought not to be noticed at all.

Reverting to the course of his argument, he insisted that neither by the law of England, nor that of Scotland, could a trustee assign a greater interest than he himself had : and he put this case : suppose he (Leach) gave a bond to A. an executor, for the repayment of money lent : that the money advanced by A. was not his own, but taken from the assets of his testator : that A. on the same day executed a back bond, declaring the original bond to be held in trust for those claiming under the will : that A. then assigned for valuable consideration to B. delivered the bond, and intimated the fact to him (Leach), and that the *cestui que* trusts intimated to him not to pay : the claim of the *cestui que* trusts would be preferred, as they had a prior equity : and yet here the competition was not between B. and the debtor : it was nothing to the debtor to whom he paid : the competition was between B. and the *cestui que* trusts, and they might successfully contend that A. could assign no higher interest than he himself possessed.

The counsel for the Appellant cited neither text writers nor cases in support of their doctrine, that a prior equity could be defeated by a subsequent assignment. What they said was, that the passages from text writers, and the cases cited on the part of [60] the Respondents, did not apply to the present case, but all related to questions between the debtor and creditor in the obligation. They admitted that, as

to the Glass-house Company, the assignee here could only be in the same situation as the cedent (assignor), but said that his claim was complete as against the *cestui que trusts*. But in the case which he had put above, the competition was not between the original debtor and the assignee, but between the assignee and third persons, the *cestui que trusts*; and yet the claim of the *cestui que trusts* would be preferred by the Law of England, and also, as he contended, by the Law of Scotland. The Law of Scotland was, in this respect, the same as the Law of England, with the exception that by the Law of Scotland the assignee of a bond might sue in his own name. Redfearn was not a vendee: he only took the assignment as a security, and he was bound to give two months notice before he could sell the subject of the assignment. It was objected that this was a secret trust; but why should not a trust be constituted as well by writing in the partnership books as by deed?

In answer to a question from the Chancellor, Whether the partnership of Steuart and Company could have interfered in the sale of this share? he said that they could not, provided, by the articles of the Glass-house Company, all trusts of their shares had been excluded. But such trusts were not in fact excluded.

In regard to the effect of the intimation, they took it for granted on the other side, in arguing that point, that the share had at first belonged to Steuart individually, whereas the very reverse was the fact, [61] for Steuart was only a trustee for the partnership of Steuart and Company. Then they said that a partner might assign the partnership property, and that therefore the assignment was good: but he denied this. A partner could only assign in things assignable under the authority which he had to use the partnership name; and he must sign as for the Company. Steuart, however, signed merely as an individual, and could not bind the partnership.

Mr. Horner (for the Respondent). One fact had not yet been noticed, which was, that a balance due upon the price of the share stood in the Glass-house Company's books as the debt of Steuart and Company: which proved that the share was understood by the Glass-house Company to be in the firm of Steuart and Company. This fact had been stated in the Respondents' condescendence and had not been denied.

Sir S. Romilly. We had put them on the proof of that allegation, and it was never proved.

Mr. Horner. The Lord Ordinary, by his last interlocutor, had approved of the accountant's report, and this was one of the facts stated in it. This proved what view the Glass-house Company had of the ownership of the property. The very form of the action, indeed, shewed that they conceived the share might be held by an individual in trust; for why have recourse to the action of multiple-pounding, if they had conceived that by their articles the share belonged solely to Steuart, and therefore to his assignee?

With respect to the reduction it was necessarily absolute. A partial reduction was unknown in the [62] Law of Scotland. The ground of the reduction was, that Steuart had no right to assign. The reasons of reduction were sustained because David Steuart, the cedent, not being sole owner of the share in question, had been guilty of a breach of trust, in assigning that to which he had no proper title. A decree in multiple-pounding would not be sufficient: for although the Glass-house Company might safely pay under it to the partnership of David Steuart and Company, yet, as long as the assignation remained unreduced, they needed not have done so unless they chose. Steuart might be entitled to a balance out of the partnership fund, but no specific part of it could be his, till the concern was wound up: and consequently his assignee was not intitled to hold this assignation against the partnership.

The facts were agreed upon in the Court below, though they might be questioned here again, from the nature of the appeal. Some difference had now arisen concerning them. This was one of the many instances which proved of how much importance it was to the lieges in Scotland that they should have some institution similar to the trial by jury in civil cases, in order to find the facts, that their Lordships might not be under the necessity of sending causes back again on this ground.

As to the law of the case, that had been decided in their favour by eleven judges against two: by the Law of Scotland no heritable rights that required infeoffment could pass without registration. As to moveable rights, a distinction was taken: where the *ipsum corpus* could be delivered, things passed by delivery; where the *corpus* could not be delivered, they passed by assignation; and intima-[63]-tion

was necessary to complete the transfer. An assignation was now therefore different in Scotland, from an assignment of a chose in action in England. In Scotland it was a direct transfer of the whole right, title, and interest of the cedent : and an assignation, indeed, had words of direct transfer, which were not to be found in an English assignment : for instance, the words " (surrogating and substituting) in my full right and place in the premises." But the cedent could not substitute his assignee in more than his full right : nor pass to his assignee any greater interest than he himself possessed. Steuart, in the present case, was a mere trustee : and where a cedent appeared to be a mere trustee, either by a subsequent declaration, or from the result of facts and circumstances, (for the judges admitted that it made no difference whether the trust was constituted by deed or in any other way,) his assignee could take nothing except whatever beneficial interest belonged to the cedent.

To prove this to be the law, the following authorities were cited for the Respondent : *Macartney v. Creditors of Macredie*, 26th Nov. 1799. (*Gray v. Ferguson*, 31st Jan. 1792 : (these two cases were cited in illustration, from the state of the law respecting landed property, of the common law principle respecting the transmission of personal property.)—*Stair*, b. 1. t. 10. sect. 16 ; and b. 4. t. 40. sect. 21. —*Bankton*, b. 4. t. 45. sect. 34—102.—*Erskine*, b. 3. t. 5. sect. 10.—*Keith v. Irvine*, *Durie*, 23d Dec. 1635.—*Scott v. Montgomerie*, *Stair*, 14th Jan. 1663. *Diet.* vol. 2. p. 64. *voce* Personal and Real.—*Street v. Hume* and *Bruntfield*, [64] *Stair*, 9th June, 1669.—*Gordon v. Skeen and Crawford*, 6th July, 1676. *Diet.* vol. 2. p. 64.—*Mackenzie v. Watson and Stuart*, *Stair*, 5th Feb. 1678.—*Monteith v. Douglas and Leckie*, *Forbes and Fountainhall*, 8th Nov. 1710, *Erskine*, b. 3. t. 6. sect. 19.—*Sir S. Baird v. Creditors of Hugh Murray*, *Kaims*, 4th Jan. 1744.—*Alison v. Fairholm and Malcolm*, Nov. 1765.—*Henderson v. Gibson*, 17th June, 1806.

Sir S. Romilly in reply. He had not before heard of the fact that the Glass-house Company considered Steuart as a trustee ; but at any rate it was no where stated that the trust had been intimated to them, and therefore the fact was immaterial.—He still said that the authorities cited on the other side were entirely inapplicable. The Appellant was called upon to produce authorities in his favour, but he had no occasion to produce them : he had got a legal conveyance. When he heard them, on the other side, insisting upon the effect of an intimated assignation, he could hardly help thinking that they had forgot on which side they were counsel. That was exactly the Appellant's case. The Appellant had got a complete legal conveyance, by an intimated assignation. Their trust was not intimated ; and their equitable claim could not prevail against a legal conveyance. The Glass-house Company might have the strongest reasons not to allow their shares to be held by partnerships. He remembered that the house of Sir Charles Raymond had lost several £100,000's by some of their shares being held by a banking-house partnership which had failed, and the [65] house of Sir Charles Raymond was answerable for the debts of that partnership. As to the case being decided against the Appellant by eleven judges against two : he did not think that fact very material. Those who did not vote were to be taken as being on the side of the Appellant : having only refrained by a sort of judicial politeness, when they found that the majority was decidedly against them. But he had himself been so often concerned in cases where the unanimous decisions of the Court of Session had been reversed, that he was not apprehensive of suffering from any particular bias towards the opinion of the majority.

Lord Redesdale. If this share had been the unqualified property of Steuart, no doubt it would have vested in Redfearn, against all other persons, according to the law of Scotland, in regard to this species of security. The extent of the reduction did not appear, whether it was partial or absolute : if absolute, it could not be supported, as Redfearn had a claim upon it, at least, as far as Steuart's interest extended. But however the reduction might be qualified, the interlocutors appealed from were not founded on any principles or decisions applicable to the case.

It was clear that, by the law of Scotland, an intimated assignation denuded the cedent of all right, in the subject of which the assignation was made : and as far as he could learn from what had been said at the bar, and from his own researches, there was no dictum nor authority of any description, to show that an intimated assignation for onerous cause [66] could be defeated by a latent equity. This case was there-

fore a new one, and had produced in the Court below a new decision, establishing a new principle, which their Lordships would probably not be very anxious to recognize, viz. that a latent equity, however unjust in its application, should defeat a *bona fide* assignee. No notice was here given of the secret trust, and the assignee might not be able by any diligence to ascertain the fact; it was totally different from an assignment by an executor of his testator's property, as that carried with it notice of his fiduciary character.

But the Judges below, however objectionable the decision in point of principle, appeared to have conceived, that they were bound by the authorities. The first text writer cited was Lord Stair, b. 1. Tit. 10. sect. 16. "The common rule of law is more rational, that the assignee *utitur jure auctoris*, and is no better case than the cedent, unless it be in the matter of probation, that the cedent's oath will not prove against him *nisi in jure litigioso*, and therefore in *personalibus* all exceptions against the cedent are competent against the assignee, even compensation itself." These last words of themselves showed, that Lord Stair was speaking of the defence that might be made against an assignee by the original debtor, and not by a third person. Then, after stating that personal exceptions, such as the *exceptio doli* in the Roman Law, are not effectual against singular successors in feudal rights, Lord Stair added, "But in personal rights, the fraud of authors is relevant against singular successors, though not partakers, nor conscious of the fraud when they purchased, [67] because assignees are but procurators, albeit *in rem suam*, and therefore they are in the same case with their cedents, except that their cedents' oaths after they were denuded cannot prejudice their assignees." This still related to the defence that might be made by the original debtor against the assignee, and not to the claim that might be set up against him by a third person. The passage from Bankton was of the same description: "One who buys from another who is not the proprietor, must restore it to the owner, without recovering the price from him; and has only his recourse against the seller, whose condition he ought to have known. Our law secures persons by the records, as to lands and heritable rights constituted by infeoffment, so that they may purchase the same safely; and one who purchases the species of moveables from the proprietor, is safe against all his personal contracts touching the same; the modern rule being that *mobilium non habent sequelam*, the commerce of moveables must by such means be obstructed: but as to personal rights one must follow the direction of this rule, and inquire into the circumstances of the person with whom he transacts about them. In those he comes only into his author's place, and can have no better right than he. *Utitur jure auctoris*, according to another of our rules, and even an onerous purchaser of such right is subject to all the objections and exceptions that lay against the right in his author's person, otherwise vouched than by his oath, which however is good against a lucrative acquirer of the same." And in an after paragraph of the same title, Lord Bankton said, "All ex [68]ceptions or objections, even such as are called merely personal in the civil law, that lie against the author in personal rights, as personal bonds, etc. are good against his assignees, whether for a valuable consideration or not." It was manifest that all this applied to the exceptions or counter claims which the original debtor might have against his creditor, and not to another title set up by a third party in competition with the claim of the assignee, which was the case here.

The whole of the cases cited in favour of the Respondent were answerable in the same way. One attempt had been made to draw an inference favourable to the Respondent from the law in regard to stolen goods, sold in market overt; but the vendor of stolen goods sold that which was not his, and to which he could make no title whatever; and the general principle was, that the original owner should have his property back again, subject to the protection which the law afforded to sales in market overt. But in the present case Steuart had a complete legal title, so that the argument had no application.

But the law was in principle against Somervail: the right of Somervail, even upon the Respondent's own statement of his case, amounted to this, that he might have compelled an assignment for the partnership use to a trustee. By the rules of the Glass-house Company, he could not have compelled an assignment to the partnership directly, and therefore it must have been made to a common trustee. But by the law of Scotland, an actual assignation not intimated could not stand against

a second assignation if duly intimated : and even an arrest-[69]ment excluded the assignee, unless his assignation had been intimated. So in a competition of assignees, the question turned upon the priority of intimation, and in competition of assignees and arresters, upon the priority of dates as between the arrestment and the intimation. Suppose two assignees.—the prior assignation is not intimated, the second is intimated : if the first had been intimated, the second would have been defeated ; but for want of that intimation the second clearly had the preference, for his author could not controul his own assignation, and the debtor was bound by the intimation.

This case had been compared to that of an executor assigning the debt of his testator ; but the resemblance was not complete. From the face of such a transaction, every one must know the fiduciary character of the executor, and that the assignment was made in that character, unless he was a creditor and had a right to retain.

Somervail carrying his right to the utmost possible extent, could not be in a better condition than an assignee without intimation ; and Redfearn, whose assignation was intimated, had clearly the preferable right. It was absurd then to say, that a person having the qualified right of a latent trust should be preferred to Redfearn, who had an intimated assignment. On these grounds it appeared to him that the interlocutors appealed from, must be reversed.

Lord Eldon (Chancellor). The question arose respecting the right to a share in the Edinburgh [70] Glass-house Company, purchased for a partnership, but in the name of an individual only, legally standing in the name of that individual, who, in consideration of a sum of money assigned the share in question to a third person : which assignation was in the usual manner duly intimated to the Glass-house Company, from whom the value of the share was due and owing. Mr. Leach had objected to any reference to the articles of the Glass-house Company ; but when they had to consider the law in regard to the transference of rights to real and personal property, it was fit that they should ascertain from the articles how far this share was assimilated to any other personal property. It appeared from these articles that this Company had been formed in 1726, for twenty-one years, and after the expiration of that term, had been continued for such indefinite period as might be agreed upon ; the termination to be notified by eight members, who should have it in their power to put an end to the society. Their property consisted of real estates, such as land, warehouses, and other premises ; and of personal or moveable property, such as bottles, debts due to them, etc. It was proper then before deciding upon the title to this share, to consider how far the interest was a personal debt : it could only be considered as a personal debt in this way, that in as much as no single partner could put an end to the Company, but might withdraw and demand the value of his share, the Company must be considered as his debtors to the amount of his interest. If then the Glass Company was the debtor, the question here was not between the assignee and [71] the debtor, but between the assignee and a person setting up a collateral claim in the nature of that of a *cestui que* trust. No intimation was given of this claim, and it appeared to him that the Glass-house Company was not bound to accept of it if it had been given. The Glass-house Company, if told that this was claimed as partnership property, might say that they were not bound to take notice of any intimation on a partnership or trust account, as their articles and their policy admitted only of their shares being held by individuals absolutely. They might say that, if an assignment were made of a share to an individual, they would take notice of it, and receive him as one of the Company ; and even then they were not bound to receive him, for they might refuse to accept of him, only paying him the value of his share.

The question here was—not between a debtor of Steuart and his assignee, but between the assignee and one possessing a secret equity : this disposed at once of the argument respecting an assignment by an executor.

It had been said that the Glass-house Company debited the partnership of Steuart and Company in their books with a part of the price of the share in question. That circumstance, however, did not render them debtors to the partnership of Steuart and Company, for others were to be governed in their proceedings of this kind by the known rules and policy of the Glass-house Company, and had nothing to do with the manner in which any transaction was entered in their books by themselves. But

it did not appear that this secret trust had ever [72] been intimated to the Glass-house Company at all, even if they had been bound to accept of that intimation, which they were not.

He would ask then how the authorities cited for the Respondent could possibly apply? A. assigns a bond to B. and B. to C.—C. knew that he was taking that of which no part, or of which some part or the whole might have been discharged. *Utiur jure auctoris*. He took what interest B. had in the bond and no more, and this was no hardship, for it was his fault if he did not apply to the known debtor to ascertain how that matter really stood. So with respect to back-bonds the same answer applied. There were cases of back-bonds upon assignments of back-bonds; but he had looked very anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignments, and he had found none. An assignation would even defeat an arrestment, if intimated before the arrestment, as the arrestment was only a prohibitory diligence. If latent equities were suffered to prevail against assignments, the effect would be that nothing could ever be assigned; for as long as their Scotch neighbours retained any part of their characteristic shrewdness, they would never take an assignment if they were aware that by means of latent equities such assignments might give them nothing. He admitted that if the doctrine contended for on the part of the Respondent had been borne out by the authorities, the inconvenience must have been in the mean time submitted to, and the remedy derived from the Legislature. He had found how- [73]ever no case nor authority of any kind to support this position—that an intimated assignation might be defeated by a latent equity, which as being latent *ex necessitate* could not be intimated.

Judgment of the Court below reversed.

Agents for the Appellant, SYKES and KNOWLES.

Agents for the Respondents, SPOTTISWOODE and ROBERTSON, Sackville-Street.

ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

STUART, Esq. and Others, — *Appellants*; MARQUIS OF BUTE, and Others, —
Respondents [June 28, 1813].

[Mews' Dig. xv. 1249, 1254. Distinguished in *In re Prater*, 1887-88, 36 Ch. D. 476; 37 Ch. D. 489; and see Watson, *Comp. of Eq.* 1327-8.]

[Testator, having devised certain freehold manors, lands, collieries, etc. bequeathes waggon-ways, rails, staiths, and all implements, utensils, and things, which, at the time of his death should be used, or employed, for the working and management of the collieries, and might be deemed of the nature of personal estate, to be enjoyed by the persons respectively entitled under the will, to the said manors, lands, collieries, etc. Question, Whether coals resting at the pits and staiths, debts due to the collieries, money (the price of coals sold) lying in the Tyne Bank, and other particulars enumerated, passed by this bequest under the general word THINGS?]

Lord Bute, by will, dated the 27th May 1789, devised and bequeathed his freehold and leasehold collieries, lands, tenements, and heredita-[74]-ments, and parts and shares of freehold and leasehold collieries, lands, etc. in the counties of Northumberland and Durham, to certain trustees, their heirs, etc. upon trust, to grant a certain rent-charge out of these estates, and subject thereto, to the Countess of Bute for life, and after her decease, for all and every the children of his son James Archibald Stuart, except the eldest for the time being, according to the appointment of their father;

and in default of, or until such appointment for all, except the eldest, during the life of their father, equally, share and share alike, as tenants in common, their executors, administrators, and assigns, according to the nature and tenure of the said property.

The testator then proceeded in the following words. " And I give and bequeath all and every the waggon ways, rails, staiths, and all implements, utensils, and things, which at the time of my death shall or may be used, or employed, together with, or in, or for the working, management, or employment of any of the said collieries, or shares of collieries, and which are, or shall, or may be deemed or considered to be as, or of the nature of personal estate, unto my executors hereinafter named, upon trust to permit and suffer the same to be from time to time held, used, or enjoyed by the person or persons respectively entitled by virtue of this my will, to the use and enjoyment of my said several freehold manors, messuages, collieries, lands, and hereditaments, or parts or shares of freehold manors, messuages, collieries, lands, and hereditaments in the said counties of Northumberland and Durham. [75] as far as the nature of the said property and the rules of law and equity will admit."

And the testator gave the rest and residue of his personal estate to his son, the Honourable Charles Stuart (the father of the Appellants) for his own use and benefit : and appointed his wife, and his sons, the Marquis of Bute and Charles Stuart, and his brother, James Stuart Mackenzie, executors of his will.

In 1793 Lady Bute exhibited her bill in Chancery. (it was apparently, a friendly suit,) praying " that her rights under the specific bequest in the will, might be ascertained and declared : and that an account might be taken of all the stock, utensils, implements, and things to which the testator was entitled in respect of the collieries : and that she might be declared entitled to the whole thereof for her life : or, if the Court should be of opinion that the whole did not pass under the specific bequest, then, that such parts as did not pass, might be ascertained : and that the complainant might be indemnified in permitting the same to be applied as part of the general personal estate of the testator." The residuary legatee (the Appellant's father) by his answer, insisted that corn, hay, horses, coals resting at the pit's mouth, and at the staiths, money due from the several fitters, money in the Tyne Bank, balance of cash in the cashier's hands, balance due from several persons, timber and deals, oil and candles, and also all waggons and waggon materials, waggon ways, and materials belonging thereto ; fire-engines, machines, gins not erected or fixed : ropes ; iron or materials at the pits : stables, [76] store-houses, horse trappings, etc. etc. not actually employed or used in working the collieries at the time of the testator's death, did not pass : and he therefore claimed them as residuary legatee.

The cause was heard before Lord Loughborough who ordered a reference to the Master to inquire and state what were the waggon ways, staiths, rails, implements, utensils, and things, which, at the time of the testator's death were used or employed in working or managing the collieries, and which might be deemed to be of the nature of personal estate : and particularly, whether any, and which of the articles enumerated in the schedule to the bill, (including those stated in the answer,) were used and employed in working and managing the collieries, and in what manner : and the Master was also ordered to state with what funds, and under what contract or partnership the collieries were carried on at the time of the testator's death.

The cause afterwards came on for further directions on the 2d of July 1794, and afterwards on the 27th April 1796, on each of which occasions the Master was ordered to review his report, and to state which of the articles were necessary for carrying on the collieries, and in what respect, and why they were necessary. The Master, by three several reports, dated respectively the 5th March 1794, the 30th Nov. 1795, and 29th April 1796, stated that the collieries were carried on under articles of agreement made in 1726, between Mr. Wortley, of Wortley, in the county of York, (from whom Lord Bute purchased,) and other persons named : that there never was any capital previously formed for [77] conducting the partnership concern : but that the partners from time to time advanced what was necessary in equal proportions : that the concern was managed by agents, who made dividends from time to time, retaining funds sufficient to answer probable exigencies : that there was not, at any time, any certain sum left in the hands of the fitters : but that the partnership always drew the money from them as fast as they could get it : that the agents for the partner-

ship issued from time to time to the cashier, by draft on their banker, money for making the necessary payments for the use of the collieries : that the agents deposited all the money received from the fitters in the Tyne Bank, and drew it out as there was occasion, and that they made the dividends at uncertain times according as it appeared to them, that there was money sufficient in their banker's hands for that purpose ; and that the whole of the monies and articles enumerated were necessary for carrying on the collieries. The material words of the original agreement were set forth, from which it appeared, that the coals might be separated for each partner the moment they were raised, that they might be led to separate staiths, and vended separately.

The residuary legatee excepted to the Master's last report, " for that the said Master " had stated that all the particulars, etc. etc. were necessary for carrying on the collieries, " whereas he ought to have excepted therefrom (as not being specifically necessary, " or falling within the words of the said bequest) the several articles enumerated in " the schedule to the answer to the original bill, etc. etc." The Chan-[78]-cellor on the 1st of June 1796, over-ruled the exception, and by a decretal order of the 18th July 1796, confirmed the Master's reports of the 30th November 1794, and 29th of April 1796. In the course of these proceedings Lady Bute and the residuary legatee died, and the suit was duly revived against all proper parties.

The cause was afterwards re-heard before Lord Eldon, who on the 1st January 1806, affirmed the decretal order of the 18th July 1796, but with considerable doubt ; and the representatives of the residuary legatee therefore appealed to the Lords.

Mr. Richards for the Appellant. This was merely a question of construction ; and he argued that, by the word things, must be understood things *ejusdem generis* with those previously mentioned. The decision of Lord Loughborough had been examined by his successor : (11 Vesey, 657.) and if the latter had heard the cause first, it was probable that it would have been decided the other way : under the circumstances, however, the judgment of Lord Loughborough was affirmed, and an appeal recommended, that the opinion of the twelve Judges, if necessary, might be taken on the construction of the will. The testator was speaking of implements, utensils, and things, and he did not see that a sum of money could, consistently with the cases, pass under these words.

Mr. Courtney. The Judge appeared to be influenced by another cause, (5 Brown, P. C. 534. Case of Mr. Wortley's will,) with which this had nothing to do, when he decided that the testator be [79] queathed the whole of that, of which he had become the purchaser. That was not a safe ground unless their Lordships were satisfied from what appeared upon the face of the will itself, that the testator really intended to give all he had bought. But the present bequest did not at all refer to what he had bought.

The general mode of construing the word things was, to consider it as referring to things *ejusdem generis* with the particulars mentioned before it. It could not be larger than the words goods and chattels, and stock in trade, and yet it had been decided that debts were not included in these words, and debts formed a great article in the present account. The debts and the coals to any extent could not be employed in working the colliery. The testator was speaking prospectively with a view to the future profits, and then, in giving what was necessary to secure these, such as the engine, etc. etc. he had a definite idea of what he was bequeathing. But if he meant any thing more large, he could not have the least idea of what he was giving : he could not, for instance, form any definite idea of the debts due to the concern ; and this was another reason why the meaning should not be extended further than the words strictly imported.

Debts did not pass by the words stock in trade : debts were not included in the words goods and chattels generally ; and therefore debts due to the concern could hardly be included in the words " in or for the working of the collieries." There was evidence indeed, that the amount of debts was not greater at the time of the testator's death than usual. [80] It would be dangerous on such grounds to give so large a construction to the word things. (Seymour v. Rapier *et al.* Bunbury, 28. Latimer's Case, 2 Dyer, 59. B.)

Sir S. Romilly (for the Respondents). Their Lordships would consider whether the testator did not mean to pass the whole of his interest in these collieries. They were carried on for the joint benefit of Lord Bute and his associates in the concern :

he had not the money itself, but an interest in the money, and the question was, whether he did not mean to pass the whole of that interest. As to the horses, hay, etc. he did not understand these to be now disputed; but they said that the debts due to the concern and the coals remaining unsold on the estate did not pass. The balances, however, and the coals, were inseparable from the interest in the collieries until a dividend was declared, and Lord Bute could not touch a shilling, but the whole was as much at the disposal of the managers as the engine, or any of the utensils employed in the work. They said that it was incumbent on the Respondents to show that this sum was necessary to carry on the work; but they admitted that some money was necessary, and therefore it was incumbent on them to show what less sum would suffice for that purpose. The cases which they cited were different from the present; here the debts were inseparably connected with the concern, and in a late case the debts were considered as so inseparable from a colliery, that they were both sold together. Brewers' leases of public houses were also considered, as part of the stock in trade on the same principle, and would be sold with the brewery, as these things [81] were necessary to carry on the trade. Lord Roslyn did not decide merely on the ground that the testator meant to pass all that he had bought, but he considered the money here, not as separate and distinct property, as money usually was, but as a part of the machinery necessary for carrying on the work. (*Wren v. Kirton*, 8 Ves. 502.)

Mr. Wetherel. This, to use an expression of Lord Kenyon, was a case by itself. It did not come within those relating to stock in trade. It was a bequest of a noble Lord, disposing of personal property, so that it might accompany the real property. He devised the colliery, not to be put an end to, but to be carried on, along with the enjoyment of the other property, and how could it be carried on without the money and debts, material to its continuation. This, therefore, was not the case of an ordinary bequest; and the observation, as to his having no definite idea of what he gave, did not apply; the intent was that the Respondent should stand in respect of the colliery, in the same situation as Lord Bute was at the time of his death; and it did not depend on him what the balances should be, but on the mode of carrying on the trade. They said that the debts were not necessary to carry on the trade; but suppose £10,000 worth of coals had been sold on a credit not run out, then the debt might be essential to the carrying on of the work, and must go along with the colliery. No trade in which it was necessary to give credit could be carried on without debts, which were therefore essential to the [82] conduct and management of the works. Latimer's case cited by them was not law now. In the other case it was true that debts were held not to be included in the stock in trade; but there it did not appear to be intended that the trade should be continued.

Mr. Richards in reply. The construction which they put on the word things was too large, and not warranted by the cases. In answer to a question from Lord Eldon, he stated that debts, balances in the hands of the fitters and others, money in the Tyne Bank, coals resting at the pit's mouth, and staiths, and whatever articles were not actually employed in the collieries at the time of the testator's death did not pass, as the bequest was confined to what was in use at the time of his death. Leases of public-houses would pass with a brewery, he admitted, but that was because such leases were a part of the trade. Possibly Lord Bute intended that all should pass in this instance, but *quod voluit non dixit*, and all the articles could not pass without giving an unusual construction to the word things.

Lord Redesdale. The difficulty was whether the money, and the subject to be converted into money, which was to form the matter of dividend, passed by this bequest. Suppose Lord Bute had been seized in fee of the collieries, and died intestate, so that the real property should go to the heir, and the personal property to the personal representative—would not the personal representative have the coals and cash? The question was, Whether he meant to give [83] what, if he had lived, he would have taken as bygone profits; and thus, to take all the bygone profits from the residuary legatee? That was a view of the subject, which had not before been taken. Was it not his meaning that Lady Bute should have the profits of all the coals raised from the time of his own death to that of the Lady? Yet according to this decision, as the coals might go on accumulating for years, she might have nothing. Was this money intended to go as a capital sum to be laid out at interest, or how was it to be applied?

Lord Eldon (Chancellor). The opinion of Lord Loughborough appeared to have been partly founded on this ground, that as the testator had purchased the whole together, he intended to pass the whole in the same manner; but that was begging the question, for the conclusion did not necessarily follow. His opinion was, that the stock got together for the purpose of being used did pass. As to the rest he had very great doubt. If these sums were bequeathed to be enjoyed along with the collieries according to the limitations in the will, *quo modo* were they to pass? Were they to remain in the Bank, or what was to be done with them?

When he considered the latitude to which this would lead in the construction of the word things, he certainly felt great doubts as to the correctness of this decision, even though it rather appeared to him that the testator intended to pass the money, coals, &c.

Lord Redesdale. The difficulty arose upon the construction of the words. A testator when he was [84] desirous of passing the whole of his personal property, would naturally do so by the general expression. When he enumerated several particulars, the presumption was that he intended to exclude something; and it was settled on decided cases, that the word things must be understood as applying to things *ejusdem generis*, with particulars previously specified.

Another circumstance which had been much overlooked was the purpose for which the bequest was made. It was made to be used, or enjoyed, by the persons to be respectively entitled to the collieries. Several persons who were to take the freehold were to take these things along with it. Now, how could they take the debts, balance of cash, &c.? It could only be by laying out the money at interest, which was not expressed in the will.

But then it was said that he had an undivided third, which he had no right to separate. But he had a right to separate the coals which were raised, and the partners might have carried them to different staiths; otherwise the coals might be retained for a great number of years, and some of the persons in the limitation might have no benefit from them whatever. He thought therefore, that the testator did not intend to dispose of his whole interest in the colliery; if he had so intended, he might have done it by the simple words "the whole of my interest in the collieries." But the words used were not applicable to the whole of his interest.

This was an important question with a view to other cases; for if the words were to have the operation [85] contended for, a man's whole property might go where he never meant it should. Suppose Lord Bute had no property but the colliery, the whole of his personal estate would pass under that latitude of construction. And so in the case of a bequest of this kind by a manufacturer, all the money due for manufactured goods and the whole of his personal estate might pass.

Lord Redesdale (after stating the case and proceedings). The question was, Whether the decretal order of the 18th of July 1796, was right or not? With respect to some of the articles, there was no doubt but they must pass; as to others, it was contended they were not meant to pass. The question then was, what was the intention of the testator as it was to be collected from the will. The directions in the will were, that the things which the testator meant to pass should be held in trust for those who should be entitled to the manors, messuages, collieries, &c. mentioned in the will. And the decision appeared to have been founded on the supposition that among the articles and things in question, were to be included the by-gone profits not received by him before his death. After the best consideration, however, that he had been able to give the subject, he could not go the length of that decision. If such had been the intention of the testator, it was natural for him to have said so in a few comprehensive words. But as there was an anxious enumeration of the particulars to be passed, it was rather to be presumed that he did not intend to pass the whole. Some of the articles too were incapable of being [86] enjoyed according to the limitations in the will, for the testator directed that they should be enjoyed by the persons who held the freehold manors, &c. in succession; and these, it would be remembered, were devised to the Countess of Bute for life, then to the children of J. A. Stuart, according to the appointment of their father, and in default of, or until such appointment, equally during his life; so that as long as the father did not exercise his power of appointment, and he might not choose to exercise it at all, the absolute property would be in suspense, and that suspense might last till his death.

How then could these coals and sums of money be held and enjoyed with the freehold manors, etc., according to the course of succession directed by the will?

An impression appeared to have been made on the mind of the judge, who originally decided this cause, that the question had been previously determined in another cause which arose on Mr. Wortley's will (5th Brown P. C. 534). There, however, the words were different, and no complete decision upon the point took place at all. As the words here were so very different, they might have been expected to have led to a different, rather than a similar determination. That case might therefore be laid entirely out of view.

Suppose the testator had been tenant for life of the collieries, and that upon his death, the interest in them had of course gone to another, the coals raised before his decease, and resting at the pit's mouth, would not go along with the collieries, but remain as part of the personal estate of the tenant for life. This would also be the case with his share of the balances due from various persons, and [87] money in the Bank, which were still nearer the state in which the produce was usually divided. The wages of the workmen, it was said, must be paid out of this fund. But, so the case would be, if the testator had been tenant for life only, or tenant in fee and had died intestate, though, under these circumstances the money would have gone to his executors. It appeared to him that this formed no ground for including the money in the Bank, coals at the pits, and staiths, and balances due to the concern, among those things which passed by this bequest. The reference to the Master to inquire what was necessary for carrying on the collieries went beyond the words of the will; for the testator did not say that every thing which was necessary should pass, but only such things as might be used or employed in the working and management of the collieries at the time of his death.

It seemed to him therefore clear upon the whole, that the intention was to give those articles only which might be enjoyed with the colliery as long as they lasted; and that the enumeration ought not to be extended beyond the usual construction of the word things, that is, things *ejusdem generis*. Horses, hay, corn, etc., were not properly bygone profits, but to be used and employed in working the collieries, and therefore passed. They were in their nature capable of enjoyment in succession as long as they lasted, and might be included among those things which passed, notwithstanding the argument to the contrary. But the coals raised, the debts due to the concern, and money in the Bank, did not pass, as they were not in their nature within the [88] meaning of the word things as used in the will, but rather bygone profits.

If these things were taken as having passed, they could not belong to Lady Bute absolutely. They must be used in succession, and the money and value of the coals must be secured for that purpose, and how were they to be secured? Were they to be laid out in the funds, or in what other way? As to this, the will gave no directions. He could not conceive how these articles could be applied to the uses to which the property really meant by the testator to pass was destined. It was the intention of the testator that the collieries should be going on; but a bequest of the money and coals already raised, was not necessary for the purpose. That object was secured by the conditions of the partnership. The only question here was, To whom the dividends out of these bygone profits were to be made? When the coals raised at the time of the testator's death were sold, and the debts or balances due to the concern were paid, and the money lodged in the Bank, the whole formed an aggregate fund to be applied, first, to the payment of the debts due from the colliery, to the payment of the wages of the workmen, and the purchase of the necessary new implements; and even these new implements were not given by the will, but only such as were used and employed at the time of the testator's death. Those purchased after his death could not answer that description.

The ground upon which it was imagined that these things passed was, that the collieries could not be carried on without the money. This was true; and the executors could not divert it from that appli-[89]cation; but it did not follow that it therefore passed by this bequest, though they could not divert it, nor get possession of any part of it until a dividend was declared. With respect to the property given by the word things, as applicable to waggon ways, etc., its destination was the working of the collieries, and it might be used and enjoyed in succession for that purpose as

long as it lasted : but the destination of the other things, such as money, etc. was profit. They were not of a nature to be used in working the collieries, but of the nature of dividends.

Such being the impression on his mind, he differed to that extent from the order over-ruling the exception. The decree of the 18th July 1796 therefore went beyond the proper limits, and he should propose to find, that the coals resting at the pits and staiths at the time of the testator's death, valued at £2899 12s. 8d. ; money due from the several fitters, amounting to £10,371 13s. 8d. ; money in the Tyne Bank, amounting to £5512 19s. 6½d. ; balance of cash in the cashier's hands, £656 17s. 4d. ; and the balances due from several other persons, amounting to £5632 10s. 10d., did not pass : but that the testator's share of these particulars formed part of the general residue of his personal estate, applicable first, to the payment of the debts of the collieries ; then to the payment of his general debts and legacies, and that the remainder went to the residuary legatee : and thus far to reverse the decree of the Court below, and affirm it as to the rest.

This fund was certainly applicable in the first place, to the payment of the debts of the collieries, as the partnership had a specific lien upon it for this [90] purpose, in preference to other creditors. Particular directions would be necessary, as Lady Bute had received the dividends, though, as tenant for life, she ought to have received only the produce of the collieries from the time of the testator's death ; and therefore the enjoyment had not been according to what he conceived to be the proper effect of the testator's will. But the Court below would make the proper order in this respect.

This was a case of considerable importance : for it was difficult to say to what extent the principle of the decree, if suffered to stand as it was in the Court below, would lead in other cases. For instance, if a person gave a manufactory, there too it might be argued that it could not be carried on without goods and money ; and thus all a man's goods and money, and the whole of his property might pass under the words " manufactory, and things employed in it," though it might be his intention to give only the manufactory, with the things actually employed in it, to one child, and to suffer the rest of his property to go to his other children. This would be monstrous, and yet the decree, if allowed to remain as it stood, would be a decisive authority in favour of such a construction.

Lord Eldon (Chancellor). He thought himself highly fortunate in having the assistance of his noble and learned friend, in whose view of the question he completely concurred. As this judgment would affect another cause now depending in the Court of Chancery, it was expedient that the terms of it should be settled with the utmost possible accuracy, [91] and he proposed that the matter should stand over for that purpose.

This day the judgment was read, and was in substance and effect conformable to the suggestion of Lord Redesdale. [See 11 Ves. 656, 666.]

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

EARL OF MORTON,—*Appellant* ; STUART, Esq.,—*Respondent* [June 21, 1813].

[3 Scots R. R. 25.]

[Declarator of immunity from an alleged right of way as far as respected a person or persons claiming in virtue of a particular tenement, and prayer that (if the right existed) the uses to which the ways were to be applied should be ascertained and defined. Defence, claiming the right by prescription to two ways ; one to a harbour, the other to a bay of the sea, in favour of the proprietors of grounds and houses in and about a certain village, in which description the defender was included. Question, Whether on the ground of the sea-shore being *publici juris*, or for any other reason assigned, this is sufficiently explicit, or whether it is not necessary in pleading to state the precise and particular uses or purposes for which the right of way is claimed, before the parties can be permitted to go to proof.]

The Appellant, in 1806, brought an action of declarator of immunity from an alleged servitude, stating, " That his barony of Aberdour was nowise burthened with " any servitude or privilege in favour of the lands of Hillside ; and that the proprietors " or inhabitants of these lands had [92] no legal right or title to exercise any servitude or privilege whatever upon the lands and barony of Aberdour." The summons (declaration) further stated, that James Stuart of Dunearn, present proprietor of Hillside, nevertheless insisted for and was attempting to establish some sort of right to a privilege or servitude of two roads through the pursuer's property, of which the one was described as the Fishergate, and alleged to lead from the village of Easter Aberdour to Aberdour-harbour ; and the other to the bay called Whitesands-bay. And the summons concluded with a prayer to have it found, and declared that the Appellant's property was free from any such privilege or servitude, etc. etc. Which being so found and declared, that the proprietors and inhabitants of the lands of Hillside should be prohibited from claiming, using, or attempting to use these roads, " or otherwise, that if the defender (Respondent) should duly explain, condescend " upon, and instruct any right to the said pretended roads, or either of them, then " that the precise course, nature, extent, objects, and purposes of such servitudes or " privileges, as well as the particular seasons and manners of exercising the same, " which may be found competent to the proprietors or inhabitants of the said lands " of Hillside ought and should be exactly ascertained, limited, and defined." The Respondent stated in defence, that he had acquired a right by prescription to the roads in question. In December, 1806, the action came before Lord Meadowbank, Ordinary, who appointed the Respondent to state in a condescendence what he claimed, and what he offered to prove. The [93] condescendence was accordingly given in ; and the Respondent, after describing the course of the roads, " offered " to prove by the parole testimony of witnesses, that these roads had been uninterruptedly used ; the one leading to the harbour as a road for foot passengers, horses, " and carriages, and the other to Whitesands-bay, as a road for foot passengers, by all " the proprietors of grounds or houses situated on the east side of the rivulet called " Aberdour Burn, and lying in the parish of Aberdour, and particularly by the " defender and his predecessors (to whom the description applies) for a period beyond " the memory of man."

The Appellant objected to this condescendence as not being sufficiently explicit, and he required a new one, stating, whether the servitude claimed by the Respondent was constituted by grant or prescription, and what were the purposes to which the servitude roads were to be applied, and whether the use of both or either of the roads was for his own personal convenience, or for any benefit connected with his lands of Hillside as the dominant tenement, and also what possession the Respondent, his

predecessors in the estate of Hillside, and their tenants, have had of the roads in question, without reference to any possession that may have been had by the other proprietors of grounds or houses, situated in Easter Aberdour.

Lord Meadowbank pronounced the following interlocutor: "Having considered the condescendence for the pursuer, with the answers thereto, and being of opinion that the condescendence implies sufficiently the nature of the defender's claim to the roads in question, as not to be defended on any existing grant known to the defender; that the defender, in giving in the condescendence ordered, is nowise called to assign any particular uses for an access to the sea-shore, which is *res publici*; that the general use of the road in question, by the feuars of Aberdour, may be very material to ascertain, in leading any proof in support of the defender's claim in behalf of Hillside to the same benefit," etc. etc.

The Lord Ordinary having adhered to this interlocutor, the Appellant petitioned the whole Lords that the Respondent might be ordained to lodge a new condescendence stating as above, "and at all events to find that any proof which might be ultimately allowed must be limited upon the defender's (Respondent's) part, to the possession which might have been enjoyed by himself, and his predecessors, and authors, as proprietors of Hillside, and their tenants, exclusive of any possession alleged to have been had by any neighbouring proprietors, such as the proprietors of grounds and houses in the neighbourhood of Aberdour."

This petition was refused without answers, and Lord Morton appealed.

Sir S. Romilly, and Mr. Horner, (for the Appellant,) argued that the Respondent must prove a title in himself, as proprietor of the lands of Hillside, and that proof of title in all the rest of the world would be nothing as to the purposes of the present [95] action, unless a public highway were claimed, which was not pretended. Issue was not joined on the issue tendered. The precise objects for which the ways were claimed must be stated: the foot-path was said (not in the pleadings) to be for the purposes of sea-bathing; but that ought to be stated, and then it would remain to be considered, whether that was a right of way that could be supported: a right of way must have a precise object, as well by the law of Scotland as by that of England. (Erskine, B. 2, T. 9.)

Mr. Adam, and Mr. Brougham, (for the Respondent,) The condescendence was sufficiently explicit, as Mr. Stuart was included in the description of "proprietors of grounds to the east of Aberdour Burn," and the rest was surplusage. It was not necessary here to set forth the particular uses, as the object of the action was to annihilate the servitude: and to this the mere allegation that the Respondent had a right of way was sufficient answer.

Their Lordships would consider how extremely different in point of pleading the laws of the two countries were. The *termini ad quam*, described *ex vi terminorum*, the uses for which the ways were claimed, for when a carriage road was claimed to a harbour, and a foot path to the sea shore, it was to be presumed that they were to be applied to the ordinary uses in such cases. (Farquhar and Shaw, Kaims, S. D. 1757.) The inhabitants of a town or village might clearly have a servitude of this nature over another person's ground, and they cited to this point the cases of "the inhabitants of Dunbar, and the Duke of Roxburgh, 1713. — Jaf. [96] — fray and inhabitants of Kelso against the Duke of Roxburgh, 1755. — Inhabitants of Dysart against Sinclair, 1779."

Sir S. Romilly in reply. The inhabitants in the cases mentioned, claimed under a general custom, which was a different thing, in England certainly, and he believed in Scotland.

Lord Eldon (Chancellor). If there were no other road to the harbour but this, then to be sure the reasoning in the interlocutor might be well founded. But if it was only a shorter road, it must be shown whether it was limited, or for all uses.

There were two questions to be considered: first, whether the Court of Session was right in not calling upon the Respondent to state the particular uses for which these ways were claimed. Now, without prejudice to the further consideration of the subject, he thought that when the Lord Ordinary called upon the Respondent to state what he claimed, and what he offered to prove, he could not mean less than that he should describe the nature of the servitude, because the evidence might be, that the right of way was for general purposes, or for one purpose, or for a variety of purposes short of a general use. He could not accede to the argument at the bar

that a harbour's being the *terminus ad quam* showed the uses for which that road was designed ; for as it was not a public road, it might be only for particular purposes. A person might have the right to drive every kind of carriage upon this road, and yet might not have a right to carry every commodity to every place, or to use it for every purpose as the [97] king's subjects might use his highway. There might be a right to carry certain articles for particular tenements, and not for any other purposes. The Lord Ordinary appeared to think that as the sea-shore was *publici juris* wherever there was a way to it, every man had a right to use that way ; but this was not universally true, for a right of way to the sea might be granted to one person and not to another. But then it was argued, that it was quite enough to say that they had a right to these roads, and that when it came out in proof for what purposes they had been used, it would be time enough to state for what purposes they should be used. But their Lordships would observe, how that bore upon the second material question. The right was claimed for the proprietors of grounds and houses to the east of Aberdour Burn in the parish of Aberdour, and not merely for this particular Respondent, and the foundation of the claim was prescription. Why then a prescription must be proved in all of them for exactly the same purposes ; for otherwise the evidence for A. would not be evidence for B., as A. might have the right for one purpose, B. for another, and C. for a third, and so on. And though a right were proved in all the rest, yet the whole of the evidence might be entirely beside the point, since there might still be no proof that this Respondent had a right to use it for any purpose whatever. If a grant could be produced to all the inhabitants, then to be sure it would be evidence for him, though he had never used the roads ; but it was not stated that there was any grant, and he thought, that at any rate the Respon-[98]-dent in the present state of the pleadings, was confined to the prescription.

Lord Eldon (Chancellor). After stating the facts of the case as above, he observed, that the action of declarator at the instance of the Appellant might be represented as having two objects ; the one, that the Barony of Aberdour should be declared to be free from any servitude in respect of the proprietors of Hillside ; the other, that if these proprietors had any right, then that it should be declared what these rights were. The Respondent claimed by prescription, and was therefore bound to make out his case on that ground. The action came before the Lord Ordinary, who ordered the defender to give in a condescendence of what he claimed and what he offered to prove. It was insisted at the bar that this had been complied with. The condescendence after describing minutely the course of the roads, went on to state, etc. (*vide ante*.) The Appellant insisted that this was not sufficient, as it did not describe the nature and origin of the servitude ; and he required a new condescendence stating the following particulars :—First, Whether the servitude was constituted by grant or prescription, and what length of possession the Respondent undertook to prove in either case ? As to that, the pleadings confined the Respondent to the prescription, and he must be taken to comprehend in that the length of time necessary to constitute a prescriptive right ; so that this particular was sufficiently set forth. Then followed the second point ; “ What were the purposes ? ” etc. etc. (*Vide ante*.)

[99] The interlocutor stated, “ That the defender was nowise called upon to assign “ any particular uses for an access to the sea-shore, which was *publici juris*.” A proposition which was not true without some qualification : “ that the general use of “ the road in question by the feuars of Aberdour might be very material to ascertain,” etc. Considering the two objects which the action had in view, the interlocutor could not be right in the two particulars above mentioned. The Defender was first called upon to state whether he had a right to any road ; and, to be sure, it would be an answer to that, to say that he had a right, without stating its nature and purposes. But if their Lordships would look at the other object ; that, if the Defender had a right, it should be declared for what particular purposes the right existed : then they must perceive that it was necessary to ascertain the nature of the claim, and the purposes to which the roads, or either of them, were to be applied. It might be of importance surely to ascertain whether this was a right of way for all purposes, or for some purposes, more or less limited ; and it was fitting, that in the condescendence these particulars should be distinctly stated. Suppose it were universally true that every one had a right to use a road leading to the sea-shore, yet it might happen that the road must not be used for every purpose.

Then it had been said, that the purposes would appear in the proof: but the pursuer had a right to know what the other party intended to prove, that he might be prepared to disprove it if he could. Suppose the claim to the foot-path should be for [100] the purpose of bathing, the proof must be according to the nature of the claim: and yet in such a case it might be useless to go into any proof at all, because a right of way for the purpose of bathing might be one which in law could not be supported. In England, if a foot-way were claimed, it would not be sufficient to prove that the claimant had been there on horseback. If a highway had been claimed, that would raise an entirely different question. But when the Defender said that the right even to drive carts and horses along one of the roads belonged to a particular description of persons, he negatived the notion of a highway, and confined the uses in these pleadings to those who came within that particular description. Then it was proper that the Defender should state what species of proof he meant to bring forward, and by what actual exercise of the right or how otherwise, it was to be established: and for what purposes it was intended, as it might be a road to carry articles, not all the world over, but to particular tenements. Unless the particulars were set forth, a variety of loose and improper evidence might be introduced. If the Respondent should state that either of the roads was for the purpose of resorting to the sea-side for the benefit of bathing, then they might afterwards have to consider whether that was a species of right which could be maintained.

Another point of great importance to be attended to, was, Whether a right in these feuars of Aberdour could have any bearing upon a right claimed by the Respondent according to the state of these pleadings? He did not say but that in some cases such evidence might be material, but he was of opinion [101] that in the present case it was not. As the declarator related merely to the proprietors of the lands of Hillside, proof of usage by other persons was unnecessary or inadmissible. The user must be by himself, or his predecessors in the lands of Hillside, or their tenants: that was the only point in these pleadings. He should therefore propose to remit the cause again to the Court of Session, with these findings:

1st. That the condescendence given in by the Defender (Respondent) did not state the nature of the right of way claimed, inasmuch as it did not set forth to what uses or purposes these roads, or either of them, were to be applied.

2d. That in the state of the pleadings it was not competent with respect to these roads, or either of them, to go into evidence of usage by any person or persons other than the proprietors and tenants of the lands of Hillside.

3d. That the title to one of these roads did not necessarily decide the title to the other.

This last finding seemed to be a truth sufficiently obvious: but, on reading these papers, it would appear not to be unnecessary.

The Judgment of the Court below was accordingly reversed, so far as it was inconsistent with these findings:—affirmed as to the rest, and the cause remitted.

[102] ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

J. C. TRENT,—*Appellant* ; C. E. TRENT, and Others,—*Respondents*

[March 19, 1813].

[Mews' Dig. xiv. 520 ; xv. 1637 ; S. C. *sub. nom.* *Trent v. Hanning*, 10 Ves. 495.]

[Testator, by his will, gives an annuity to his wife and legacies to children, knowing, that his personal estate was insufficient to answer these purposes ; says nothing about his real estates, but appoints certain persons trustees of inheritance for the execution of his will. Question, whether the trustees took any interest in the real estates for the purposes of this will ?]

John Trent had an estate for life in certain lands in Barbadoes, remainder to trustees for a term of two hundred years, to secure a jointure of £500 per annum to his wife, in case she survived him. In 1795, he became equitably entitled to certain lands in Somersetshire ; in August 1796, he made the following will, duly executed, and attested by four witness :—

"I, John Trent, do hereby give unto my wife £200 per annum during her natural life, in addition to her jointure, my just debts being previously paid ; and I do give unto my two younger children £6000 each, to be paid when they severally come to the age of twenty-one : and I do appoint John Hanning, William Hanning, and Constantine Phipps, as trustees of inheritance for the execution hereof."

Soon after making this will, he dictated a codi-[103]-cil to the said John Hanning, (who immediately reduced it to writing) in the following terms :—

"I do give, Robert Strike fifty pounds beyond his wages. It is Mr. Trent's wish that if either of his estates must be sold, that the Dillington estate (being the estate to which the said testator was equitably entitled as aforesaid) be first sold—Codicil £6000 to the child of which Mrs. Trent is now pregnant, when he or she shall arrive at the age of twenty-one, and full interest for the same during the several children's minority."

The testator being very ill at the time of making the will, could only set his mark to it : but he recovered a little and signed the codicil, which was not, however, attested.

The testator died the following day, leaving three children born in his life-time, and one born in due time after his decease. The will was duly proved, and a bill was filed in Chancery by the younger children, the widow and trustees against the heir at law, to have the will established and carried into execution : and praying that an account might be taken of the testator's property, and that, if necessary, the annuity of £2000 and legacies might be declared to be charged on the real estates. After answer put in, issue joined, and witnesses examined, it appeared that the testator's personal estate was not nearly sufficient to satisfy the annuity and legacies.

The cause came on before the Master of the Rolls (19th July, 1802), who ordered a case to be made for the opinion of the Judges of the Common Pleas, on the following questions, viz.:—"Whether John Hanning, William Hanning, and Constantine Phipps, took any and [104] what estate or interest in the real estates of the said John Trent, under and by virtue of his will ; or whether they had, by virtue of such will, a power to make any conveyance or appointment of any and what estate or interest of or in such real estates : and if they had, whether such power survived to the said John Hanning and William Hanning."

The Judges (Mansfield, Heath, Rooke, and Chambre,) unanimously certified that the Hannings and Phipps took no interest in the real estates under the will, and that they had no power, by virtue of such will, to make any conveyance or appointment of any estate or interest of or in such real estates."

The cause came on for further directions before the Lord Chancellor (Eldon) (11th March, 1805,) who directed a similar case for the opinion of the Court of King's Bench.

Three of the Judges (Ellenborough, Grose, and Le Blanc,) certified as follows :—18th Dec. 1805. We have heard this cause argued, we have considered it, and it appears to us, attending to the whole of the will, that the testator, John Trent, in appointing John Hanning, William Hanning, and Constantine Phipps as trustees of inheritance for the execution of his will, plainly meant to make them trustees of his estates of inheritance, in the same manner as if he had used the words, 'Trustees of my inheritance,' or 'trustees to inherit my said estates for the execution of this my will.' We are therefore of opinion, that the said John Hanning, William Hanning, and Constantine Phipps took an estate in fee in remainder in the said real [105] estates of the said John Trent, subject to the term of two hundred years created by the settlement."

Justice Lawrence, on the contrary, agreed with the Judges of the Common Pleas, stating, amongst other reasons, that the words trustees of inheritance, upon which the Plaintiffs chiefly relied, in contending that the testator meant to charge his real estates, were too uncertain to support that conclusion in opposition to the rule of law, that the intent to disinherit the heir must appear plainly in his will, otherwise that the heir shall not be disinherited.

The cause came on again before the Chancellor for further directions (26th April 1806), who confirmed the opinion of the three Judges of the King's Bench, in opposition to that of Justice Lawrence, and the Judges of the Common Pleas; whereupon the Heir at law appealed.

Mr. Richards (for the Appellant), insisted on the rule of law, that the intention to disinherit the heir must distinctly appear in the will before it can have that effect. The word inheritance did not seem to have been used by the testator in a technical sense, but was applied to the personal estate.

Sir S. Romilly for the Respondents. No one had a greater respect than he had for Justice Lawrence, or more deeply regretted his resignation: but that eminent Judge had taken an erroneous view of this case. The great rule in the construction of wills, was to find out and to act upon, the intention of the testator, and to give effect, if possible, to every [106] word in the will. In Scotland, indeed, they said "heir of personal estate;" but in England, the word inheritance was exclusively applicable to real estate. The appointment of trustees of inheritance was equally strong as a devise of the inheritance (Taylor and Webb. Styles, 319.)

Lord Redesdale still retained the opinion which he had before formed, that the decision of the Chancellor, in conformity with the opinion of the three Judges of the King's Bench, was correct. He admitted this however to be a case of doubt, and it would be presuming in him not to do so, when the four Judges of the Common Pleas, and one of the Judges of the King's Bench had decided the other way. To apply the word inheritance to personal estate would be altogether an improper use of the term: and why should that be done, when in the present case it might perfectly well be understood in its proper sense?

Lord Eldon (Chancellor), concurred, but with doubt certainly, after the Judges had so much differed. It was a material fact, that the testator must have known at the time of making his will that his personal estate was insufficient to answer its purposes.

Judgment of the Court below affirmed.

[107] IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MAGRANE,—*Appellant* ; ELIZABETH ARCHBOLD, and Others,—*Respondents*
[May 7, 1813].

[See *Oceanic Steam Navigation Co., v. Sutherland*, 1880, 16 Ch. D. 240. n.]

[Sub-lease at a fixed rent with covenant of perpetual renewal under a penalty of £70 made of a church lease held by an administratrix for the benefit of her children and herself. Whether such a lease can be supported, except by considering the option to pay the penalty as of the essence of the contract ?]

Mrs. Archbold was in 1789 possessed of a church lease, of certain lands (about sixty-two acres), in the vicinity of Dublin. In that year she demised the lands to one Magrane, at the yearly rent of £171 15s. 11d. taking at the same time a fine of £70. Mrs. Archbold also covenanted that as long as she held the head lease in question, and as often as she obtained a renewal from the Archbishop, she, her executors, administrators, and assigns, would renew the sub-lease to Magrane, his executors, administrators, and assigns, under a penalty of £70. Her husband had died the year before, and she was administratrix for their children.

Mrs. Archbold soon after obtained a renewal of the head lease, and in 1793 renewed the sub-lease to Magrane, in terms of the covenant. In 1806, Magrane assigned his interest to his son, the Appellant. Mrs. Archbold obtained a further renewal from the Archbishop, but refused to renew the sub-lease upon the ground that she had an option to refuse, [108] upon paying the £70 penalty. The Appellant then filed his bill in the Exchequer against her, to compel a renewal ; in her answer she insisted on the aforesaid option. After the usual proceedings, the cause came to a hearing in the Exchequer, when the bill was dismissed without costs ; whereupon Magrane appealed.

Sir Arthur Pigott and Mr. Richards (for the Appellant) insisted upon the known rule of equity, that the penalty was to be considered only as a further security, and the performance as of the essence of the contract. Equity would order a perpetual renewal, however hard it might be on the party, where the contract for that purpose was clear and distinct. Mrs. Archbold might relieve herself from the hardship by not renewing with the Archbishop.

Sir S. Romilly and Mr. Hart (for the Respondents). In this particular case the option to renew or pay the penalty was of the essence of the contract, and was the only circumstance that could make it reasonable ; without this equity would not order performance, even if Mrs. Archbold had the absolute interest ; for it would amount to a sale by her without consideration, in as much as the fines or rents of church lands were raised on renewal, according to the value of the property at the time. The fines might thus be raised so as to leave her no beneficial interest in the lease, but the whole must go to him who had the sub-lease at a rent certain. It was clear that Mrs. Archbold did not understand the nature and consequences of this contract at the time she [109] entered into it ; and equity would not order performance of a contract so improvident under such circumstances, though she had been possessed of the absolute interest. But she was only a trustee or administratrix of her children, and could not be allowed to conclude them by a contract so unreasonable. An administratrix paying her own debt to a third person out of the effects of the intestate, the money might be followed by a legatee, even in the hands of the innocent third person. (Willan and Willan, 16 Vesey, 72. Mortlock and Buller, 10 Vesey, 292. Mead and Lord Orrery, 3 Atkins, 235.)

Lord Eldon (Chancellor). This was clearly a case where the rule, that the penalty was not to be considered as of the essence of the contract, did not apply. The option was meant as an alternative ; it was of the essence of the contract, and the only way to make it reasonable ; otherwise the contract would have been bad, though she

had been the absolute owner ; but she was administratrix of her children, and could not bind their interests by a lease so very improvident.

Lord Redesdale. These leases with covenant of perpetual renewal arose in Ireland, instead of fee farms. Persons purchased improveable estates ; but having no money to carry on their improvements, they procured it in this manner : they paid, for example, £15,000 for an estate, and conveyed it to another in fee-simple for £10,000, taking a lease of the whole, with covenant for perpetual renewal, at a rent equal to the interest of the £10,000. There were many such leases, and they had a claim in reason and justice to be supported.

But this sub-lease was of a different description. [110] It would have been bad under the circumstances, though Mrs. Archbold had had the absolute interest in the original lease ; but she had not that absolute interest ; part of it was in her children, for whom she was administratrix. In both views it was bad, unless combined with the option of paying the penalty. How far she could bind her children even as to the payment of the penalty he would not say at that time.

The decree of the Court below affirmed, without prejudice to any remedy the Appellant might have at law, etc. ; possession being immediately delivered, and no writ of error to be brought in the action of ejectment brought in one of the Courts below ; and leave given to apply to the Lords in regard to mesne profits, pursuant to an undertaking by the agents.

The action of ejectment above-mentioned was brought at the expiration of the sub-lease, and judgment given in favour of the Respondent. The Appellant had obtained an order from the Lords to stay proceedings upon this judgment, upon an undertaking to the above effect by his agent.

June 2, 1813.—Mr. Shadwell now applied on the part of the Respondents for an order for payment of the profits during eight months, being the time the Respondents had been kept out of possession by the stay of the proceedings. If there should be a difficulty about a criterion of value, their Lordships would give them leave to produce affidavits to that point, or remit the case to the Court below, with directions to ascertain the value and order payment.

[111] An objection to the jurisdiction was made on the part of the Appellant, as the appeal had been already disposed of ; but the Chancellor had no doubt but the House had jurisdiction founded on the undertaking of the agents.

It was accordingly ordered that the Court below should cause an account to be taken, and payment to be made of what was due up to the time of delivering possession.

SCOTLAND.

ERROR FROM THE COURT OF EXCHEQUER.

WALKER,—*Plaintiff* (in Error) ; ADVOCATE-GENERAL,—*Defendant* (in Error)

[July 12, 1813].

[3 Scots R. R. 29. 33 & 34 Vict. c. 99 & S. L. R. Act, 1861. 8 & 9 Vict. c. 15. See Sale of Land by Auction Act, 1867, s. 6 ; Sale of Goods Act, 1893, s. 58 ; *Barlow v. Osborne*, 1858, 6. H. L. C. 556 ; *Waterhouse v. Wilkinson*, 1864, 636.]

[The agent of the owner of an estate, to be sold at auction, attends at the place and time of sale ; mentions the upset price, but no bidders. He gives notice that he will be ready to treat for a sale by private bargain. Soon after he is called into a private room by some of those who attended at the public meeting, and they give him offers in writing. He engages, before inspecting the offers, that the highest offer shall be accepted ; and it is accepted accordingly. Question, Whether this be a sale at auction under the acts of the 17th George 3, c. 50, and 19th George 3, c. 56 ?]

The estates of Foodie, Davisie, and others, in Fifeshire, belonging to the trustees of the Marchioness of Titchfield, were advertised to be sold by public auction, at Edin-

burgh, and a number of per-[112]-sons attended in consequence. The Plaintiff in error, a writer to the signet, was employed by the trustees as their agent to sell the estate. A licensed auctioneer attended at the place and time of sale, but Mr. Walker took the most active part in the business. No notice was pretended to have been given to the auctioneer of any intention to buy up the estates for the vendors in case the biddings did not reach the value. Mr. Walker stated the upset price at or about £50,000; but notwithstanding every exertion for that purpose, he could procure no biddings upon that sum. He then stated, that he should be ready to treat for the sale by private bargain, and the meeting broke up. Mr. Walker left the house, but soon after, while he stood near it, in the street, or in the court of the Exchange, some gentlemen, who had attended in the public room, came to him, and said they would make an offer, provided it was not communicated to others. Mr. Walker stated, that it would be unnecessary to make any offer, either verbally or in writing, unless it was something better than £50,000, and that the best, or highest offer above that sum, would be preferred without partiality. In two or three hours after, letters or lines with offers were delivered to him; upon which, he went back with them to the Coffee House, opened the letters, and found in one of them an offer of £50,650; which, being the highest, he said would be accepted, provided the terms of payment could be adjusted; and these having been adjusted, the bargain was concluded the following day.

An information, in the name the Advocate Ge-[113]-neral, was filed against Mr. Walker for payment of the auction duty, upon the sum at which the estates sold, amounting to £1266 5s.

The question came on to be tried before the Barons of the Exchequer; and the jury returned a special verdict, finding the facts as above stated.—The Barons, after hearing the case argued, gave judgment for the Defendant in error, upon which Mr. Walker brought his writ of error.

Mr. Adam and Mr. Dauncey (for the Plaintiff in error) contended, that this was no sale by way of auction. The upset price was not a bidding, but the *terminus a quo* the bidding commenced. This had been decided by the Court of King's Bench; and the subsequent transaction was a private bargain, totally distinct from the public auction. (Cruso and Crisp, 3 East, 337.)

The Solicitor-General and Mr. McKendzie (for the Defendant in error) maintained, that the whole was one transaction; that the vendor had the advantage of the competition; and that the sale in another room was a mode of sale at auction, "whereby the highest bidder was deemed the purchaser," and clearly within the meaning and letter of the statutes. The circumstance of time was essential, as it showed the connexion between the open and the more private transaction. Unless the second transaction should be held to be a continuation of the former, the payment of the duty might, in almost every instance, be evaded: and they relied upon the case of the King and Turner, decided at the Exchequer Sittings, Hilary Term, 1798; the cases of the King [114] and Sterling, and the King and Christie, were also mentioned.

The Chancellor stated, that when he was Attorney General, they had a case in the Exchequer of a female auctioneer. She continued silent during the whole time of the sale; but, whenever any one bid, she gave him a glass of brandy.—The sale broke up, and, in a private room, he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction.

His Lordship suggested, that the information ought to have been against the licensed auctioneer; but that point had not been noticed below, and there appeared to have been an understanding that no advantage was to be taken of the circumstance.

Lord Eldon (Chancellor). After stating the case and proceedings, and noticing the Auction Act of the 17th of the King, c. 50, he adverted more particularly to that of the 19th Geo. 3, c. 56, and read the material words upon which the question turned, from the 3d section, "who doth or shall exercise the calling, etc. of an auctioneer, "by outcry, knocking down of hammer, candle, lot, parcel, or by any other mode "of sale at auction, or whereby the highest bidder is deemed to be the purchaser." The act therefore described, not merely the several species or modes of sale of which the word auction might be considered as the genus, but added the words "any other "mode of sale, or whereby the highest bidder is deemed to be the purchaser."

They had heard much argument about the justice [115] of making those pay

the duty who had the advantage of the competition produced in this way ; but that was a consideration not for their Lordships to enter into. They had to consider, temperately and soberly what was the meaning of the Act of Parliament, and to decide accordingly. Three or four cases had been mentioned, on which he should trouble their Lordships with a few short observations. By the 12th section of the Act of the 19th of the King, it was enacted, " That, in case the real owner of any estate, etc. " put up to auction shall become the purchaser by means of his own bidding, or the " bidding of any other person on his behalf, at such sale, the officers of excise are author- " ised to make an allowance to such vendor of the duties imposed by the Acts in ques- " tion, provided the requisite notice be given to the auctioneer before the bidding." Then the question arose, What constituted a sale at auction, and how far this was such a sale ? In the case of " *Cruso and Crisp*," the Court of King's Bench had decided, that the mere stating of the upset price was not a sale under the act. Three other cases had been mentioned, but all he need say of these was, that none of them were exactly similar to the present case.

He should give no opinion how far it was necessary, in order to make a vendor a buyer, that there should be another bidding ; but it would take more argument than he had as yet heard or read to convince him clearly of the contrary ; for, where an estate was put up, whether there was another bidder or not, he had very great doubt whether that [116] was not a sale at auction, for the purposes of this act. But on that point he gave no opinion.

Here the Appellant put up the estate, and stated that he would not sell it for less than £50,000. If the matter had stopped there, then it would have been necessary to determine upon the point which he had already mentioned ; viz. Whether the putting up to sale, and naming an upset price, was not a sale at auction for the purposes of this Act ? But it did not stop there ; nobody having bid, Mr. Walker stated, in the presence of those assembled, that he was ready to treat for the sale of the estate by private contract. He then went into a private room, with several of those persons who had attended in the public room, and they having made offers, he engaged that the highest should be accepted. He put himself under an obligation to treat with them all, and to give the estate to the highest bidder. Here the question was : not, Whether this was what was usually called a sale by auction ? but, Whether, for the purposes of this Act, every thing must not be considered as such a sale, where the contract was with various persons, with an engagement to let the highest bidder be the purchaser ? He might have taken any individual he pleased and concluded a bargain with him ; that would have been a transaction of a different kind ; but here he treated with a number, and came under an engagement to accept the highest offer. He was of opinion, therefore, that this was a sale by auction for the purposes of the act, and that the judgment of the Court below was right.

[117] Lord Redesdale concurred in this opinion. The point appeared to him perfectly clear. The second Act was passed for the purpose of further regulation, and to prevent evasions : and after pointing out who were the persons who must take out licences, it proceeded to describe what should be considered as a sale at auction. It was to be a sale " by outcry, knocking down of hammer, candle, by lot, or parcel, " or any other mode of sale at auction, or whereby the last, or highest bidder, is deemed " to be the purchaser."

The words, " or whereby the best or highest bidder is deemed to be the purchaser," he considered as explanatory of what was meant by the word " auction," and he conceived that all such sales were, for the purposes of this act, to be deemed sales at auction. Under this construction of the act, there was, in the present instance, clearly a sale at auction.

Judgment of the Court below affirmed.

SCOTLAND.

APPEAL FROM INTERLOCUTORS OF THE COMMISSARY COURT AND COURT OF SESSION.

AUGUSTA M. TOVEY,—*Appellant*; MAJOR M. E. LINDSAY,—*Respondent*
[June 18, 1813].

[3 Scots R. R. 32. See Divorce Act, 1857; and note *inf.* 1 Dow, p. 131.]

[Marriage at Gibraltar of a Scotchman (in the army) to an English woman.

While retired on half-pay he resides with his family at Durham, for the education of his children, and is again employed in the military service, but still keeps his family at Durham, where it remains for about ten years.

[118] English deed of separation between the husband and wife, by which he permits her to choose her own residence, and she resides in England. Two actions of divorce against her in the Scotch Courts, on the ground of adultery; one laying the acts of adultery in England, the other laying them in Scotland. Question, Whether the Scotch Court, under these circumstances, has jurisdiction to dissolve the marriage?]

The parties in this case differed in a variety of particulars in their statements of facts, but appeared to be agreed in those which were most material.

The Respondent, eldest son and heir of Mr. Bethune, of Kilconghuar in Fife, was born in Scotland, where he chiefly remained till he went to Gibraltar in 1781, with the 73d regiment. The Appellant was a native of England, and spent her youth there according to her own statement, though according to that of the Respondent, she left England at five years of age for Scotland, where she remained till she was sixteen years of age, and then went to Gibraltar, where her father, Col. Tovey, was stationed. There the parties met and were married in 1783, by the Chaplain of the 73d regiment, according to the rites of the Church of England, as the Appellant stated. In 1783, or 4, the regiment was ordered home and disbanded; and the parties resided at Perth till 1786, when the Respondent was put on full-pay in the 26th regiment, which he joined in Ireland, but soon returned to Scotland. He afterwards, in 1789, went to Canada with the regiment, leaving his family at Perth, but returned in 1790, when he retired on half-pay, and resided in Fife till the end of the year 1792. Up to this time [119] it seemed to be admitted, that the Respondent's domicile was in Scotland.

In 1792, the Respondent removed with his family to Durham for the purpose, as was stated, of the education of his children. In about a year after, he was again employed in the army; sold out in 1794, but soon after procured an appointment in the Commissariat department, in which he still remains as Deputy Commissary General. During this period he was occasionally absent on duty in various places, but his family remained in Durham, where he himself joined it as often as he had an opportunity.

In 1802, a misunderstanding having arisen between him and his wife, they agreed to separate; and a deed of separation according to the law of England was executed, by which he agreed to pay to her trustees an annuity of £125 for her life, whether sole or married. By this deed also it was specially agreed, "That the said Martin Eccles Lindsay shall and will permit and suffer the said Augusta Margaret Tovey Lindsay, to live, inhabit, and reside separate and apart from the said Martin Eccles Lindsay, in such place and places as she shall think proper: and shall not, nor will at any time during their joint lives, sue, prosecute, or molest the said Augusta Margaret Tovey Lindsay, or any person or persons in whose house or family she shall reside, or be entertained, for, or on account of such residence or entertainment, or of her living separate and apart from him the said Martin Eccles Lindsay."—From this time the Appellant appears to have resided chiefly in England, though she was occasionally in Scotland. The Re [120]-spondent some time after raised an action against her before the Commissaries of Edinburgh, for a divorce, on the ground of

adultery : and libelled in his summons, that the defender " had both before and since " the separation given herself up, at many different times and places, to adulterous " practices, and particularly at Bishop Auckland, near Durham." The defender denied the jurisdiction, but it was sustained by the Commissaries, and afterwards by the Court of Session, on the ground, 1st. That the Respondent had a domicile in Scotland : and 2d. That his domicile must fix that of his wife. From the interlocutors of the Commissaries, dated respectively April 5th, and May 2, 1805 : and from those of the Court of Session, dated May 22, 1806, and 27th January 1807, the defender appealed. Pending this last mentioned process, the Respondent instituted another suit of the same nature, but libelling on acts of adultery committed in Scotland, " particularly in the House of Logie, in the county of Perth, and at " various places in the counties of Perth and Inverness, and other parts of Scotland, " in the months of June, July, August, September, and October, in the year 1807." The Commissaries and Courts of Session decided in this action also in favour of the Respondent (Feb. 8, 1811). The interlocutor of the Court of Session, to which they afterwards adhered, is in these terms : " The Lords having resumed consideration " of this petition, and advised the same with the answers thereto, in respect that the " pursuer is now confessedly domiciled in Scotland, and that the deed of separation " is revoked, they adhere to the interlocutors reclaimed against, and refuse [121] the " desire of the petition." From this judgment the defender likewise appealed, and both causes were heard the same day, but argued separately : it being imagined that the acts of adultery being in the one case laid in England, and in the other, in Scotland, might possibly be held to form a material distinction.

Sir S. Romilly and Mr. Holroyd (for the Appellant). In order to decide whether the Scotch Courts had jurisdiction in this case, two questions were to be considered : 1st. Whether the Respondent's domicile was in Scotland ? 2d. Whether, if it was, the wife's domicile followed his ? As to the first point, Mr. Lindsay went to Durham by choice, and established his family there for ten years : and though his original domicile was in Scotland, he must now be taken to be domiciled in England, and any subsequent residence in Scotland, as he was in the military service of government, could not change his last domicile properly acquired. A boy residing at any place, merely for education, by the doctrine of the civil law acquired no domicile ; but this did not apply to the case of a man residing with his whole family, even though only for the education of his children. The Respondent had cited the following authority (Voet. ad Pand. lib. 5. t. 1. sec. 92.) in his favour as to the question of domicile : " Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, " rerumque ac fortunarum suarum summam constituit, unde rursus non sit disces- " surus, si nihil arceat, UNDEQUE CUM PROPECTUS EST, PEREGRINARI VIDETUR." But this rather made against [122] him, for the residence at Durham came exactly within this definition. He had established his home there, his household goods, his family. The claim of jurisdiction *ratione domicilii* was therefore altogether unfounded. The facts of his being born in Scotland, and being heir to an estate there, only proved that his original domicile was in Scotland. When he could select for himself, he chose another : and their Lordships would overturn the most solemnly decided cases if they were to say that he did not thereby acquire a new domicile. Lord Thurlow had decided that a native of Scotland, an officer in the East India Company's service was domiciled in England, (*secus* if he had been in the government service,) though there were letters of his produced stating his intention to return and end his days in his native country (Bruce and Bruce, 2 Bos. and Pull. 229. Dom. Proc. April 1790) : and Lord Eldon afterwards confirmed the doctrine laid down by Lord Thurlow (Marsh v. Hutchinson, 2 Bos. and Pull. 226). These and the case of Sir T. Wallace (Brunsdan and Wallace, Feb. 9, 1789) were decisive authorities against the claim of jurisdiction *ratione originis*. It was monstrous to say that the place where a man first drew breath was always to be his domicile wherever he might reside. The case of Sir T. Wallace was also an authority against any claim of jurisdiction *ratione rei sitæ*, though that reason was stronger in the case of Sir T. Wallace, who had an estate and a dignity in Scotland, whereas the Respondent here had only an expectation. The *ratio rei sitæ* was good to support an action of debt or damages, but it was totally inapplicable where the object was to have a marriage declared void, or to obtain a divorce. The *ratio loci contractus* was quite out of the question, as the

[123] marriage took place at Gibraltar within the pale of the English law. The *ratio delicti* was also out of the question, as this was not a criminal prosecution, but a civil action. The Respondent had also relied upon the case of "Pirie and Lunan," (March 8, 1796, Fac. Col.) but as the marriage there was contracted in Scotland, it had no application.

2. There was no place here for the rule of Scotch law—that the husband's forum regulated that of the wife; for it was expressly stipulated by the deed of separation, that she should reside wherever she pleased: and she had chosen to reside in England, where she had been born. The very nature and operation of this suit supposed that the parties were separate. The rule was founded on the community of interests between the husband and wife: but it was absurd to apply that rule where these interests were directly opposed to each other. He was persuaded they could produce no good authority for their doctrine, and in the absence of authority it was fair to consider the consequences that would result from the establishment of the doctrine which they contended for. The consequence would be that Scotland would become a place where persons wishing to violate their most solemn engagements would assemble from all quarters of the globe for the consummation of their iniquity. A person having his original domicile there and returning to it, or going to it and residing a few months, might apply to the Commissary Court, and prove alleged acts of adultery against his wife, which she could have no opportunity of contradicting, and so obtain a divorce for ever.

[124] A third point was, that an English marriage being indissoluble by the English law, could not be dissolved by a Scotch divorce, in any other way than by an act of the legislature.

Mr. Adam (for the Respondent), Major Lindsay, he apprehended, might have gone into evidence of acts of adultery committed in Scotland, even in the first cause, under the general words in the summons, "at many different times and places." He was born in Scotland, and heir to a considerable estate in that country, and therefore his case resembled that of Lord Somerville (5. Ves. 750), who was born in Scotland: but without being a Peer of Parliament, resided one-half of the year in London: and yet it was found that he had not lost his domicile in Scotland. Mr. Lindsay was married at Gibraltar, while in the army, at a time when it was admitted he had not changed his domicile.

Chancellor. This is a case of a Scotchman marrying an English woman in England, (for so it must be considered) where marriage was indissoluble. The twelve Judges had lately decided (Lolly's case), that as by the English law marriage was indissoluble: a marriage contracted in England could not be dissolved in any way except by an act of the legislature.

Mr. Adam. This was too serious a point to be considered in this incidental manner upon a question of jurisdiction. It had not been at all started in the Court below. Their Lordships would hardly remit therefore on this ground, as the remit must be applicable to the state of the pleading.

[125] Chancellor. You say the marriage ought to be dissolved. Her answer to that is, that being contracted within the pale of the English law, it is indissoluble.

Mr. Adam. That was a question of international law, and the Commissaries had, since they knew of the decision (Lolly's case) of the twelve Judges here still maintained their authority to dissolve an English marriage if the parties were domiciled in Scotland. But granting, for argument's sake, that they could not dissolve an English marriage which the English law declared to be indissoluble, still he should contend that this was not properly an English marriage, and was therefore one that they could deal with. But first, as to the domicile of Mr. Lindsay, if he went to Durham for the special purpose of educating his children, even though he took with him his whole family, he did not acquire a new domicile, as he did not go there *animo remanendi*: but *animo revertendi*, and this brought the case within the reason of Lord Somerville's. Besides, the question of forum was not exclusive: and though it were admitted that he acquired a new one, it did not therefore follow that he lost his old forum.

With respect to the marriage, it was performed by the Chaplain of the 73d regiment, which is a Scotch regiment. The Chaplain was probably a Clergyman of the Church of Scotland, and, it was to be presumed, did not use the ritual of the English Church. It was therefore a marriage over which the Scottish Courts had jurisdiction.

But it was said, that the marriage took place within the pale of the English law. Why, then, it could not be a good [126] English marriage, as the solemnities required by the Marriage Act (26th Geo. 2. c. 33) had not been complied with, and the marriage had only become valid by the subsequent co-habitation in Scotland; so that it was in fact a Scotch marriage. As to the deed of separation, that only gave the wife liberty to live separate from her husband, but did not give a sanction to adultery, and therefore the adultery put an end to the deed as to the present purpose. It would be *contra bonos mores* to establish a different rule. Then the wife was a proper object of the suit; and, if she was, her husband's forum was hers. The case of Pirie and Lunan, was a strong authority for this; the wife and husband being there domiciled in England, (but the wife still following his original forum.)

Mr. Brougham (on the same side). He would state the reasons why he thought that the question of indissolubility had no place here. The marriage was not celebrated in such a way as to make it a good English marriage; and it only became such, or rather the marriage was altogether constituted in Scotland, by the parties living there together, and being habit and repute man and wife. It was therefore a Scotch marriage, and the rule which governed Lolly's case, that an English marriage was indissoluble, had nothing whatever to do with the present question. But suppose this were an English marriage, their Lordships were there sitting as a Scotch Court, and must decide according to the law of Scotland, and not be governed by the decisions of foreign judges and the rules of a foreign law, for such the English law was as to this purpose. The Scottish Courts below had, since the decision of [127] the English Judges in Lolly's case, repeatedly confirmed their own judgment upon long and elaborate argument. If the decision in Lolly's case were cited in the Court below, what would be the answer? That it was a case of foreign law: that the opinion of the English Judges was intitled to great weight by way of illustration, but that it was no authority. Their Lordships sitting there as a Scotch Court could not judicially even know that an English marriage was indissoluble, except the fact were averred on the record, and proved. There was here no such averment. The same observation applied to the deed of separation. He need not argue what was the effect of a deed of separation according to the law of England; because, if that was intended to be relied upon, it ought to have been pleaded and proved. They treated these points on the other side as matters of law, whereas here they were matters of fact, and ought to have been proved.

But this case did not at any rate come within the decision in Lolly's case, of which he had a note taken by himself at the time the judgment was delivered; the judges "were unanimously of opinion upon the points reserved, " that a marriage solemnized in England was indissoluble by any thing, except "an act of the legislature." Now it was one thing to say, that such was the law in regard to marriages solemnized in England, and another to say that the same law was applicable to marriages contracted in the colonies. By the 26th of George the Second, c. 33, certain solemnities were strictly required to constitute a marriage; but these were not necessary in the colonies, and it was offered to be proved in this [128] case, that the most material of them had not been complied with. Granting then for a moment, that the decision in Lolly's case could be judicially noticed here, it did not apply, as it only related to marriages solemnized in England. At all events, no lawyer in the Scottish Courts had ever questioned their power to dissolve an English marriage, and their Lordships therefore would be cautious how they broke in upon what had always been considered as the legitimate power of the Scottish Courts.

His friends on the other side, however, had confined their observations chiefly to two points. 1st. That the Respondent's domicile was in England. 2d. That even if he were domiciled in Scotland, the deed of separation had given the Appellant a distinct domicile. In regard to the domicile, he contended that Major Lindsay was domiciled in Scotland, and not in England, and cited the case of Somerville and Somerville, (5 Ves. 750,) where the Master of the Rolls, who decided it, relied chiefly on the *forum originis*. Lord Somerville without being a Peer of the British Parliament, resided half the year in London; but the Master of the Rolls, as his connections, his estate, and his hereditary honours were Scottish, and as he returned to Scotland every year, and resided there the half of the year, decided that he was to be considered

as domiciled in Scotland. So it was with Major Lindsay. He had for a time, for the purpose of educating his children, resided in England, but returned again to Scotland, which he always considered as his home, and he was heir to a considerable landed estate in that country. Taking it for granted, then, that his domicile [129] was in Scotland, and that by the rule of law, the domicile of the wife followed that of the husband, the next question was, as to the effect of the deed of separation. By the Scottish law a deed of separation between married persons was revocable at the will of either party, and their Lordships being then a Scotch Court, must decide according to the Scotch law. By the English law, a deed of separation between husband and wife could not be revoked, but by the consent of both parties, (although that was taken for granted rather too rashly) ; but supposing it to be so, still their Lordships could not take notice of that doctrine, as it was contrary to the principle of the Scotch law of marriage ; its validity, as a deed of separation irrevocable except by the consent of both parties, was confined to the territory of England. The Scotch Courts could not notice it as such ; they knew no more of irrevocable deeds of separation, than they did of indissoluble marriages. Whoever appealed to the law of any particular country must be concluded by it : and the Appellant, by bringing forward this deed, appealed to the Scotch law. But it was quite out of place here on another ground : for the fact of its being irrevocable by the law of England was not pleaded below, and therefore no notice could be taken of it by their Lordships. By the law of England, however, the question of irrevocability did not appear to be clearly established, (Marshall and Rutton, 8 T. R. 545,) but it was at any rate clear, that by the law of Scotland, such a deed might be revoked at the option of either party : and here there was an express revocation by the husband. No case could be cited where the Scotch [130] Courts refused to sustain their jurisdiction to dissolve a marriage, merely because it had been contracted in another country.

Sir S. Romilly in reply. It made no difference in this case, whether the marriage was solemnized in England itself, or in a colony, where the laws of England prevailed. The point did not depend upon the marriage act : an English marriage was indissoluble by the common law. The question then was, whether an indissoluble English marriage could be dissolved by the Scotch Courts ? and this brought it directly to the point in Lolly's case : their Lordships sat as a Scotch Court, it was true ; but when they were called upon to decide a question of English law, they must of necessity take the English law into consideration. The case of Lord Somerville had no resemblance to the present. Lord Somerville kept an establishment in Scotland, and always resided there one half of the year. In the present case there was a total abandonment of residence in that country. But it was said, that this was for the purpose of educating his family. Suppose it were so, the abandonment was not the less complete. The argument on the other side went this length, that there could be no abandonment of a domicile in Scotland, if any reason could be assigned for leaving it. The case of a boy or young man at school or college was totally distinct from the present : he did not change his domicile, because he was still supposed to form a component part of his father's family. The case of Sir Charles Douglas (Bingham and Trustees of Sir Charles Douglas, 1794) was also in point, and was in some respects stronger than the present. With respect to the deed of separation, [131] they did not contend on the part of the Appellant, that it made her a *feme sole* : they only said, that it expressly provided that she should have a separate domicile if she chose. Mr. Brougham said that the deed was clearly revocable by the husband, without the consent of the wife : but he did not know where Mr. Brougham found that law. It was directly the reverse, except the husband's object was to revoke for the purpose of residing with her, and even then he could only revoke when there was no just cause of separation, such as harsh treatment, etc. : instead of being more revocable, it was less revocable by the law of Scotland, than by the law of England. (Erskine, 105.)

SECOND CAUSE.

TOVEY, — *Appellant*; LINDSAY, — *Respondent*.

[3 Scots R. R. 37; see also 10 Scots R. R. p. 646. See *Warrender v. Warrender*, 1835, 2 Cl. & F. 488, 551; *Harrie v. Farnie*, 1882, 8 A. C. 43, 54, 61, 63; *Le Mesurier v. Le Mesurier* [1895], A. C. 517.]

Sir S. Romilly and Mr. Holroyd. The only distinction in this cause was, that the acts of adultery were laid in Scotland, which the Appellant had transiently visited without residing so as to acquire a domicile. The only ground of jurisdiction that could be stated, therefore, was the *ratio delicti*, which amounted to nothing, as this was a civil action, not a criminal proceeding.

Mr. Adam and Mr. Brougham. The judges had in the present case stated in their interlocutor, "that the Respondent was confessedly domiciled in Scotland." The deed of separation ought not to [132] stand in the way of the jurisdiction; as this, he repeated, would be giving a sanction to adultery. This action was partly criminal as well as civil, and, as was the custom in such cases, the Procurator Fiscal was a party.

Sir S. Romilly insisted that it was merely a civil action, he did not know what the judges meant by saying, that the Respondent was confessedly domiciled in Scotland, as no such confession had been made on the part of the Appellant.

Several authorities not particularly dwelt upon at the bar, were stated by the Respondent in his case, viz. To show that the forum of the wife must follow that of the husband, Cod. lib. 10. tit. 39. sec. 9.—Voet. lib. 23. tit. 2. sec. 40.—lib. 5. tit. 1. sec. 101.—Stair, b. 1. tit. 4. sec. 9.—Ersk. b. 1. tit. 6. sec. 19.

As to the effect and revocability of a voluntary contract of separation, Voet. lib. 24. tit. 2.—Blackstone, b. 1. c. 16. v. 1. p. 457. 8vo.—Ersk. b. 1. tit. 6. sec. 30.—Fac. Coll. v. 10. No. 44.

To show that the Respondent had a competent forum in Scotland, Ersk. b. 1. tit. 2. sec. 19. p. 20. —Galbraith v. Cunningham, Nov. 15, 1626. —Lord Blantyre v. Forsyth, Dec. 6, 1626.—Anderson v. Hodgson and Ormiston, July 1744.—Hay v. Tenant, June 27, 1760. —Voet. lib. 5. tit. 1. sec. 98.—lib. 5. tit. 1. sec. 92.—lib. 5. tit. 1. sec. 99.

Lord Eldon. (Chancellor.) solicited the particular attention of their Lordships to the facts of these two appeals, as they involved points of the greatest importance. In the first of them the Appellant stated, [133] that she had been born and educated in England: the Respondent controverted that; but the fact did not either way appear to be material in this case. It seemed beyond all doubt that Lindsay was domiciled in Scotland, till he went to Gibraltar, where the marriage took place. Mrs. Tovey and Major Lindsay differed too as to the manner in which the marriage was solemnized. She asserted that it was solemnized according to the rites of the Church of England: while on his part it was said that the marriage was performed after the manner of the Scottish Church, by a person not in Holy Orders, according to the English requisites for that purpose. He, therefore, insisted that it was a Scotch marriage; she, that it was an English marriage.

From the time of this marriage, which took place in or about the year 1781, till 1792, Major Lindsay continued to be considered as a domiciled Scotchman. In 1792, having before retired from the army on half-pay for a time, he went to Durham, as he said, for the education of his children: formed an establishment there, and resided, or at least kept his family in that place till the year 1803. The question then was, Whether Major Lindsay had, by this means, lost his original domicile, and acquired a new one? and he confessed that he appeared to him to have been so much established at Durham, that if he had died in 1802, he should have felt no hesitation in saying that he had been a domiciled Englishman. Then an English deed of separation was executed between the parties: and afterwards, upon the ground of alleged misconduct in the Lady, he commenced a suit of divorce against her, [134] and there the Court granted divorces, not a *mensa et thoro*, as in the case of the courts in this country, but a *vinculo matrimonii*. The Lady declined the jurisdiction, but

the Commissaries refused the defence, and the matter was, in the usual way, brought before the Court of Session, who affirmed the judgment of the Commissaries, and found the letters orderly proceeded in, and from this decision of the Court of Session she appealed.

FIRST CAUSE. Their Lordships would observe, that the allegations in the summons were very loose. The Procurator Fiscal was a party, and this fact deserved attention because an argument was founded upon it at the Bar ; the circumstance of his being a party having been relied upon, as evidence to shew that this was, in some measure, a criminal procedure. Their Lordships would observe, that the summons merely stated the fact of the marriage, without specifying the place where, or the form in which it had been solemnized. And then the summons went on to state, that the parties were reputed man and wife, in Scotland ; with a view to lay the foundation for the argument, that the marriage was completed only by their living as man and wife in Scotland, and that it was therefore a Scotch marriage. Here it ought to be observed, that it might be one thing to say, that being habit and repute man and wife, should be evidence of a marriage,—and another thing to say, that it should be held as constituting, or admitted as incontrovertible proof of, a marriage, even though it should be shewn that there was in fact originally no marriage. Here it must be taken that the parties were married abroad. The summons then [135] stated the cohabitation, and laid the acts of misconduct as being committed in England, to which, in his opinion, the allegation was substantially confined ; and it then concluded in the usual manner of summonses of divorce in Scotland.

Afterwards there was a supplementary proceeding ; he did not very well know whether or not it could be called a new action, imputing to the appellant adulterous practices in Scotland ; and this seemed to have arisen from an idea, that it might produce a different result from the action laying the acts of adultery to have been committed in England.

The wife pleaded, that she resided in England ; that she was separated from her husband under an English deed of separation agreed upon by both parties ; and that, as the marriage took place abroad, within the pale of the English law, the *locus contractus* was quite out of the question : that she was residing in England at the date of the citation, which, as usual, in cases of persons residing in foreign countries, was made at the Market Cross of Edinburgh, and pier and shore of Leith. She concluded by protesting her innocence.

An answer to this was given in, stating that the pursuer was born and domiciled in Scotland ; that it was a Scotch marriage ; and that the deed of separation was no bar to the suit. The defender, herself, it was alleged, had said that the marriage was informal ; but it was nothing to the purpose what she said or thought ; the question was—what was the fact ?

Now, if the first of these actions could be supported, and if the marriage was an English one, [136] and the Respondent was domiciled at Durham, and he had not subsequently changed that domicile, then the decision must go this length. That the Scotch Courts, founding their jurisdiction on the original domicile of the husband, could divorce a *vinculo matrimonii*, though the marriage was English, and the actual domicile of both parties was in England. The question, at the time it was before the Judges below, had not assumed so serious an aspect as it since bore. The twelve Judges of England had lately unanimously decided, that an English marriage could not be any where dissolved except by act of the Legislature. If then the present marriage was a good English marriage, the subject would deserve great consideration upon this first cause. The consequences must be of the most serious description to the lieges ; and yet it appeared they still adhered in Scotland to their former doctrine on this subject. But, if they had not in the present case given all the attention to it which its magnitude deserved—and if the question, since they had it under consideration, had assumed an aspect so much more serious than before, it was proper that their Lordships should have the benefit of the amplest consideration that could be given to it in the Court below, before they should be called upon to come to a final decision.

SECOND CAUSE.—Now, as to the second cause, Major Lindsay instituted a new suit, if it might be so called, against the Appellant, in 1810, for acts of adultery, alleged to have been committed in 1807, in Scotland, where she, as she alleged, had only

been transiently, without any regular residence. In looking at the decision of the Court of Session, upon this point, it [137] would be found that one ground of it was, that the Respondent was then confessedly domiciled in Scotland. Now, where the Court got that fact he did not know, for it certainly did not appear on the face of the papers produced. The Appellant insisted, that the Respondent had only gone to Scotland while in the commissariat department, so that being in his Majesty's service he had not changed his English domicile. But, at any rate, he had not changed it at the time of the alleged acts of adultery.

Here then was a case in which both parties were domiciled in England, and then the husband went to Scotland, where it was said he had a domicile by reason of origin and his being heir of entail of an estate there, and instituted a suit against his wife, which she said did not affect her in England; and, if his domicile was at Durham, the answer would be sufficient, though the rule of law should be admitted, that the domicile of the wife followed that of the husband. But if the jurisdiction by reason of the original domicile could be maintained, it would be attended with the most important consequences to the law of marriage. The decision in the second case appeared rather singular, when connected with the decision in the first. They stated as a main ground of the judgment in the second cause, that the Respondent was confessedly domiciled in Scotland, and that therefore they had jurisdiction, which appeared to imply a doubt whether they had jurisdiction in the first cause. If the first cause could be supported, there was no occasion for the second. But suppose the Respondent were domiciled in [138] Scotland at the time of the alleged acts of adultery there, the question still remained, whether in 1810 he could institute a suit against her with effect, unless she had changed her forum likewise, merely upon the ground of the fiction which had been stated. This was a question of the very highest importance.

Then with regard to the deed of separation, even if the fiction or rule of law were admitted that the forum of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts in this case, the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. He himself had agreed that their forum should be different, if his wife so pleased; and then he endeavoured by this process to get rid of the effect of his own agreement. Under these circumstances, remembering all that had passed relative to this question, since it had been before the Courts below: and considering the very serious effect that the decision might have upon the civil relations of families, and even upon questions of property, he thought the best step that could be now taken, would be to desire the Court below to review its own decision. And availing themselves for this purpose of the provision in the act for dividing the Court of Session into two Courts, they would probably think it right, not only to remit these causes, but to desire the opinion of the whole Court upon them, in order to have all the light which they could possibly derive from that source.

Lord Redesdale agreed that the subject deserved [139] much more consideration than they could well give it with the limited information now before them. He could not conceive why the second suit had been instituted, if the grounds of the first were good. The second appeared to proceed upon the supposition that the ground taken by the first was untenable. This case was a most important one, not only with a view to marriage itself, but with a view to contracts relating to it. Upon this ground of original domicile, and the fiction that the wife's domicile followed that of her husband, they had proceeded to judge according to the Scotch law, not only of the marriage but of the deed of separation. The marriage took place at Gibraltar; and the question, whether it was valid or not, must be decided by the law of England, as applicable to Gibraltar. The deed of separation too was English, and ought to be judged of by the law of England, and the ground upon which it had been held to be revoked, was therefore unfounded. But as to the fact respecting the domicile, if the Appellant's statement was correct, the domicile of the Respondent was in England, and therefore the ground of the judgment of the Court below failed, for the *ratio domicilii* had no place in this instance, and could give no ground of jurisdiction.

An attempt had been made at the bar, to found an argument on the *ratione delicti*, by stating, that the Procurator Fiscal was a party, and that this must be considered as partly a criminal suit. This point, however, had never been considered at all by the Court below, and the mistake at the bar seemed to have arisen from the supposition that the Commis-[140]-sary Court of Scotland was more like our Ecclesiastical Courts

than it really was. The Commissary Court in Scotland he believed was entirely a civil Court.

When it was considered that, on the principles of this decision of the Court below, any one from any quarter might go and establish a domicile in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch forum and proceed against her for an absolute dissolution of the marriage, the question must appear to be one of the very greatest importance. If this were to prevail, any person had it in his power to alter the nature of his most solemn engagements. The wife might say that such was not her contract, and if this were held not to be a sufficient answer, the Court below might, on the same principle, judge all other contracts by their own law, as well as that of marriage. A more important case could not possibly be offered to their Lordships' attention. The principle might involve the relations of families and the ownership of property to an unknown extent in both countries. The case, ought, therefore, to be considered dispassionately, without partiality or prejudice either on one side or the other; but solely with a view to what was necessary for the purposes of justice: and it could not be just that one party should be able at his option to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed.

The causes were accordingly remitted for review, generally, upon the whole matter.

[141] TOVEY AND LINDSAY.

Lord Eldon (Chancellor). He had before stated some important features in this case, which rendered it proper to send it back for review—more particularly as it introduced, or might introduce, that extremely important question which had been lately under the consideration of the Judges here, relative to the effect of a Scotch divorce on an English contract of marriage; and as this question arose in both cases, he thought it right to remit both. The cases, in fact, embraced a variety of important questions, and it would be desirable to have the deliberate judgment of the Court below on all of them.

Agent for Appellant,
Agent for Respondent,

GREY, Gray's-Inn.
CAMPBELL, Duke-street, Westminster.

FROM SCOTLAND.

WIGHT,—*Appellant*; DICKSONS,—*Respondents* [June 23, 1813].

[Lease of lime-works, with stipulation on the one side to furnish, and on the other side to take, a certain quantity of coals from particular collieries. The full quantity not raised by the lessor from the collieries in question.—The lessee cannot, on account of this failure, resort to other collieries for the whole of what he requires, but only for the quantity he may want beyond the supply from the particular collieries.]

Sir John Dalrymple, of Cousland, desirous of making the minerals on his estate subservient to each other, granted a lease to the Respondents, with the exclusive privilege of burning lime in the barony of Cousland, provided they consumed a certain quantity of coal raised on the same estate.

The material words in this lease were these:—"Sir John Cousland is bound to furnish panwood from the coal works at Cousland, so long as they are worked, at the rate of 1s. a cart of three bolls: great chows and panwood mixed, as they stand in the mine, at the rate of 1s. 6d. per cart, of 12 cwt.;" (thus making the one sort, as is customary, deliverable by measure, and the other by weight). "And to make the said John and George Dickson certain, that no injustice shall be done them in that mixture, it is agreed, that a number of colliers, sufficient for supplying the draw kilns with great chows and panwood mixed, shall be set apart for the sole supply of the lime works, and those colliers to keep a separate bing for them, of what they cut down, of which NO PART shall be sold or go to the use of any other person, except

"the two or three inches of parrot coal at the top, which shall be set aside for the use of the said Sir John and his heirs, in case they shall desire to have it; and the said John and George Dickson are not to be at liberty to purchase panwood, or coals of any kind, from any other coal work, as long as they can be supplied at the above rates," (*i.e.* with the one description of coal as well as the other,) "from the Cousland coal works, under the penalty of 5s. for every cart they shall get elsewhere; and if the Cousland coal stops, they are to build no more kilns."

"And in order to prevent the panwood from [143] hanging a burden upon the coal works, it is specially agreed, that if the said John and George Dickson do not consume 24,000 bolls of panwood in a year, the said leasers shall be at liberty to consume the surplus panwood in separate kilns by themselves or others."

As the Respondents did not consume the quantity of panwood necessary to entitle them to their exclusive privilege of burning lime, Sir John Dalrymple granted a lease to the Appellant, with liberty to raise coal to supply the Respondents, and to burn lime for sale on his own account, with the difference between the quantity of coal consumed by the Respondents, and what they ought to consume. The Respondents insisted on their exclusive privilege, and stated as the reason for their not taking the stipulated quantity of coal, that the Cousland colliery was not worked in such a manner as to yield them a regular supply, so that they were entitled to resort to other collieries.

A question arose whether "great chows and panwood" mentioned in the lease, did not mean "great coal; chows (small pieces of coal,) and panwood (the refuse or smallest coal)."

After a long course of litigation, not necessary to be particularly stated, the Court of Session decided upon the whole, in favour of the Respondents, by an interlocutor, the material words of which are set forth in the observations of Lord Redesdale.

It was argued at the bar, that the Court by introducing the word "coal," had made a new agreement for the parties; and that it was dangerous to intro-[144]-duce a word on mere conjecture, when the words as they stood in the lease made sense without it.

Lord Redesdale read the material words of the lease or leases to the Respondents (*vide ante*); and observed, that a variety of disputes had arisen respecting them, which it was not necessary to mention particularly. Sir John Dalrymple, thinking that the Dicksons had not used the coal on the estate as they ought to have done, granted another lease to Wight, the Appellant, empowering him to supply the Dicksons with the quantity of coal which they were bound to consume, to entitle them to the exclusive privilege of burning lime, for sale in the barony of Cousland; or if they did not consume the proper quantity, then empowering him (Wight) to burn as much lime for sale on his own account, as could be burnt with a quantity of coal amounting to the difference between what they ought to take and what they actually took.

The material question then was, what the Dicksons were obliged to take, and Wight, as standing in the place of Sir John Dalrymple, was obliged to furnish. A question had arisen whether "great chows and panwood mixed" meant the chows and panwood exclusive of the great coal, or the whole of the coal, as it stood in the mine, except the parrot coal at the top, as mentioned in the lease. The Court of Session had determined, and he thought properly determined, that the expression meant the whole coal except the parrot coal. An attempt had been made to distinguish great chows from great [145] coal, but from the whole of the lease taken together it was clear that great coal was meant to be included, since the Respondents were to have the whole together as cut down by the colliers. The interlocutors were numerous, and some of them not material to be considered. The only one which required particular attention was that of the 23d of January 1806, where it was found "that the pursuers, Messrs. Dicksons, were obliged to take, and the defenders "obliged to furnish them with, regular wrought panwood to the extent of 24 bolls annually, it raised at the Cousland colliery; and also the great coal, chows, and panwood mixed as they stood in the mine, to the extent of 30 carts in each month, and that upon failure to work such a quantity of panwood yearly in a regular manner, so as to afford the pursuers a constant supply for their works, the pursuers are entitled to have, and the defenders obliged to furnish, the great coal, chows, and panwood they raise, mixed, as they stand in the mine, in terms of the leases,

"to the extent required by the pursuers for the supply of their lime works, or at their option to be supplied from other collieries." Now, whether the Court of Session understood this to the extent to which it went, or not, it certainly appeared on the face of it to go beyond the meaning of the lease. The great object had been the consumption of coal, and the Dicksons were not at liberty to purchase their coals any where else, as long as they could be supplied from the Cousland colliery properly worked. The supply ought to be a ready and a fair one it was true; [146] but then it was equally clear that if the Cousland colliery should be properly worked, the Dicksons could only resort to other collieries for the deficiency, or the difference between the supply and their demand. This appeared to be the true construction of the lease; but it might be contended from this interlocutor, that if the Dicksons were not furnished from the Cousland colliery with all that they wanted, they might at their option take the whole from other collieries.

The best mode of proceeding would be to remit the interlocutors for review to the Court below, with findings to this effect:—That the construction put by the Court of Session upon the lease, so far as related to great coal being intended to be given to the Dicksons with the chows and panwood, was correct:—that the Dicksons were not at liberty to purchase coals for their lineworks from any other mines so long as they were regularly supplied from the Cousland colliery—and that in case the Cousland colliery should be regularly wrought, the Dicksons were bound to take all that should be raised, the supply being as regular as the nature of the colliery would permit—the mixed coal to be fairly wrought, and the panwood supplied to be of such quality as was fit to burn lime, and that the Dicksons were at liberty to supply themselves to the extent of the deficiency, and to that extent only, from other collieries. Then he should propose to affirm the interlocutors as far as they were consistent with these findings, with directions to the Court below to vary them, where it might be required, for the purpose of making them correspond.

[147] Lord Eldon (Chancellor). These interlocutors had been repeatedly under his consideration, and he had found great difficulty in understanding some parts of them. He agreed, however, in the suggestion that had been made by his noble and learned friend. There were two principal points to be considered: First, whether the Dicksons were entitled to the great coal along with the chows and panwood, under the words "great chows and panwood" in the lease. It had been said that it was too strong to insert a word; but the answer was, that other words in the lease could not have their proper effect without it. The 2d point was, whether the Dicksons were confined by the contract to supply themselves from other collieries, only to the extent of the deficiency of the supply from the Cousland colliery. He was of opinion that they were so confined, if the Cousland colliery was properly worked. The Court below would settle the interlocutors, and perhaps they might see something in them inconsistent with the findings. It appeared to him however, that the whole of them might be affirmed except that of January 1806, which seemed to give an option to the Dicksons, which the true construction of the lease did not warrant.

The cause was accordingly remitted for review with the above findings.

Agent for Appellant, CHALMER.

Agent for Respondent, MUNDELL.

[148] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

M'ADAM, Esq. — *Appellant* ; WALKER, and Others, — *Respondents*

[May 17, 19, 21, 1813].

[3 Scots R. R. 41. See *Dalrymple v. Dalrymple*, 1811, 2 Hagg. C. R. 54 ; *Reg. v. Mills*, 1844, 10 Cl. & F. 534, 572, 601. *Dysart Peerage Case*, 1881, 6 A. C. 513 ; *Yelverton v. Longworth*, 1864, 4 Macq. 745 ; 10 Scots R. R. 717.]

[M'Adam keeps a woman in his house for some years as his mistress, and, as appears from several circumstances throughout the course of that connexion, contemplates the probability of its terminating in marriage. He, on a certain day, calls some of his servants to witness his marriage, and in their presence, declares that she is his wife, and that his children by her are legitimate. She rises, gives her hand, and courtsies in token of assent, but says nothing. This *per se*, without any further ceremony, constitutes a complete and valid marriage, *ipsum matrimonium*.]

The late Quintin M'Adam of Graigengillan was proprietor of very valuable estates in the county of Ayr, and stewartry of Kirkeudbright, to a part of which he had succeeded under an entail executed by his father, and the remainder of which he held in fee simple, and had disposed to trustees for the benefit of his own lawful issue in the first instance, and of a certain series of heirs to be appointed in an additional entail to be executed by these trustees. In 1800, he took into keeping the Respondent, Elizabeth Walker, a country girl then residing with her brother, a farmer, in the neighbourhood of his mansion-house at Berbeth. In this situation she continued to live with him till the 22d of March, 1805, when in the presence of some of his servants, he declared that she was his wife, and that his children by her were legitimate. It was not pre-[149]tended that there was any *copula* subsequent to this declaration. In the afternoon of the same day, he was found dead in his own house, with a pistol grasped in both hands, and in short, under circumstances which left no reasonable doubt of his having committed suicide.

Various proceedings took place upon a competition of briefs between the trustees under Mr. M'Adam's settlements, who were also the tutors of his children by Elizabeth Walker, and the Appellant, Mr. Alexander M'Adam of Grimmet, who was the next heir under the entail executed by Quintin M'Adam's father, failing lawful issue of his son. The question was, Whether the Respondent, Elizabeth Walker, had been lawfully married to the deceased, Quintin M'Adam, and of course whether the children were legitimate. The Court of Session decided that this question ought to be tried by counter actions of declarator of bastardy, and of legitimacy, in the Consistorial Court, at the instance of the opposite parties.

An action of declarator of marriage and legitimacy was immediately instituted in the Consistorial Court by E. Walker and her children, and also by the tutors. The summons set forth, " that the Pursuer, Elizabeth Walker, resided with the said Quintin M'Adam for some years, during which period he treated her with affection and respect, and she having borne to him two children, and having become again pregnant, he, in the month of March last, determined immediately to put in execution a wise and just resolution he had some time before deliberately formed, and occasionally [150] expressed, to render his children legitimate, and his connexion with their mother honourable and indissoluble. That, in pursuance of this resolution, the said Quintin M'Adam, did, in particular, on Thursday, the 21st day of March last, ride to the house of David Woodburn, his factor, at Bellsbank, situated about two miles from his Mansion-house of Berbeth, when he told the said David Woodburn, that he was resolved immediately to acknowledge his marriage with the said Pursuer, Elizabeth Walker, and wished that he would write their contract of marriage ; but which Mr. Woodburn from his unacquaintance with the form of such a writing, declined to do ; and proposed to the said Quintin M'Adam to send for the Pursuer,

" Thomas Smith, his ordinary man of business, to draw up the same. That the said Quintin M'Adam immediately approved of this suggestion, and said that he would do so; and accordingly after his return to Berbeth, on the said 21st day of March, he expressed to the said Pursuer, Elizabeth Walker, his wish and determination, that their marriage should be declared without delay; and mentioned that he had resolved to send for the said Thomas Smith to write their marriage-contract; to all which the said Pursuer fully assented. That on the said 21st day of March, the said Quintin M'Adam accordingly wrote, with his own hand, the following letter, addressed to the said Pursuer, Thomas Smith. ' Berbeth, 21st March, 1805. Dear Sir, As I intend to marry Miss Walker immediately, come out as soon as you receive this; and bring [151] stamped paper to write the contract, and every thing requisite to draw up a deed, to have the whole of my landed property that I now have, or may afterwards acquire, strictly entailed.—I am, dear sir, sincerely yours. Q. M'ADAM. Mention this to no person, not even to your son. Q. M.'

" That on the evening of the said 21st day of March, the said Quintin M'Adam delivered this letter to one of his servants, with directions to carry it next morning to the Post-Office at Ayr: and the said letter was duly received in Edinburgh, on the morning of the 24th day of March. That the said Quintin M'Adam, on the morning of Friday the 22d day of March last, after walking out, returned home to breakfast, when he told the said Pursuer, Elizabeth Walker, that he wished to declare their marriage immediately, without waiting for Mr. Smith's arrival; and the said Elizabeth Walker having expressed her satisfaction and consent, the said Quintin M'Adam, between the hours of ten and eleven o'clock of the forenoon of the said day, desired his house-servant, George Ramsay, to call in three of his men-servants, to wit, Robert Galt, William M'Gill, and James Richardson. That the said William M'Gill could not then be found; but the said George Ramsay came soon after into the dining-room, along with the said Robert Galt, and James Richardson, when the said Quintin M'Adam told them, that he had called them to be witnesses to his marriage; and immediately thereafter asked the said Pursuer, Elizabeth Walker, to rise, which she did; and having given her hand to the said [152] Quintin M'Adam, he holding it, said, I take you three to witness, that this is my lawful married wife, and the children by her are my lawful children; which acknowledgment and declaration of marriage were solemnly and deliberately made, and explicitly assented to, and acquiesced in by the said Elizabeth Walker, Pursuer; and were again on this occasion repeated a second time, in presence of the said George Ramsay, Robert Galt, and James Richardson, and also of Margaret Wylie, the said Quintin M'Adam's housekeeper, for whom, he, the said Quintin M'Adam, likewise sent with the express intention of being an additional witness to the said declaration and acknowledgment of marriage which were then so formally and seriously passed between him and the said Pursuer. That the foresaid acknowledgment and declaration of marriage were soon very generally known to all the people in the neighbourhood, by many of whom the Pursuer, Elizabeth Walker, was congratulated as the wife of the said Quintin M'Adam; and the intelligence, which gave very general satisfaction, was in the course of the forenoon of the said day universally spread in the town of Dalmellington, which is situated about two miles from the house of Berbeth: that after the parties had made the foresaid mutual acknowledgment and declaration, the said Quintin M'Adam walked out to see his workmen; and afterwards went to the house of the said David Woodburn, at Bellsbank, to whom he mentioned that the said Pursuer and he had declared their marriage; whereupon the said [153] David Woodburn said, that he had been informed so by Robert Galt, and wished him much joy; to which the said Quintin M'Adam replied, that he believed it was a very proper step; that the said Quintin M'Adam then asked the said David Woodburn to dine with him at Berbeth on that day, of which invitation the said David Woodburn was prevented by another engagement from accepting; and the said Quintin M'Adam having left the said David Woodburn's house, in perfect health about three o'clock, returned home to Berbeth, where he died suddenly about four o'clock of the afternoon of the said 22d day of March last: that in consequence of the said Quintin M'Adam's decease, the succession to all his estates, entailed and unentailed, has, by virtue of certain deeds of settlement, opened either to the Pursuer, Katharine M'Adam, his eldest daughter, or to the eldest child of which

"the said Elizabeth Walker is pregnant, in case that child shall happen to be a male."

The summons concludes, "That therefore the said Elizabeth Walker, now widow of the said Quintin M'Adam, and the said Katherine and Jean M'Adams their two children, and the child or children *in utero* of the said Pursuer, Elizabeth Walker, ought and should have our sentence and decree, finding and declaring that the said Quintin M'Adam, and Elizabeth Walker, were, at and previous to the time of his decease, lawfully married persons to one another, and husband and wife; and that the other Pursuers, Katharine and Jean M'Adams, their children, and the child or [154] children *in utero* of the said Elizabeth Walker, are their lawful children; and that the Pursuer, Elizabeth Walker, and the said children respectively, are entitled to all the rights and privileges competent to the lawful wife or widow, and the lawful children of the said Quintin M'Adam, either by law or by the rights, titles, and investitures of his lands and estates," etc. etc.

Against the conclusions of this action, Mr. Alexander M'Adam (now Appellant) stated the four following pleas in defence: First, "The allegations made in the summons are totally irrelevant, and insufficient for supporting the conclusions thereof. Secondly, It appears from the shewing of the summons, that the Pursuers can bring no competent evidence for proving the allegation upon which the supposed marriage depends. Thirdly, *Esto*, the parole evidence offered would have been competent against Mr. M'Adam himself, if he had been alive; yet as no marriage was actually celebrated, and no claim of marriage was made against him in his lifetime, the proof offered is not competent against his heirs, now that he is dead. Fourthly, the late Mr. M'Adam, at the time of the declarations libelled, was incapable, from insanity, of contracting a marriage."

The Pursuers (now Respondents) briefly stated their answers to these defences; and the commissaries, having considered these pleadings, appointed the parties to give in mutual memorials, stating more particularly the grounds of their action and defences, and the relevancy of these grounds to support or elide the conclusions of the libel: and [155] on afterwards advising those memorials, and the whole process, The Commissaries found the libel sufficiently explicit to supersede the necessity of a condescendence, and, before answer, allowed the Pursuer a proof thereof; and allowed the Defender a conjunct probation and a proof of this specific allegation, that at the time of the declaration libelled the late Mr. M'Adam was then, and had for some time before, been incapable, by insanity, of contracting marriage."

The Appellant brought this interlocutor under the review of the Court of Session, for the purpose of having the scope of the proof of alleged insanity further extended; and having given in a special condescendence of facts relative to this allegation, the Lord Ordinary, upon advising with the Lords, remitted to the commissaries "with instructions so far to vary their interlocutor as to receive the said condescendence, and, before answer, to allow the Defender a proof thereof, and the Pursuers a conjunct probation."

The transactions of the 21st and 22d of March were proved, as laid in the summons. The declaration of marriage by Mr. M'Adam, and the circumstances attending it, were proved solely by the parole testimony of the servants present. It also appeared, that E. Walker said nothing at the time, but that she stood up, and gave her hand to Mr. M'Adam when desired to do so, and after he had declared that they were married, that she courtsied in token of her assent. It also appeared, that Mr. M'Adam had from the commencement, and during the whole period of the continuance of the [156] connexion, contemplated the probability that it might end in marriage. When about to take her into his house, he wrote the following letter to his agent:—"Stenhouse, 16th February, 1800.—Dear Sir, I am going to take a girl into keeping; her name is Elizabeth Walker, daughter of the late John Walker in Knockdon, parish of Straiton. Get two bonds wrote instantly; and be sure to send them by the very first post to Ayr, binding me and my heirs to pay her sixty guineas yearly, so long as she lives. Write them so that if I at any time marry her, that she gets no more jointure, unless provided by a subsequent deed. I mean by that, to prevent any claim to a third of the moveables. I suppose it can be done; if not, write them as you see best. Be sure that they arrive at Ayr on Wednesday or Thursday at farthest. I shall be in Edinburgh the first week of March, and will bring in the will;

"but is it not better to allow it to remain as it is, until we see what this produces. I remain, etc. Quintin M'Adam."

On the day after the Respondent had secretly quitted her brother's house, and gone to Berbeth, Mr. M'Adam addressed to him a letter, in these words: "Berbeth, 21st February, 1800.—Dear James, You will, perhaps, be surprised, when I tell you, your sister is come to live with me. But I hope you will not be angry, when I assure you, that I mean to behave to her in the most honourable manner. I have already settled sixty guineas on her yearly during her life. I have made her no promise of marriage, but it is very proba-[157]-ble it will end in that. She and I would be very happy you will come over to-day; and if there is any further explanation you wish, I shall be glad to make it you. I am, James, yours, etc. Quintin M'Adam."

In the month of January 1801, the Respondent was delivered of a daughter; and immediately prior to that event, Mr. M'Adam wrote a letter to Mr. Smith, his agent, proposing to him a question, which indicated, that it was in his contemplation to legitimate the children of this connection. Of this letter, the following is an extract: "Berbeth, 19th January, 1801.—Miss Walker will *lie in* in a few days; if I get the Minister of the parish to christen the child, and pay the fine for a bastard child, will that, in the event of my ever wishing to declare a marriage, have any effect of illegitimizing that child, or will it do it? Answer this immediately; it is the only part of the letter that requires an answer." To this letter Mr. Smith immediately wrote the following answer, which was found in Mr. M'Adam's repositories: "Edinburgh, 22d January, 1801.—Dear Sir, I am this day favoured with yours of the 19th. Upon Miss Walker's in-lying, and your getting the Minister to baptize the child, and your paying the fine for a natural child, all this will not prevent your afterwards legitimizing the child, by declaring a marriage, in case you should afterwards choose to do so. From the time of the declaration of marriage, the legitimacy of the child draws back to its birth, providing no other marriage has inter-[158]-vened." A few days afterwards Mr. M'Adam again wrote to Mr. Smith: "Miss Walker was delivered of a daughter on Wednesday last. I mean to call her Katherine for my mother." And in the course of the year 1803, the Respondent bore another daughter to Mr. M'Adam, to whom, after one of his sisters, he gave the name of Jean.

The evidence of Mr. Campbell, of Treesbank, led to the same conclusion. "He stated that he was out coursing with Mr. M'Adam, at Berbeth, and they had been talking together of Mr. M'Adam's new approach, and his bridge over the river Doon: That Mr. M'Adam started the subject of marriage, and spoke of Betsy, meaning Elizabeth Walker, the Pursuer; That, among other things, Mr. M'Adam said, that the great objection he had always had to marriage was, the fear of having no family, which would have made him the most miserable man alive: That his cousins, Captain M'Adam the Defender, and Mr. M'Adam of Turnbery, were most excellent people, but they had no families; and he alluded to a brother of theirs, who had a family, but of whom he spoke in terms of the greatest disapprobation; and said, that he was resolved that he should never get a shilling of his, as marriage could always take place on death-bed: By all which, the Deponent understood Mr. M'Adam to mean, that it was in his power to marry Miss Walker on death-bed; and the impression made on the mind of the Deponent by this conversation was such, that although he would, before it took place, have laid a bet, that [159] Mr. M'Adam would not marry Miss Walker, he would then, and afterwards, have betted, that such a marriage would take place."

The great object of the evidence in defence was to prove the insanity of Mr. M'Adam. It appeared that in March 1803 he was for a short time raving mad, but as he had been drinking to excess at that period, this was considered as rather the frenzy of intoxication. Some of the servants deponed, that he was periodically subject to pains in the stomach, accompanied with head-ach, flushing of the face, and an incapacity of sleep for several nights together, which had a strong effect on his mind: that when attacked by these complaints he was occasionally excessively depressed, and at other times excessively irritable, and broke out into "raptures of passion," as one of the witnesses expressed it, without any apparent reason. In March 1804, Mr. M'Adam himself, in speaking of his complaints to a Mr. Hugh Logan, Surgeon, in Maybole, said, "that they were most distressing—that while under the influence of them the world appeared to look with contempt upon him; and that once or

"twice he was so ill as to have nearly formed the resolution of destroying himself ; " and Mr. Logan gave it as his opinion, " that Mr. M'Adam was under the influence " of melancholic insanity to a certain degree, and that it often happens that this species " of insanity leads to suicide." Some of the servants likewise deponed, that for a day or two previous to, and on the day of his death, he complained of these disorders in his stomach : " that he felt a burning heat there which rose up to his throat as if it " would [160] suffocate him ; that he asked the same question three or four times " after it had been answered, and that he himself complained on the morning of his " death, that he had got no sleep for three nights running." One of the servants stated, that he put the fire-arms out of the way when he thought Mr. M'Adam was unwell. It appeared, that about a fortnight before his death, an old gardener, who had been long in the family, advised him to marry Miss Walker, and that he then said " he would not marry her, and that he would blow his brains out the day he married " her." On the morning of the day of his death, before breakfast, he wrote a codicil to his trust-deed of settlement in these words :—" Berbeth, 22d March, 1805.—To " Sir John Maxwell I leave my chesnut horse and pointer Sancho, and Major too " if he chooses. The rest are rather old."—From all these circumstances the Appellant drew the conclusion, that Mr. M'Adam was subject to periodical derangement ; that he was under the influence of this malady at the time of the alleged marriage, and when he committed the supposed suicide ; that it appeared from the codicil above-mentioned, that he entertained the purpose of suicide on the morning of the day of his death ; that the purpose of marrying Miss Walker and the purpose of suicide were associated in his distempered imagination, and that both were the effect of insanity.

On the other hand, the Earl of Eglinton, the Earl of Casillis, Sir Andrew Catheart, Sir Adam Fergusson, and a great number of other witnesses of the most respectable description, several of them of the medical profession, who had been in habits of [161] the closest intimacy with Mr. M'Adam, who had transacted business of a public nature with him, and had been employed by and with him in the management of his private affairs, who had been consulted by him on the subject of his complaints, and had seen him when under their influence—all concurred in declaring, that they had not only never observed in Mr. M'Adam any tendency to insanity, but that he always appeared to them a man of unusually sound and vigorous understanding. The respondents likewise traced the conduct of Mr. M'Adam during each day for a week before his death by means of the most unexceptionable witnesses, who had the best opportunities of observation, all of whom deponed, that they never discovered in him the least vestige of mental derangement. Even the servants, who spoke particularly to the existence and effects of his bodily complaints, could not say directly that he was deranged. The only witness who went to that extent was Mr. Hugh Logan, a country practitioner, who had never seen Mr. M'Adam when labouring under his stomach disorder, whose opinion that Mr. M'Adam was under the influence of melancholic insanity to a certain degree, appeared to rest upon his theory, " that stomach " complaints, in his (Mr. M'Adam's) and all cases of the kind, were the effect of a morbid " state of the brain operating by sympathy on the stomach."

It was attempted on the part of the appellant, to aid his case of constitutional insanity in Mr. M'Adam, by going into evidence of the insanity of some of his relations by the mother's side ; [162] but this was resisted by the Commissaries, and also, upon review, by the Court of Session.

The Pursuers (Respondents) therefore contended :

First, That there was no foundation whatever for the plea of insanity, but that it had been established, by the most striking and decided testimony, that Mr. M'Adam was in a state of perfect mental vigour ; and that in the business of his marriage, his conduct was not the effect of any insane or even sudden impulse, but of a deliberate and long-meditated purpose.

Secondly, That the facts alleged in the libel of the summons were fully sufficient in law to sustain the conclusions of the action ; and for this they gave the reasons afterwards stated in substance on the appeal case, viz. : " That by the law of Scotland, " marriage was held to be a civil contract, to the constitution of which, nothing more " was essential than the consent of the parties, expressed by words, either spoken " or written ; or manifested either by the unequivocal conduct of the parties, or by

"such presumptive indications of present consent as the law allows not to be questioned and traversed. Of the first kind are explicit declarations, *per verba de presenti*, either spoken in the presence of competent witnesses, or committed to writing, and those writings interchanged by the parties : Of the second kind are, on the one hand, continued cohabitation in the avowed characters of husband and wife : or, on the other hand, a promise of marriage, *subsequente copula* : from which last fact the law infers, *presumptione juris et de jure*, that the previous promise was then intentionally converted [163] into present consent. From these principles flow the two negative propositions : First, That the forms of a religious celebration, although prescribed by the church, and approved of by the law, are not essential in the expression of matrimonial consent : and, Secondly, That when such consent has been given, it derives no additional force from subsequent consummation.

"These leading principles of the law of Scotland, have been derived from the well known doctrines of the canon law ; which, in all this class of matrimonial obligations, may be stated as the general law of civilized Christendom, unless, in so far as local and positive institutions have innovated on the ancient system. Of the adoption of these principles into the existing law of Scotland, there is the most undoubted evidence, in all the writings of authority on that law, and in the decisions of the Consistorial and Civil Courts.

"Against these weighty authorities, the appellant had been able to refer to nothing more substantial than a sceptical tract, by the late ingenious Lord Kames, contained in a work entitled, *Elucidations respecting the Law of Scotland*. But a serious refutation of the opinion of Lord Kames on this subject would be very superfluous. It was observed on the Bench, when the judgment now appealed from was pronounced, that this tract is throughout a tissue of error, always brought forward in Consistorial causes of the present description, and always treated with contempt by the Court. And it has been still more lately observed by a very high authority, that his extreme inaccuracy in what he ventures to state, with respect both to the ancient canon law, and to the modern English law, tends not a little to shake the credit of his representations of all law whatever." The same learned person has added with great truth, "that it is easy to strike the balance upon this class of authorities ; they are all in one scale, a very ponderous mass on one side, and totally unresisted on the other." (Dalrymple against Dalrymple.)

Thirdly, That the allegations in the libel had been fully established by competent evidence, for in the case of a declaration of consent *de presenti*, it appeared necessarily to follow that it might be proved by parole testimony ; and Stair had accordingly said, "that marriage might be proved by witnesses, which was a direct and immediate probation." The only way in which the defender (Appellant) could dispute this proposition, was by confounding a declaration of present consent to marriage, with a promise of marriage *de futuro*.

The proof on both sides having been at length concluded, the Commissaries proceeded to give their judgment in the cause, in the following terms : "The Commissaries having resumed consideration of this cause, with the productions and proof for both parties, and whole process, find it proven by real evidence, that some years prior to the year 1805, the late (Quintin M'Adam had formed a resolution of making the Pursuer, Elizabeth Walker, his wife, and legitimating the children which she had borne to him, at some future period : Find it clearly proven, that on the forenoon of the 22d day of March, 1805, Mr. M'Adam carried this [165] purpose into execution, by joining his hands with those of the Pursuer, and declaring her to be his wife, and her children his lawful children, in presence of several persons whom he had called up to his dining-room to be witnesses to this declaration : Find, that this declaration was made in the most solemn, serious, and deliberate manner : that the late Mr. M'Adam was in his perfect sound mind ; that the deportment of the Pursuer clearly indicated her approbation of what Mr. M'Adam had done : that on this occasion, Mr. M'Adam and the Pursuer mutually accepted of each other as husband and wife : Find these facts relevant to infer marriage betwixt the late Mr. M'Adam and the Pursuer ; that by this declaration, the status of the Pursuer as his wife, and of her children as his lawful children, was fixed, and could not be affected by any subsequent act of Mr. M'Adam : Find the condescendence on which the defence

" was founded not proven, and repel the defence, and decern in the conclusions of " marriage and legitimacy in terms of the libel."

This judgment was brought under the review of the Court of Session, by a Bill of Advocation, on the part of the Appellant ; and with the consent of parties, the Lord Robertson, Ordinary, " appointed the parties to prepare and print memorials, " to be put into the boxes *quam primum*, in order to be reported to the Court." And on advising the cause, the Lords of Session directed the Lord Ordinary to pronounce the following interlocutor : " The Lord Ordinary having again considered this bill, " with procedure and writings produced, and [166] also memorials for the parties, " and advised with the Lords, refuses the bill, etc."

Against this interlocutor, the Appellant reclaimed by petition ; and on advising that petition, with answers for the Respondent, the following interlocutor was pronounced : " The Lords having advised this petition, with the answers thereto, they " adhere to the interlocutor reclaimed against, and refuse the desire of the petition."

Against these interlocutors, and also against the interlocutors over-ruling the attempt to prove mental derangement in some of Mr. M'Adam's maternal relations, the Appellant lodged his appeal. It was contended on the part of the Respondents that as the Appellant had acquiesced in these last interlocutors and suffered the cause to proceed, an appeal from them was no longer competent. But from the view of the case upon which the final decision turned, it was not found necessary to touch upon this point.

Mr. Clerk (for the Appellant). 1st, He still insisted that the insanity of Mr. M'Adam had been proved ; that the declaration in question was made under the influence of the malady, from some vague imagination floating in his mind, relative to the legitimization of his children before his death, which he was at the time resolved to procure by his own hand ; that the declaration was as much a prelude to his purpose of self-destruction as his grasping the pistol ; and that even though this purpose of self-destruction were not the effect of insanity, it was clear from his entertaining it at the time, that [167] he did not propose to live with the Respondent Walker as his wife, nor intend that *consortium vite* which was considered as entering into the definition of marriage.

2d, The Appellant ought to have been allowed the further proof of Mr. M'Adam's insanity, by showing that it was constitutional in his mother's family, because it was clearly a relevant fact ; and therefore it was no good objection to such proof that the feelings of third parties might be incidentally hurt by it. A case had been prepared from the evidence, and submitted to some eminent physicians, who gave such an opinion relative to the nature of the malady indicated by the symptoms as induced the Appellant to submit another case to Dr. Alexander Monro, senior, in regard to the relevancy of proving the tendency to insanity in the maternal relations of the deceased ; and Dr. Monro had given an opinion decidedly in favour of the Appellant, which, however, the Court below had ordered to be expunged from the proceedings. In regard to the relevancy of the fact in question, and also to show that the symptoms of Mr. M'Adam's complaints were such as indicate insanity, he cited a variety of the most eminent medical writers on insanity.

3d, Supposing the plea of insanity out of the question, the pretended marriage was not proved : First, because the facts were not sufficient to establish a marriage : Secondly, because if they were, they could not be proved by parole evidence, but only by writ, or oath of party. First, there were only three ways by which a marriage could be [168] constituted : First, by actual celebration *in facie ecclesie* : Secondly, cohabitation of the parties as man and wife, which affords a legal presumption of marriage : Thirdly, a previous promise, or a declaration of marriage with subsequent *copula*, and a decree of the proper Court finding that the parties are married. None of these modes were adopted in the present case. It was no regular marriage *in facie ecclesie* ; there was no cohabitation as man and wife, no promise or declaration with subsequent *copula*, no celebrator, not even a blacksmith. He then cited various authorities to show that nothing was understood by the law of Scotland before the Reformation to constitute marriage, but celebration *in facie ecclesie*, and particularly the act relative to bigamy, (1551. c. 19.) where the crime is made to consist in marrying a second husband or wife, the first being alive, " contrair to the aith and promise " made at the solemnization." The *medium peccati* here was perjury : but there

could be no pretence for saying, that Miss Walker would have been guilty of bigamy, or perjury, though she had married another after this declaration. Kames's *Elucidations*, article 5, p. 29—*Canons of the church*, drawn up at Perth in the years 1242 and 1269—Act of 1503, c. 77—Sir J. Mackenzie's *Observations*, p. 114—Mackenzie's *Criminal Law*, p. 59, were authorities to the same point. Even after the Reformation there was no idea that there could be a marriage, without a celebrator of some description, and he cited Spottswode's *Church History*, b. 1. p. 172.—*Directory for Worship*, 1643.—Act 6 and 7 of Assembly, 1690. and Act 15 of Assembly, 1715.—Act of [169] Par. 1641, c. 8, revived by 1661, c. 34, and Act of Par. 1698, c. 6.—Cohabitation as husband and wife, and promise or declaration *cum copula*, were different questions. There, matters were not entire. The question here was, whether a bare declaration, without any celebrator, constituted a marriage, or could prevent either of the parties from resiling, *rebus integris*. The Respondents relied, not on precedent or practice, but on certain passages in Stair, b. 1. tit. 4. and Erskine, b. 1. tit. 6. Both writers were vague and obscure upon this point, and when properly considered would not bear out the argument for the Respondents. Much was said about consent making the marriage, "*consensus, non concubitus, facit nuptias*." But upon the Respondents' doctrine the maxim was absurd. Would consent by parties at 600 miles distance from each other, and who never saw each other, be sufficient ! The consent must be to something done, viz. to such ceremonies as by law constitute a marriage. At the execution of the antenuptial contracts, the parties solemnly declare *per verba de præsenti*, that they take each other etc. etc. and yet, after this, either party is at liberty to resile, *rebus integris*, and is not even liable to the other in damages, unless under special circumstances. Here then was an instance of a much more solemn declaration than that of M'Adam, and by both parties ; and yet this was no marriage. But then it was said, that in the contracts the parties did not intend a present marriage : suppose, however, they did intend a present marriage, still, being but a bare declaration, it would not, *per se*, constitute a marriage.

[170] With respect to the decided cases, there was not one in which a declaration of marriage had been found sufficient, *per se*, to constitute a marriage, *rebus integris*, and the following cases were cited and commented upon in proof of this assertion :—M'Lauchlan v. Dobson, Dec. 6, 1796.—M'Kie v. Ferguson, 1782. —Cochrane v. Edmonstone, 1802.—Johnston v. Smiths, Nov. 18, 1766, Dict. IV. voce Proof, p. 169.—M'Innes v. More, Dec. 20, 1781.—White v. Hepburn, Nov. 18, 1785.—Taylor v. Kello, Feb. 16, 1786.—Anderson v. Fullerton, Nov. 13, 1795.—Ballantine v. Wallace, 1773.—Cameron v. Malcom, June 20, 1756.—Allan v. Young, in 1773.

In the case of M'Kie and Ferguson, bans were twice proclaimed under the authority of a line subscribed by the parties. The lady was prevailed upon to subscribe a letter to the Session clerk, to proceed no farther. The parties afterwards met, went to bed together, where they continued an hour, with the door locked. Six persons were then introduced, in whose presence they declared, that they were married. This was held to be a marriage : but then the distinction in that case was, that matters were not entire, for consummation must have been presumed.

(Chancellor. They were in bed together an hour before the declaration, but it did not appear that they were alone a moment after.)

In the case of M'Lauchlan and Dobson, Mr. H. Erskine, who was in the cause, took a note of the observations of the Justice Clerk, M'Queen, the greatest Scotch lawyer of his age, which agreed [171] with a note taken by another counsel at the same time. This note was as follows :

"Justice Clerk (M'Queen of Braxfield). Case new ; but the law is old and settled.

"Two facts admitted *hinc inde*. No celebration ; no *concubitus* ; nor promise " of marriage followed by *copula*.

"Contract as to land not binding till regularly executed, unless where *res non sunt integra* : A promise without *copula*, *locus penitentiæ*. Even verbal consent " *de præsenti* admits *penitentiæ*. Form of contracts contains express obligation " to celebrate : till that done, either party may resile. Private consent is not the " *consensus* the law looks to. It must be before a priest, or something equivalent. " They must take the oath of God to take each other. A present consent not followed " with any thing, may be mutually given up. But if so, it cannot be marriage."

If this, then, was not such a ceremony as constituted a marriage *per se*, it was not

such as would authorise the Courts to compel marriage by process; and in proof of this, he cited Kames's *Elucidations*, p. 31, 32.—Balfour (Marriage).—Spottswode, (Marriage).—Craig, lib. 2. d. 18, 19.—Stair, b. 1. tit. 4. sect. 6.—Kames's *Elu.* p. 33, 34.—Bankton, b. 4. tit. 45. sect. 49.—Erskine, b. 1. tit. 6. sect. 3.—Young v. Irvine, Dict. vol. 1. p. 565.—Haydon v. Gould, Burn's *Eccle. Law*, vol. 2. p. 416.

But suppose a mere declaration of consent *de presenti* did constitute marriage, there was no such thing in the present case. The Respondent Walker said nothing, but was a mere passive spectator of [172] the scene. No marriage therefore took place, for marriage is a mutual contract, and requires the consent of two parties which consent on both sides must be distinctly and unequivocally expressed.

Secondly, A *nuda emissio verborum*, as this was, could not be proved by parole evidence to the effect of establishing a marriage *per se*. This was strongly implied in those passages of Bankton and Stair, which touched upon this point. It was no answer to say that a regularly celebrated marriage might be proved by parole testimony as the public solemnization of a regular marriage was very unlike the naked emission of words in private. Even in the case of a promise *cum copula*, in order to lay the ground for establishing a marriage, the promise must be proved by writ, or oath of party, though the copula, *ex necessitate rei*, may be proved by parole testimony. To allow a proof by parole, of such a declaration as this, to the effect of establishing a marriage, would be still more dangerous than allowing a proof by parole of a promise *cum copula* to the same effect. But even if such proof could be admitted while the party was alive, it could not alter his death.—Cockburn *contra* Logan, Dict. July, 1670.—Bankton b. 1. tit. 5.—Dirleton's *Doubts*, *voce* Marriage and Legitimation.

Mr. Leach followed on the same side.

Sir S. Romilly (for the Respondents). First, After a particular statement of the evidence, in regard to the question of insanity, he remarked that the witnesses who deposed to the soundness of Mr. M'Adam's mind, were of a much superior description to those [173] on whom the Appellant relied. They had every opportunity of forming a correct estimate of the state of Mr. M'Adam's intellects, and they spoke decisively to the fact, that he was not only totally free from any appearance of mental derangement, but was a man of uncommonly vigorous understanding; yet the species of insanity attributed to Mr. M'Adam was not such as could have been concealed if it had existed. He purposely avoided saying any thing as to the medical authorities on which the Appellant relied, because, however valuable the testimony of such men might be in questions of insanity when speaking from personal knowledge and careful observation of the individual, nothing could be more fallacious than to try judicially the condition of any person by a comparison of his alleged symptoms with those which were stated by medical authorities to be usually the concomitants of insanity, or to submit the opinions of medical men, taken upon cases laid before them with a description of symptoms, as evidence to a Court of Justice. It was no uncommon thing for an ignorant person, in reading a treatise on diseases, to fancy that he had the symptoms of all the diseases about which he read.

Secondly. In regard to the attempt to prove an hereditary tendency to insanity, if this were to be allowed, it might be necessary to follow out that proof through a great number of collateral relations, and to try twenty causes instead of one. Mr. Clerk with all his knowledge of Scotch law, had not been able to produce a single authority for such a proceeding. Something of the kind was [174] done or attempted in Kinloch's case, and not stopped. That was all. In a late case in the Common Pleas, the heir at law offered to prove hereditary insanity against a testator, but this proof was rejected: so that in the law of England at least there was authority against it.

Thirdly. Whether a declaration of consent to marriage was proved? For that he need only refer to the evidence of the servants. It was also in evidence that Mr. M'Adam not only intended to marry the Respondent Walker, but also to live with her as his wife. But suppose he had at the time the intention to destroy himself, she still acquired the status of his wife, and could not be deprived of it by any subsequent act of his.

Fourthly. Whether a declaration *per verba de presenti* was sufficient *per se* to constitute a marriage. The Appellant said, there were three ways of constituting a marriage. First, Regular celebration. Secondly, Cohabitation with habit and

repute. —Thirdly, Promise *cum copula*. The Respondents insisted that there was a fourth mode, viz. a declaration of consent *per verba de presenti*, and for this they had the authority of the text writers and decisions. It was clearly stated in the writing of Sir G. Mackenzie, Stair, and Erskine, and the principle was distinctly recognized, even in the cases relied upon by the Appellant. The same doctrine was supported by the case of Dalrymple and Dalrymple, lately decided in the Consistory Court here, and the authorities there produced. Against the note of the opinion of the Justice-Clerk (M'Queen) in M'Laughlan v. Dobson, they had to set another note taken by Mr. [175] Hamilton, of the opinion of the same Judge in the case of Ritchie and Wallace (Fac. Coll. 1792), in which he was stated to have said, "With us marriage is now a civil contract to be proved like others. Is there here sufficient evidence? The Defender has said there are only three ways of marriage, (celebration, cohabitation, with habit and repute, and promise *subsequente copula*.) But I deny the doctrine. The principle of marriage by promise, etc. is, that *res not sunt integræ*, which, by a common rule of the law of Scotland, bars resiling: but a promise to marry, and actual declaration or acceptance, are quite different things. The last makes marriage *per se*."

The case of M'Kie and Fergusson he particularly relied upon as not to be distinguished from the present. With regard to ante-nuptial contracts, the whole of such a contract was to be taken together, and then it must be evident that no declaration of present consent was intended. In the old styles the words were, that the parties took each other for their future husband and wife. As to the argument drawn from the bigamy act, it applied equally against a promise *cum copula* as against a present declaration: so that, as it proved too much, their Lordships would probably think that it proved nothing.

Fifthly, To say that a marriage of this kind could not be proved by parole evidence appeared to him an absurdity; for it was as much as to say, that though there might be such a marriage yet it never could be proved at all. If a marriage could be constituted by a declaration *de presenti*, it followed *ex* [176] *necessitate* that it must be proveable by parole evidence.

Mr. Thomson (on the same side). A declaration *per verba de presenti*, before witnesses, was equivalent to celebration by a clergyman. A celebrator was not, therefore, necessary. The blacksmith was only a witness.

Mr. Clerk replied.

Lord Eldon (Chancellor). In a case of such importance, it would have been proper to have taken further time for consideration, if the only source of their information upon the subject had been the argument at the bar, relevant and able as that argument was on both sides. They were, however, assisted, among other documents, by a paper drawn by Mr. Clerk: which, in point both of composition and learning, was one of the best that ever had been prepared by any lawyer: and which would do him the highest credit, as long as that paper should be remembered. In the discussions in the Courts below, in this country too, a marked distinction had always been made between the promise *de futuro* and contract *de presenti*: as would be noticed, when he came to consider the validity of the marriage in that view.

The first question here was, Whether Mr. M'Adam was of sound mind at the time when he entered into the contract? If not, that contract certainly could not be valid: his opinion, however, was, that on the 22d of March, 1805, Mr. M'Adam was of perfectly sufficient soundness of [177] mind to form a valid contract; and this would dispense with the consideration of the other very delicate point, whether the evidence to show hereditary insanity in the blood ought to have been received in a case of this nature. The true question was, not, Whether he had ever been insane before, or from what cause? but, Whether he was of sufficiently sound mind to contract on the 22d of March, 1805? It was of no consequence in what state he had been at any other time. If then they should affirm the judgment of the Court below on the other ground, there could be no occasion to pronounce any opinion upon the very delicate question to which he had adverted.

It was impossible, however, speaking as a man and as a lawyer, to deny, that if Mr. M'Adam was insane in 1803, and the similarity between the state of his mind at that time, and on the 22d of March, 1805, had been so marked as to render it probable that it was a recurrence of the same malady: it was impossible, he said,

to deny, that this circumstance ought to be attended to in judging whether Mr. M'Adam was really insane on the 22d of March, 1805. But if they had satisfactory evidence of his sanity at the time of the contract, then the antecedent state of his mind, and the causes of it, might be laid totally out of view.

Now, their Lordships knew what the law of England was upon this point, and he was not aware that, in this respect, the law of Scotland was different. A man might marry, as well as form any other contract, if he was sane at the time. The legislature, with a view to prevent the marrying [178] of lunatics during their lucid intervals, had enacted, that a commission of lunacy would avoid such marriages. This was conclusive that other contracts might be formed during their lucid intervals; and that the law did not avoid marriages, unless contracted during the course of time that the lunacy had been found to exist. The usual way was, to direct an issue to try whether the party was of sound mind at the time of the contract; and, if he was, it was of no consequence in what state he might have been, either before or after. He was unwilling to mention names in such cases; but a case had lately occurred, where a young lady at Hampstead had been insane, and her father thought it would be of advantage to her if she were married. She was accordingly married during a lucid interval. He himself had examined her, and found that she was affected, even then, with a certain degree of morbid feeling; and it appeared in evidence, that, without any apparent foundation for the notion, she always believed that somebody had poisoned her. As she was a ward of the Court, and no commission of lunacy existed, he had directed an issue to try whether she was of sound mind at the time of the marriage, and it was found that she was of sound mind. He recollected having been concerned, many years ago, in a cause, where a gentleman, who had been some time insane, and who had been confined till the hour of his death in one of those houses (mad-houses) of the better sort, at Richmond, had made a will while so confined. The question was, Whether he was of sound mind at the time of making this testament? [179] It was a will of large contents, proportioning the different provisions with the most prudent and proper care, with a due regard to what he had previously done for the objects of his bounty, and in every respect pursuant to what he had declared before his malady, he intended to have done. It was held, that he was of sound mind at the time. He mentioned this the rather, on account of its similarity to the case now under consideration, in one important particular; viz. that the act done was pursuant to a previous declaration of intention. The act of marriage, on the 22d of March, 1805, was in this way connected with the letters of 1800.

He agreed, that it was not a proper mode of proceeding, merely to state facts, in such a case as this, to medical men, and take their opinion upon these facts, and then leave it to the Court to judge upon these facts and opinions, without any personal examination of the party by these medical men. But he admitted, that it was fair to consider whether, at the time of the marriage, Mr. M'Adam did not intend to commit the act of suicide. If it were proved, that he was at the moment under the influence of that morbid feeling, it might be a circumstance of considerable weight.

With respect to the evidence here adduced, there was no doubt but an unsound state of mind might manifest itself by an accompanying ill state of bodily health. But if it was admitted that the mind was in a sound state before, then they were to look at the state of bodily health: not as in itself an evidence of mental derangement, but with a view to ascertain what effect it had on the state of [180] the mind. Then, after looking at the evidence of Woodburn the factor, Hawthorn the surgeon, and a number of other most respectable witnesses, who had the very best opportunities of observation, who declared that he was in a perfectly sound state of mind, it would be taking a liberty which man ought not to take with man, to say, that Mr. M'Adam, at the time of the marriage, was not competent to contract. Under these circumstances, it belonged to God alone, who knew the heart, to decide, whether Mr. M'Adam, at the moment of contracting, entertained the purpose of suicide. It ought not to be decided by any declaration of theirs. He did not think, therefore, that the judgment of the Court below should be touched on that ground.

He had said so much upon that head on account of the opinion given by one who had been President of the Court of Session, now alive, (Islay Campbell); who had said, that he did not conceive that Mr. M'Adam was of sufficiently sound mind to contract at the time of this marriage; and that, at any rate, he conceived the object

of Mr. M'Adam to have been, not to make Miss Walker his wife, but his widow. How it was possible for him to make her his widow, without making her his wife, could not very easily be conceived.

As to the other question, it was of so much importance, that it was a great satisfaction to have heard all that they were ever likely to hear upon it : for, though they could not have the opinions of professional men at the bar of that House upon an appeal ; yet such opinions were to be found in the [181] proceedings of the Consistory Court of this country. In the case of Bearnish and Bearnish, which had been not very long ago before the Consistory Court, it had been necessary to inquire particularly what was the law of Scotland upon this point ; and it had been found, that there was a marked distinction made between contracts *de presenti* and promises *de futuro*. And in the case of Dalrymple and Dalrymple, in the Consistory Court, the question was also considered, and each of the persons who were there examined stated his opinion on paper, gave the text in writing, and the decisions, with comments on the decisions and text. He found five names there of persons of the greatest professional knowledge, who had given it as their opinions, that a contract *de presenti* constituted an immediate marriage ; and there were three on the other side, who said, that a contract *de presenti* was not of itself an entire immediate marriage. There had been, therefore, a difference among professional men on the point, but, after attending to all that he could learn on the subject, he did not find that there was the same difference in judicial opinions on this head. The fact was, that the canon law was the basis of the marriage law all over Europe ; and the only question was, How far it had been receded from by the laws of any particular country ? By the canon law, the distinction between the contract *de presenti* and promise *de futuro* was well known : the former consisting a good marriage of itself ; the other not unless followed by *copula*, or some other act which is held in law to amount to the carrying the promise into [182] effect. This distinction is stated in the text of Stair. But if the contract *de presenti*, as well as the promise *de futuro*, had required the subsequent *copula* to give effect to the marriage, the distinction would never have been heard of. The fact of the *copula* following the promise, is held to make that present and complete which before was future and incomplete. If, then, a verbal declaration *de presenti* was sufficient to constitute a marriage, how it was to be proved, except by verbal testimony, he did not know.

With respect to the decisions, it was a position again and again clearly recognized in them, that the contract *de presenti* formed very marriage, *ipsum matrimonium* : and the judgments of the House of Lords had not trenched on the general doctrine. Since this was the evident result, their Lordships would excuse his entering into a detail of the decided cases. If such was the law of marriage in Scotland, he was relieved upon entering upon the consideration of the question. Whether it was wise that it should have been the law so long ? or, Whether it ought to be so in future ? If it should be thought proper to make any alteration in the law on this subject, it must be done in another way.

Another point had been made : viz. That there was not here the species of consent necessary to bring the case within the maxim, "*Consensus, non concubitus, facit nuptias.*" Now, the evidence was, that, as soon as the connexion between this lady and Mr. M'Adam began, in 1800, he looked forward to a marriage with her ; for, in his letter to [183] his man of business, on that occasion, he called the provision to be made for her, a jointure ; and expressly directs the deed to be so prepared, as that the provision should not necessarily be increased, if he should at any time be married to her ; and he mentioned in his notice to the brother, that the connexion might possibly end in marriage. After this, when she became pregnant, he wrote to his man of business, to ascertain whether certain acts would endanger the legitimation of the child in case he should afterwards marry the mother. Their Lordships knew the distinction between the law of Scotland and that of England on this point ; the former legitimating all the children of the parties born before marriage ; the latter legitimating only those who were born after the marriage. If they were arguing respecting the comparative moral effects of the two institutions, one might quote this as an instance of the encouragement given, by this doctrine of the law of Scotland, to postpone the time of marriage, from the idea that they can marry on their death-bed, and thereby render their children legitimate ; whereas, accident might prevent

them from ever carrying their design into effect. At the time of baptizing the child, he gave her the name of his mother ; which, as connected with other acts, was a circumstance worthy of attention. It was clear, then, that he had the intention of marrying from the beginning ; though this amounted neither to a promise nor a contract. It was in evidence, too, that he treated her with great respect. It had, however, been said, that he had declared to Richardson, the gardener, that he would [184] not marry her ; and to another witness, that he had given her no promise of marriage. But he did not think there was much in these casual observations, uttered probably merely to conceal his real intentions, when the design was decisively marked by his more deliberate acts. Then he wrote to Smith, and declared to Woodburn, that he had made up his mind to marry Miss Walker. Might not these be looked at as throwing light upon his intention to do the act of the 22d of March, 1805 ? He called her his wife, in the presence of his servants, sent for expressly for the purpose of bearing testimony to the marriage ; and he likewise declared, that these were his legitimate children : words deserving of being particularly noticed, as evidence of his intention. The parties joined hands. There was a conversation between them afterwards, upon which Mrs. Wylie, the house-keeper, who appeared not to have been very well disposed towards this marriage, was called in, along with the other witnesses, and the same ceremony was repeated, with a slight unimportant variation in the expression. The lady gave her hand, and, when he declared her his wife, courtied, as a sign of her assent. If this had been a promise of future marriage, it would not certainly have constituted an actual marriage. But when he declared that the lady was actually his very wife, and that these were his legitimate children, *per verba de presenti* : this formed a present contract, and they became, *eo instanti*, as much husband and wife, as if the ceremony had been celebrated in the kirk ; and the marriage was as valid as if a man, in returning from the kirk, immediately after his [185] marriage there, had died of an apoplectic fit before he reached the house. Afterwards, Mr. M'Adam told Woodburn, that he was married. It appeared that Mrs. Wylie was nettled at this business, and was anxious that he should wait till Mr. Smith came ; but he refused to wait for him, lest Smith should dissuade him from his purpose. The lady received compliments as Mr. M'Adam's wife. All this was evidence of the intention of the parties to marry, and it was clear, that, by the transaction of the 22d March, they meant to celebrate and constitute a present marriage.

Then came this question, Whether this transaction could be proved by parole testimony ? He agreed, that there was great danger in admitting the constitution of a marriage to be proved by mere parole testimony. But they had only to consider, whether the existing law allowed this to be done. Sitting there as a Court of Appeal they had nothing to do with the question, Whether it should be so in future. Now, when an actual marriage was constituted by the mere verbal declaration of the parties, how was it to be proved, but by parole testimony ? Suppose a marriage celebrated before a minister : there was no regular form of words for this purpose ; and there it was admitted, that the celebration might be proved by parole evidence. Then, if it was not necessary for a clergyman to be present, and if an irregular marriage was as valid as a regular one, why should it not be proved in the same way ? It was answered, True : but there was the "habit and repute," and the subsequent *copula*, in that case. This, however, did not [186] grapple with the argument : for it might happen, that the death of one of the parties, by the act of God, might prevent any sexual intercourse, and yet the marriage might be proved by parole testimony. So the law already existed, in a number of cases : and, upon the whole, he had heard nothing to convince him that a marriage could not be proved by this species of evidence.

With respect to the question, Whether, if the parties had married other persons, after this contract, they could have been punished for bigamy ? he agreed, that the argument founded upon this proved too much. If the statute applied only to marriages regularly celebrated, and if this was not a regularly celebrated marriage, then it appeared to follow, that the parties could not be punished for bigamy, on marrying other parties again, though the second marriage might be invalid. The legislature probably meant to make a distinction between the civil and criminal consequences in these cases.

He had now pointed out generally the grounds of his opinion, that this marriage

was duly had. They had before them such evident demonstration of the inconvenience of loose judgments, that he intended to propose, that the present judgment should be prefaced by some finding which might distinguish it from some of the loose cases noticed at the Bar. The finding might be of this nature :—

1st, That, at the time of the declaration of marriage in question, Mr. M'Adam was of sound mind, and able to contract.

[187] 2d. That, being then of sound mind, it was unnecessary to decide upon the question of previous insanity, or any circumstances connected with it.

3d. That, by the declaration of marriage, and the facts and circumstances connected with this declaration, it appeared, that the parties did, on the 22d of March, 1805, intend, forthwith, to marry, and did accordingly contract very matrimony.

Lord Redesdale concurred in the opinion, that there was not the slightest proof of insanity at the time of the contract. Insanity was not to be inferred from the subsequent act of suicide. It was not inferred by law, but must be proved. There was no evidence here that Mr. M'Adam was insane at any period of his life, except from his irregular living at Edinburgh in 1803 ; and then it was immediately removed by medicine. Putting that, then, wholly out of consideration, the question was, Whether the circumstances were sufficient to constitute a legal marriage ? The Acts of Parliament had been referred to, and especially that of 1551, cap. 19 ; from which it was inferred, that a marriage was not valid, except regularly celebrated in *facie ecclesie* ; as a prosecution for bigamy could not be supported under that statute, unless the previous marriage had been so celebrated. It did however appear to him that the answer given by Sir S. Romilly, to that argument, was sufficient. Besides, he thought that the expression in the act was not strong enough to support the inference, considering that, by the prior act of 1503, cap. 77, marriage was recognized without this evidence of regular celebration for its validity. Perhaps the intention [188] was, that stronger evidence should be necessary in criminal cases. The acts of 1641, cap. 8, and of 1661, cap. 34, were so far from supporting the conclusion, that regular celebration was necessary to constitute a valid marriage, that they referred to marriages constituted in both ways, where there was, and was not, a regular celebration ; and the act of 1698, cap. 6, made the same distinction.

All the text authorities made a clear distinction between the contract *de presenti* and the promise *de futuro*, whereas the argument on the side of the Appellant went utterly to abolish the distinction. In the text writers, and especially in Mackenzie's and Erskine's *Institutes*, the doctrine contended for by the Respondent was clearly recognized.

The same doctrine was also to be found pervading the whole of the cases. In the case of M'Lauchlan and Dobson, there was only a declaration, and no subsequent *copula*. Upon the doctrine of the Appellant, there was no ground to have induced the Commissaries to declare this to be a marriage. It was afterwards indeed found by the Court of Session, that this was no marriage, not because a declaration *de presenti* was *per se* insufficient to constitute a marriage ; but because, from all the circumstances taken together, it was evident that the parties had no intention of forming a present marriage. The declaration was considered as an engagement for the future, from which the parties, *rebus integris*, were at liberty to resile. It was not enough that there should be a reservation by one of the parties. The intention of both in that case was, that the real marriage should be future. It had been said that in the pre-[189]-sent case there was a secret reservation in the mind of Mr. M'Adam, who never meant to live with Miss Walker as her husband. But could it be allowed that a contract should be ineffectual, because there was a reservation in the mind of one of the parties ? In the case of M'Lauchlan and Dobson the reservation was in the minds of both parties. But was there proof of any such reservation on the part of Mr. M'Adam ? It had been inferred from the subsequent suicide, and from his language to Richardson and others. That inference however had been met by a variety of circumstances, which marked his present intention to marry. He had said at the time of the declaration, that these were his legitimate children. From his letter to Smith, stating, that he had made up his mind to marry Miss Walker ; from his declarations to Woodburn before and after—it was clear that he considered himself bound by his contract, and that he had completed his marriage.

It had been objected, however, that the verbal declaration could not be proved

by parole testimony. But if a marriage could be constituted in this way, he did not understand how it could be proved, except by parole evidence. In M'Lauchlan and Dobson, and in M'Kie and Fergusson, the evidence was parole.

He saw no reason in this case therefore to dissent from the Court below. If ever a marriage could be completed without consummation, this was a case of that description. He did not think it could be properly said, that things were entire after this: Though one of the parties died before consumma-[190]-tion, the person living had acquired a different character—her children had acquired a different character. There was no proof that Mr. M'Adam did not intend a *consortium vitæ* at the time of the marriage; and even though he had not had that intention, still it was not to be allowed that a civil contract, (as this was by the law of Scotland,) should be avoided by a secret reservation of one of the parties.

Lord Carlton was satisfied that the law of Scotland made a distinction between a contract *de presenti* and a promise *de futuro* in cases of marriage. Adverting to the objection, that there was no evidence of consent on the part of the lady, he noticed the facts that she had stood up—that she had given her hand—that she heard the declaration, and then courtsied, which was a usual mode of intimating consent. And from all these circumstances, he said it was fairly to be presumed that she had consented.

Judgment of the Court below, establishing the marriage, affirmed.

Agent for Appellant, RICHARDSON.

Agent for Respondents, SPOTTESWOODE and ROBERTSON.

NOTE.—The Court of Session had awarded a sequestration of the entailed estates in question, in the above cause, during the proceedings in the Courts below. Upon the termination of the cause there, the sequestration, which the Appellant was desirous should be continued pending the appeal, was recalled: the Respondents proceeded to take possession, and [191] an interdict was applied for and refused. Against this recall of the sequestration and refusal of the interdict the Appellant appealed: but as the effect of the above decision, was that he had nothing to do with the estates, these two supplementary or secondary appeals fell to the ground of course.

ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

RUBICHON v. HUMBLE [July 20, 1813].

[12 Car. II. c. 18, repealed by 6 Geo. IV. c. 105; 48 Geo. III. c. 69 by S. L. R. Act, 1872 (No. 2); 41 Geo. III. c. 103 (except s. 3, declaring Malta part of Europe) by S. L. R. Act, 1872.]

[Contract by the owner of a ship, that the vessel shall proceed from the Thames to Martinique, there to take in a full and complete cargo of sugars, rum, and other West India produce, and to proceed with the same direct to Malta. This contract illegal under the Navigation Act of 12 Car. 2, cap. 18, and 48 Geo. 3, cap. 69, and not helped by the Malta Act, 41st Geo. 3, cap. 103.]

The Defendant in error, Michael Humble, owner of the ship *Neptune*, brought an action of covenant in the Court of King's Bench, upon a charter party of affreightment, against the Plaintiff in error, Maurice Rubichon, freighter of the vessel.

The ship was hired in November 1809, to proceed from the Thames in ballast, or with a cargo, to Martinique, without waiting for convoy, and there to deliver her cargo, if any, and then to take on board "a full and complete cargo of sugar, rum, and other West India produce," and to proceed direct to Malta, without waiting for convoy, and there to deliver the cargo to the agents or assigns of the freighter. In consideration whereof, the freighter covenanted to furnish a cargo or cargoes

[192] as above ; " and also well and truly to pay or cause to be paid to the owner " or his owner, in full for the hire of the said ship, in the voyage aforesaid, at and after " the rate of forty shillings lawful money of Great Britain, per ton, for each and every " ton of the said ship's register tonnage, per calendar month, for every calendar month " the said ship should be kept in the service of the freighter, in the voyage aforesaid " etc." The declaration stated, that the ship was furnished with everything needful for such a voyage.

The ship proceeded with a cargo to Martinique according to the contract, but the Plaintiff in error neglected to furnish her with a cargo of West India produce ; but the declaration stated, that after having remained at Martinique for some time for the cargo, she afterwards sailed to Malta without any cargo, and in every respect completed the voyage according to the engagement of the owner. The freighter having refused to pay, the action was brought to recover the amount of the freight according to the rate above-mentioned for eight months, during which time the vessel had been employed in the voyage. The Plaintiff in error pleaded several dilatory pleas, upon which issue was joined. The issues were tried the sittings after Trinity term, when a verdict was found for the owner (Defendant in error). The Plaintiff in error had, for the purpose of getting the trial postponed, given an undertaking, according to the usual practice, to give judgment as of the preceding Easter term, in case the Defendant in error should recover. In the ensuing Michaelmas term, the Plaintiff in error moved in [193] arrest of judgment, upon the ground of illegality of the contract : but as he had agreed to give judgment as of a preceding term, the Court thought itself precluded from then entertaining the consideration of the objection : and judgment was given for the Defendant in error—whereupon the Plaintiff in error brought his writ of error.

Mr. Curwood and Mr. Richardson (for the Plaintiff in error). They had two propositions to maintain : 1st, That this being a contract for freight for carrying on a contraband trade, was therefore illegal. 2d, That being illegal, it could not be enforced, and no damage could be recovered for non-performance.

It being contrary to the navigation laws of the 12 Car. 2, cap. 18, sect. 18, to export sugar and other articles from his Majesty's colonies to any port in Europe, except England, Ireland, Wales, or the town of Berwick upon Tweed, the 48 Geo. 3, cap. 69, was enacted for the purpose of authorizing the exportation of sugar and coffee from his Majesty's colonies and plantations to any port direct to Europe, southward of Cape Finisterre, (under certain terms therein mentioned). But by the latter part of the 2d section it is enacted, " That in that case no other goods whatever, except " sugar and coffee, shall be taken on board any such ship or vessel, unless it be for " the necessary use of the said ship or vessel." And sect. 4, (referring to the second section, which prohibits sugar or coffee from being shipped in any of the colonies or plantations of America, for the purpose of being carried to any port in Europe southward of Cape Finisterre, without [194] first obtaining a licence,) enacts, " That " if there shall be found any other sugar or coffee but such as shall be indorsed on such " coquet or warrant taken out and delivered as aforesaid, or any other goods than " sugar and coffee shall be discovered to have been laden or put on board any ship " or vessel having liberty to trade to parts to the southward of Cape Finisterre by " virtue of this act, or shall be brought to or be shipped on board such ship or vessel, " or shall be put into any hoy, lighter, boat, or other vessel, in order to be put on board " such ship, before such entry, or taking out such coquet or warrant, all such sugar, " coffee, and other goods, shall be forfeited and lost, as also the hoy, lighter, boat, " or other vessel or carriage whatever employed in shipping or attempting to ship " any goods other than sugar or coffee, together with the ship or vessel on which such " other goods shall be laden ; and the owner of such sugar or coffee, or such goods, " shall also forfeit double the value thereof."

The stipulation, therefore, in the above-mentioned charter-party, to take in a complete cargo of sugar, rum, and other West India produce, and proceed with the same to Malta, must be deemed illegal and void.

The statute is express, that if any other goods than sugar or coffee be shipped, the whole cargo shall be forfeited as well as the ship. In a case of this nature, where any part of a contract is contrary to legislative provision, the whole is void. (See the several cases collected in 1 Saunders' Reports, by Serjeant Williams, 66, note 1.)

In *Chater v. [195] Beckett*, 7 Term Reports, 204, where a part of a contract would have been valid at common law, but the other part was declared void by the statute against frauds, 29 Car. 2. cap. 3. for not being reduced into writing, the whole contract was held void : so in *Drury v. Defontaine*, 1 Taunton's Reports, 136, Sir James Mansfield said, that if any act is forbidden under a penalty, a contract to do it is now held void. (See also the cases of *Gallini v. Laborie*, 5 Term Reports, 242 ; *Ribbans v. Cricket*, 1 Bosanquet and Puller's Reports, 264 ; *Blachford v. Preston*, 8 Term Reports, 89 ; and *Law v. Hodson*, 11 East's Reports, 300.) It will suffice merely to allude to the principle on which it has so frequently been decided, that no part of a contract militating against the provisions of a statute, can be enforced. It is obvious, that if Courts of Justice were to give effect to such stipulations, they would in effect repeal the statute, since parties, for a larger premium or consideration, would always be found ready to incur the risk of a seizure. It is not, as observed by Lord Mansfield, on the behalf of the individual, but for the sake of the public, that he is allowed to avoid performance of his own contract.

But the stipulation in this particular case, to pay freight, is so entire, that, even supposing it were competent to the Court in point of law to divide the contract, and give the Plaintiff freight for so much of the voyage as was legal, they could not find a principle on which equitably to apportion the freight. In the case of illegal voyages, or indeed of any other illegal contract, the party stipulates to give a larger premium or consideration than he [196] otherwise would ; consequently it may be inferred, that, on account of the Plaintiff's covenant to receive a cargo of rum, the Defendant agreed to pay a larger freight for the entire use of the ship ; the Plaintiff cannot therefore be allowed freight, even on the outward voyage, because that would probably be too large a reward merely for the use of the ship during that part of the voyage. The ship was hired for an illegal purpose, and therefore the decision at common law, that a party cannot recover any thing whatever, seems applicable. (See *Girardy v. Richardson*, 1 Espinasse's Cases, *Nisi Prius*, 13.) In whatever shape a question on an illegal contract arises, Courts of Judicature are bound to give that decision which tends to destroy the inducement of parties to enter into such contracts ; and the best course must obviously be, in cases of this nature, not to allow the party to recover any remuneration whatever. Even in cases where there is no illegality in the contract, if the party do not perform every thing on his part, there are many cases of conditions precedent, in which, though a partial benefit has been conferred, yet, on account of the non-performance of the whole bargain, no partial remuneration is recoverable. In the present case, the Defendant in error neither did nor could legally perform his entire contract. If, therefore, it can be established, that on the face of his declaration the voyage was in part illegal, it is submitted that a writ of error is sustainable.

It appears on the face of the declaration, that the ship was hired to carry rum and other West India produce from the isle of Martinique to the island [197] of Malta ; and as the Court are bound to take notice of the situation of these places, falling within the prohibition in the statute against carrying produce of his Majesty's colonies and plantations in America to a port in Europe southward of Cape Finisterre, the objection is certainly on the record, and may be take advantage of by writ of error.

In that case, the averment in the declaration, that the ship was provided with all things needful for such a vessel, and for the said voyage, would not avail ; for unless some statute authorised it expressly, even the King's licence could not legalize the violation of the Act of Parliament, (see *Shiffner v. Gordon*, 12 East, 296 ; and the observations of Sir James Mansfield, in the case of *Toulmin v. Anderson*, 1 Taunton's Reports, 231.) consequently, in point of law the ship could not have been provided with all things needful for the voyage, and the above allegations cannot avail.

It was also submitted, that the stipulation to sail without convoy was illegal, and contrary to the statutes 38 Geo. 3. cap. 76, and 43 Geo. 3. cap. 57, and consequently the said charter-party was illegal and void.

It might perhaps be said that both Martinique and Malta were plantations belonging to his Majesty, and might therefore lawfully trade between each other. But the word plantations must be understood of plantations *ejusdem generis* with those

previously mentioned, such as arose from colonization, factories, etc., among which Malta could not be included. It also appeared from the whole of the act, that it applied only to plantations in Asia, [198] Africa, and America : whereas by the act 41 of the King, cap. 103, Malta was declared to be in Europe. If Malta should be held to be in Africa, it was not strictly a plantation ; if in Europe, the direct intercourse between it and the plantations was forbidden by the navigation laws ; and in all articles except sugar and coffee by 48 of the King, cap. 69. In the act of 15 Car. 2, cap. 7, the distinction between plantations in Asia, Africa, and America, and the dependencies of this country in Europe, might be clearly traced. The 4th section of the act 48 of the King was so strong that it would have rendered this traffic illegal, even if it had not been so before, as it confined the liberty to trade, as there stated, to the articles of sugar and coffee exclusively, and prohibited the trading even in rum, which was not mentioned in the original Navigation Act, not being then manufactured. Yet the present contract was to carry rum and any West India produce. It might be said that the act 48 of the King was an enabling statute, and merely legalized that which was not legal before, and took away no benefit ; but it did take away some benefit, as it rendered the ship and cargo in some cases liable to confiscation. The regulations of the Malta trade under 41 of the King did not prevent the prohibition extending to it as far as concerned British trade. The proclamations had only rendered it a free port in regard to neutrals. This must have been the extent of the permission to regulate, given to his Majesty by the act 41 ; otherwise he might have superseded the whole of the navigation laws.

[199] Messrs. Scarlet and Abbott (for the Defendant in error). The engagement was to take " a full and complete cargo of sugar, rum, and other West India produce." The carriage of rum was not illegal, for it was not enumerated among the prohibited articles in the Navigation Act of 12 Car. 2. But they rested upon the words, " and " other West India produce," which word *and* was the foundation of their argument, as enabling them to make the contract illegal if they chose. But if Malta was a plantation belonging to his Majesty, the prohibition in the statute 12 Car. 2, did not extend to it. If there was any ambiguity they had only to look at the object ; and what could be the object of excluding any territory belonging to the crown of Great Britain, either in Europe or any where else ? But if the trade was prohibited by the navigation laws, these were dispensed with by the Orders in Council under the Malta Act. Rubichon knew of this, and wished to take advantage of it. It would be a harsh construction to say, that these orders only extended a benefit to neutrals, which was denied to the subjects of this country. Then came the act 48 of the King, which was not a restrictive, but a permissive statute ; not taking away that which was before permitted, but introducing a new trade.

Lord Eldon. Was it clear that the trade was lawful before ?

Lord Redesdale. The object of the Malta Act was to put it on the footing of Gibraltar.

Messrs. Scarlet and Abbot. If Malta was an English plantation within the meaning of the navigation laws, the trade was legal. If not such a plantation, the trade was legalized by the Orders in Council under the Malta Act 41 of the King, and the statutes continuing that act, and the liberty was not taken away by 48 of the King.

Lord Eldon. Had it been decided whether Malta was a plantation ?

Mr. Curwood. It had been decided that Gibraltar was not a plantation.

Lord Redesdale. Upon this construction, Dunkirk, Toulon, and Calais, if they had remained in our possession, would have been plantations.

Mr. Curwood read a passage from Mr. Reeves' book, which he did not cite as any authority, but merely in explanation of the meaning generally attached to the word plantation. It properly signified a place that had been colonized from the parent country.

Lord Eldon (Chancellor) stated the case, and said, that he had looked at this contract with great anxiety, in order if possible to find some ground on which it could be supported ; because it appeared to him, that in moral justice the original Plaintiff was entitled to recover. But he regretted to have to say, that, speaking as a lawyer, he was unable to discover how the objection could be got over. In this opinion, his noble and learned friends (Redesdale and Ellenborough,) concurred with him : and the judgment of the Court below must therefore be reversed.

It was accordingly ordered and adjudged, that [201] the judgment of the Court of King's Bench be reversed.

Agent for Plaintiff in error, FLADGATE.

Agents for Defendant in error, PALMER, TOMLINSON, and THOMSON.

FROM SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HALL,—*Appellant*; ROSS, Esq., of Rossie,—*Respondent* [June 23, 1813].

[3 Scots R. R. 63.]

[Respondent, having let certain fishing stations to Appellant, erects a dock, by which the fishing is injured. Appellant claims a deduction from the rent, on account of damage, which is refused. Question comes before the Court of Session. Majority of Judges of opinion that some damage had been sustained by Appellant, but Court pronounces against his claim; some of those Judges who admitted that he had suffered damage being against him, on ground that the degree of injury could not be exactly ascertained. This judgment held to be erroneous by the House of Lords, on the principle, that where damage is admitted, some compensation is due; and cause remitted, with instructions to ascertain damage in some way or other.]

The Rossie salmon fishings in the river Southesk, near Montrose, were let by the Respondent to the Appellant, Hall, at the yearly rent of £600 upon a lease for 21 years. By the terms of the lease, the fishings were let to Hall, "as they were lately possessed by John Richardson, Esquire;" and the tenant was allowed "to adopt any improvement in the mode of fishing, in any of the bays or islands formed by the sea on the island of Rossie, which [202] he might think proper." The Respondent also became bound to warrant the lease, as follows, viz. "in so far as the different stations have been hitherto fished or occupied at all hands, and against all mortals; and, in so far as the said Thomas Hall, or his forefathers, may judge fit to alter and improve the same, in consequence of this liberty, or commission before written, from his own facts and deeds only." The Respondent had resolved to erect a dry dock on the island of Rossie, in the river Southesk, and it was probable that this intention was known to the Appellant, Hall; but it did not appear that either party thought that any damage to the fishings would result from this operation, and nothing was said about it in the contract. The erection of the dock was accordingly begun, and when the first year's rent became due, Hall claimed a deduction for damage done to the fishings by the work in question; and the matter being referred to arbitration, an award was made, finding the Appellant Hall, entitled to £130, for damage done in the course of one year. Hall afterwards took a protest against the Respondent in these words; "That the dry dock, and other buildings near the same, erected during the course of the last season upon Rossie Island, by said Hercules Ross, or by others deriving right from him, have been found to be injurious to the fishing, let by him to the said Thomas Hall, in so far as they prevent and interrupt the drawing of the fishing nets at the fishing stations, opposite to said dock, and other buildings for some hours every tide; and that the pumping of foul water from the said dock into the river Southesk, is not only in-[203]-jurious to the adjoining fishing stations, but also to the fishings in the other parts of the said river, by rendering the water in the river muddy, so as to deter the salmon from going up the river; and further, that the laying down of stones, coals, or other bulky materials in the bed of the river, effectually prevents the drawing of the fishing nets at the different places where the said stones, coals, or other materials are so laid down." The Respondent having commenced an action for the whole of the rent, Hall presented a bill of suspension. After proof taken, and various other proceedings in the cause, the Lord Ordinary,

and afterwards the whole Court, pronounced against the lessee, and found him liable in expences. Hall having become bankrupt, Claud Russel, the trustee, on his estate, was made a party along with Hall, and they appealed from the decision of the Court of Session.

Sir S. Romilly and Mr. Adam, Jun., for the Appellants ; Mr. Thomson and Mr. Murray, for the Respondent.

Lord Eldon (Chancellor) stated the case, and requested their Lordships to observe not only that the reasons of suspension were repelled, but that the suspender was found liable in expences ; which was saying in effect, that he had no ground to come into Court.

It had been argued here, that as the Respondent had, previous to the lease of these fishings to the Appellant, informed the world by public advertisement, and otherwise, of his intention to erect a dock [204] on Rossie Island, the Appellant had no right to complain of damage arising from that circumstance, since he knew that the thing was intended, and yet took the lease without stating any objection on this ground. But nothing could be more dangerous than to go out of the four corners of a contract, and endeavour to find out the meaning of the parties from other circumstances not mentioned or alluded to in the contract itself.

By the terms of the lease, the fishings were let to the Appellant, Hall, as they were lately possessed by John Richardson, Esq., and the tenant was allowed "to adopt any improvement in the mode of fishing in any of the bays or islands formed by the sea, in the island of Rossie, which he might think proper." The Respondent also became bound to warrant the lease "in so far as the different stations have been hitherto fished or occupied at all hands, and against all mortals ; and as far as respected any alterations or improvements to be introduced by the Appellant against his own acts and deeds only." Now, it was clearly the intent of the parties, and manifest upon the face of the contract, that the warranty was more extensive in regard to the old stations, as these were warranted against all the world. As to the rest, the Respondent justly reasoned in this manner : "I cannot give you a warranty equally extensive as far as respects your alterations and improvements, because it is impossible for me to know what these may be, or how they may operate ; all I can say is, that I shall do nothing to prevent them."

The whole of the advantages mentioned in the [205] contract were given to the Appellant, at a rent of £600 per annum ; and though he could have let them for £1200 per annum in the second year of the lease, that would be no reason for his submitting to any damage contrary to the stipulations of the contract, of which he was to have all the advantages, at the rent of £600, unless it could be proved that it was damage without injury. Seven of the judges who supported the claim must have been of opinion that there was damage in this case ; and some of those who decided against the Appellant's claim, appeared to think that there might be damage. Lord Balmuto said, that there was no damage, but a great deal of inconvenience, which the Appellant might have prevented by another mode of fishing. But with great deference to the learned Judge, the Appellant under this contract had a right to fish in any way that he found most convenient ; and if he was prevented from doing so by the Respondent, that was damage. Lord Armidale said, that there was damage, but that it was not specific ; and Craig said, that there might be damage, but that it could not be ascertained. The Justice-Clerk said, that if there was damage, he did not know whether it was of such magnitude as to warrant the interference of the Court in this case : and he concluded by saying, "After we shall have given damages, the fishing may be more productive than ever." Suppose it were so, the Appellant would still have a right to compensation for any damage he had sustained. Lord Meadowbank said, there was no damage ; and Lords Robertson and Glenlee did not state any grounds for [206] their opinion. Four of these seven Judges then, who had decided against the Appellant, might fairly be taken to have admitted that there was, or might be, some damage in this case ; and these being added to the seven who had decided in favour of the Appellant, and who of course must have conceived that there was damage, formed a majority in favour of the Appellant, to this extent, that he had sustained some damage.

This was one of those fish causes which had sometimes very much distressed him. He had in his possession a very learned paper on the temper and disposition of salmon,

etc., which was produced in one of these causes, and which he kept as a curiosity. But if their Lordships instead of confining themselves to the terms and nature of the contract, were to decide upon philosophical speculations respecting the temper and disposition of fishes, it would be long before they could come to a satisfactory conclusion. There was less of that kind of learning here, than there had been in some other causes; but still there was a good deal of it. It was said that salmon was a nice and delicate fish, and a question had been raised whether it was fonder of clear than of muddy water; and whether clear water, or muddy water, was the natural climate of salmon; though, if their Lordships were compelled to decide upon that ground, a doubt might be suggested whether fresh water was the natural climate of salmon at all. But it was a much safer way to ask, whether the stipulations of the contract had been complied with, than to resort to these philosophical speculations for a ground of decision.

[207] An argument had been used, "that though the fishing in one station had been injured or lost, still if as many were caught in the remaining stations as had been caught before in the whole, there was no damage." But if he (Eldon) were to take a lease of a salmon fishing with ten stations, he would rather have his ten stations according to the contract, than try in a Court of Justice whether he might not catch as many in nine stations, as in ten.

Now, if in England a majority of the Judges had been of opinion that some damages were due, their Lordships would never have heard of the decision being against the person who had made out his claim to damages. Too much might be given him or too little; but he could never, under such circumstances, be dismissed out of Court, with the additional loss of having to pay the expenses of the suit. It might be very often difficult to ascertain the amount of the damage, and in this country there were two modes of proceeding in such cases, viz. to prove the amount by the testimony of competent witnesses, or where there was no ground or criterion to estimate the damage, they were in the habit of giving nominal damages, but they never dismissed the claim altogether, where it appeared that there was some damage.

It had been said at the bar, that the award gave the amount of the damages; but he did not conceive that it could be taken as the proper measure of damage in the present action, though it was important, as connected with the original cause of the damage, and as showing that there was some [208] damage. But the Lord President had said, that there were several actions usual in Scotland, where they were under the necessity of conjecturing the extent of the damage; and that those who might suffer by this had no right to complain, because it was at their peril that they entered into a contract where damages could be ascertained in no other way than by conjecture. In his opinion, they must ascertain the damage in some way; and for that purpose, it would be proper to remit the cause for review with some findings to direct the Judges below in their further proceedings in it.

One of the Judges had made a distinction between the primary and secondary use of water; and said, that it was amusing to hear fishermen complaining of the obstructions of vessels in their fishing stations; but it could not be very amusing to one who had agreed to pay £600 a year for fishing stations, to find himself interrupted in the use of these stations.

He proposed then to find,

1st. That, if damage had been sustained by the Appellant, compensation was due.

2d. That it appeared that some damage had been sustained—then, for the purpose of ascertaining the extent of the damage, he proposed, that the Judges should be directed to permit the Appellant to give proof of the extent of damage, if he thought proper, or if he offered no further proof, then to ascertain the amount of the damages due, by such other means as their practice authorized, and then to do what was fit and just. It must be understood, how [209]—ever, that the Appellant in giving proof of damage, ought to be confined within the limits of his own condescendence.

Lord Redesdale. All that could be inferred from the circumstance of the erection of a dock being known to be in contemplation at the time of the contract, was this, that neither party then thought that the dock would injure fishing. If it did injure the fishing, the Respondent was still liable upon his contract to make up the loss. But this point had not been at all taken up in the pleadings. The allegation

was, that the dock did no damage to the fishing, and not, that if it did any damage, the loss ought to fall on the Appellant.

This decision was different from any thing that he knew. The contract was, that the fishings should be enjoyed as they were before. The evidence showed that they could not have been so enjoyed; and a majority of the judges had said, that the Appellant had sustained some damage, and the decision was, that he should not only have no compensation, but should also be obliged to pay the expenses of the suit. An attempt had been made to show that there had been no damage, as the quantity of fish caught had increased. But every bargain of this kind was in some measure a speculation, as the quantity of fish to be taken could never be exactly ascertained before-hand; so that, though as many should be taken at nine stations in one year as had been taken at ten in another year, the loss might still be considerable, because it was possible that if the whole of the ten stations had been used in the subsequent [210] year, the quantity taken might have been much greater than in the previous year. But then there had been a difficulty in ascertaining the damage. The Court must do that in the best manner it could. In their judgment in the case of *Wight v. Dicksons*, (*vide ante*.) the judges had determined by conjecture, and a consideration of the circumstances of the case, what number of carts of coals the Dicksons ought to be supplied with in the course of each month, though there was nothing in the contract itself to show the exact number; but the Court took upon itself to ascertain it. Here too they were bound to ascertain the quantum of damage as well as they could, by proof or other means.

One could not help lamenting, that Scotland had not the benefit of jury-trial. Juries here were in the habit of forming the best conclusion they could, from all the proof and circumstances in such uncertain cases; and it was to be regretted, that Scotland had not the advantage of the same mode, of having facts decided upon and settled. But the Court below must find some means of ascertaining the damage. In the case of the *Earl of Morton v. Stuart*, (*vide ante*.) the Court, in case they should have to ascertain damages, could only do it in an arbitrary way; as the injury must consist merely in disturbance, and not in any thing that could be accurately valued in money. He agreed therefore with his noble and learned friend, that the Judges must settle the amount of damage as well as their practice would permit; for where it was admitted that there was damage, it was not just that, because the person damnified could not state the [211] precise amount of his loss, he should have no damages at all.

The judgment of the Court below reversed, and cause remitted with the above findings.

Agents for Appellant, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, RICHARDSON.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HUNT, and Others, *Appellants*; MAUNSELL, *Respondent* [June 16, 1813].

[Mews' Dig. i. 270; vi. 1808.]

[John Graham had in his life time granted two annuities, or rent charges, to Ann Maunsell, the Respondent, stated to be in consideration of services; after his death his representatives applied the whole of his property in discharge of incumbrances and debts, to the exclusion of the Respondent's demands. A sum of about £11,000 had been applied in discharge of incumbrances, subsequent to the date of her annuity deeds, and she filed her bill against the representatives of Graham, to compel them to discharge her claims, upon the ground that they were answerable to the extent of the above sum, which she stated to have been misapplied. The representatives (*Appellants*) answered, that the grant of the annuities was voluntary, and ought to be postponed to all just debts, or *pro turpi causa*, and therefore void. The only evidence as to the consideration was that of a servant in Graham's family, who said, he believed that the Respondent and Graham cohabited as man and wife—his wife being alive at the time. The Master of the Rolls directed an inquiry as to the consideration, but the Chancellor on appeal altered this decree, thinking probably that there was no sufficient evidence upon which to found an order for inquiry. This decision of the Chancellor was, however, reversed by the House of Lords. It was insisted [212] at the bar that the bill might have been dismissed, on the authority of *Priest v. Parrott*, 2 Ves. 160.]

John Graham, of Platten, in the county of Meath, deceased, in pursuance of marriage articles previously entered into on his marriage in his minority with Dorothy Sophia Graham, in 1752, being then of age, conveyed his estates to trustees in trust, to the use of himself for life, remainder to his first and every other son in tail, reversion to himself in fee, on failure of issue male; and also for the purpose of securing a jointure of £300 per annum for his wife, and £3000 for the younger children of the marriage. One son William, who died a minor and unmarried, and one daughter, Elizabeth Gertrude, were the only issue of the marriage.

Graham, the father, by indentures dated 14th March, 1767, granted to the Respondent, Ann Maunsell, who it appeared resided with him in his house after a separation had taken place between himself and his wife, two annuities, the one of £40, the other of £72, chargeable upon certain parts of his estates, and said to be in consideration of services performed by the Respondent to the grantor. He subsequently, in the same year, gave her two leases for lives of a certain portion of his lands, the one for her own life at a pepper-corn rent, the other for the lives of two persons named in the indenture, at a rent of £1 10s. renewable for ever on payment of £2 rent, and a pepper corn fine. In 1770 Graham executed his bond, dated 20th February in that year, to his daughter, conditioned for the pay-[213]-ment of £2000 at his death, as an additional provision for her. On this bond judgment was entered up in the Exchequer, in 1772. In March 1771, the Respondent surrendered her leases in consideration, as was stated, of £400 paid her by Graham. By an indenture dated 22d July, 1773, in consideration of the Respondent relinquishing all claim to the aforesaid annuities of £40 and £72, and certain arrears said to have accrued due thereon, and also, as was stated in the indenture, in consideration of the surrender of the above-mentioned leases, Graham granted her an annuity of £100 for her life, to which was to be added an additional annuity of £100 for her life from the period of his death, in case she survived him; which annuities were charged, and to be charged, upon certain of his lands in the indenture specified.

John Graham died on 17th April 1777, having previously made his will, dated 22d January 1776, by which he devised all his real estates, (except the lands of Knock

Island of the yearly value of £20, which he devised to the Respondent, besides bequeathing her a legacy of £1200 subject to the payment of his debts and legacies, to Graves Chamney, Esq. his heirs and assigns, for ever, and appointed him sole executor and residuary legatee. Chamney proved the will, and having entered into the receipt of the rents and profits of the real estates, and possessed himself of the personal property, he applied the produce in payment of the judgment and simple contract debts of the testator, exclusive of the widow's jointure, and the sums due to Elizabeth Gertrude the testator's daughter [214] under her father's marriage settlement, and upon the bond above-mentioned, and also exclusive of the claims of the Respondent.

In November 1786 Elizabeth G. Graham filed her bill in Chancery against G. Chamney, the Respondent, and others, praying "an account of what was due to her in respect of the aforesaid sums and a sale of the lands charged therewith for the payment thereof, and an account of the personal estate of John Graham, and of prior incumbrances." Chamney in his answer set up the claims of the Respondent, in respect of her annuities, in preference to the judgment debt of E. G. Graham. The cause was heard on the 6th December 1790, when it was decreed "that an account should be taken of the real and personal estates of John Graham, of his debts and legacies, and of the incumbrances affecting the lands, of what sums were paid and what remained unpaid, and what was due to E. G. Graham in respect of the sums aforesaid."

The Master reported that up to 1st November 1793 Graves Chamney had received out of the estates in question £32,399 7s. 3d. and had applied to the discharge of incumbrances prior to the judgment debt of the Plaintiff E. G. Graham £20,649 4s. 6d. and in discharge of subsequent incumbrances £10,377 18s. 2d. and in discharge of simple contract debts £896 15s. 9d. leaving a balance in the hands of Chamney of £475 8s. 10d. and that there was due to the Plaintiff £3165 in respect of her provision under the marriage settlement, and £4001 19s. 8d. in respect of her judgment debt.

Before further proceedings Graves Chamney died, [215] having previously made his will, and devised and bequeathed his real and personal estates to the Appellants, against whom the cause was revived, and the same was heard on the report and merits on 6th July 1795, when it was ordered and adjudged among other things, "that the Plaintiff's debts should be paid, and that if necessary the lands of John Graham remaining undisposed of should be sold for payment thereof, without prejudice (in case that fund should be insufficient) to her claims against the estate of Chamney, as far as respected the sum he had applied in payment of debts created subsequent to her incumbrance." The remaining lands were accordingly sold, including those of Knock Island (which had been devised to the Respondent), and the produce applied to, and exhausted in, the discharge of incumbrances; and after the whole of Graham's property had been applied to the payment of his just debts, a considerable sum (as alleged by the Appellants) remained due and unpaid.

In February 1799 the Respondent filed her bill in Chancery, stating that the sum of £11,750 2s. 9d. had been misapplied by Graves Chamney, inasmuch as the same had been applied to the discharge of incumbrances which were subsequent to the date of her deed of annuity, and therefore praying that the said sum of £11,750 2s. 9d. might be brought into the Bank of Ireland to answer her demands, or that the estates of Graves Chamney should, after account taken, be sold for that purpose. The Appellants answered, that there was not any good or valuable consideration given for the annuities, and [216] that they ought to be postponed to all the just debts of John Graham; and one of the Appellants, (Athanasius Cusack) stated in his answer "that he had heard and believed, that the Respondent, at the time of the execution of the annuity deed, lived and cohabited with the said John Graham, his wife being then living, and that the annuity was intended as a recompence for the said service." From the cross examination of a witness produced by the Respondent herself, it in fact appeared, or was rendered, highly probable, that though the wife of John Graham had survived him, the Respondent and he had, for many years before his death, cohabited together as man and wife. On the 19th May 1804 the Master of the Rolls decreed "that it should be referred to the Master to inquire and report whether the Respondent gave any valuable consideration for her annuities, and what was the nature and amount of such consideration, if any, etc. etc."

The Respondent acquiesced in the decree for nearly a year, and proceeded on it before the Master, who on the 23d October 1805, reported that there was neither valuable nor adequate consideration given for the annuities. But before the report was confirmed, the Respondent appealed to the Chancellor from the decree of the Master of the Rolls directing an inquiry, and his Lordship on the 14th November 1806 decreed that the said decree so pronounced by the Master of the Rolls should be, and the same was, thereby varied so far as the same ordered an inquiry as to the consideration paid by the plaintiff. (Respondent.) for the two annuities in the pleadings mentioned. [217] and it was further ordered that it be referred to one of the Masters to take an account of what was due to the Plaintiff, in respect of the said annuities, and that the said Master should also take an account of the estates, real and personal, of Graves Chamney deceased, etc. etc."

Against this decree of the Chancellor the Appellants lodged their appeal.

Sir S. Romilly (for the Appellants.) The question was, whether or not the Master of the Rolls was right in ordering an inquiry to the consideration for which the annuity was granted. It might perhaps have been insisted in the Court below, that the bill should be dismissed, upon the authority of the case of *Priest v. Parrott*, (2 Ves. 160,) where Lord Hardwicke held, that though an annuity given to a woman as *præmium pudicitie* might generally be supported, yet where the man was married, and the woman knew it, it could not. He therefore submitted that, even if the bill had been dismissed, their Lordships would not have reversed the judgment. But the Court below, however, had not gone that length. The Master of the Rolls only directed an inquiry, and he could not conceive why that decision had been reversed by the Chancellor. The demand might possibly be partly for *val. con.* and partly not, yet the creditors for *val. con.* must be preferred to the voluntary claimants, and how was all this to be ascertained and settled, except by an inquiry before the Master? and he therefore submitted that the Master of the Rolls was right, and the Chancellor wrong.

[218] Mr. Bell. There were two questions to be considered: 1st, Whether this was such a bond as there was reason to believe ought to be set aside, or at least postponed to the *bona fide* creditors: for if it was, an inquiry was necessary. 2d, Whether any thing had been before done that ought to prevent such inquiry. As to the first point, there was no evidence of service, but this cohabitation, and the case of *Priest v. Parrott*, remained unshaken.

In regard to the second, there did not appear any thing in the state of the property that ought to prevent the inquiry. The fund upon which the present claim was made, had been actually applied, and the question was whether it had been properly applied: so that the matter stood as between her and other creditors. Then what was the nature of the debt? It was doubtful whether she could claim against creditors or any other person. The Court could not know what directions to give until it saw what was the real nature of these securities.

Mr. Richards (for Respondent.) The question was, whether the Court would either presume that the security was void as being given on an improper consideration, or voluntary, and to be postponed to creditors. A voluntary grant was good against the person of the executor, and the grantee might sue the grantor. If in 1767 a voluntary grant was made and not *turpi causa*, and if the arrears had accumulated from that time till 1773, and these were given up in consideration of another annuity, then it would not be permitted to the grantor or [219] executor, to say that the consideration was not a good one. Assuming for a moment that the annuity of 1773 was given for a good consideration, it was as good against the Appellants, as against the original grantor whom they represented. Now, in the suit commenced by the daughter, Chamney the devisee of the grantor insisted upon the grants of 1767 and 1773 to the Respondent, as grants for valuable consideration, and the Appellants therefore were estopped from saying that the grant was void, or not for valuable consideration. She had been treated as an incumbrancer, and the validity of her claim insisted upon as such. They said that the grant was voluntary: but he contended that if the grant of 1767 was voluntary, that together with the arrears formed a sufficient consideration for the grant of 1773. But they said the grant of 1767 was for a base consideration, and therefore there could be no arrears. There was not, however, the least imputation against the grant of 1767. Mr. Graham's

wife might be alive, and this woman might cohabit with him, but was the Court to presume that this was an unlawful cohabitation? But suppose it were; was there any evidence of her knowing that he was married? None, and that circumstance took it out of the reason of the case of *Priest v. Parrott*. If a grant was made to a woman before seduction, it was bad; if after, it was good as a voluntary grant. If this deed had a vice, it was not upon the face of it; and did not appear in any way that could enable the Court to touch it. No such fact had been proved in evidence, and indeed they did not attempt to give any evidence in [220] chief. They had only cross-examined a witness of the Respondent's, who said he believed that this woman had cohabited with him in an unlawful way, but did not specify at what time; so that, even if this testimony were good as far as it went, still it was worth nothing. This was not to be tried by belief, but according to the facts. There was no cross bill filed against her to set aside the deed; and she said it was given for lawful services. It was incumbent on them to prove the contrary if they denied this; for a grant was to be taken most strongly against the grantor, whom the Appellants represented here. The Master of the Rolls ought not to have directed an inquiry, as no ground was laid for it. Mrs. Maunsell came with an instrument good upon the face of it, and upon the validity of which the party on the other side had before insisted upon oath. What right then had the Court to throw a cloud over a grant upon which the parties had cast no imputation?

Mr. Maddocks. They said on the other side, that when Mr. Chamney insisted upon the validity of this grant in a former suit, he mistook the fact or the law: but, upon the authority of *Lightbourn v. Weedon*, (1 Eq. Ca. Abr. 21,) he doubted whether they could take advantage of that circumstance. No *purp̄s contractus* ought to be presumed, and services formed a good consideration. They had brought forward no evidence on the other side, to show that the consideration was unlawful, and the arrears upon a voluntary grant formed valuable consideration for another grant, as appeared from the case of *Stiles v. the Attorney-General*, (2 Atk. 152,) upon which the present Master of [221] the Rolls had acted in *Gilham v. Locke*, 9 Ves. 612. The witness cross-examined by them spoke only as to his belief, and, at any rate, his evidence did not go either to 1767, or 1773. He had only spoken generally. Why, then, nothing had arisen out of the cause to form the ground of a reference: and, in reality, this was referring the whole cause, instead of any thing arising out of it, to the Master, which had never been done since the time of James the First.

Sir S. Romilly (in reply.) The question here was, Whether any inquiry should have been directed, considering this as a case of competition between creditors? for the Appellants stood in the place of creditors who had been already paid, as there were no other assets to answer this demand, if it should be established. He still insisted that the bill might have been dismissed: for the witness, though he used the word belief, was speaking to a fact which he knew of his own knowledge, as far as knowledge could generally extend on such a point. The reference, under such circumstances, was quite in the usual course of the Court. With respect to the answer in the former suit, insisting upon the validity of Mrs. Maunsell's claim, as for valuable consideration, it was impossible to say that this was an admission for all purposes.

Lord Redesdale (after stating the case.) It appeared to him that the Master of the Rolls was in the right. This was a demand against the assets of Mr. Chamney, of the same kind as that which Mrs. [222] Maunsell had against the assets of Mr. Graham: which, as was alleged on her part, was good against simple contract creditors, and against subsequent specialty creditors. So that this was in fact a question between creditors. If the demand was voluntary, it could not be set up against *bona fide* creditors. The direction of the Master of the Rolls was therefore quite of course, as the assets could not be distributed without inquiry if any objection was made. Even if the £11,000 had been actually in the hands of the representatives of Mr. Chamney, if the objection were suggested, the debts ought not to have been paid without inquiry.

The Chancellor seemed to have thought, that there was not sufficient evidence of a want of valuable consideration; but he differed from him there, as the only consideration appearing in evidence, was her having lived with Graham in a certain situation which the law did not admit as a valuable consideration. The surrender on her part was admitted; and then it was said, that she, by giving up her former rights, had given a valuable consideration for the new annuities. That point, how-

ever, was open to her before the Master. It was no reason against an inquiry, which was quite of course. He thought, therefore, that the Chancellor's decision on that point ought to be reversed.

Lord Eldon (Chancellor). He agreed in substance with what had been said by his noble and learned friend. A great deal of argument had been used, to show that the Respondent had given a valuable consideration. That was entirely out of place : as that objection ought to have been made [223] upon exception to the report. The only question here was, Whether there was any ground for inquiry ? and he thought there was.

It was accordingly ordered and adjudged, that the decree of the Court of Chancery, 14th November, 1806, varying the decree of the Master of the Rolls, 23d October, 1805, be reversed, etc.

Agents, ODDIE, ODDIE, and FORSTER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHARP, and Others, *Appellants* ; BURY, and Others, *Respondents*

[May 17, 1813].

[3 Scots R. R. 67.]

[*Instrumenta noviter reperta* not a ground for setting aside a decree arbitral : especially if the want of timely discovery has been owing to the negligence of the party desirous of setting it aside.]

The Appellants, merchants in Glasgow, purchased from the Respondents, calico-printers in Manchester, goods to the amount of £6704 13s. 11d., to be paid in bills at nine months. The goods were made up in two parcels, and the one sent to Liverpool for the purpose of being shipped for New York, the other to Glasgow to be sent to the West Indies. An invoice and box of patterns [224] was sent with each of the parcels. The destination of the parcel sent to Glasgow was altered, and that, likewise, was exported to New York. In the mean time, the affairs of the Appellants having become embarrassed, a sequestration was awarded against them. The trustee upon their estate refused to rank the Respondents as creditors for the full price of the latter parcel of goods, in consequence of a representation from the agents for the Appellants at New York, that these goods were deficient, both in quantity and quality, to the description of goods ordered : and specimens were sent home, in confirmation of this representation. The whole matter was submitted to arbitration, and the arbiters, conceiving that the specimens were not properly authenticated, pronounced their decree arbitral in favour of the Respondents : who were in consequence ranked for the invoice price of the goods, and paid some dividends. The Appellants, thinking that their affairs began to wear a better aspect, proposed to their creditors to give them bills payable at four different dates, at the rate of twenty shillings in the pound, if they would consent to a recall of the sequestration. The creditors agreed, and the sequestration was recalled.

Two of the bills given to the Respondents were paid, but payment of the other two was refused : and letters of horning having been consequently raised, and a charge given, the Appellants presented a bill of suspension, and raised an action of reduction of the decree arbitral. The ground upon which the Appellants rested their case, was that of *instrumenta noviter reperta* : and these consisted of the [225] box of specimens originally sent by the Respondents with the goods, which box had been all along in the possession of one of the Appellants : and two boxes, containing patterns taken from the goods in New York, and certified by the magistrates of that place, which had been in the possession of one who acted as assistant to the trustee upon their estate, for nearly six years (as the Respondents alleged) before they were brought forward. The tin boxes sent from New York contained authentic

certificates of the goods being overcharged : the patterns in the other box, it was stated, corresponded with the invoice prices. The Lord Ordinary, and the Court of Session, decided in favour of the Respondents, and the Appellants appealed to the House of Lords.

The Respondents contended, that this decision ought to be affirmed principally on two grounds : (always, however, denying the equity of the Appellant's case :) 1st. That the plea of *instrumentum noviter veniens ad notitiam* was not admissible to the effect of setting aside a decree arbitral. 2d. That, even if the decree had been less powerful in its nature, the conduct of the Appellants and the trustee, who had acquiesced under it for a long time, and acted upon it, would have had the effect of completely establishing it by homologation.

In regard to the first point, it was stated, that, by the law of Scotland, a decree arbitral was regarded in the light of a judicial sentence, proceeding upon the consent of the parties who entered into the submission, to acquiesce in the final determination of the arbiters. Such decree arbitral may be set aside, if, proceeding upon a limited and special [226] submission, it travels beyond that authority, *ultra vires compromissi* : in the present case the submission was of the most ample latitude, comprehending all matters in difference betwixt the parties : and, accordingly, it is not pretended against this decree, that the arbiters have in any respects exceeded their authority : but it is no ground for setting aside by reduction a decree arbitral, that it may be shown, upon the merits of the question in dispute, to be an erroneous or unjust adjudication. This has been settled in the law of Scotland by express enactment. Among the Articles of Regulation of 1695, which were settled by Commissioners appointed by the King, under the authority of an act of Parliament, and which have therefore the full authority of a statute, there is one upon the subject of decrees arbitral, sect. 25, in the following terms : viz. " That, for the cutting off of groundless and expensive pleas and processes " in time coming, the Lords of Session sustain no reduction of any decree arbitral " that shall be pronounced hereafter upon a subscribed submission, at the instance " of either of the parties submitters, upon any cause or reason whatsoever, unless " that of corruption, bribery, or falsehood, to be alleged against the Judges Arbitrators " who pronounced the same."

The Act of Regulation has received complete effect from the Court of Session, wherever any question has arisen upon it. Thus, in the case of *Hardie v. Hardie*, (1724, Dec. 13, Dict. Vol. I. p. 51.) it was found that to allege that the arbiters had decided upon grounds which were not true in fact, was no relevant ground of suspension : the exception of falsehood in the act, [227] regarding only the falsehood or forgery of the submission, or decree arbitral. And again, on 12th December, 1739, it was decided, that a minor being capable, with consent of his curators, to enter into a submission, may not, when of age, plead, that facts were held to be true by the arbiters when they were not so. (*Williamson v. Fraser*, Dict. Vol. III. p. 37.)

2d. Of homologation, it was observed by Mr. Erskine, (b. 3. Tit. 3. § 47.) that, " as to all obligations arising from contract, that though they labour under legal " nullities, they may become effectual by the posterior approbatory acts of the granter, " or, in the style of our law, by acts of homologation : for, since it imports not whether " the consent essential to contracts be expressed by word, writing, or facts, nor whether " it be given at the time of entering into them, or afterwards, every act done by the " granter, after their date, which implies approbation, supplies the want of an original " legal consent : " and that this doctrine is applicable to the present case, their Lordships would at once be satisfied, from an ancient decision precisely in point. (Dict. Vol. I. p. 377.) " Ane decreete arbitral beand given be Jugeis Arbitreis chosen betwixt " twa parties, gif efter the geving thairof, ony of thame has ressavit ony thing con- " tenuit thereintill, or done ony deed by virtue thairof, he may not thairafter reclame " thairfra : because he homologatis and ratifyis the hail decrete, be fulfilling of ony " pairt thairof, albeit the samin be never so littill." Dict. Vol. I. p. 377. Balfour, *voce Arbitrie*, No. 30. p. 416.

On the part of the Appellants, it was admitted, that a decree arbitral could not be opened up merely [228] on the ground that a wrong decision had been given on the merits : but, in the present case, they contended, that there was a point upon which it was obvious that the arbiters had been completely misled, or deceived, by the Respondents, in regard to the quality and quantity of the goods, as clearly appeared

from the certificates sent from New York : and that this was a ground for opening up the decree. The Appellants had recovered evidence which, as they alleged, fully proved the inferiority of the goods furnished, as compared with the specifications in the invoice, and the patterns originally sent : and *instrumentum noviter repertum* had always been considered as sufficient ground for opening up the most solemn and final judicial procedure. The Appellants likewise denied the homologation. They had, indeed, granted bills to the Respondents, for payment of the balance ; but that they had been obliged to do, by the terms upon which the sequestration had been recalled.

The Lord Chancellor. The Appellants' case appeared to him to amount to this.— That they had not chosen to make use in proper time of evidence which they had in their own possession.

Judgment of the Court of Session affirmed, with £100 costs.

Adam and Leach, Counsel for Appellants ; Romilly and Horner, for Respondents.

Agents for Appellants, SPOTTISWOODE and ROBERTSON.

Agent for Respondent, RICHARDSON.

[229] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SCOTLAND,—*Appellant* ; MERCER,—*Respondent* [June 25, 1813].

[Mercer purchases an estate held in feu, with clause of pre-emption in favour of the superior, under penalty of nullity of the sale and irritation of the feuar's right. The purchaser in open Court consents to take the estate without the usual warranty. The sale sustained.]

Thomas Scotland, the Appellant's father was owner of a small estate called Craiglaw, in Perthshire, held in feu of the family of Aldie, of which Miss Mercer, Lord Keith's daughter, is the representative. This property, the Respondent, the factor on the Aldie estate, agreed to purchase as trustee for Lord Keith, and a minute of sale at the price of £1100 was accordingly drawn up on unstamped paper, signed by Thomas Scotland, and attested by Mr. James Keay, a respectable Solicitor, and another witness, and kept by the purchaser. This contract was executed in August 1795, the Respondent paying down £100 of the price.

The Appellant having heard of his father's intention to sell inhibited him, and raised an action in the Court of Session, for declaring his own right as having the fee vested in him : his father being, as he alleged, merely a tenant for life. This action was depending at the time of the contract, and was finally dismissed only in 1798. During the whole [230] process nothing was said respecting any mental incapacity of his father.

On examining Scotland's title deeds another difficulty occurred : it was discovered that by the original grant or feu charter of the lands of Craiglaw to Scotland's ancestor, which was dated in 1711, it was declared " not to be lawful to the feuar to sell or convey " the lands so feued to any person, without first making an offer to the granters of the " feu, or their successors ; and upon their paying the value thereof, which had been " paid by them (that is 600 merks, or £33 6s. 8d. sterling) the feuar should be obliged " to denude (divest himself) in their favour. Or if the feuar should sell and convey " without making such offer, then the feu right, or any deed granted by the feuar, " should be void and null." And this proviso was repeated in the instrument of sasine following on the feu charter, and in the subsequent investitures.

A question on a similar case (*Farquharson v. Keay*, Fac. Coll. 1800) was depending in the Court of Session—whether such a proviso was available against a purchaser from the feuar, and it was deemed advisable to postpone the enforcing of the contract, 1st, Till the termination of the Appellant's above-mentioned action, and 2dly, Till the decision of the case in question, as this might be of material consequence in fixing upon the proper method of conveyance.

In August 1801, old Scotland died, upon which the Appellant, as heir-at-law, brought an action in the Court of Session, calling for the production of the minute of sale, and concluding that it should be reduced on these grounds: 1st, That there was but [231] one copy of the minute or contract, which was all along retained by the Respondent, who having it thus in his power to cancel or destroy it, might consequently put an end to the bargain, when he thought fit, without the knowledge or consent of Thomas Scotland, whereas, by law, one party cannot be bound in a mutual contract, while the other is free. 2dly, That the minute was elicited and impetrated by the Respondent, through circumvention on his part, and facility on the part of the grantor, without any onerous or just cause, and to his great hurt and enormous lesion, the sum pretended to be stipulated as the price of the lands being totally inadequate to the value, and Thomas Scotland being at the time of the pretended sale, and long before, so weak in mind and intellect, as to be incapable of knowing, entering into, or concluding a transaction of that importance; and 3dly, That it was the understanding of the Respondent himself, that there was no bargain concluded, and the pretended minute of sale was good for nothing, as was evident from the Respondent's conduct, in letting Scotland continue in receipt of the rents, and in his, the Respondent's, character of factor for the superior, taking payment from Scotland of the feu duties.

The Appellant, having by appointment of the Lord Ordinary, given in a condescendence offering to prove the facts alleged in his reasons of reduction, and a proof being allowed, several witnesses were examined as to the state of old Scotland's mind, and the value of the land at the time of the bargain. The evidence was contradictory, but the [232] Court appeared to be of opinion, that the imbecility and lesion were not sufficiently made out, and that if the Respondent would, at the bar, agree to discharge his claim of repetition, in the event of the superior's evicting the lands, it would render the bargain sufficiently equal, and defeat the Appellant's plea upon that head. To this the Respondent consented, and the following minute was given in: "George Joseph Bell, for the Defender, stated, that the Defender all along considered himself bound by the minute of sale, under reduction, to implement the bargain in the terms of that deed, and that he did not, nor does he now consider himself entitled to any claim whatever against Thomas Scotland or his heirs, upon the warrandice in the minute, in consequence of any effect which might have been, or which may at any time hereafter be given to the clause of pre-emption, in favour of the superior of the lands in question contained in the charters thereof."—The Court then (Dec. 6, 1806) pronounced the following interlocutor: "The Lords having resumed consideration of this process, and advised the state thereof, testimonies of the witnesses adduced, writs produced, and a minute now given in by the Defendant, and heard counsel further, repel the reasons of reduction, assolzie the Defender, etc." From this decision the Appellant appealed to the House of Lords.

Sir S. Romilly and Mr. Brougham (for the Appellant.) They submitted, 1st, That the preponderance of evidence, as to the imbecility and in-[233]-adequacy of price, was in favour of the Appellant. 2dly, That the lesion under the clause of pre-emption was enormous, amounting to a forfeiture of the whole of Scotland's real property; and the Court of Session must have been convinced of this, when they prevented the purchaser from having recourse to Scotland or his heirs for compensation, in the event of the superior claiming the forfeiture. It was no sufficient reply to this, to say that the contract was rendered more equal by the release of the warranty. The question was, Whether at the time it was entered into the contract was not, to use the words of Lord Thurlow in a less clear case, such as would make any man in his senses stare to hear it mentioned! 3dly, That the contract was never completed, or was abandoned by both parties in Scotland's lifetime, no possession having ever followed upon it, though Martinmas, 1795, was the term of entry declared in the minute, and Scotland having from the time of the execution of the minute of sale, up to the time of his death, six years afterwards, acted as the owner, and the Respondent having levied the feu duties in the usual manner. It was also stated, as evidence of inequality or circumvention, that there was only one copy of the minute of sale which remained with the Respondent, and gave him an opportunity of enforcing the contract or not as he thought fit; and also that, on the death of old Scotland, his widow had broken open his desk, and given the Respondent what papers he chose.

Messrs. Adams sen. and jun. (for the Respondent.) 1st, The Appellant had totally failed in the [234] attempt, to prove the mental incapacity of his father or the inadequacy of the price. The direct contrary had been proved in both particulars, and even if the latter had been proved, inadequacy of price was no reason for setting aside the contract, supposing Scotland to have been in full possession of his mental faculties. 2dly, The clause of pre-emption induced no forfeiture, and in proof of this they cited the act, 20 Geo. 2. cap. 50, and the case of *Farquharson v. Keay* (Fac. Coll. 1800). But suppose it had, the loss would have fallen not on Scotland but on the purchaser, who must have had notice, and *caveat emptor*. 3dly, There was no abandonment, but merely a delay, the reasons for which were sufficiently explained. With respect to the fact that there was only one copy of the minute of sale, nothing was more common than to rest on one such copy where the parties had confidence in each other; and in the present case it was the only evidence of the Respondent having paid down £100 of the price. As to the breaking open the desk, the Appellant's own witnesses proved that the Respondent took nothing except a lease and plan of the estate.

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed.

Agent for Appellant, CAMPBELL.

Agent for Respondent, CHALMER.

[235] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

BATEMAN,—*Appellant*; OLIVIA, COUNTESS OF ROSS,—*Respondent*

[March 22, 1813].

[*Mews' Dig.* vi. 673. Followed in *Nicol v. Nicol*, 31 Ch. D. 526; and see *Cahill v. Cahill*, 8 A. C. 430; *Rowell v. Rowell*, 1900, 69 L. J. Q. B. 55; *Macan v. Macan*, 1900, 17 T. L. R. 131.]

[Olivia leaves her husband's (Bateman's) house, commences a suit in Ecclesiastical Court for divorce, and files a Bill in Chancery for payment of her separate annuity. All matters in difference referred to arbitration; and the award made a rule of Court by consent. Bateman, the husband, obtains an order of Court, which, without setting aside the award, partly does away the effect of it, by which means the records of Court are made contradictory. Bateman, upon this, takes possession of a house which the award had given to his wife, and she goes there to protect her property. Bateman then pretends a reconciliation, and takes an exception to suit in Ecclesiastical Court on that ground—but exception disallowed. Olivia files another bill, praying benefit of award: cause comes before Lord Redesdale, who receives sentence of Ecclesiastical Court as admissible, but not conclusive, evidence of non-reconciliation, and decrees according to prayer of bill. Chancellor states general doctrine to be clear, that reconciliation after separation entirely does away the effects of it; but here no reconciliation. Lord Redesdale's decree affirmed.]

The Respondent upon the death of her husband, the Earl of Ross, in 1764, became entitled for life to the estate of Castle Gore, in the county of Tyrone which had been devised to her by the will of her father, dated 12th October, 1737; and also to an additional annuity of £500 secured on the Earl of Ross's estate. On the 8th October, 1770, the Respondent and Appellant intermarried; and on the 28th May, 1777, the Appellant, in pursuance of marriage articles to that effect, conveyed the Castle [236] Gore estate to trustees, to secure to the Respondent a separate annuity of £500 by way of pin money; and about the same time conveyed in trust for her during life, after his decease, a house which he had purchased in Granby Row, Dublin, subject however to a mortgage to Lord Farnham.

Differences having arisen between the parties, the Respondent in 1780 instituted a suit for divorce and alimony in the Spiritual Court : and in 1781, by her next friend, filed a bill in Chancery against the Appellant, stating, that he had neglected to pay the incumbrances on the estate and the Respondent's pin money : and praying among other things for an account and payment of the arrears of her annuity and for a separate maintenance. The Appellant, by his answer, alleged, that he had been induced to give her so large an annuity by false representations as to the income from her estates : and in June, 1782, filed a cross bill praying an account of various articles of value, stated to have been taken from him by the Respondent, who had left his house, to which the Respondent answered that she had a right to the articles in question.

In June, 1784, the parties consented to a reference of all the matters in dispute, and on the 1st July, 1784, the arbitrators published the following award : " We, the arbitrators, etc. etc. do award, that John Bateman, Esq., the Defendant in the original cause, do, within one month from the date hereof, convey to a trustee, to be named by Olivia Countess of Ross, the Plaintiff in the original cause, the mansion house and demesne lands of Castle Gore in the pleadings mentioned, and the furniture in [237] said house, as also the term, estate, and interest, in the house and premises in Granby Row in the pleadings also mentioned, together with the furniture thereof ; to hold said house and demesne lands free from quit rent and all other incumbrances, and said house in Granby Row free from all rent and incumbrances, save the ground rent payable thereout, without prejudice however to the mortgage thereof in the pleading mentioned, to said trustee, in trust, and for the sole use of the said Olivia, for and during the joint lives of them the said John Bateman and Olivia Countess of Ross, provided they shall live so long separate and apart.— And we do also award, that the said John Bateman do and shall likewise, within the space of one month from the date hereof, grant, assign, and confirm, to such trustees as the said Olivia shall nominate for the purpose, during the joint lives of them, the said John Bateman and Olivia, provided they shall so long continue to live separate, the annuity or rent charge of £500 chargeable on the estate of the late Earl of Ross, as and for the jointure of the said Olivia, in the pleadings mentioned, in trust, for the sole and separate use of the said Olivia. And we award, adjudge, and decree, that the said Olivia shall yearly and every year from the first day of June 1787, during the joint lives of her and the said John Bateman, provided they shall continue to live separate so long, receive out of the rents and profits of the Castle Gore estate in the pleadings mentioned, under and by virtue of the deed of the 20th of May 1777, in the said pleadings mentioned, the sum of £50 by half yearly pay-[238]ments : the first payment thereof to be made on the first day of December, 1787 ; and that she the said Olivia, or her trustees in said deed named, shall have and exercise all the powers for recovery of the said annuity of £50 to which she or they is or are entitled thereby, for the more easy recovery of the annuity of £500 in said deed and in the pleadings mentioned. And we award, that during such separation the said Olivia and her trustees shall not be at liberty to receive any greater sum, annually or otherwise, out of the said rents of the Castle Gore estate under said deed, than said annuity of £50. And we further declare and award, that the said Olivia Countess of Ross is entitled to detain in her separate possession, free from the controll of the said John Bateman, during the time she and the said John Bateman shall live apart from each other, all her jewels. And we further award, that the said Olivia shall, within the space of one month from the date hereof, deliver to the said John Bateman all the plate bequeathed by the will of her father, Hugh Edwards, Esq. deceased, and now in her possession. And we further order and award, that the said Olivia Countess of Ross shall, within one month from the date hereof, deliver up to the said John Bateman the wardrobe, wearing apparel, and ornaments of the person, belonging to the said John Bateman, hitherto detained by her the said Olivia, as in the pleadings mentioned : as also the accounts and vouchers which respect a contest subsisting between the said John Bateman and George Semple, Esq. in the pleadings also mentioned.— And we further adjudge and award, that the said John [239] Bateman likewise shall, within the term of one month from the date hereof, deliver up to the said Olivia Countess of Ross the wearing apparel, wardrobe, and ornaments of every kind, belonging to the said Olivia Countess of Ross, which have been hitherto detained

by him, as in the pleadings mentioned. And we also award, that the said John Bateman shall also, within one month from the date hereof, perfect to a trustee, to be named by the said Olivia Countess of Ross, in trust, and for the separate use of the said Olivia, one bond, with warrant of attorney for confessing judgment thereon, for securing the sum of £300 payable with interest in one year from the date of the said bond, and that he shall also, at the same time, perfect to such trustee, in trust, and for the separate use of the said Olivia, two other bonds, with warrants of attorney for confessing judgment thereon; the one for securing the sum of £300 payable with interest in two years, from the date of said bond, and the latter for securing a like principal sum of £300 payable in three years from the date of said bond.—And we further adjudge, decree, and award, that the said John Bateman shall, during the joint lives of him and the said Olivia, provided the separation shall so long continue, enjoy to his own use the remaining part of the rents and profits of the said Castle Gore estate, subject to the outgoing, debts, and incumbrances affecting the said estate, etc.”

The award was, on the 8th December, 1784, made a rule of Court on the consent of the Six Clerks and agents for the respective parties: and by an order [240] of 15th July, 1785, the Appellant was directed to execute certain instruments to carry it into execution, which he did. He soon after applied to the Court to have the award set aside, but this was refused. Lord Farnham, in 1787, filed his bill to foreclose the premises in Granby Row, under the mortgage above-mentioned, when the Respondent paid the mortgage money, and had an assignment of the house executed in trust for herself.

In 1789 the Appellant made a second application to have the award set aside, but without success. In March 1795 the Appellant renewed his application to set aside the award, when the Court, without setting aside the award, directed that the injunction by which the Respondent had been put in possession of the demesne lands and mansion-house of Castle Gore, and Granby Row house, in pursuance of the award, should be set aside; that the Master should deliver up their papers to the respective parties, etc. In consequence of this order of Lord Chancellor Clare, the Appellant resumed possession of the Castle Gore mansion-house, and the Respondent, hearing of this, repaired thither to protect her property. As the parties now resided in the same house, the Appellant caused an exception to be taken to the suit in the Spiritual Court on the ground of re-union and reconciliation between himself and the Respondent. But it appeared in point of fact, that though living under the same roof they were in a state of the greatest animosity. The exception was therefore disallowed, and the sentence of the Ecclesiastical Court to that effect was, upon appeal, affirmed by the delegates.

In 1797 the Respondent filed another bill, pray[ing] [241] that the Appellant might be compelled to abide by the award, or to restore to her the property which had been paid for out of her separate funds. The Appellant answered, that the award was not conclusive or obligatory, as it proceeded on the supposition of a separation, whereas no deed of separation had been executed, and no sentence of separation had been pronounced by any competent Court. The cause was heard before Lord Redesdale, who admitted the sentence of the Ecclesiastical Court in evidence as to the point of re-union; and on the 17th March, 1804, decreed, that the Respondent ought to have the benefit of the award, and ordered that the Respondent should be put in possession of her estates, and an account taken upon the basis of the award.

The Appellant endeavoured to protract the proceedings under this decree, and gave in a list of one hundred and fifty-two witnesses. But at length a sum of £8333 11s. 9d. was reported due to the Respondent, and upon hearing on the report and merits, the same was ordered to be paid her by the Appellant. From this decree of March 1804, and orders under it, the Appellant lodged his appeal, and contended that they ought to be reversed:

1st, Because the paper writing purporting to be an award is the basis of the decree, and such award is void for two reasons: 1st, Because the subject matter was not within the jurisdiction of the arbitrators: and 2dly, Supposing the subject matter to be cognizable by an arbitrator, because the Respondent's next friend in whose name this suit was [242] instituted was not a party to such arbitration, and cannot be compelled to obey the award.

2d. Because the award, if originally valid, has been avoided by the subsequent cohabitation of the Appellant and Respondent.

3d. Because the sentence of the Ecclesiastical Court, disallowing the exception taken on the ground of re-union and reconciliation, ought not to have been admitted in evidence.

The Respondent on the other hand contended that the decree and orders in question ought to be affirmed.

1st. Because the decree of 17th March 1804 gives the Respondent the benefit of the award made between her and the Appellant July 1, 1784, founded upon a submission executed by him; which award was not only confirmed in the Court of Chancery by the Appellant's consent on the 8th of December 1784, but a deed was actually executed by him so long ago as 22d July 1785, to carry the same into effect; and the said award was never questioned, or attempted to be set aside by the Appellant, until the 28th July 1789; a period of five years after it had been executed by the arbitrators, and acted upon by the parties.

2dly. Because there is not the slightest proof, nor pretence, to support the Appellant's assertion, that a re-union and cohabitation of the Appellant and Respondent, as man and wife, took place subsequent to publishing the award: by which circumstance the said award could alone be satisfied, and its operation made cease.—But, on the contrary, the [243] sentence of the Consistorial Court of the diocese of Dublin, affirmed by the Court of Delegates, is decisive evidence, that the Appellant and Respondent did and now continue to live separate; and that no reconciliation, nor subsequent cohabitation, has taken place between them since the said award was executed.

3dly. Because it appeared from the proceedings, that the Appellant neither had nor could establish any claims against the Respondent, (other than have been already allowed by the Master in taking the account,) which could operate in his discharge, and lessen the general balance, which had been found due to the Respondent by the report.

Sir S. Romilly and Mr. Montagu, for the Appellant; Sir T. Plomer and Mr. Nolan, for the Respondent.

Lord Redesdale (after stating the case as above.) Bateman, the Appellant, at the time of the marriage, was a young man very well received in the world, the Respondent not a very young woman, and the Appellant himself described her as not very agreeable either in person or manners; so that the object of the marriage was quite obvious. An annuity of £500 was settled upon her separately, by way of pin-money, and the whole of the rest of her property came to Bateman. The usual consequences ensued; quarrels, and a suit for divorce in the Ecclesiastical Court for adultery in the husband. A suit likewise was commenced in Chancery, and the whole matters in dispute were referred to [244] Mr. Toler, now Lord Norbury, and Mr. Hussey, afterwards Recorder of Dublin.

It had been objected to the award, that the Countess could not agree to the submission, so as to bind herself, unless she had been separated from her husband; and her next friend was not made a party to it. But it appeared to him that there was nothing in this objection, as the award was founded on an agreement on both sides, and he had filed a cross bill against her, which she had answered; so that, under the circumstances of this case, she was to be regarded quite as a *feme sole*, and there was no occasion to make the next friend a party, as there was nothing for him to consent to. He must act entirely as the wife directed: it was not like the case of an infant suing by a next friend. The award was confirmed by order upon consent.—Some time after, the Court made an order, not setting aside the award, but partly doing away the effect of it. The cause afterwards came before him, when he pronounced the decree appealed from. Bateman contrived to delay the proceedings under this decree for some time; but at last a sum of £8333 11s. 9d. was decreed to be due to Lady Ross. It could not be necessary to examine one hundred and fifty-two witnesses, to prove what had become of certain pieces of plate, articles of wearing-apparel, and a few accounts and vouchers; so that the object appeared to have been merely delay.

It had been contended, that the sentence of the Ecclesiastical Court ought not to have been received in evidence at all; but he was of opinion that [245] it was admissible, though not conclusive evidence. As to the alleged reconciliation, no such

thing, but the very reverse, appeared on the evidence. The Appellant was living at Castle Gore; the Respondent went there, not for the purpose of reconciliation, but to protect her property. There was no reconciliation to do away the effect of the award.

Lord Eldon (Chancellor.) It was objected to the award, that it assumed the jurisdiction of the Ecclesiastical Court, and went beyond the submission, in awarding a separation. But it did no such thing. It only assumed that there must be a separation, and provided accordingly. In regard to the point of reconciliation, notwithstanding what might be found in some of the Reports, he held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it. This rested upon the ground of public policy: as it must not be permitted to parties to make agreements for themselves, to hold good whenever they chose to live separate. The question then was, Whether, in the present case, there was a reconciliation? It appeared to him that there was not; unless their Lordships were prepared to say, that living under the same roof amounted to a reconciliation, though in a state of the highest animosity, which was the case here. He had no doubt but the decree and orders appealed from were correct, and he should therefore propose that they be affirmed, taking notice that the money decreed to be due having been paid into Court pending the appeal, Lady Ross should be at liberty to take it out, [246] on satisfying the Court that Bateman was using harassing and vexatious delays.

The judgment was in the following form:—

It is declared, that in case the sum of £8333 11s. 9½d. hath been paid into the Bank of Ireland, the Respondent is to be at liberty to apply to the Court for immediate payment thereof; respecting which application such order shall be made as to the Court seem just, having such regard to any proceedings in the cause now depending in the said Court, as to the Court seem meet. And that in case such sum hath not been paid into the said Bank, the said Respondent is to be at liberty to apply to the Court for immediate payment thereof to the said Respondent, or into the said Bank: respecting which application such order shall be made as to the Court shall seem meet, having such regard as aforesaid; and with this declaration, it is ordered and adjudged, that the decree and orders complained of be affirmed.

Agent for Appellant, BEDFORD.

Agent for Respondent, MUNDELL.

[247] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WEBSTER, and Another,—*Appellants*; CHRISTIE, Esq.—*Respondent*

[March 28, 1813].

[Suspension against a charge upon a bond, on the ground of fraud by the charger in obtaining it. The alleged fraud consisted of unfounded representations of circumstances generally, without any direct reference to the bond, which was admitted not to have been elicited by the Respondent. Judgment that the bond was valid, and this decision affirmed upon appeal.]

The Respondent, in 1795, became bound jointly with Sir D. Carnegie to the British Linen Company for the faithful conduct of his nephew, Robert Christie, who was the Company's Agent at Montrose. In 1796, the Respondent having become uneasy at the extent of his obligation, proposed to his nephew to limit his discounts to the annual sum of £18,000; and otherwise, he stated, that he would withdraw his security. The nephew, to prevent this, prevailed upon the Appellants to become bound in another bond, to relieve the Respondent from his liability to a certain amount. In 1804, Robert Christie, the nephew, became bankrupt, and the Respondent called upon the Appellants to relieve him in terms of their obligation, which they refused.

A charge followed, and the Appellants presented their bill of suspension. Their defence amounted to this, "that they had been induced by fraud to subscribe the obligation in [248] relief." The uncle, they alleged, by collusion with the nephew, concealed the real situation of his affairs from the Appellants at the time of granting the bond in question, and represented them as prosperous when he knew the reverse; and had acted fraudulently by inducing the Suspenders to become bound to relieve him of a future and contingent debt, while he was conscious of a large and enormous debt being then incurred, and no means of payment existing. The Respondent answered, that he never heard of the bond in question till it was presented to him executed by the parties. The Appellants had offered to refer certain points to the Respondent's oath, which, in the opinion of the Lord Ordinary, depended upon a previous fact not explicitly set forth; and he therefore appointed the Suspenders to say, in express terms, whether they would refer to the oath of the Respondent that he did elicit that bond. The Suspenders then admitted, "that they never meant to say that there was any degree of personal influence with either of them to elicit the bond of relief." The Lord Ordinary and Court of Session pronounced in favour of the validity of the bond.

The Appellants appealed from this decision: but the appeal was immediately dismissed, and the interlocutors complained of affirmed.

Agent for Appellant, BERRY.

Agent for Respondent, CHALMER.

[249] ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

RENDLESHAM, and Others,—*Appellants*; WOODFORD, and Others,—*Respondents*
[June 9, 1813].

[Mews' Dig. v. 1572. Reported as *Thellusson v. Woodford*, 13 Ves. 209.

See *Hance v. Truwhitt*, 1862, 1 J. & H. 222.]

[Testator by his will leaves various legacies to heir at law (among others.) Contracts for the purchase of certain freehold estates, subsequent to the date of his will, which (as is apparent on the face of the will) he intended should go to trustees and executors, and not to heir at law. The heir at law, who is legally entitled to these estates, is obliged to elect between them and the benefits which he derives under the will.]

This was a question of election, arising out of the remarkable will of Peter Thellusson, which gave occasion to the passing of the Act 39 and 40 Geo. 3. cap. 98, by which the power of settling and devising property for the purpose of accumulation is restrained in general to twenty one years after the death of the grantor or testator.

By this will, dated April 2d. 1796, the testator, after bequeathing various pecuniary legacies to his sons and daughters, etc. devised and bequeathed the whole of the rest of his immense property, consisting of lands of the annual value of £4500 and of personal property to the amount of £600,000, to trustees, for the purpose of accumulating, during the lives of his three sons, and the lives of all their sons who should be living at the time of his death, or born in due time afterwards, and the lives and life of the survivors and survivor of them; then the [250] estates directed to be purchased from time to time, with the produce of the accumulating fund, to be divided into three shares; one to be conveyed to the eldest male lineal descendant of each of his three sons, with benefit of survivorship; and in case of failure of all such descendants, the whole to be applied to the use of the Sinking Fund. It was calculated that this property might possibly amount to thirty-two millions before any part of it could be alienated.

The testator died July 27th. 1797. The will was established in Chancery by decree, February 19th, 1801; affirmed by the House of Lords, June 25th. 1805. After devis-

ing and bequeathing as aforesaid, it contained the following clause, on which the question of election arose :—

" In case I shall in my life time enter into any contracts for the purchase of any lands, tenements, or hereditaments, and I should happen to die before the necessary conveyances thereof are executed, I order and direct, that all and every such contract or contracts so entered into by me as aforesaid, shall be completed and carried into execution by my said trustees after my death, and that the purchase-mones for such respective estates and premises, shall be paid by them, by, with, and out of my personal estate and effects, and that the deeds and conveyances thereto respectively shall be made to them, their heirs, and assigns ; and that they, and every of them, shall stand, remain, and be seised, and possessed of all and singular the premises so to be conveyed upon, under, and subject to such and the same [251] uses, trusts, limitations, provisoes, and conditions, as are in and by this my will created, expressed, and declared of and concerning the estates hereby directed to be purchased by and with the aforesaid residuum of my estate and effects, in the manner hereinbefore mentioned."

The Chancellor, by the decree of the 19th February, 1801, had reserved the question of election till the Master, to whom the usual reference in such cases was ordered, should have made his report. Master S. C. Cox, by his report dated 20th May, 1806, certified, that the testator had, by articles of agreement of 10th November, 1795, contracted (prior to the date of the will) for an estate at Thorpe, in Balne, in Yorkshire, which was conveyed to the testator by indentures, dated 18th and 19th of July, 1796 (subsequent to the date of the will) ; and that the testator, subsequent to the date of his will, contracted to purchase three several estates, of which the purchase had since been completed, and the purchase-money paid by the trustees ; viz. one at Motherby, in Yorkshire, for £21,000 ; another at Newton Hanzard, in the County of Durham, for £9600 ; and a third in the parish of Wadsworth, in Yorkshire, for £1050 ; which three last mentioned estates, contracted for subsequent to the date of the testator's will, descended to Peter Lord Rendlesham, heir at law to the testator, as declared by the decree.

On the 15th December, 1806, Lord Erskine (then Chancellor) ordered that this report should be confirmed, and that the Appellant, Peter Lord Rendlesham, should convey and assure unto and [252] to the use of the said Matthew Woodford and Emperor John Alexander Woodford, their heirs and assigns, upon the trusts of the will of the said testator, Peter Thellusson, the messuage and lands, situate at Thorpe, in Balne aforesaid, contracted to be purchased by the said testator, prior to the date of his will, with their appurtenances ; and it was ordered that the Appellant, Peter Lord Rendlesham, should make his election between the estates to which he was entitled, as heir at law of the said testator, and the legacies and other benefits bequeathed to him by the said testator's will.

Against this order, as far as it related to the question of election, Lord Rendlesham the heir at law, appealed : and having died on 15th September, 1808, the appeal was revived by order of the Lords of 26th February, 1810.

It was contended on the part of the Appellant, that this order of the Court below ought to be reversed, for these reasons :—

1st. That the doctrine of election is said to be founded on an implied condition ; but an heir at law, who is particularly favoured by the law of England, ought not to be disinherited by such implication, which is not that necessary implication, which is in other cases required to disinherit an heir at law, who takes by descent, either because there is no intention to disinherit him and give the property to another expressed or necessarily implied, or because the apparent intent to disinherit is such as the policy of the law directs shall not be attended to.

2d. That the common law did not invest a person [253] with the power of devising an estate by will, but such power only originates in Acts of Parliament, which authorise him to devise by will such estates only as he had at the time of making the will. A will therefore containing a clause, devising an estate intended to be purchased, must be read as if it contained no such clause, and consequently a court cannot call on the heir to elect. (*Shedden v. Goodrick*, 8 Ves. Jun. 481, and *Carey v. Askew*, there cited, p. 492.)

3d. The heir is always particularly favoured by the law of England ; and it seems

therefore only to have authorised the testator to dispose of those lands which he had, and not to have entrusted him with a power to dispose prospectively of whatever he might have, that the heir at law might not be disinherited without the testator having a full knowledge of the property he was parting with, and if that is the reason of the law, to apply the doctrine of election to such a case as this is to raise an implication to defeat the policy of the law.

4th, Lord Holt, in *Brunker v. Cooke*, 11 Mod. 123, compares the disability the testator is under, of disposing of real estate he had not when he made his will, to the disability in cases of infancy and coverture; and *Herle v. Greenbank*, 1 Ves. 298, 3 Atk. 695, is an express authority in point, that the will of an infant or feme covert, shall not put the heir taking a legacy under it to his election. In this case (as is observed in that case) the will is void as to the estate attempted to be disposed of, and it therefore differs from the common cases of election, where the testator gives land which belongs [254] to another; for there the testator, supposing himself to have an interest in the land, gives what he supposes he has, and the will is therefore good as far as he has any title, but the title of the testator to that land failing, the devisee is obliged to make it good; but here the testator having no shadow of present interest, and knowing that to be the fact, wishes to dispose generally of all after acquired property, which the rule of law does not allow him to do.

It was on the other hand contended in behalf of the Respondents, that the order in question ought to be affirmed on these grounds:—

1st, It is a rule of a Court of Equity, that a person taking benefits under a will, shall not disturb the disposition made by it.

2d, It distinctly appears upon the will to have been the intention of the testator, that the interest, that the heir insists descended to him, should pass by the will.

Sir S. Romilly and Mr. Bell for Appellants; Mr. Martin and Mr. A. Buller for Respondents.

The appeal was dismissed, and the order complained of affirmed without any observations. (For report of the proceedings under this will, from the beginning, *vid.* 4 Ves. 227—11 Ves. 313: and upon this particular question, 13 Ves. 209, and cases there referred to.)

Agents for the Appellants, ODDIE, ODDIE, and FORSTER.

Agents for the Respondents, BUDD and HAYES.

Agent for the Treasury, LITCHFIELD.

[255] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HAIG,—*Appellant*; NAPIER,—*Respondent* [May 17, 1813].

[Contract for spirits to be paid for by bills at three months from delivery. No opportunity for delivery given by purchaser, till a new duty imposed on spirits by Act 43 Geo. 3, cap. 81. Decided that under these circumstances the distiller was entitled to charge the amount of the additional duty on the spirits.]

The Appellant, a distiller, by contract entered into 21st May, 1803, agreed to supply the Respondent with a certain quantity of spirits, to be shipped at Leith for Kirkcudbright, at the price of 5s. 2½d. per gallon, to be paid for by bills payable at three months from the time of the shipment. It was the practice that the purchaser should send a vessel to take the spirits on board, but the Appellant agreed to be on the look out for one. No vessel could be found at Leith, and none arrived till after the 5th July, 1803.

In the mean time, the Act 43 Geo. 3, cap. 31, passed, by which spirits distilled on, and after the 5th July, 1803, were subjected to an additional duty. The Act contains the following clause:—"Whereas contracts or agreements may have been

made, for the sale or delivery of certain articles or commodities, on which additional duties of customs or excise are, or may be granted by this act, or by any other act of this present session of [256] parliament : which contracts or agreements have no reference to such additional duties, and thereby the several contractors may be materially affected : for remedy thereof, be it further enacted, that all, or every person or persons, who shall, or may have made, or entered into, any such contracts or agreements, shall, and they are hereby respectively authorised, and empowered, in case of any such contracts or agreements, to add so much money as will be equivalent to the said additional duties respectively, to the price of such articles, or commodities, etc. etc."

The Appellant insisted that he had a right to charge the additional duty (making the price 7s. per gallon) upon the spirits in question, under this clause of the Act. The Respondent demanded them at the original price, and raised his action before the Court of Session for delivery of the spirits and £800 damages. The Appellant pleaded that it was not the practice to distil spirits till there existed an immediate opportunity for delivery ; and that as the Respondent had not given an opportunity for delivery till after the 5th July, he was not entitled to say, that the spirits were distilled for him before that time, especially as the time upon the bills for payment would only have begun to run from the period of the shipment.

The Lord Ordinary sustained the defences ; but the Court, by an interlocutor of 5th May, 1805, found the Defender (Appellant) liable in damages for failure to implement the contract. Upon petition by the Appellant, this interlocutor was altered, and the petitioner assolvied ; but upon another petition [257] by the Respondent, this last interlocutor was altered, and the Defender found liable, in terms of the interlocutor of 25th May, 1805. From this decision the Appellant appealed.

Mr. Adam and Mr. Leach for the Appellant ; Sir S. Romilly and Mr. Horner for the Respondent.

Lord Eldon (Chancellor.) The argument for the Appellant was, that no specific part of his stock belonged to the Respondent, till he tendered a ship ; that he did not tender a ship till after the 5th July, and that then the Appellant was entitled to say, that he would only furnish the Respondent with spirits distilled subsequent to that period. This case lay in the narrowest compass. Haig had engaged to sell to Napier a certain quantity of spirits at a certain price ; and the material question was, whether any part of Haig's stock could be specifically pointed out as the spirits of Napier, until the delivery on board the vessel at Leith. It had been argued on the part of Napier, that Haig had engaged to provide a vessel to carry the spirits. But that did not appear to be the contract. He had only promised to endeavour to procure a vessel, and there was no evidence of any default in that respect. Then came the Act imposing the duty on spirits delivered subsequent to the 5th of July, 1803. Napier had not before that time put Haig in a situation to deliver the spirits, and until the spirits could be delivered, there was no part of Haig's stock that could be specifically pointed out, as the quantity belonging to Napier. Under these circumstances, Haig was entitled [258] to charge the duty. He was of opinion therefore, that the interlocutors of the Court of Session, in favour of the Respondent, ought to be reversed, the defences sustained, and the Defender assolvied.

Lord Redesdale concurred in this opinion. It was clear that the transaction was not what it had been supposed by the Judges below to be. They appeared to have misunderstood the contract. The agreement was to deliver the spirits free, on board a ship at Leith. They seemed to think that some other mode of delivery was intended, they did not specify what. But Napier himself had no other mode of delivery in contemplation, and there was no other mode of getting the spirits out of Haig's stock, except by hiring a warehouse, and setting them apart as Napier's stock, which he was not called upon to do ; and which was inconsistent with the nature of the contract. The argument for the Respondent went to this, that Haig was bound to keep the spirits of Napier separate for 12 months, or any indefinite time, unless a ship arrived ; so that as the credit on the bills was not to commence till the delivery, Haig might have been obliged to give credit for 15 months or more instead of three months. The vessel did not arrive till the 18th of July. The Act began to operate on the 5th. The spirits could not be delivered till the 18th, and till then the sale could not be completed. The manufacturer was, by the Act, entitled

to charge the duty on all spirits sold after the 5th, and of course on Napier's spirits. There was no pretence for the argument that Haig was bound to provide a ship. He had only promised to look out for one, and there [259] was no evidence that he did not. Napier himself appeared to have been sensible that the duty must fall on him.

Interlocutors in favour of the Respondent reversed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HAIG,—*Appellant* ; HANNAY,—*Respondent* [May 17, 1813].

[Haig desires Hannay to engage a vessel for the carriage of spirits, upon the understanding that the freight was as usual to be paid by the purchaser. No evidence of any authority given by the purchaser to Hannay, and therefore Haig, the seller, was held to be liable for the amount.]

This was a question arising out of the transactions stated in the last case. The Respondent, a trader at Kirkeudbright, wrote to Haig to send him some spirits by the same vessel which was to carry Napier's larger quantity. Haig's clerk wrote to Hannay, stating that no vessel had as yet been got, and asking whether he, Hannay could procure one. Hannay wrote in reply, that he could; and accordingly freighted a vessel, which arrived at Leith on the 18th July. For the reasons stated in the last case, the spirits were not shipped; and the owners of the vessel raised an action in the Admiralty Court [260] against Hannay for freight and demurrage, for which he was found liable. Hannay made use of this as a reason of suspension against a charge given him at Haig's instance, on a bill due by him to Haig. The Court of Session sustained the reasons of suspension, holding that Haig was bound to relieve Hannay against the payment of the freight and demurrage, whereupon Haig appealed.

Mr. Adam and Mr. Leach (for the Appellant). Haig merely contracted to deliver the spirits free on board at Leith. He had nothing to do with the freight of the vessel, which was to have been paid by Napier, the Respondent in the last case. Napier therefore, and not Haig, was liable to Hannay for the amount.

Sir S. Romilly and Mr. Horner (for the Respondent). The question as to this sum of £97, which had now been depending 10 years, if brought before a jury in England would have been set at rest in half an hour. The single question was, Whether Hannay in freighting the vessel acted as the agent of Haig, or of Napier? Now there was no evidence whatever that Hannay had any connexion with Napier.

Lord Eldon (Chancellor) and Lord Redesdale, after noticing the letters between the parties, of which the language, they said, was equivocal, observed that the former case ought to have no bearing upon this, which was to be decided on its own merits as they appeared in evidence. There was no evi-[261]-dence that any thing passed between Napier and Hannay that could make Napier liable. Whatever therefore their individual opinion might be, they saw no sufficient grounds upon this case to say judicially, that the decision of the Court below was wrong: that judgment ought therefore to be affirmed. Whether Haig might recover over from Napier was another question. He might have saved the demurrage by discharging the vessel immediately on her arrival at Leith.

Appeal dismissed, and interlocutors complained of, affirmed.

Agent for the Appellant, CAMPBELL.

Agent for the Respondent, GORDON.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

FITZGIBBON, Esq.—*Appellant* : SCANLAN, Esq.—*Respondent* [June 2, 1813].

[Mews' Dig. iv. 859. See *Clegg v. Edmondson*, 1857, 8 De G. M. & G. 807.]

[Fitzgibbon holds a lease as trustee; lease expires, and he renews it for his own benefit. This not impeached for nearly 20 years from the time of renewal. Trustee held in equity to have renewed for benefit of his *cestui que* trust, and his representative ordered to account accordingly.]

In the year 1773, Matthew Lane Scanlan intermarried with Elizabeth Fitzgibbon. At the time [262] of his marriage, he was entitled to certain estates in the County of Limerick: that is to say, to the lands of Gortnacreehy, which he held for three lives, with a covenant for perpetual renewal; the lands of Ballylin, which he held for one life; the lands of Ballymacrory, which he held for two lives; and the lands of Duckstown, which alone were in question in this Appeal, and which he held for the remainder of a term of 31 years. The fortune of Elizabeth, the wife, consisted of a sum or portion of £2100, to which she was entitled under the will of her deceased father Thomas Fitzgibbon.

By marriage articles dated 21st May 1773, M. Lane Scanlan, in consideration of his marriage and his wife's portion, for the purpose of securing a jointure for his wife, and making a provision for the issue of the marriage, covenanted with Standish Grady and Gibbon Fitzgibbon, (trustees,) that he would, within "the space of six" months after the date of the said articles, grant, settle, and assure the lands of Gortnacreehy, with the appurtenances, to the use of him the said Matthew Lane Scanlan "for his life, with remainder (subject to a jointure of £150 a year for the said Elizabeth Scanlan, his wife, during her life, if she should happen to survive her husband, in "bar of Dower) to the first and other sons of the said marriage in the usual course "of family settlements, etc. and that he would, within twelve months from the date "of the said articles, secure a sum of £2000, to be paid within twelve months from "his decease, [263] and as for the portions and provisions of the younger children "of the said marriage who should be living at the time of his decease: and the said "Matthew Lane Scanlan thereby further covenanted with the said Standish Grady "and Gibbon Fitzgibbon, their executors and administrators, that he would pay "all rents and arrears of rents that then were, or that thereafter should become due "out of the lands of Gortnacreehy, Ballymacrory, Ballylin, and Duckstown, and "every of them; and also pay off and discharge all debts and incumbrances that "then did or thereafter should affect the said lands, or any of them; and that he "would, at a certain time in each year, for eight years, pay to them the said trustees "a sum of £200, to raise a fund for the purpose of paying off a sum of £1500 and "interest, the portion of Hayes Scanlan, the brother of the said Matthew Lane Scanlan, "which was a charge on the said premises: and that he the said Matthew Lane Scanlan "would, from time to time, during his life, renew the several leases of the said lands "which were renewable: and it was by the said articles further declared and agreed, "that all and every new lease or leases thereafter to be taken of the said lands and "premises, or any part thereof, should, from time to time, remain, continue, and "be, to, for, and upon the several trusts therein before declared of and concerning "the said premises respectively."

Scanlan neglected to pay the annuity of £200 and to secure the £2000 for the younger children, and Gibbon Fitzgibbon (surviving trustee) in 1776 [264] entered into the possession or receipt of the rents and profits of the lands of Gortnacreehy, Ballylin, and Duckstown, and continued in such possession till 1780, when the lease of the lands of Duckstown expired. These lands being advertised in the public papers to be let, Fitzgibbon made a proposal to the agent of Lord Courtnay the proprietor to take a renewal of the lease on his own account, stating at the same time, "that "he would not have it understood, that he meant by taking the farm in question

"to become a trustee for Mr. Scanlan." The proposal was accepted, and, Fitzgibbon having died intestate in August 1781 or 1782, a lease for 31 years was, in pursuance of the proposal, executed to his widow and administratrix.

Matthew Lane Scanlan died in 1793, leaving two sons and two daughters, having by his will directed that of the £2000 portion, £1000 should go to his younger son the Respondent, and £1000 to his daughters between them. The eldest son died in 1795, unmarried, and without issue.

The Respondent and his sisters, on the 18th May 1799, exhibited their bill in Chancery against the widow and legal personal representative of the deceased Fitzgibbon, and against two other defendants, Bourke and Bouchier, who were tenants of the lands of Ballymacrory, under leases or agreements for leases alleged to have been unduly obtained from Matthew Lane Scanlan in his life-time, stating the matters before mentioned, and praying (among other things), that the leases to Bourke and Bouchier might be set aside, and (in substance) that the leases both of the lands of Ballymacrory, and [265] Duckstown, might be rendered available for payment of the £2000 portion, there being (as was alleged) no other fund for that purpose.

The Defendant Barbara Fitzgibbon, by her answer, insisted that the deceased, Gibbon Fitzgibbon, had become lessee of the lands of Duckstown for his own use and benefit, and not as trustee for Matthew Lane Scanlan; and the said Barbara having died intestate before any further proceedings, the suit was revived against the Appellant, who became representative both of Barbara and Gibbon Fitzgibbon, and also against the Respondent's sisters, who had refused to proceed further as Plaintiffs.

Issue having been joined and witnesses examined, the cause was heard before Lord Chancellor Ponsonby, who on the 20th June, 1806, decreed as follows:—"That the Plaintiff was entitled to the benefit of the renewed lease of March 1780, and that the Defendant should accordingly execute an assignment thereof to the Plaintiff," and that it be referred to one of the Masters to take an account of the rents and profits of the lands in the said renewed lease mentioned, from the 25th of March 1780, and let the rent reserved by any lease which the Plaintiff shall appear to said Master to have *bonâ fide* made of said premises, be the quantum wherewith to charge the Defendant for any part of the lands so leased; and the said Barbara Fitzgibbon having in her answer in her life-time, as administratrix of Gibbon Fitzgibbon deceased in the pleadings mentioned, admitted assets of him sufficient for payment of so much [266] of said rents as was received in his life-time, and the Plaintiff, as administrator of said Barbara, admitting assets of her sufficient for payment of so much of said rents as were received in her life-time, let the Defendant, in one month after confirming the Master's report, pay to the Plaintiff the sum to be reported due on foot of said rents and profits, and decree the Plaintiff entitled to his costs in this cause so far as same respects said lease of the 25th of March 1780 to this day inclusive; and as to the remainder of the costs of the suit, let the parties abide their own costs."

The decree was affirmed on a re-hearing on the 2d February 1807, with this variation, "that the Plaintiff should indemnify the Defendant against the covenants in the renewed lease," and the Appellant was ordered to pay the costs of the re-hearing. From this decree the Appellant appealed to the House of Lords, and contended that it ought to be reversed or varied, for these reasons:

1st, That Gibbon Fitzgibbon was not a trustee in settlement of 1773, with respect to said lands of Duckstown, neither was there any thing in that settlement that can make him be so considered: that upon the expiration of the lease of said lands at Duckstown upon 25th March 1780, it was as competent to said Gibbon Fitzgibbon to become tenant of such lands as if they had not been mentioned in the settlement: said lands having been advertised by Lord Courtnay in the public newspapers to be let to the best bidder, as appears by the evidence in the cause.

2d, That Courts of Equity in decreeing an account [267] of mesne profits have been always governed by special circumstances, and whenever a Plaintiff has been guilty of default in not asserting his title sooner, courts of equity have uniformly restrained the accounts to the time of filing the bill. That even supposing the decree right in declaring the new lease a trust for the Respondent as such administrator as aforesaid, yet the account of mesne profits ought not to have been carried back to 25th March 1780, the date of the lease, nor beyond the 18th May 1803, the time

when the Respondent took out administration to his father, and when, for the first time, he sustained a character to entitle him to sue as his personal representative.

3d. That said Respondent having filed his bill after so long an acquiescence, ought not to have been decreed the benefit of the new lease, nor to an account of the mesne profits, as he cannot be considered in any other or better situation than said Matthew Lane Scanlan, whose personal representative he is, and by whose laches he ought to be bound.

4th. Appellant contends and humbly insists, that he ought not to pay costs, in as much as he was bound as trustee for the next of kin to defend their rights, and that in a case like the present, he could not have acquiesced in the claims of the Respondent without the sanction of the Court: he submits that instead of paying costs he was entitled to costs, so far at least as same sought to impeach the lease of Ballymacrory made by said Matthew Lane Scanlan to said Bourke and Bouchier, the Appellant having no concern whatsoever with said lease or [268] said lands, neither ought the Appellant to pay the costs of the re-hearing, because the former decree on the re-hearing was altered in a material point, namely, by directing the Respondent to indemnify the Appellant against the covenants contained in said lease of 25th March 1780, and more especially as Respondent did not by his bill offer such indemnity.

It was contended on the part of the Respondent that the decree ought to be affirmed.

1st. Because Gibbon Fitzgibbon, by whom this lease was renewed, had no interest whatever in, nor any connexion with, the original lease and the lands in question, but as a trustee under the marriage articles of the 21st May 1773, which articles he had as a trustee executed, and the trusts of which he had undertaken to perform, and which he, as such trustee, obtained the possession: and by those articles it was expressly stipulated and declared that all new leases to be taken of the settled estates, of which the lands of Duckstown were a part, should remain, continue, and be, to, for, and upon the several trusts of those articles: and

2d. Because upon the established principles of equity, independently of the express covenants and agreements contained in those articles, Gibbon Fitzgibbon could not put off his character of trustee, and repudiate the trusts he had undertaken to perform, and by any dealing with the trust property acquire an interest therein or derive a benefit to himself, to the prejudice of those for whom he was a trustee.

[269] Sir S. Romilly, and Mr. Raithby for Appellants; Sir A. Piggott and Mr. Roupell for Respondent.

Lord Eldon (Chancellor). After stating the particular circumstances in the case which rendered the renewed lease a trust for Matthew Lane Scanlan, he said that this was a trust upon another ground. Where a trustee held a lease for the benefit of a *cestui que* trust, and made use of the influence which his situation enabled him to exercise to get a new lease, Courts of equity had said that he should hold it for the benefit of the *cestui que* trust: and to such a length had this doctrine been carried that where a trustee procured a new lease where it was perfectly clear that the lessor would never have renewed for the benefit of the *cestui que* trust, the rule was still adhered to that the trustee must hold it for the *cestui que* trust. But then it was said that he was not a trustee of the lease. Now, under the effect of this covenant the moment he entered on the lands he did so to hold them for the purpose of paying out of the rents and profits the annuity of £200, etc. If there was anything beyond what was necessary for that purpose, it remained in his hands for the benefit of Matthew Lane Scanlan. He was bound to have given up the possession when these sums were paid, or to have admitted that the surplus was received by him in right of Scanlan. In equity therefore he ought to be held a trustee, and to be considered as having renewed for the benefit of the *cestui que* trust. It was doubtful whether he himself had not acknow-[270]ledged that he was a trustee. There was a caution too in the proceedings for the renewal, which afforded some reason to believe that this was not a case where the lessor would have refused to renew for the benefit of the *cestui que* trust, and at any rate the new lease must be held for his benefit.

Then if he were to be considered a trustee, it was fairly enough objected that he ought only to account for the advantages which he had actually received, and some directions ought to be given to settle that point.

In regard to the matter of costs, although an appeal would not be received merely on the subject of costs, yet it did not follow but the article of costs might be taken into consideration when there was an appeal respecting other matters. And it would be proper in this case to relieve the Appellant from the costs of that part of the suit in which he had no concern.

Lord Redesdale concurred with the Chancellor in every particular.

The judgment was in the following form :—

" It is declared, that the Respondent, as administrator of Matthew Lane Scanlan his late father, on behalf of himself, and the several persons interested in the settlement of 21st May 1773, is entitled to the renewed lease of March 1780 : And it is therefore ordered, that the Appellant do execute an assignment thereof to the Respondent, for the benefit of the persons so interested, subject to the further order of the Court of Chancery in Ireland : And it is further ordered, that the rent reserved by [271] any lease or demise *boni fide* made of the premises be the quantum wherewith to charge the Appellant in his own right, and as representative of Barbara Fitzgibbon and Gibbon Fitzgibbon deceased, for any part of the premises, so far as such rent shall have been received by him or the said Barbara Fitzgibbon and Gibbon Fitzgibbon deceased respectively : And it is further ordered that what shall be coming due on such account, after deducting the costs of the Respondent so far as the same relate to the said lease, and the costs of the Appellant after mentioned, be applied in the first place for the purposes of the said settlement, and the surplus, if any, be paid to the Respondent as administrator of the said Matthew Lane Scanlan : And it is further ordered, that the costs of the Appellant, with respect to so much of the said suit as does not relate to the said lease, be retained by the said Appellant out of the money to be found due for the rents and profits of the said leasehold premises : And it is further ordered and adjudged, that subject to the said declaration, orders, and directions, the said decree complained of be affirmed : And it is further ordered, that the Court of Chancery in Ireland do give all necessary directions for carrying this judgment into execution."

Agents for Appellant, RASHLEIGH, SON, and LEE.

Agents for Respondent, CANNON, and GARGRAVE.

[272] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SMITH, Esq. and Others,—*Appellants* : GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND,—*Respondents* [June 16, 1813].

[3 Scots R. R. 69 : *Lee v. Jones*, 1864, 17 C. B. N.S. 504, 506 ; *Railton v. Matthews*, 1844, 10 Cl. & F. 934 ; and *Philips v. Foxall*, 1872, L. R. 7 Q. B. 672. See also *Mackreth v. Walmsley*, 1884, 51 L. T. 21 ; and *Carton and Arrington Union v. Dew*, 1899, 68 L. J. Q. B. 380.]

[Appellants bound to Bank of Scotland in a cautionry bond for one of their agents who fails. Action to reduce the bond on two grounds chiefly. 1st, Fraud or undue concealment on part of the Bank, to prove which various material circumstances offered in evidence, but proof not allowed by Court below. 2d, Bond not in point of fact executed according to statutory solemnities, (though perfect on face of it.) 1st, In witnesses not having seen parties sign. 2d, In the parties having at first signed only on last page, (the bond consisting of a single sheet, in two leaves, book-ways.) No decision by Court below on the point of formality. Cause remitted with instructions to the Court of Session, to decide whether (under Acts 1681, c. 5. and 1696, c. 15.) the bond was valid notwithstanding the alleged defects in its execution ; and if it was, then to permit Appellants to go into evidence on question of fraud.]

The Appellants had bound themselves in a bond of cautionry to the Bank of Scotland, for one Paterson, the Bank agent at Thurso. Paterson having mismanaged

the affairs of the Bank, and become bankrupt, the Respondents proceeded to enforce the bond. The Appellants resisted payment, presented a bill of suspension against a threatened charge, and raised an action of reduction of the bond. In both questions the Court of Session pronounced against the Cautioners, (Appellants,) who thereupon lodged their appeals.

[273] The grounds in law on which the Appellants relied for setting aside the deed were these :

1st, The deed was defective in the solemnities required by the act 1681, c. 5.

2d, It was informal under the act 1696, c. 15, which first allowed that deeds should be written book-ways.

3d, The bond was never properly delivered.

4th, It was obtained by concealment and fraud. Besides direct fraud by Paterson, there was at least such constructive fraud on the part of the Respondents as to debar them in law or in equity from taking advantage of the instrument.

The fraud or undue concealment alleged by the Appellants consisted in this, that at the time the Bank Company took the bond in question, they were aware of, or had strong reason to suspect, the misconduct and insolvency of Paterson. The circumstances which the Appellants offered to prove, (but of which the proof was rejected by the Court below,) in order to make out this proposition were chiefly these : —

1st, That an officer of the Bank having been suddenly sent to Thurso, in September 1803, for the purpose of inspecting the Bank transactions, was for four days baffled in his attempts to be permitted to examine Mr. Paterson's accounts, during which time Paterson was borrowing money, &c. &c. in order to make a show of regularity, and that in point of fact, a suspicion of the truth was at that time conveyed to the Bank. The Respondents were called upon in the Court below, to produce a [274] report which was transmitted to them on that occasion by their officer, but they refused.

2d, The reason alleged by the Bank for their requiring additional security was, the increase of their business at Thurso ; the Appellants offered to prove that their business had decreased there, and was decreasing, and that this must have been known to the Bank.

3d, The extreme and unusual anxiety to have the bond executed with dispatch, which appeared in the Bank Secretary's letters, and the surprise expressed among their people that Paterson had procured cautioners, one of them having said that he would as soon have expected that Paris should be transported to Edinburgh. In regard to the non delivery, the bond was at first sent to the Bank in June 1804, but was returned again to Paterson, to get it properly executed ; so that this (according to the Appellants) was no delivery. The letter in which the bond was last sent to the Bank was of 11th July 1804, but the Appellants offered to prove that it was not actually dispatched till after Paterson had been suspended from his office on the 13th, when the whole transaction must be considered as stopped, and never finally concluded, so that no proper legal delivery could have taken place, and the instrument was, consequently, by the law of Scotland, a nullity.

The bond was alleged to be informally executed in two respects. At the first execution it was signed by the parties only on the last page, whereas (as the Appellants alleged) it ought to have been [275] also signed on the three first, (the bond being a single sheet, in two leaves, book-ways.) Then at both the first and second execution, none of the parties subscribed in the presence of more than one witness, and some of them subscribed without any witness at all present. The testing clause was likewise incorrect, both as to the times when, and places where, some of the parties subscribed.

By the act 1681, c. 5, it is enacted " That no witness shall subscribe as witness " to any parties subscription, unless he then knew that party and saw him subscribe, " or saw, or heard him give warrant to a nottar, or nottars, to subscribe for him, and " in evidence thereof touch the nottar's pen, or that the party did, at the same time " of the witnesses subscribing, acknowledge his subscription." And the act concludes in these words : " And that in all the said cases the witnesses be designed in the body " of the writ, &c. &c. otherwise the same shall be null and void, &c."

The act 1696, cap. 15, declares, " That it shall be free hereafter, for any person " who hath any contract, decret, disposition, or other security above-mentioned to " write, to choose whether he will have the same written in sheets battered together,

"as formerly, or to have them written by way of book, in leaves of paper, either in folio or quarto: providing, that if they be written book-ways, every page be marked by the number, first, second, etc., and signed as the margins were before, and that the end of the last page make mention how many pages are therein contained, in which page only witnesses are to sign, in writs [276] and securities where witnesses are required by law, and which writs and securities being written book-ways, marked and signed as said is, his Majesty with consent founded, declares to be as valid and formal as if they were written on several sheets battered together, and signed on the margin, according to the present custom."

At the time when the Act 1681, cap. 5, was passed, "Where any security was to be executed, consisting of several sheets of paper, the sheets were pasted together by the ends, and the grantor signed on all the joinings." (Erskine's *Institutes*, book 3, tit. 2, sect. 14.) And though this custom of signing at the joinings had received no confirmation from statute, yet the supreme Court thought themselves at liberty to repel the objection, that the grantor had not signed at the joinings, only where all the obligations on the grantor's part were contained in the last sheet, that sheet being signed by him. (Forbes, Nov. 23, 1708, *Sym v. Donaldson*.) And the act 1696, clearly recognised this marginal signing as adopted by use into the law. The act 1681, therefore, in enacting that the witness must see the party subscribe, or that the party must, at the time of the witnesses subscribing, acknowledge his subscription, must be held to apply equally to the signature of the party on the margin, at the joining of the sheets, wherever by the practice at that time such signature was necessary, as to the signing at the foot of the deed. By the act 1696, the signing each page of a deed written book-ways was substituted for signing the margins as before. But the statutory requisites under the act 1681 remained in full force, applicable in every circumstance to the deed written book-ways, as they [277] were formerly to the corresponding circumstances in the deed written on sheets battered together. If therefore by the act of 1681, it was necessary that the subscribing witnesses should witness the marginal subscription of the deed then in use: it was now equally necessary that they should witness the paginal subscription of a deed written book-ways. In the present case, in point of fact, the subscription of all the parties to the last page was not witnessed by two witnesses, and that of none of the Appellants to the preceding pages was so witnessed.

The instrument in question was therefore (the Appellants contended) null on two grounds, independent of the inaccuracy of the testamentary clause. First, The signature of the grantors to the first, second, and third pages, were not duly witnessed by the witnesses subscribing. Secondly, If it should even be held, that this was not necessary under the statute, yet this instrument would still be void, inasmuch as the subscription of all the parties to the last page was not duly witnessed by the subscribing witnesses.

It was clearly established by decisions, (they said,) that witnesses not seeing a party subscribe was fatal to a bond. (Home, Nov. 1682, *Stevenson v. Stevenson*. Fount. 12th Feb. 1684. *Blair v. Peddie*.)

The Respondents, besides denying the equity of the Appellants' case, maintained that the acknowledgment of their subscriptions by the parties was sufficient; that the subscription upon all pages of a single sheet was not necessary *de solemnitate*; that the bond was therefore properly executed and delivered at first, and they relied on *Williamson v. Williamson*, December 21, 1742, (*Kilk. v. Writ*, No. 9.) (and cases there stated).

[278] The Appellants on the other hand, to show that the acknowledgment of subscription by parties was not sufficient to supply the want of statutory requisites, relied on the case of *McFarlane v. Grieve*, with *Edmonston v. Lang*, and cases there cited (*Fac. Coll.* May 22, 1790). The bond, in stating the liability of the Appellants, purported to be "in supplement of the first bond, and included transactions which had been made by Paterson during the time he acted as agent." The Appellants however contended, that from the nature of the instrument which was a bond of credit, they were at all events only liable for losses sustained subsequent to the date of the bond: while the Respondents insisted that the instrument covered past as well as future transactions.

Sir S. Romilly and Mr. Brougham (for the Appellants.) If the facts offered in

evidence on the question of undue concealment were made out in proof, the principle by the law of England and also by that of Scotland was clear. A case of this kind had lately come before the Court of Chancery. One Maltby had been clerk to the Fishmongers' Company : several of his sureties had died, and he had not been asked to renew them. At length the Company were dissatisfied with his conduct, and directed an inquiry into the state of his accounts, and found that he was indebted to them in a very considerable sum. Before settling accounts with him, however, they required new sureties in place of those who had died, and a bond was executed accordingly : immediately after which Maltby was removed. A bill was filed by the sureties to pre [279] vent the enforcing of the bond, and the bill was retained, though liberty was given to sue upon it at law : it being apprehended by the Court that the nature of the defence was such as might be pleaded at law. He had heard nothing further of that case, but concluded that the Fishmongers' Company had thought proper to acquiesce in the opinion intimated by the Chancellor on that occasion, and had refrained from attempting to enforce the bond. This therefore, though it could not be called a decided case, was an opinion intimated by the Court after, in effect, a full hearing, and acquiesced in by the parties. The present case was exactly similar to that of the Fishmongers' Company and Maltby. They thought therefore to be permitted to go into evidence of those facts which they had offered to substantiate.

But there was an objection also in point of form, and if ever there was a case in which it was proper to take such an objection, it was this : the bond was null and void from the want of the formalities in the execution required by the statutes 1696, cap. 15, and 1681, cap. 5. (*vide ante*.) — But then it was said, that the parties had admitted that they had signed the bond, and that therefore the spirit of the act had been complied with : since, where there was a distinct admission, there could be no danger of fraud. This was no answer : the statutes required the proper formalities *de solemnitate*, and unless they were complied with no subsequent admission would cure the defect. Suppose a will of real property executed in the presence of two witnesses, the devisee might say that the spirit of the statute frauds [280] was complied with, as two witnesses were sufficient to guard against fraud. Still the heir-at-law would have a right to insist that this was no will, as it was not executed with the prescribed formalities. It would be dangerous, where the law prescribed a special solemnity, to decide, that a compliance with what might be conceived to be the spirit was sufficient. In a deed made up book-ways, the only way to prevent fraud was to have each page signed, and the number mentioned in the last page. But they said there was no danger of fraud where the number was mentioned on the last page, though the rest were not signed. There unquestionably was great danger of fraud. Suppose two sheets put up in four leaves, each written on one side, it might be signed and the number of pages mentioned on the last page : the middle sheet might be taken out and another put in containing matter totally different, and yet the number of pages would exactly correspond with that mentioned on the last page. This was stated *ex abundanti*, for it was enough that the formalities were required by the statutes. The Respondents said it was enough that the spirit of the statute was complied with : and they relied upon the case of *Williamson v. Williamson*, reported by Lord Kilkerran (21st Dec. 1742, *v. Writ*). But there the deed was holograph, or wholly written by the grantor : which by the law of Scotland was one of what were called privileged deeds, and exempted from the operation of the statutes : and, as to the note of Lord Kilkerran affixed to that case, it was a mere dictum of his own, and not material to the question then decided. This argument, if good for any thing, would go the length [281] of setting aside the necessity of attesting witnesses altogether, which no one ever contended for. To allow the mere fact of admission, to take the case out of the statutes, would be to offer a premium to dishonesty : 1st, then, they submitted, That the circumstances which they offered to prove were material, and if proved, would have formed sufficient ground to reduce the bond on the score of constructive fraud : and that the rejection of this evidence by the Court below called for their Lordships' interference. 2dly, that the bond was never properly executed ; and 3dly, That it had never been properly delivered.

Mr. Adam and Mr. Horner (for the Respondents.) This was a case of great importance, since it was highly requisite on the one hand that the meaning of the statutes

as to the execution of bonds should be finally settled, and that on the other hand persons should not be permitted to take advantage of a mere matter of form, to avoid instruments completely admitted by themselves to have been executed. The facts which had been stated as to the merits of the case did not appear in evidence, for the Court below did not permit the proof, as the principle seemed perfectly clear, and the instrument executed in a manner so perfect, as not to be affected by any facts relative to the conduct of the parties. They had been inserted only for the purpose of founding the objection of form, which was the main point.

The first objection in point of form was under the statute of 1696, cap. 15, that each page of the bond, which was made up book-ways, had not been [282] signed by the parties; and the second was under the statute of 1681, cap. 5, that the individuals attesting the signatures were not present at the signing by some of the parties, nor heard them acknowledge their signatures. While these objections were under examination, their Lordships would bear in mind that the signatures were in fact admitted by the parties themselves, and that this was not a case as between third parties, so that cases of that description were out of the question.

In regard to the act of 1696, their Lordships, on examining the bearings of that statute, would find that the object of it was to provide a security for the due execution of bonds not pasted together, as the several sheets were when deeds were put up in the shape of rolls, but only fixed together with threads as they generally were when several sheets were joined together book-ways. The design of the statute was, to take care that the parts which were so detached should be so authenticated as to prevent the fraud that might otherwise arise, by the subtraction of one sheet, and the substitution of another which the grantor might never have seen. But there was no necessity whatever for this precaution of signing on every page, where there was only one sheet as in the present instance. Suppose a sheet of paper in the form of two leaves written on one side, and then the back of it turned and partly written, it would be sufficient to prevent fraud to execute it on the back, and no mischief could in such a case result from not signing it on each page. This was exactly the present case, to which therefore the statute did not apply. In the first practice of con-[283]-veyancing, deeds were made up in the form of rolls, the separate sheets battered (pasted) together, and the law for the purpose of preventing fraud, required that they should be signed at the joinings in order to connect the several parts. By the statute of 1696, it was allowed to write deeds book-ways in folio or quarto; and it was provided, that deeds so written, if the pages were numbered and signed, should be as valid and formal as if written in the old way. The statute did not say that such deed should be null and void unless signed on every page, but that if signed on every page they should have the same effect as if written in the old way. The act was only directory, not mandatory. But what they chiefly relied upon was, that the bond in question was not written book-ways at all, as it consisted only of one sheet, which from the first was signed. It was not within the scope of the danger to be guarded against; and therefore the statute did not bear upon it. Here the case of *Williamson v. Williamson*, reported by Lord Kilkerran in his dictionary under the word *writ*, was material. (Clerk Home, 361.) It was true, the instrument was in that case holograph of the grantor; but this was not the sole ground of the decision. There was no exemption in the statute, in regard to holograph instruments. One ground of the decision appeared to be, that the signing on each page was not necessary *de solemnitate*, where the instrument was written on one sheet. The case of *Robertson v. —*, to the same effect, was also noticed by Lord Kilkerran, in a note under the word *writ* in his dictionary. It was also reported by Lord Elchies. (Elchies, 19th Jan. 1742, Dict. 16955), some of whose manu-[284]-scripts had been lately presented to the faculty of advocates by Sir James Montgomery, and which were found to be so valuable that they were now printed. This case was decided on the 19th January, 1742, a month or two previous to that of *Williamson v. Williamson*, and had been considered in the decision of the latter case. It must therefore be taken as distinctly decided, that the statute did not extend to writings on a single sheet. The case of *Macdonald v. Macdonald*, decided in February 1778, reported in the Faculty Collection (and Dict. 16956) was determined on the ground of *Robertson v. —*. The bond here was therefore perfect upon its first execution, and had been delivered as such; and the mistake of the officer in sending it back again ought not to prejudice that delivery. Some of the

grantors themselves, it was to be observed, had transactions with Paterson, as agent for the Bank, subsequent to the date of the bond.

The other objection in point of form was founded on the act of 1681, cap. 5. The act set out with an acknowledgment of the principle, that instruments properly executed "were probative of themselves," like instruments in England of a certain age. It was important that this principle of the law of Scotland should not be disturbed. The present bond was perfect and probative of itself. But then it was said, that the attesting witnesses had not, in fact, seen all the parties sign or acknowledge their subscriptions in terms of the act; as the bond however was probative of itself, they ought not to be allowed to give evidence of that fact. The cases of *Edmonston v. Lang*, and *McFarlane v. Grieve*, [285] mentioned on the other side were not applicable. In both these cases the instruments were imperfect on the face of them: in the one case there was a defect in the point of subscribing witnesses, in the other the writer had not been designed. But the bond here was *ex facie* perfect, and not to be impugned by evidence *dehors*. Independent of that, however, upon looking at the act it would be found that a very different effect was given to the want of designation of the writer and witnesses, from what was given to the false attestation of witnesses, as to their seeing the party subscribe or acknowledge his subscription. In the former case the bond was declared to be null and void; in the latter case, the witness was to be punished as accessory to forgery, but there was no declaration of the nullity of the bond. Even if it were proved, therefore, that the subscribing witnesses did not see the parties sign or acknowledge their signatures, there was no statutory nullity. The witness was liable to punishment as an accessory to forgery; but the instrument being perfect on the face of it was conclusive against the grantor. He ought not to be allowed to take advantage of his own fraud or negligence, to avoid his own deed. Their Lordships would shake the security of all property, if they permitted deeds perfect *ex facie* to be questioned on such grounds.

In regard to the proceedings of the Bank in this transaction, there was no evidence of bad faith on their part. The circumstance of their taking no steps in the business so long after their agent, Mr. Marshall, had inspected Paterson's accounts, was itself a proof that they were not aware of his misconduct [286]; and their demand of additional security was accounted for by the increasing business. The Bank, however, had been charged with unconscientiousness and want of faith in these transactions; and, in order to make something of this, the case of the Fishmongers' Company and Maltby had been relied on. But it was not known what had become of that case, which had been sent to be tried at law. Sir S. Romilly, with all his knowledge of equity, had been able to produce nothing better than this fragment of an abortive case in favour of his argument, relative to the equitable relief which he conceived due to the Appellants. Three circumstances had been alleged as importing fraud on the part of the Respondent: 1st, The sudden appearance of the inspector at Thurso; 2dly, The refusal of the Bank to produce the report of their agent on the state of Paterson's account; 3dly, The anxiety of the Bank officer to get the bond executed for the additional security. But this sort of occasional inspection was not extraordinary; it was in the common course of the Bank's proceedings. Mr. Marshall had visited Thurso in September 1803; but if any fraud on the part of Paterson had been discovered, it was strange that the Bank should have rested satisfied for ten months without evincing the least suspicion on that head. From the increasing state of business, they found it necessary to require more security from all their agents, and from Paterson among the rest. But they allowed him time to provide this additional security, and acted in every respect as if they had the most complete confidence in him. As to producing the report, the Appellants had no right to [287] have it. They had no claim to be allowed to fish for evidence from the private transactions of the Bank.

Lord Redesdale. Supposing the report shewed that Paterson was no longer trustworthy, and the Bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions, as contrary to the faith of the contract. And then it might be a question what bearing this circumstance might have on the new sureties.

The point which his Lordship had stated as decided in England, was also settled by the law of Scotland: but what they alleged was, that the Appellants had no right to scrutinize the Bank documents. It would have been very well here, where they

might file a bill of discovery ; but it was repugnant to the principles of the law of Scotland. The Appellants might have had the oath of the party if they had chosen to proceed in that way. As to the anxiety of the Bank agent, it was natural for him to wish to have the bond executed without delay, as he himself might have been liable to the Bank. The Appellants therefore had made out no *prima facie* case to entitle them to be allowed to give the circumstances in evidence ; and it was therefore submitted that the interlocutors ought to be suffered to stand.

Sir S. Romilly (in reply) again insisted that even if the bond were properly executed, it had been obtained under such a suppression of facts as made it fraudulent, and therefore void. The Court, by the law of Scotland, ought, upon the least appearance of relevancy, to allow the proof. It was not al[288]-leged that the Bank could be compelled to produce the report ; but their refusal was evidence, that it produced it would have proved fraud. As to the allegation of their remaining satisfied so long after that report, they did not remain satisfied, for they endeavoured to get additional security ; and they thought it their interest not to take any further steps in regard to Paterson, till he had procured that security. The bank, no doubt, formed a most respectable body. Some of the Judges below were themselves directors ; but when a body executed a kind of public trust, they were often led, even by a sense of duty, to act in a manner in which they would not have acted, if their own interests alone had been concerned. Paterson, like Maltby, was removed the moment the security was obtained. Maltby's case had been called an abortion : but it had been solemnly argued, and the grantees of the bond there were so well satisfied, that either law, or equity, or both were so much against them, that they had not further attempted to enforce their bond, and were losers to the amount of several thousand pounds. Another view of the case, suggested by one of their Lordships, (Redesdale,) was very important. If the Bank knew of the fraud of their agent, even the former sureties were discharged from all consequences of the transactions subsequent to their obtaining that knowledge, so that the new sureties could not get a contribution *pro tanto* from the former sureties. He had before stated the case too weakly for his client ; for the Appellants, by the improper concealment of the Bank, had become sureties, not only for a debt incurred, but for a debt of which it was impossible [289] they could have known the extent. With respect to the other ground, the want of formality, the object of the Act of 1696 was not merely to prevent fraud by the insertion of leaves, but also to prevent the fraud that might arise from the insertion of additional lines. For this purpose, it was necessary before not only to sign every sheet in the roll, but to sign each at the joining : and with the same view, when deeds were made up book-ways, it was necessary they should be signed not only on every page, but at the bottom of every page. The signing of each page was therefore not only necessary *de solemnitate*, but also for the very object which the statute had directly in view : viz. the prevention of fraud. But then they said that this was not a bond written book-ways, because it was only a single sheet. He did not know whether that was the fact ; the bond ought to have been produced. But supposing it to be so, the distinction was a very extraordinary one. There had been a question whether a song, written on a single sheet, was a book, and it was decided that it was. The real distinction was between paper, or parchment, made up in the manner of a roll, and in the manner of a book. That the present bond, whether consisting of one or many sheets, was written book-ways, and not in the manner of a roll, there could be no question. Then it was said, that the act was only directory, and did not declare the instrument void, although the formalities should be neglected. This was a distinction which he had never heard of before. When an act directed a thing to be done, he had always understood that it was necessary it should be [290] done. Unless this was the effect, the act was wholly nugatory.

Then as to the Act of 1681, cap. 5, it was argued, that the clause relating to the subscription in the presence of witnesses, did not make the instrument void where this was neglected, but only rendered the attesting witnesses liable to punishment as accessory to forgery. In other words, the party forging was to be punished, but the forged instrument was valid ! But there was another decisive answer : there was no occasion to say in direct terms that the instrument should be void, for it was so under the law as it stood before. The Act of 1540, cap. 117, required upon pain of nullity, that the deed should be executed in the presence of witnesses ; the Act

of 1681 only added to this the punishment of witnesses falsely attesting the due execution. It had been said, there was no exception in the act, even of holograph instruments. The answer to which was, that holograph writings were privileged, and that therefore the statute did not apply.

Lord Eldon (Chancellor,) stated the form of the proceeding in the Court below, as above set forth, and then observed that the grounds of these proceedings by suspension and reduction were several : and among these frauds was one, though that expression appeared to be considered as rather too harsh, and it was sometimes called a concealment of material circumstances. A difference of opinion appeared to have prevailed among the judges.

The 1st question was, whether the instrument had been well executed. 2d, Whether, if well executed, it had been properly delivered. 3d, Whether, if the instrument could be impeached on neither of these grounds, the cautioners ought to be allowed a proof of certain facts and circumstances which if proved, they contended, would afford an equitable ground of relief.

On the one hand, it had been argued, that under certain statutes of 1681 and 1696, the bond was void, because it had not been executed in proper form, and with proper solemnities, which by the enactments of these statutes were indispensable. On the other side it was contended, that as the instrument had been admitted by the parties to have been executed by them, there was no room for the objection for want of form. He had then expressed a wish to see the grounds upon which the Court below had decided : and he had since obtained some notes of the opinions of the judges, but they gave no light on this particular point.

The Court below, however, had attended to the objection with respect to the delivery of the deed. They seemed to have considered it properly delivered, and he did not think there was sufficient ground to quarrel with their decision on that head.

Another question was, whether the bond was to its amount to be considered as in its nature an instrument to indemnify the Bank against past, as well as future loss to them, from the transactions of Paterson as their agent. If such was the nature of the bond, it would be necessary to look with great attention at the circumstances, under which it had been given and taken.

[292] The next question related to the materiality and effect of the circumstances, offered to be given in evidence in regard to this bond. If an agent had been guilty of embezzlement, or other improper conduct unknown to his employer, the cautioner would be liable. But if a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt : if under such circumstances, he required sureties for his fidelity, holding him out as a trust-worthy person, knowing, or having ground to believe, that he was not so : then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent. The cautioners here said, that they were taught by the Bank to believe that Paterson was a good man, when the Bank knew, or had reason to believe, that he was not so, and they offered to prove, that the Bank did, at the time of requiring this additional security, know of Paterson's misconduct, or had good reasons to believe that he had misconducted himself. Now he understood the Court of Session to say, that though they proved all this they proved nothing.

The letter, they alleged, requiring additional security, was written in December, 1803. Marshall, one of the Bank inspectors, had been at Thurso in the September preceding, and they said, that he had to wait four days before Paterson would state his accounts, though he (Paterson) ought to have been prepared to do so at a moment's warning. Marshall had, as they alleged, made a report at the [293] time to the Bank, and they called upon the Bank to produce that report. They had not the power in Scotland to compel a discovery, as in our Courts of Equity ; but if it could be shown that Paterson had been guilty of such a gross breach of duty, as to baffle the Bank inspector for four days, till he could fabricate an account, and that the Bank was apprised of that circumstance, though the cautioners could not compel the production of the report, they might examine Marshall as a witness, and if he stated that he had made such discoveries to the Bank, in regard to Paterson and his affairs, as put the Bank *in mala fide* with respect to the cautioners, that would surely be very material evidence in the cause.

The reason alleged by the Bank for requiring the additional security was, that the business at Thurso had increased. Now the cautioners affirmed, that it had not increased, and that the ostensible ground on which the Bank demanded the additional security was contrary to the fact; and they offered to prove, that the state of the business was such, that £5000, the amount of the former security, was fully sufficient to cover it. And they alleged, that the additional bond was, therefore, really intended as a security, not against future misconduct, but for the payment of a debt known by the Bank to have been previously incurred. And though the bond should be considered as having been given to protect the Bank, partly against past transactions, as well as future; yet, if the Bank applied it solely to the past, and immediately dismissed the agent, so as to prevent any possibility of its being applicable to the future, then that was a fact to be given in evidence [294] in attempting to show that the real intent of the Bank was to procure security for the payment of a debt already known to them to exist, but concealed from the cautioners.

Much had been attempted to be made of the circumstance of the Bank sending Sim, another of their agents, by stealth, as it had been alleged, to Thurso. This was a circumstance to be looked after, though at present it did not appear to be very material. But if Sim had communicated any important information to the Bank on the subject, he might be examined as a witness.

Another fact was stated, viz. that when the same persons connected with the Bank heard that Paterson had provided the desired security, one of them exclaimed, that he would as soon have expected that Paris should come to Edinburgh, as that Paterson had got security. Why then, this was evidence to show that it was at least known to persons about the Bank, that Paterson's situation had been such, that no prudent man, if he had known it, would have become security for him; and this was a material circumstance for a Court of Equity to consider.

One case similar to the present, had come before himself, (Maltby's case.) A clerk to the Fishmongers' Company had incurred a considerable debt. The deficit had been increasing from year to year, and was at length carried beyond what the Company were likely to recover. They demanded additional security, which he procured. The case had come before him only upon motion, but he had thought a good deal upon it, and the light in which it appeared to him was this:—if he knew himself to be cheated by an agent, and concealing that fact, [295] applied for security in such a manner, and under such circumstances, as held him out to others as one whom he considered as a trust-worthy person, and any one, acting under the impression that the agent was so considered by his employer, had become bound for him; it appeared to him that he could not conscientiously hold that security. He was then of opinion that the Fishmongers' Company could not hold their security. He did not know what had become of the case afterwards, but he believed that his opinion was submitted to, and that no further proceedings were had. He had since reconsidered the matter, and still retained his former opinion, and would act upon it judicially, if occasion offered. He therefore thought, that an opportunity ought to be afforded to these cautioners, to prove the facts which they alleged, and offered to substantiate by evidence.

Lord Redesdale. The material questions, as he with difficulty collected them from the confusion of the pleadings in the case, appeared to be these:—1st. The validity of the instrument in respect of execution and delivery. 2d. The construction of the instrument. 3d. The effect of the particular circumstances under which the bond was given and taken.

As to the execution of the bond, that point did not appear to have been at all considered by the Judges in the Court below. In regard to the question of delivery, there appeared to have been great difference of opinion among the judges, but that was not now of much consequence, as Paterson seemed to have [296] acted as the agent of the Bank in the transaction, and delivery to him might be considered as delivery to the Bank; though that fact might possibly be material with a view to the third point.

As to the construction of the instrument, he thought it must be taken as extending to past, as well as future transactions.

With respect to the third question, a case though not exactly similar to the present, yet bearing a considerable resemblance to it, had come before him in Ireland. A

Banking Company at Dublin had trusted their clerk too far, and had not called him to account in the ordinary regular manner. He became indebted to them in a large sum, which he was unable to pay, and they called upon his sureties. When the case came before him, the sureties contended, that the Bank had not acted fairly by them, in not calling upon the clerk to account in the ordinary regular manner, which if they had done, the deficit would have been much smaller, and perhaps the misconduct would never have occurred. He remarked at that time, that the principal ought to call upon the agent to account in the ordinary regular course of business; and that it certainly was not acting altogether fairly by the surety, to be negligent in this respect. One of the partners of the Bank was in Court at the time, and was so strongly impressed with the view which had been taken of the case, that he acknowledged it was not dealing fairly by the surety, and so the matter ended, without any decision. He mentioned this merely to show, that the surety had a right to expect from [297] the principal, that there should be no negligence on his part; and that he should not trust the agent beyond the ordinary bounds of prudence.

If then Paterson was the agent of the Bank in taking the bond, it remained to consider the circumstances under which it was given, and certainly those stated by the Noble Lord (Eldon) were highly important and material. If a person had some doubts as to the circumstances of his agent, and therefore required fresh sureties, stating his doubts at the same time to these sureties, they would have no right then to complain, though called upon to pay to the amount of their engagement. But if he suggested no doubt, but, on the contrary, required additional security upon an alleged increase of business, solely concealing his doubts as to the misconduct of the agent, this was a species of proceeding which placed the person adopting it *in mala fide* in regard to the surety. If then it could be proved that the Bank knew that Paterson was not trust-worthy, or had good reason to believe so, and did not inform the sureties of their knowledge or suspicions on that head, but required security upon a ground which could not lead the proposed sureties to suspect that any thing was wrong, and that ground too could be proved to have had no existence in fact, all these circumstances would unquestionably be material evidence; and he therefore concurred in the opinion expressed by the Noble Lord on the woolsack.

The judgment in the question of reduction (which [298] in effect disposed of the question of suspension) was in the following form:

16 Junii, 1813.

The Lords find, that the deed in question, if not impeachable on other grounds, is to be considered as a delivered deed: and find, that the Appellants ought to be allowed to make proofs of the circumstances by them alleged as grounds for reducing the deed as unduly obtained by concealment or deception, if the deed is valid according to the statutes of 1681 and 1696; and it is therefore ordered and adjudged, that the cause be remitted back to the Court of Session, to re-consider the same as to the validity of the deed, as the same may be affected by the said statutes, having regard to the nature of the deed, and that the Court do proceed in re-considering the same as to them shall seem meet; and it is further ordered, that in case the said Court shall, upon such re-consideration, adjudge that the said deed is valid, if duly obtained, that the petitioners be allowed all proof of the circumstances by them alleged as affording grounds for reducing it, as unduly obtained as aforesaid; and it is further ordered, that with these findings and directions, the said Court do review the interlocutors complained of, and proceed upon such review as to the Court seem just.

Agent for Appellants, A. GRANT.

Agent for Respondents, CHALMER.

[299] ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

THOMSON,—*Plaintiff* (in Error); BEALE,—*Defendant* (in Error) [June 12, 1813].

[Mews' Dig. xiii. 108 (*Thompson v. Beale*). Approved and explained in *Melville v. De Wolf*, 1855, 4 E. & B. 847, 849.]

[Russian Government lays an embargo (as they called it) on British ships in Russian ports, till an alleged convention between the Russian and British Governments should be fulfilled by the latter. Crews taken out of the ships, marched up the country, detained for six months, and treated as prisoners of war. At the end of six months crews marched back to their ships, and the vessels with their cargoes restored. Decided that this was an embargo and not a hostile capture.]

Assumpsit by Defendant in error, (a seaman,) in Common Pleas, for wages, against Plaintiff in error (a ship owner.) Plea, Non assumpsit. Trial in Michaelmas Term, 1802, when the jury found a special verdict, stating as follows:

That the Defendant in error, a British seaman, on the 8th day of September, 1800, signed articles to serve as a seaman in a British ship called the *Aquilon*, of which the Plaintiff in error was owner, at the wages of £5 10s. per month, on a voyage from Hull to Petersburg, and from thence to London, and that in consideration of the said monthly wages, the Defendant in error should and would perform the above-mentioned voyage, and the Plaintiff in error did hire the Defendant in error as a seaman for the said voyage at such monthly wages, to be paid pursuant to the laws of Great Britain: and the Defendant in error did promise and oblige himself to [300] do his duty, and obey the lawful commands of the officers on board the said ship, or boats thereunto belonging, as became a good and faithful seaman and mariner, and at all places where the said ship should put in or anchor at during the said ship's voyage, to do his best endeavours for the preservation of the said ship and cargo, and not to neglect or refuse doing his duty by day or night, nor should go out of the said ship on board any other vessel, or be on shore under any pretence whatever till the voyage was ended, and the ship discharged of her cargo, without leave first obtained of the Master, Captain, or commanding officer on board, and in default thereof he should be liable to the penalties mentioned in the Act of Parliament made in the second year of the reign of King George the Second, (cap. 36.) intituled, "An act for the better regulation and government of seamen in the merchants' service," and the act made in the thirty-seventh year of his present Majesty's reign, (cap. 73.) intituled, "An act for preventing the desertion of seamen from British merchant ships trading to his Majesty's colonies and plantations in the West Indies," and that twenty-four hours absence, without leave, should be deemed a total desertion, and render the Defendant in error liable to the forfeitures and penalties contained in the acts above recited; and further, that the Defendant in error should not demand, or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered, and that if the Defendant in error should well and truly perform the above-mentioned voyage, he should be en-[301]-titled to the wages or hire that might become due to him pursuant to the said articles: That the Defendant in error sailed on board the said ship, which arrived at Petersburg on or about the 18th day of October, in the same year, and continued there in prosecution of the purposes of the voyage, until the 5th day of November following, on which day the following order was issued by the Russian Government.

"Whereas, we have learned, that the island of Malta, lately in the possession of the Hercule, has been surrendered to the English troops, but as it is yet uncertain whether the agreement entered into on the 30th day of December, 1798, will be fulfilled, according to which this island, after its capture, is to be restored to the order of St. John of Jerusalem, of which his Majesty the Emperor of all the Russias is Grand Master, his Imperial Majesty being determined to defend his rights, has

"been pleased to command that an embargo shall be laid on all English vessels in the ports of his Empire, until the above-mentioned convention shall be fulfilled." In consequence thereof guards were placed along the shore to prevent the crews escaping from their respective ships until the 10th of the same month of November, when such part of the crew of each ship as were British subjects were taken out by a Russian guard and marched into the interior of the country. On the 18th and 21st days of the said month of November, the following proclamation appeared in the Petersburg Court Gazette :

"The crews of two English ships in the harbour [302] of Narva on the arrival of a military force to put them under arrest in consequence of the embargo laid on them, having made resistance, fired pistols, and forced a Russian sailor into the water, and afterwards weighed anchor and sailed away, his Imperial Majesty has been pleased to order that the remainder of the vessels in that harbour shall be burnt, his Imperial Majesty having received from his Chamberlain Stalinskoi, at Palermo, an account of the taking of Malta, has been pleased to direct that the following note shall be transmitted to all the diplomatic corps residing at his court by the minister presiding in the college for foreign affairs, and the Vice Chancellor Count Panin: His Majesty the Emperor of all the Russias has received circumstantial accounts respecting the surrender of Malta, by which it is actually confirmed that the English Generals, notwithstanding the repeated remonstrances on the part of his Majesty's ministers at Palermo, as well as from the ministry of his Sicilian Majesty, have taken possession of the island of Valetta, and of the island of Malta, in the name of the King of Great Britain, and have hoisted his flag only: his Imperial Majesty's just indignation having been raised by this violation of good confidence, he has resolved not to take off the embargo that has been laid on all English vessels in the Russian ports until the agreement of the convention concluded in 1798 shall have been completely carried into execution."

On the 14th day of January, 1801, his Britannic Majesty in Council issued the following order :

[303] "Whereas, his Majesty has received advice that a large number of vessels belonging to his Majesty's subjects have been and are detained in the ports of Russia, and that the British sailors navigating the same have been, and are, detained as prisoners in different parts of Russia, and also, that during the continuance of these proceedings a confederacy of a hostile nature against the just rights and interests of his Majesty and his dominions has been entered into with the court of Saint Petersburg by the courts of Denmark and Sweden respectively: His Majesty, with the advice of his privy council, is therefore pleased to order, as it is hereby ordered, that no ships or vessels belonging to any of his Majesty's subjects be permitted to enter and clear out for any of the ports in Russia, Denmark, or Sweden, until further order: And his Majesty is further pleased to order that a general embargo or stop be made of all Russian, Danish, and Swedish ships and vessels whatever now within, or which hereafter shall come into any of the ports, harbours, or roads within the United Kingdom of Great Britain and Ireland, together with all persons and effects on board of the said ships and vessels, but that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships or vessels, so that no damage whatever be sustained, and the Right Honourable the Lords Commissioners of his Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are [304] to give the necessary directions herein as to them respectively appertain."

On the 16th day of January, 1801, his Britannic Majesty in council issued the following order :

"Whereas, his Majesty has received advice that a large number of vessels, belonging to his Majesty's subjects, have been and are detained in the ports of Russia; and that the property of his Majesty's subjects in Russia has, by virtue of several orders and decrees of the Russian government, particularly one bearing date the 29th day of November last, old style (corresponding with the 10th of December, new style,) been seized and directed to be applied, in violation of the principles of justice, and of the rights of the several persons interested therein, his Majesty, with the advice of his privy council, is thereupon pleased to order, as it is hereby ordered, that no bills drawn, since the said 29th day of November last, old style, (corresponding

" with the 10th of December, new style,) by, or on behalf of, any persons being subjects of, or residing within the dominions of, the Emperor of Russia, shall be accepted or paid without license from one of his Majesty's principal secretaries of state, first had in that behalf, until further signification of his Majesty's pleasure, or until provision shall be made in respect thereof, by Act of Parliament, whereof all persons concerned are to take notice, and govern themselves accordingly."

The captain and crew of the *Aquilon* (including [305] the Defendant in error) remained up the country, until the 28th of May in the succeeding year, during which time they were kept within certain bounds, and from the time they were taken from their respective ships, were treated, in other respects, as if they had been prisoners of war. On the said 28th of May, in the succeeding year, the said captain and crew were marched back to Petersburg, and returned on board the ship, and afterwards proceeded on the voyage to London. The ship went out to Petersburg in ballast, to bring a cargo to London, and was to be paid freight for that cargo by the ton. The Defendant in error did his duty as seaman on board the ship during the said voyage, and the ship received the same freight as if she had not been detained, and no more. After the captain and crew returned on board the ship, the Russian government issued the following order :

" Quoique l'intention magnanime de S. M. l'Empereur de toutes les Russies de rendre pleine et entière justice aux Sujets Britanniques, qui ont essuyé des pertes pendant les troubles qui ont altéré la bonne intelligence entre son Empire et la Grande Bretagne, soit, déjà, constatée par les faits, S. M. I. ne consultant que sa loyauté, a autorisé encore le Plénipotentiaire soussigné a declarer, comme Il declare par la présente :

" Que tous les navires, les merchandizes, et les proprietes des Sujets Britanniques, qui avoient été mis en sequestre sous le dernier regne en Russie, seront non seulement fidèlement restitués, aux dits sujets Britanniques, ou à leurs com-[306] mettans, mais que pour les effets qui auroient été aliénés d'une manière quel conque, et qui ne pourraient plus être rendus en nature, il sera accordé aux propriétaires un equivalent convenable ; lequel sera déterminé ultérieurement d'après les regles de l'équité.

" En foi de quoi, nous, plénipotentiaire de S. M. I. de toutes les Russies, avons signé la présente declaration, et y'avons fait apposer le sceau de nos armes. Fait à St. Petersburg, le 5-17me Juin, 1801.

" (Signé)

LE COMTE DE PANIN."

This order has not yet been carried into complete effect ; no new articles were entered into between the captain and the crew ; the Plaintiff has received all his wages for the voyage, according to the articles, of five pounds ten shillings per month, except for the time the captain and crew were so kept out of the said ship.

The action was for wages during the period of detention, being about six months. In Easter term 1803, the Court of Common Pleas gave judgment for the Plaintiff in error. The Defendant in error immediately brought a writ of error in the Kings Bench, and that Court, in Hilary term 1804, reversed the judgment of the Common Pleas and gave judgment for the Defendant in error, upon which the Plaintiff in error brought his writ of error returnable in the House of Lords.

Mr. Brougham, (for Defendant in error.) in answer to an objection which had been made on the part of the Plaintiff in error in the course of the [307] cause, argued, that the being actively employed in the performance of the service, during the whole of the time, was not a condition precedent, or necessary to be averred in order to lay a foundation for the claim. The condition precedent was his entering on board, and continuing for the whole voyage in the service of the owner, and this was averred. Whether the active performance of service during the whole of the time ought to have been averred, was exactly the question to be decided. The Defendant in error had performed it as far as it depended on him, and the special verdict found that he had done his duty according to the acts, etc. etc. As instances to show that it was not necessary absolutely and in all cases to perform the service, they referred to the case of sickness in a servant, which excused him from the service to his master, and the case of premises being burnt down without any fault of the lessor. Wages in the one case, and rent in the other, were due because the contracts were made with a view to these contingencies, and such was the nature of the contract in the present

case. The only question was, who must run the risk, which ought to have been in the contemplation of the parties.

This was not a hostile seizure, but a civil detention or embargo. But however that might be it was at any rate only a temporary detention, followed by a subsequent liberation, and did not alter the situation of the parties, or the nature of the running contract. If this was a hostile seizure, the freight had notwithstanding been paid, and therefore the wages were due, and *à fortiori* they were [308] due if it was only a civil detention. Marine contracts differed emphatically from others in this respect, that the seaman's wages depended on the success of the voyage. Where no freight was earned by the owner, no wages were due to the men. On the other hand, where freight was earned, the seaman ought to have his wages, unless forfeited by his own misconduct. There were authorities where capture followed by recapture did not impede the claim of the owner against the freighter, and in such cases the contract was not dissolved between the master and mariner (Molloy, 263). In all the cases where the freight was refused after an embargo, the ground was, that the voyage was not performed (Cases of the *Werldsborgaren* and *Isabella Jacobina*, 4th Rob. Ad. Rep. 17, 77). But when the voyage was performed as in the present case, the seaman was entitled to his wages.

Then came the question whether the mariner had forfeited his wages. The Defendant in error promised and obliged himself to do his duty and obey all lawful commands of the officers on board the ship, and not to go out of the ship without leave; and in default of complying with these articles, the Defendant in error was to be liable to the penalties of the acts 2 G. 2. c. 36, and 37 G. 3. c. 73. All these instances related to some wilful act of the mariner himself. It was not every absence that made a forfeiture. There must be a wilful absents, and this was negatived by the special verdict, which found that the Defendant in error had done his duty. Absence from inevitable necessity was one of the risks of the voyage, all which ought to have been in view at the time of forming the contract. The voyage might be slow, the ship might [309] be delayed by calms or by baffling winds, or detained in ports by foul weather; and yet in such cases there could be no doubt but the master must pay. But then it might be said that in these cases the mariner was on board the ship. The answer was that this was not necessary. The vessel might be detained for weeks and months by stress of weather, as in the case of a ship frozen up, and the mariners taken out and removed to a distance of some miles, and yet the claim to wages would be good. Then again it might be said, that there the men were kept together and ready to do duty when wanted. The answer was, that here too the mariners were kept together, and ready as soon as they were wanted. But, waving that for a moment, suppose another accident had happened; suppose a seaman were sick, he could not be busy about the ship, and yet it was clear that he must have his wages upon the general law. (1 Oleron, Molloy, 246. *Chandler v. Greaves*, 2 H. Blackstone, 606.) This however, it might again be said, was the act of God, and that this constituted the distinction. But there was no real distinction between the act of God and that of the king's enemies, as to this purpose. This might be assumed on the reason of the thing, since the principle was, that inevitable necessity, without fault of the party, was an excuse. In this sense, disease, a blow wilfully given by another, came under the description of the act of God. There was no authority for the distinction. The authorities, on the contrary, were the other way, as in cases of waste, where it was a good answer that it happened by tempest, the king's enemies, etc. without any fault of the party. (C. Litt. 53. b. 283, a.) The principle upon which [310] the authorities rested was this, that the party was not liable for what happened from inevitable necessity, without his fault or procurement. It was hardly necessary to repeat the train of decisions where the same principle was recognised in cases of premises destroyed by fire, where the rent was held to be due. (*Paradyne v. Jane*, 27 Aleyne, *et ib. cit.* 2 Rolle Abr. 248. Molloy, 264. Y. B. 40. Ed. 3. p. 6. *Monk v. Cooper*, 2 Str. 763. *Belfour v. Wigton*, 1 T. R. 912, *et ib. cit.* *Pindar v. Anislie*. *Doe v. Sandham*, *ib.* 705. *Shubreck v. Salmon*, 3 Bur. 1637.)

They were now arguing upon the supposition that this was a hostile seizure. And here the case of *Bergstrom v. Mills* (3 Esp. 36) decided at *nisi prius* by Lord Eldon was in point. There, in a case of capture and recapture, the defence was the same as in the present instance, that the service had not

been performed during the whole of the voyage. But if the voyage was performed with a temporary interruption, and the services as far as depended on the mariner, this was sufficient. Freight was earned and wages were due. It had been objected that this was a contract by time, and that the contract for freight was by the ton. But still the ship was earning this freight during the whole time of the voyage. It was spread over the whole time, and the amount might be divided by the months, so as to make it appear how much it came to per month. So if the mariner had stipulated for the whole voyage, the amount of wages might in the same manner be divided by the months. Each contract was in effect for the voyage; both were commensurate, and as freight had been earned for the whole, so ought the wages to be paid. The principle was distinctly recognized in *Hadley v. Clarke*, (8 T. R. 259,) and *Blight v. Page*, (3 Bos. Pull. 295.) ; and in *Robertson v. Eure*, (1 T. R. 127.) [311] and *Pratt v. Cuff*, cited in *Thomson v. Rowcroft*, (4 East. 43.) the doctrine was admitted by inference peculiarly cogent. The whole of the cases were with them upon the principle.

But this was not properly a hostile seizure. It was only a temporary detention; and such it appeared in the findings of the special verdict. In this light it was considered by the British Government, as appeared from the Orders in Council of the 14th and 16th Jan. 1801. The mere act of seizure was not necessarily a capture, though it might turn out to be so. It was merely an inchoate act, to which the final result had a retrospect and showed its nature. In the present case it turned out to be only a temporary detention. The sailors returned to the ship, and the voyage was completed. (*Molloy*, b. 2. c. 2. s. 3. *Hamilton v. Mendez*, 2 Bur. 1209. *Goss v. Withers*, *ib.* 694. 1 Rob. 139. *Gertruyda*, 2 Rob. 211, 222.)

Another point was, that the master or agent had received the mariners again on the old contract, no new one having been formed; and the Session cases clearly proved, that where servants were received after a temporary interruption the wages were due for the whole time. It was besides a clear principle of mercantile law, that wages attended on freight. It might be hard, that in a voyage usually of three months the owner should have to pay during a detention of six months; but the loss would be harder still on the mariner; and it was more reasonable that he who earned the freight should be subject to the consequences of the risks of the voyage.

Holt (on the same side). The writers on embargo divided it into two sorts: 1st, Precautionary, [312] 2d, For procuring a pledge. The second differed from the first in this, that it was marked with a hostile force; but if the result was not hostile it was still an embargo; if war ensued, it was then *quasi* a capture *ab initio*. Capture *ex vi termini* implied a loss, embargo only a detention. In the present case there was no capture, no sale, no condemnation. It was nothing but an embargo, and if so, there was an end of the question, as the Plaintiff in error was bound by law to pay. There was an interruption of the service, but no interruption of the obligation. There were three ways of dissolving a contract: 1st, by consent of the parties, 2d, by a default of some or one of them, 3d, by construction of law. There was no dissolution in this case by consent of parties, or by the default of the mariner. If dissolved then it must be by construction of law. Contracts might be dissolved by construction of law, 1st, from their nature, 2d, from the presumed consent of parties. But none of these grounds of dissolution existed here. This was a marine contract, of which all the risks and consequences fell upon the capitalist, except in cases where freight could not be recovered. The men could not resist the force to which they were exposed, and it would be monstrous to say that in such circumstances they ought to have attempted it. It was not from any fault of theirs that they were not on board in the performance of their duty, and the suspension of that service could not therefore be held to dissolve the contract. The same equitable rule prevailed in the case of *Perry v. Royal Assurance Company* (1 Bur. 206).

[313] Mr. Gaselee (for Plaintiff in error). The Defendant in error had not put himself in a condition to receive the wages claimed. He might say that the performance of the service was a condition precedent, and so it had been considered by those who drew the pleadings on the other side, as an attempt had been made to show that the whole had been performed, but without success. When a party sought compensation he ought to show that the service was performed, or that he was prevented from performance by the party against whom he sought compensation. The case of

Paradyne v. Jane, (Aleyne, 27.) and the cases there cited were not strictly applicable to the present case. Here the contract was for wages, not during the whole voyage, but at so much per month, and the Defendant in error had been paid at that rate for the time he was in the Plaintiff's service. There was no occasion to stop to inquire whether or not the acts of God and of the king's enemies were not the same in effect in the particular cases referred to; but by the marine law, capture put an end to the claim for wages. The present case did not go so far. The Plaintiff in error only sought to relieve himself from the payment of wages for that time during which he had no benefit from the Defendant's service. It had been said in the course of the arguments in this case, that it was not necessary to inquire whether or not this was a hostile seizure. But hostile or not hostile made all the difference. This was not a case of forfeiture of the whole of the wages, but only a forfeiture during the time the mariner [314] was not in the owner's service. It was said that the mariners were here ready to perform the service; but how did that appear? In a case of recapture the mariners were ready to do their duty, and the principle upon which the contract revived was, that the crew were supposed to be assisting in the recapture. This principle governed the decision of Sir W. Scott in the case of *The Friends*. Here the crew were not in a situation to do anything for the rescue of the ship. The case of *Chandler v. Greaves*, differed from the present, as there the inability happened by an accident in the performance of the duty, through the act of God, so that it came within the rule in *Molloy* (246). In *Robertson v. Ewer*, the question was not raised. *Pratt v. Cuff* was a *nisi prius* case, and at any rate it did not appear there how the freight was earned: it might have been by the time. All the cases cited on the other side, (without going over them minutely,) differed from the present in some material circumstance. In *Hadley v. Clarke* the detention was a mere embargo, and the action was not for compensation.

But if there were any doubt as to the wages not being due for the time when the service was not performed, it was hardly possible, after attending to the facts, to call this a mere precautionary embargo. It was a hostile capture, and it might be contended that the claim to any wages was at an end. But he was not under the necessity of going that length. Were the crews separated from the ships in the case of a precautionary embargo? Were [315] they imprisoned? That they were kept together made no difference here, any more than if they had been kept in separate prisons. The transaction carried hostility on the face of it. It might be called an embargo, or any thing else. But the name signified nothing. It was in fact a hostile capture. Not one of the definitions of embargo applied to this. It was treated in this country as an act of hostile confederacy, though the consequent act of our government was an embargo. In the case of *Curling v. Long* (1 Bos. Pull. 634) there was a recapture, so that he need not rely on the dictum of Chief Justice Eyre, though he might. The ground of giving wages in case of recapture was to encourage recapture. Here there was only a restoration, and on the principle of the case of *The Friends* no antecedent wages were due. As to the crew being received again, there was no agreement then to pay them wages, and they must have been glad to get back again without any wages. 1st then no service was shown to have been performed for the wages claimed; and 2d, if there was any doubt as to the service, the claim could not be supported, as this was a hostile capture and there was no recapture.

Lord Eldon (Chancellor). This was a very important case, and it was proper their Lordships should have the opinion of the Judges upon a question embracing the whole of it.

It was agreed that the opinion of the Judges should be taken on the question, whether on the whole of the facts found in the special verdict, the original Plaintiff was intitled to recover wages during [316] the time he was kept out of the ship, as found in the Special verdict.

The Judges attended this day, and the Lord Chief Baron delivered their unanimous opinion that the Plaintiff was entitled to recover.

Lord Eldon (Chancellor). This appeared to him to be a case of considerable difficulty; but, on the whole, he concurred in opinion with the Judges.

Judgment of the Court below affirmed.

Agents for Plaintiff in Error, ATCHESON and MORGAN.

Agent for Defendant in Error, RIPPINGHAM.

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

PARMETER, and Others,—*Appellants*; ATTORNEY-GENERAL,—*Respondent*
[Feb. 13, 15, 1813].

[Mews' Dig. v. 20; S.C. 10 Price, 378, *sub nom. A.-G. v. Parmeter*. See *A.-G. v. Lonsdale*, 1868, L. R. 7 Eq. 389.]

[The Appellants, claiming under a grant by Charles I., of the soil between high and low water marks, along the coast of the county of Southampton, erect a wharf, dock, etc. between high and low water marks in Portsmouth harbour. Information to abate this as a nuisance. No possession of this particular spot under the grant, till 1784. Court of Exchequer decree a removal of the nuisance, and this decree affirmed by the Lords, solely on the ground of non-user as to this particular place, without reference to general validity of grant.]

This was an appeal from a decree of the Court of Exchequer, made in a cause commencing by [317] information filed by his Majesty's Attorney-General in Hilary term, 1803, for the purpose of abating a nuisance in Portsmouth harbour. The information stated, that in 1784 the Defendants (Appellants) began to erect, and did erect, and make on the Gosport side of Portsmouth harbour, and within the high and low water marks there, and near to a place which had been commonly used for the mooring his Majesty's ships, and called the King's Moorings, a certain wharf, quay, or stage, (with a storehouse, etc. at the side,) connected with the shore by a wooden bridge, and extending from the shore, or high water mark, toward the low water mark, 336 feet, and in this wharf, quay, or stage, the Defendants had placed the hull of a large ship, to serve as a dry dock; and near the side of the wharf between high and low water marks, they had placed another large ship for the same purpose, embanking the intervening space with stones, soil, and rubbish, to form a communication between the last mentioned ship and the wharf; and also that the Defendants had inclosed a certain piece of mud-land in the said harbour, between high and low water marks, for a timber-pound, etc.

The information then stated, "that the said wharf, quay, or stage, dock, bridge, store-house, and timber-pound, and other buildings, erections, and works, which had been so erected, built, and made as aforesaid, were a nuisance and injury, and if continued, would be a great nuisance and injury to the said harbour, and would prejudice the aforesaid moorings, and would also be an obstruction to a quantity of water proportionable to their [318] dimensions coming into and going out of the said harbour on each flux and reflux of the tide, and thereby prevent a great scouring and cleansing of the lower part of the channel of the said harbour of soilage there, and greatly endanger the loss of the said harbour; and that if similar erections, buildings, and works, should be made in all parts of the said harbour between high and low water marks, the same would entirely destroy the said harbour, or render the said harbour useless, so that his Majesty's ships and vessels, and other ships and vessels of burthen, would not be able to come into or go out of the said harbour as they had always been used to do; or if such ships and vessels should be able to come into or go out of the said harbour, the same would not be able to remain long there, or ride with any safety."

The information then prayed, that the nuisance might be abated, and the Defendants restrained from erecting any other works, etc. of the same description.

The Defendants in their answer insisted, that the erections in question, instead of being a nuisance, were of great use to the harbour. They also stated their title to the soil on which the erections were made, as derived from a grant by letters patent of King Charles I., in 1631, "at four-pence per acre, to certain persons therein named, and their heirs, all and singular the lands and marshes surrounded and overflowed, or subject to the overflowing of the sea in the county of Southampton, from the

"county of Sussex, beginning at Emsworth, to Hurst Castle, near the confines of the county of [319] Dorset, containing five thousand four hundred and thirty-two acres, or thereabouts, and that they the said Defendants, or some or one of them, had purchased of some persons or person claiming under such letters patent a large quantity of land within the said harbour of Portsmouth, and between the high and low water marks aforesaid, whereon or wherein, or on parts of which they the said then Defendants, or some or one of them, had erected and made the said wharf, quay, or stage, dock, bridge, storehouse, and timber pound, and other buildings, erections, and works as aforesaid." The Defendants likewise claimed the benefit of the Act, 9 Geo. 3. cap. 16.

After witnesses examined on both sides, and much contradictory evidence given, the cause was first argued in the Court below, principally upon the question of nuisance: upon which the Court did not deliver any opinion; but, on the 16th day of May 1811, ordered that it should be re-argued by one Counsel on each side, on the 17th day of June following, as to the validity and effect of the letters patent; and the cause accordingly came on to be re-argued on the last-mentioned day; and on the 23d day of December 1811 the Court, by its decree, declared "that the right to the soil in the pleadings mentioned therein was in his Majesty, and thereupon decreed that the wharf, quay, or stage, docks, bridge, storehouse, timber-pound, and other erections and works erected and made by the Defendants on the piece of ground within the harbour of Portsmouth, between the high and low water marks, should be abated and removed, and that the Appellants, [320] or some of them, should forthwith, at their own expense, pull down and remove the same, and should be restrained by the injunction of the Court from making, setting up, or erecting any other erections, buildings, or works on the soil in the pleadings mentioned."

From this decree the Defendant appealed: and, upon an assurance by the First Lord of the Admiralty in his place, that the very existence of Portsmouth harbour might be endangered, unless the question was speedily decided one way or other, the cause was advanced and heard out of its course.

Sir T. Plumer and Mr. Jervis contended, that the decree ought to be affirmed on these grounds:

1st, Because the letters patent under which the Appellants derive their title were absolutely void *ab initio*, and of no effect.

2dly, Because, admitting the said letters patent to have been originally good and valid in law, the same have been abandoned.

3dly, Because the said wharf, quay, or stage, dock, bridge, storehouse, counting-house, pitch-house, timber-pound, and other buildings, are not, nor is any part thereof locally within any of the premises granted by the said letters patent.

4thly, Because all the erections, buildings, and premises in question are a public nuisance: and are prejudicial to the harbour of Portsmouth, and tend to lessen the depth of water in the said harbour, and to destroy the same.

They argued that, in the first place the grant was void as to the soil in question, upon the ground that the King could not grant his *jus privatum* in pre [321]-judice to his *jus publicum* (Hale de Jure Mar). It was void on another ground, viz. the variance between the commission and inquisition on which the grant was founded. The commission was to consider, whether the revenue would be benefited, and the grant of use to his Majesty, his heirs, and successors. The inquisition upon this did not follow the terms of the Commission, for it proceeded on private grounds and entirely lost sight of the interests of the Crown and revenue: and it did not appear that any part of the rent reserved to the Crown had been paid. Besides, no possession had been taken of the spot in question, under the grant, till 1784, so that, though the grant were valid and included this particular place, it had been abandoned by non-user. But the evidence, they submitted, proved that the place in question was not within the terms of the grant at all; and, at any rate, the title to the soil could not justify the erection upon it of a public nuisance (2 Anst. 603).

Messrs. Hart and Johnston (for the Appellants). There was evidence on the part of the Appellants, that the works which they erected were no nuisance. But, at any rate, the object of the information had been to abate the nuisance, if the erections in question should be considered as such. The title to the soil had only incidentally

come into question, and their Lordships would hardly decide that point without the judgment of a Court, where the facts could be more accurately examined, than in a Court of Equity. If then these erections were to be abated as a nuisance, the Appellants ought to have compensation, since they were begun under the eye of [322] the Government officers, in 1784, nearly twenty years before the information was filed. As to the question of abandonment by non-user, or want of possession taken, possession of some of the places comprised in the original grant had been taken, and possession of part in such a case was virtual possession of the whole. The evidence on the other side did not show distinctly that this spot was not comprised in the grant ; and it would be extremely hard if there was to be a forfeiture for mis-user, when the works were carried on under the eye of the government officers, without any legal steps taken to prevent their progress : and when they were only such as were made use of in places of a similar description.

Lord Redesdale. This grant might affect the lands of a great number of proprietors on the sea coast. The places included in it were only described generally with a reference to maps, which were not produced. It might be a question, therefore, whether the grant was not void for uncertainty. If the maps were produced, that would be another case ; as by decided cases, if there was a reference to a certainty, that would be sufficient ; or if there was a prescriptive possession from which a grant was to be presumed. But of the spot of ground in question, there had been possession only for about twenty years, before the information filed.

Lord Eldon (Chancellor). He did not see clearly how the space between high and low water marks could be represented in maps. There appeared no [323] other way here of making good the title, but by showing sufficient possession. In this case there was no sufficient possession, for the Crown had still remained in possession for upwards of one hundred and fifty years, which created a presumption against its own grant. If there had been possession under the Appellants' title for sixty years, then there would have been an adverse possession against the Crown ; but they could show nothing more than possession for nineteen or twenty years.

Mr. Hart. Possession had been taken of part, and that was virtually possession of the whole.

Lord Eldon. But how did it appear that this was a part of the ground comprized in the grant ?

Mr. Hart. That was an additional reason for not deciding the question of title, till the matter should be further investigated.

Decree of the Court of Exchequer affirmed, upon the ground of non-user as to this particular place merely, without reference to the general question as to the validity of the grant, or the right under it to other places.

Agent for Appellants, GREGORY.

Agent for Respondent, BICKNEL.

[324] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TENNANT, and Others (Underwriters),—*Appellants*; HENDERSON, and Another (Merchants),—*Respondents*; and HENDERSON, and Another (Merchants),—*Appellants*; FETTES, and Others (Underwriters),—*Respondents* [July 20, 1813].

[Mews' Dig. xiii. 1189. 3 Scots R. R. 80.]

[Insurance on a ship engaged in the African wood and ivory trade, without stating her co-operation with another ship. This mutual co-operation or trading proved to have occasionally prevailed in African voyages, but the usage not so complete as to render it unnecessary to communicate the fact expressly to the underwriters. Decided that this was a concealment of a material fact, and fatal to the policies.]

This was a question between the assured and underwriters, arising upon certain policies of insurance, effected upon the ship *Imperial* and her cargo, engaged in the African trade.

The original order of the insurance was as follows :—

" Please effect £2000 upon 5 6ths of the ship : the whole valued at £10,000, per the *Imperial*, Thomas Marshall, at and from Liverpool to the coast of Africa and the African islands, during her stay and trade there, and from thence back to Liverpool, with liberty to exchange goods with other ships, at £6 per cent. The *Imperial* was [325] lately built at South Shields, originally intended for the service of the East India Company, is 530 tons register, copper-fastened, and copper-sheathed up to the bends, and intended to sail in about a week. Upwards of £5000 has been done on her on these terms to-day here. As your underwriters may not be accustomed to these risks, it may be necessary to say, that we purchase no slaves, nor does the ship go to the West Indies : we barter the produce and manufactures of this country for the produce of Africa, dye-wood, ivory, bees-wax, palm-oil, etc."

Upon the faith of this representation, insurance to the extent of £2000 was, on the 21st of January, 1803, effected on the ship *Imperial*, " At and from Liverpool to the coast of Africa and the African Islands, during her stay and trade there, and from thence back to Liverpool, with liberty to exchange goods with other ships."

The next insurance made was upon the cargo. The policy was dated 18th June, 1803, and was in these terms :—" At and from her arrival twenty-four hours at her first place of trade on the coast of Africa to Liverpool."

A third policy, also on the cargo, was effected 1st November, 1803, " At and from Africa and the African islands to Liverpool."

The order upon which this insurance was made, was dated 29th October, and bore, that the *Imperial* " was left well at Old Calabar, on 12th June last, taking in her cargo, and was expected to leave the coast in all October."

[326] A fourth policy, upon the cargo, was entered into on 26th November, 1803, " At and from Africa and the African islands to Liverpool."

The representation upon which this last policy was entered into, and which was inserted in the slip, stated, " By advices, the *Imperial* is supposed that she would leave Africa about this time, and in July last she was described a new ship, copper-fastened, and coppered to the bends, and had six six-pounders and thirty-five people."

It appeared that, according to a plan occasionally adopted in the African trade, the owners of the *Imperial* had, in October, 1802, sent out the *George*, a smaller vessel, to take a cargo for herself, and also contract for one for the *Imperial*. The *George*, pursuant to the instructions to the Master, proceeded to Gaboon, took in some barwood, contracted for more for the *Imperial*, which was expected to arrive in two months after, and then proceeded to the Cameroons and to Calabar, where she took in ivory, palm-oil, etc. The *Imperial* sailed in January, 1803, and, according to

instructions, proceeded to Gaboon, where she took in a certain quantity of barwood and ivory, with which she proceeded to Calabar, where she met the *George*, on board which she put all her ivory and spare barwood, and received from the *George* all that remained of her outward cargo (the African trade being carried on by barter only) and superfluous stores : the object being, by means of the exertions of both ships, to dispatch the *George* with a full cargo, before the *Imperial* began to trade on her own account. [327] This fact of the mutual or combined trading was not communicated to the underwriters, and the concealment, it was contended, was of a material fact, since the risk was varied and increased by the consequent protracted stay of the ship in that pestilential climate, etc.

The *Imperial*, after having nearly completed her cargo, was, on the 14th of February, 1804, captured by a French privateer.

The underwriters in Scotland having refused to settle the loss, actions were raised against them in the Court of Admiralty : one on the ship policy, and others on the three cargo policies, which last were conjoined by the Judge Admiral, who, in all the actions, pronounced in favour of the assured. The underwriters then carried the matter into the Court of Session, by two bills of suspension, which the Lord Ordinary conjoined, the question on all the policies being the same.

The underwriters having been directed by the Lord Ordinary to give in a concordance of the particulars on which they relied, they insisted chiefly upon this, that the ship did traffic in slaves, which was contrary to the representation ; and that the *Imperial* was not entered at the Custom-House in terms of the 39th Geo. 3. cap. 80, sect. 1, for entitling her to trade in slaves. The underwriters did not, at this time, appear to be aware of the fact of the combined or mutual trading. The Lord Ordinary then ordered the Chargers (assured) to produce, upon oath, the instructions to the Captains of the *Imperial* and *George*, and the corre-[328]-spondence between them, with excerpts from entries in their books, as far as these documents related to the point of trafficking in slaves. These having been accordingly produced, the Lord Ordinary pronounced an interlocutor, " finding that the Suspenders' (underwriters) averment, that the ship *Imperial* had been employed in the slave trade " during the course of the voyage insured was not only not proved, but was clearly disproved." The underwriters, after representation to the Lord Ordinary, reclaimed to the whole Court ; the interlocutors reclaimed against were adhered to, and the underwriters thereupon appealed.

The combined trading having been discovered by the production of the documents mentioned in the above cause, some of the underwriters, in the mean time, presented a bill of suspension against a threatened charge under the policies. This new cause came to be discussed before Lord Meadowbank, as Ordinary. His Lordship, after some previous proceedings, pronounced (Dec. 12, 1809) an interlocutor, " allowing the Chargers to prove that, according to the understanding of those engaged in the African trade, liberty to exchange goods with other ships, imports a liberty not only to barter and sell, but to aid another ship in providing her speedily with a homeward cargo, without regard to any proportion between the goods so delivered or received ; and allows them a proof of all facts and circumstances relative thereto ; allows the Suspenders a conjunct probation." And on advising the proof with the whole case, this interlocutor was pro-[329]-nounced (Jan. 17, 1811) : " Having resumed consideration of these conjoined processes, and advised the proof, productions, and debate, finds, that the privilege specified in the different policies of insurance, with liberty to exchange goods with any other ship or ships : or, with liberty to exchange goods with every vessel or vessels : does not, in common language, and without a peculiar conventional meaning, import a liberty to exchange goods, without regard to observing any proportion in bulk or value between the goods so exchanged ; and still less, that the exchange may be so conducted by the vessels insured, as that it should retard the completing of her own cargo, and protract her own stay in the seas where it is to be completed, and in order to hasten the accomplishment of the voyage of other vessels, or another vessel, and her or their speedy dispatch with a competent cargo ; and as the risks of sea hazard are increased beyond an arithmetical proportion, by the prolongation of the adventure, particularly in the business of a coasting voyage to complete a cargo, so enlarged a construction of the privilege is more difficult to be entertained, where nothing appears in the rates

" of insurance stipulated between the parties, indicating that such an eventual augmentation of risk was in contemplation: finds it nevertheless proved, that the enlarged construction of the privilege contended for by the Chargers, was adopted by a great number of the dealers and underwriters in the African trade, but not uniformly in point of extent of such construction, and not universally in any extent even at Liver [330]-pool: and, amidst this diversity of sentiments, being, on the whole, of opinion, that in applying for insurance at such an out-port as that of Leith, it was the duty of the assured not to rely on a conventional meaning so adverse to the natural meaning, and attended with so much difficulty, while not established with absolute universality among all versant in the trade, but to disclose the retardment and increase of risk that might be expected from the privilege stipulated: suspends the letters *simpliciter*, and decrees; but believing the Chargers, individually, may have proceeded *bona fide*, though on somewhat too great confidence in their own practice, finds no expences due, and decrees."

The Lord Ordinary, upon representation, adhered to his interlocutors, and gave the parties the following note of the ground of his decision:—

" I certainly proceeded, in pronouncing the interlocutor, on the opinion, that the long stay of the *Imperial*, for so many months on the coast, was not at all accounted for, but from her subserviency to the *George*; and if the Chargers reclaim, this seems to me essential to be obviated."

The assured reclaimed to the second division of the Court, but without effect, and then appealed.

The reasons on which the underwriters rested their case in both appeals, as well in the former, in which they were Appellants, as in the latter, in which they were Respondents, were these:—

1st, That the *Imperial* had been employed as a floating warehouse, or tender, to the *George*, a fact which had not been communicated to the un-[331]-derwriters, though it materially varied the risk; and the case of *Hartley v. Buggen* (Marshall 405. Park 313), where it had been determined that any unnecessary delay was equivalent to a deviation; and that of *Lever v. Fletcher* (Marshall 54. Park 237), to the same effect, were cited.

2d, The representation that £5000 had been done upon the ship at Liverpool, on the day then mentioned, was groundless; and that, in fact, only £1000 had been on that day underwritten on her.

3d, It was represented that the *Imperial* did not traffic in slaves; whereas she did actually deal in slaves, without being regularly entered as a slaveship, so that the voyage was illegal; or, at least, the vessel, even by having forfeited pawns on board, was liable to seizure and detention, and the policy was thereby void, upon the principle which governed the decision in *Rich v. Parker* (Marshall 319. 7 T. R. 705), and *Farmer v. Legg* (Marshall 386. 7 T. R. 186).

4th, The misrepresentation relative to the ship had a reference to the policies on the cargo, and rendered them also void.

5th and 6th, The representations on which the policies of the 1st and 26th of November, 1803, were effected, were known to the owners, at the time, to be false in several particulars, as to the state of the vessel, the time of her expected arrival, and the number of men on board, etc.; and the policies were therefore clearly void, upon the principles laid down by Lord Mansfield, in *Fillis v. Brutton* (Park 182); by Lord Kenyon, in *Rich v. Parker* (Marshall 320. 7 T. R. 705); and by Lord Ellenborough, in *Edwards v. Portner* (Cam. N. P. C. 530).

The only point which appeared to be much relied upon, however, was that of the *Imperial* acting as [332] a tender to the *George*, and the consequent protracted stay of the former on the coast. The answer of the assured to this was, that the *George*, by contracting for a cargo for the *Imperial*, so long before the arrival of the latter, had, in reality, co-operated with, and assisted her, and, on the whole, accelerated rather than retarded the completion of her voyage. That this mutual co-operation was common in the African trade, and that this was, or ought to have been, known to the underwriters. (*Carter v. Bohem*, 3 Bur. 1905. *Plauchs v. Fletcher*, Doug. 238.) The nature of the African trade consisting in barter sufficiently accounted for the length of time occupied by the *Imperial* in her voyage, without referring her protracted stay to her subserviency to the *George*. (*Freeland v. Glover*, 7 East. 402.)

The two appeals came on to be heard on the same day, beginning with that of Tennant, etc. v. Henderson.

Mr. Nolan (for the Appellants) was proceeding to argue on the ground of the mutual trading, when he was interrupted by

The Lord Chancellor, who observed, that this and several other points were introduced into the case without being in the original papers. The point relied upon by the underwriters in their condescendence in the present cause, as far as he could understand from the papers, (the condescendence itself not being produced,) was the trafficking in slaves. The new ground of the mutual trading was afterwards discovered; but instead of bringing this before the Lord Ordinary by a [333] new condescendence, they went on with the cause before the whole Court, who decided against them possibly upon the ground, that by their practice the Court could not take notice of the mutual trading, because it was not a point stated in the original condescendence. If such was the fact and the rule, the Counsel must now likewise confine themselves within the limits of the condescendence, and argue the case on the ground of dealing in slaves.

[The further hearing of both causes was postponed till the condescendence should be produced.]

The first cause was not further proceeded in at the bar, but this day (June 21st) the second cause came on to be heard, in which the mutual trading was established.

Mr. Park, for the Appellants, (assured,) was proceeding to argue, that it was probable the underwriters knew of the usage of mutual trading in the African trade, though it was not communicated in express words.

Lord Chancellor. Then you must prove the usage as a fact.

Mr. Park. I was going to say that the voyage was not protracted by the mutual trading.

Lord Chancellor. It don't signify what the result was, if there was a deviation from the contract.

Mr. Park admitted that the usage was not proved as a fact. (*Vide* Interlocutor of Lord Meadowbank.)

[334] Lord Chancellor. Then you have no case at all.

The judgment of the Court below, in the second cause, in favour of the underwriters, was accordingly affirmed.

Lord Eldon, (Chancellor,) after stating the case. The question was, Whether, under all the circumstances, the underwriters were liable to pay. Their Lordships were of opinion in the other cause that they were not liable, and on this ground, that it appeared in evidence that the *Imperial* had been employed not only in procuring a cargo for herself, but also in finding a cargo for the *George*. This was unknown to the underwriters, and it was hardly contested at the bar, (indeed it could not,) but that this altered the nature of the voyage. If there had been nothing more than the usual exchanges in such a voyage, that would have raised a different question. But when two ships, belonging to the same parties, the *George* and *Imperial*, were sent out, and the *Imperial* was employed not only in providing her own cargo, but that of the *George* also, the risk was altered, and therefore the decision of the Court below, in favour of the underwriters, was affirmed.

In the other cause an objection of this sort arose. The Lord Ordinary had directed the underwriters to give in a condescendence of the facts and circumstances upon which they rested their non-liability to pay; and this fact of the mutual trading was not one of those offered to be given in evidence. It [335] was, however, established in the proof; but instead of stating this new ground to the Lord Ordinary, they submitted the cause at once to the whole Court, and the Court thought they were liable, either upon the whole merits of the case, or because the new point not having been regularly brought before the Lord Ordinary, they could not take notice of it: but on which of these views of the case they had decided their Lordships did not know. Their Lordships (as appeared from the judgment given in the other cause) thought the Court of Session was wrong, if it meant to say that the mutual trading did not vary the risk; but if their practice did not permit them to look at the new ground which had not been regularly brought before the Lord Ordinary, then the practice precluded the law, and there appeared no good ground to quarrel with their decision.

In order to show how the practice stood in this respect, certificates had been given

in, stating that, under the circumstances of the case in question, it was competent to the Court to have taken the whole merits into consideration. These certificates were defective in this, however, that the fact did not appear to have been stated to the persons who signed them, that the Lord Ordinary had required this condescendence. The most proper mode of proceeding would therefore be, to remit the cause to the Court below for review. It would be seen from the judgment in the other cause, that their Lordships differed from the conclusion of the Judges below, if they had decided on the merits; and the judgment would of course be altered; but if they [336] had decided on the point of form, then the judgment must remain as it was.

Ordered and adjudged, that the cause be remitted to the Court of Session, to review the interlocutors complained of.

Agent for the Assured, CHALMER.

Agent for the Underwriters, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WATSON, and Others, —Appellants; CLARK,—Respondent [May 12, 1813].

[Mews' Dig. xiii. 260, 1160; 3 Scots R. R. 85. Commented on in *Pickup v. Thames Insurance Co.*, 1878, 3 Q. B. D. 594. And see *Parker v. Potts*, 1815, 3 Dow 23.]

[Insurance on the *Midsummer Blossom*, an old ship, "at and from Honduras to London." Ship sails on her voyage, and, in a few days after, without adequate cause, arising after the period of her setting sail, becomes so leaky as to compel the Master to return. Vessel strikes on a reef of rocks, and is lost. Decided that she was not sea-worthy at the commencement of the risk.]

This was a question of insurance upon the cargo of the ship *Midsummer Blossom*, of which the Respondent was owner. The vessel was lost in November, 1801, on a voyage from Belize river, in Honduras, to London; and the question was, Whether the ship was or was not sea-worthy at the time when she undertook to perform the voyage [337] homeward? The risk insured by the Appellants (underwriters) was, "at and from Honduras to London."

The underwriters having refused to settle the loss, the owner raised an action against them in the Admiralty Court; and after a variety of proceedings, and the production of several documents in regard to the state of the ship at different times, the Judge Admiral pronounced in favour of the underwriters, "Finding that the ship or vessel in question, the *Midsummer Blossom*, was not sea-worthy when she sailed from Honduras on the voyage insured, and that therefore the policy was "null and void, etc. etc." This judgment having been brought under review of the Court of Session, in the form of an action of reduction, the Lord Ordinary appointed a special condescendence of the reasons of reduction to be given in. This having been accordingly done, he pronounced an interlocutor in favour of the owner, "being" of opinion that there was no evidence, express or presumptive, that the vessel in question was not sea-worthy at the commencement of the risk." The underwriters reclaimed to the whole Court; but the Court adhered to the Lord Ordinary's interlocutor, and thereupon the underwriters appealed.

It was admitted, "that the vessel had not been thoroughly inspected, and ascertained to be sea-worthy, immediately before sailing on the voyage in which she was lost," and therefore her sea-worthiness, or the contrary, at that time, could not be directly proved. The case therefore rested upon indirect and presumptive evidence, arising from the [338] general state of the vessel, and events and circumstances of the voyage.

It appeared that the ship was thirty-five years old at the period in question; that she was built in 1766, had been thoroughly repaired in 1781, and received several partial repairs afterwards; one in her hull, immediately previous to her sailing to Honduras. She performed the voyage outward with ease. While in the river Belize, at Honduras, she was struck by lightning, and this destroyed her masts, (which were soon replaced,) but did no injury to the hull: she was then making twelve inches water in twenty-four hours. It was proved that the Respondent had found great difficulty in getting insurances done upon her in London at 25 and 26 guineas per cent., owing to the age of the vessel, combined with the unfavourable season of the year and the length of the voyage. The insurance in question was done at Aberdeen, at 15 guineas per cent. The subsequent facts appear in the following protest of the Master, First and Second Mates, and Carpenter, to which the Chancellor referred in his observations on the case. They stated, "That they sailed in the said ship from Belize river, in Honduras, on Tuesday, the 27th of October, 1801, on a voyage to London, with a cargo of mahogany and logwood, at which time the said ship was, to the best of their knowledge, and as they verily believed, staunch, strong, and fit for the said intended voyage; and at one P. M. came to anchor off Goff's Key.—Wednesday, at daylight, got under way in company with the ship *Hope*, bound for London, and the ship *Nancy*, for Ja-[339]maica.—Thursday, the 29th October, Hat-key bearing west about four leagues from that, took our departure with fresh gales and squally weather. At ten, fresh gales, in mizen top-sail, jib, main-top-mast, stay-sail and mizen stay-sail. At four A. M. very heavy rain and squally, in one reef of the fore and main-top sail. At noon, observed, in latitude 17° 18' N., the ship making a deal of water.—Friday, the 30th, fresh gales and a very heavy sea from the northward; the ship making so much water as to keep one pump continually at work. At noon, observed in 17° 50' N.; the ship *Hope* on our larboard quarter; a heavy sea, and the ship making ten inches of water in an hour.—Saturday, the 31st of October, the ship continued making much water, pumping her every half hour.—Sunday, November the 1st, fresh breezes and squally, with a heavy swell from the northward; the ship *Hope* in company; the ship making so much water one watch could scarce keep her free. The people came aft to the Captain and complained, wishing him to proceed for Jamaica, as they thought it impossible to go to England with the ship. At noon, observed in latitude 18° 15'.—Monday, the 2d of November, fresh breezes from the northward and eastward, and at ten P. M. squally with rain, in jib, mizen-top sail, and one reef of the main-top sail; the ship making a deal more water, two feet and a half in the hour, and seven hands constantly employed at the pump.—Tuesday, November 3, moderate breezes: the ship still making much water; one pump constantly at work; the ship [340] *Hope* in company. Observed in 18° 30' N.—Wednesday, the ship still making two feet and a half water in an hour. At seven A. M. tacked, and hove to, to endeavour to find the leak; at eight tacked ship.—Thursday, squally weather and a heavy sea; the ship making more water; one pump could not keep her free. At noon, observed in 20° 02' N.; both pumps at work.—Friday, November 6th, advice of all hands being asked, and both pumps still going, it was concluded best to return back, as they were not able to continue at the pumps; bore down upon the ship *Hope*, and informed them of our situation. At two P. M. bore up for Belize, at which time the ship made upwards of forty inches per hour; steady breezes and clear; find the ship going before the wind does not make so much water.—Saturday, the 7th, fresh breezes and clear; all sail set. At six A. M. made Ambergrease Key, distant about seven miles; squared the yards, and bore more away; the ship still making the same water.—Sunday, November 8th; at six P. M. in fore-top gallant-sail, main top-mast stay-sail, and jib; at eight in main-top gallant-sail; (at six P. M. Ambergrease bore west by south about three leagues;) at ten P. M. hauled up the fore-sail, and lowered the mizen top-sail on the cap; hazy thick weather; at twelve hove to with her head to the eastward. At half-past twelve the ship struck on Turneef; kept the pump constantly going, but found it of no use, the ship having three feet water in less than an hour; cleared the boats. At four A. M. the ship had [341] nine feet water in her; squally weather with heavy rain; got yards and top-masts down. At noon, the Captain and four hands set off for Belize river's mouth, to get every assistance in his power, in order to save all that was possible for the benefit of all concerned."

The following letter, from the Captain to the owner, was also referred to by the Chancellor:—

"Honduras, December 9, 1801.

"I am sorry to state to you the loss of the *Midsummer Blossom*. I sailed from here the 27th of October, in company with the ship *Hope*, Captain Storrow. On the second day after sailing from here, I found the ship made much more water than common, and kept increasing daily. On the 5th of November I encountered a fresh gale, which the ship then made forty two inches water per hour, so as to keep the pumps constantly going. On the 6th I bore down on the *Hope*, and informed her our situation; and as all hands declared, that if the ship continued making the same water, they would not be able to keep her free longer than three or four days, so I concluded, and thought it most proper to bear up for the river Belize. I then reckoned in lat. 20° 02' N. and lon. 85° 07' by my account. On the 7th made the land; at eight P. M. shortened sail; at twelve A. M. hove to; at one A. M. struck, and ashore under the lee-side of Turneef, where there she remains. St. George's Key bears from her W. b. N. All materials were saved and sold at public vendue: [342] also the ship and cargo, for the benefit of all concerned."

From this state of the facts, two opposite conclusions were drawn by the litigating parties; the underwriters maintaining, that as the vessel had proved to be utterly unfit for the voyage so soon after her sailing, without any adequate cause to produce that unfitness subsequent to the period of her leaving the river Belize, the evident presumption was, that she was not sea-worthy at the commencement of the risk; while the owner contended that the leaky state of the vessel, which forced the Captain to put back, was owing to the tempestuous weather which she encountered subsequent to the time of her sailing from Honduras Bay; and the evidence of the existence of tempestuous weather during the period in question consisted of the above documents, and extracts to the same effect from the log-book.

As to the principles of law applicable to the case, it was maintained, on the part of the Appellants.

1st. "That in no case ought the loss arising from the inherent inability of the ship to fall upon the insurer;" and "that in every marine contract there was an implied warranty that the ship should be sea-worthy, tight, staunch, and strong, properly manned, sufficiently stored, and fully equal to the necessary fatigue of the particular voyage intended at the date of the policy." (Park 220. Marshall 364. Magens II. 90. 140. Emerigon 580. Marshall 364. *Le Guidon*, etc. etc.)

2d. That an inherent defect, or want of sea-worthiness, must be presumed from the subsequent failure to perform, unless that failure should be [343] shown to have arisen, subsequent to the commencement of the voyage, from the extraordinary perils of the sea. (Marshall 265. Munro v. Vandam. Park 221. 267.)

3d. That from these leading principles two other consequent rules followed of necessity; that in questions of this kind, the incapacity of a ship is as certain if she was unable to accomplish the whole as if she was inadequate to the accomplishment of any part of the contracted voyage; and that the legal presumption of inability must, in all cases where there were no stronger counter-presumptions, lay the *onus probandi* upon the assured, the vessel being understood to be warranted to be in a fit condition not only to begin, but to finish her voyage; and that neither the innocence nor ignorance of the assured could avail him against a breach of the implied warranty, the law on that head being absolute. (Mills v. Roebuck. Park 221. 252. Marshall 372. Marshall 386. 273. 366. Lee v. Beach. Oliver v. Cowley.)

The Respondents contended, that the law, as stated on the other side, did not apply to the facts. The vessel was proved, by the evidence of the Captain and others, to have been sea worthy when she sailed from England, and had suffered no damage on the voyage; and that her leaky state, after sailing from Honduras, was owing to the stormy weather. Captain Rains, of the navy, stated that her making twelve inches water in twenty-four hours was a matter of no consequence, as very good vessels often did the same. (Park 228. Marshall 368. 369. *Christie v. Secretan*, 3 T. R. 192.)

The Appellants, to encounter the inference attempted to be drawn from the effect of the weather, had produced to the Court of Session a certificate from the Regulating Captain at Leith, stating that [344] he had read the log-book of the *Midsummer*

Blossom, and that there was nothing in the state of the weather, as there described, that could hurt a sea-worthy ship.

Park for Appellants ; Gaselee and Horner for Respondents.

Lord Eldon (Chancellor) held it to be a clear and established principle, that if a ship was sea-worthy at the commencement of the voyage, though she became otherwise only one hour after, still the warranty was complied with, and the underwriter was liable. But when the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was, that it was from causes existing before her setting sail on her intended voyage, and that the ship was then not sea-worthy ; and the *onus probandi*, in such a case, rested with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage. He did not think himself justified in considering the mere age of the ship, which was thirty-five years, as a sufficient ground of itself for the conclusion that she was not sea-worthy ; but surely this was a circumstance of some weight in the evidence. The vessel, too, before she sailed, made twelve inches of water in twenty-four hours ; but this was a circumstance which in itself was stated in evidence by Captain Rains to be of no great importance : and he (Rains) had said that he would not hesitate to take up a ship for government service that made no more water in the [345] twenty-four hours. It was, however, to be considered, that this might be more or less material, according to the age of the ship. The fact of a ship of thirty-five years of age making twelve inches water in twenty four hours was unquestionably to be viewed in a different light from a new one making the same quantity of water in the same time. In the latter case, it might be no evidence at all of inability ; in the former case, in connexion with other suspicious circumstances, it undoubtedly might be very material evidence. Then their Lordships would consider the protest of the Captain, from which it appeared, that in two days from the time of her sailing she made ten inches of water in one hour, without any adequate cause alleged for it, or any cause, except fresh gales and squally weather. Now, though he did not pretend to much skill in nautical matters, yet he had been in a situation where he had an opportunity of hearing more of the conversation of seamen than perhaps any Judge on the bench, and if he were on board a collier, he should not be much afraid though he heard the seamen talking of fresh gales and squally weather. It was then discovered that the ship was unfit to perform the voyage, and an attempt was made to find out the leak, but the result of this attempt was not stated. If their Lordships could find out any adequate cause of this inability to perform the voyage, arising after the vessel sailed, then she might have been sea-worthy ; but if they could not, then the presumption was, that she had not been sea-worthy at the time of setting sail : and it signified nothing as to this case, whether the vessel, after the inability [346] had been discovered, was injured by striking upon a reef of rocks, or in any other way. Then it went on to state the return to Belize river, and that the vessel made upwards of forty inches water in an hour, and that too during steady breezes and clear weather ; and that the ship could be kept afloat, even by pumping, no longer than three or four days. His Lordship then read the letter of the 9th December, and observed, that their Lordships would do full justice to this protest and letter, (*vide ante*.) if they held that no cause was alleged by them for the state of the vessel, except the nature of the weather.

The affidavit of the Captain stated, that the loss did not happen in consequence of any damage done by lightning, but that the ship, in the thickness of the weather, when returning, struck on a reef of rocks. Be it so ; but if it was meant to infer from it, that this was the cause of the inability to perform the voyage, which inability had been before admitted when the bowsprit of the vessel was turned round towards Belize river, it was an inference of a fact which was physically impossible.

The true question was, Whether any circumstances which happened between her sailing from Honduras Bay and her return to Belize could be fairly considered as accounting sufficiently for the non-sea-worthiness of the ship ? This was putting it perhaps too strongly. The question was, Whether their Lordships could say that the vessel had been reduced to such a state as that described, by such causes as were alleged for it ? He had considered the case with rather a jealousy of the underwriters, [347] and yet he could not but think that the vessel was not sea worthy at the commencement of the voyage. The case which the Respondent himself stated in his own favour required an answer : and surely, under these circumstances, the presump-

tion was such as to throw the *onus probandi* upon the assured. This was a case, then, in which it appeared to him, on the whole, that want of sea-worthiness was sufficiently proved. He could not agree with Lord Meadowbank, that there was no evidence, express or presumptive, of a want of sea-worthiness at the time of commencing the voyage. He thought there was very strong presumptive evidence of it. He should propose, therefore, to reverse the decision of the Court of Session, and to say, with the Judge Admiral, that the vessel was not sea worthy at the time of the commencement of the voyage, and that the policy was null and void. Then, as to the question of sending this back again to the Court of Session, if the justice of the case had required it, that must be done. But their Lordships would be cautious how they sent back again a case which had been disposed of there in 1802 or 1803, and was heard here in 1813. Considering the bias which the Captain must have, even in the first representation of the case, when it was necessary for him to justify his own conduct, it would be dangerous to send this back again for fresh evidence, after it was discovered where the shoe pinched. Such a step would, upon general principles, be too mischievous for their Lordships to listen to such a proposition in the present case. His noble friend near him, [348] (Redesdale), who had presided in the Irish Court of Chancery with so much credit to himself and advantage to his country, and who, in addition to his knowledge of equity, was as good a common lawyer as any in the kingdom, he was happy to find, agreed with him in this opinion.

Lord Redesdale. He had always understood it to be a clear and distinct rule of law, that if a vessel, in a short time after leaving the port where the voyage commenced, was obliged to return, the presumption was, that she had not been sea-worthy when the voyage began, and that the *onus probandi* was, in such a case, thrown on the assured. The Court below appeared to have proceeded upon a different principle. This vessel, without any apparent cause of injury subsequent to her leaving port, was obliged to put back, being incapable of proceeding on her voyage. There was not only presumptive, but direct evidence that she was not sea-worthy; for if, upon the statement of facts, it appeared that there was neither bad weather nor any thing else to injure the vessel after her leaving port, and yet it was found that she was in a bad condition, and continued increasing in that badness, then it was clear that she could not have been sea-worthy when the voyage commenced. The principle upon which his opinion was founded was distinctly recognized in the books and cases.

The judgment was in the following form :—

“ The Lords find, that the ship in question, the *Midsummer Blossom*, was not seaworthy when [349] she sailed from Honduras on the voyage insured, and therefore find the policy null and void. And it is therefore ordered and adjudged, that the interlocutors complained of be reversed, and the defenders assolizied. And it is further ordered, that the judgment be without prejudice to any claim of return of premium which the Respondents might have had at the commencement of this action.”

[The same judgment was pronounced in another appeal, arising from an insurance on the ship, in which the question was the same.]

Agents for Appellants, SPOTTISWOODE and ROBERTSON.

Agents for Respondent, ATCHESON and MORGAN.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

BROWN, and Others (Merchants),—*Appellants* ; SMITH, and Others (Underwriters),—*Respondents* [June 2, 1813].

[Mews' Dig. xiii. 1287 ; 3 Scots R. R. 90. See *Falkner v. Ritchie*, 1814, 2 M. & S. 290.]

[Ship insured "at and from Liverpool to the coast of Africa, etc., and from thence to the West Indies, and America." On her arrival on the coast, the crew mutiny, and resolve to carry the ship to an enemy's port ; but, not being able to navigate the vessel, this is entrusted to the Boatswain, who, instead of making for Cayenne, as the crew imagined, steered for Barbadoes, where the ringleaders were seized, and some executed. Government Agent takes possession of the ship, and sells her, and her outward cargo and stores, [350] for the benefit of all concerned. Decided, that, under these circumstances, the assured were entitled to abandon, and recover as for a total loss.]

This was a question of insurance on the ship and cargo of *The Friendship*, employed in a voyage to Africa in the slave-trade. The insurance was in the names of the Appellants, and all others concerned, "at and from Liverpool to the coast of Africa, during the stay and trade at any ports and places there, and from thence to the port and ports of discharge, sale, and final destination, in the British or foreign West Indies and America," upon any kind of goods and merchandises ; and also upon "the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called *The Friendship*, beginning the adventure upon the said goods and merchandizes from the loading thereof at Liverpool, and to continue on the ship, etc. until moored at anchor twenty-four hours ; and on the goods and merchandizes till discharged and safely landed."

The perils insured were the common ones, including "barratry of the Masters and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, etc. or any part thereof."

The Friendship, in prosecution of the voyage for which she was insured, sailed from Liverpool the 9th August, 1801, under the command of William [351] Beamish Lane, and arrived off the coast of Africa, in Majumbo Bay, on the 6th October thereafter. Soon after her arrival, and before any slaves were taken in, the crew mutinied, and resolved to carry the ship into an enemy's port.

On the sixth day after the vessel had anchored, it being necessary for the Master to go on shore, he landed from one of the boats, and directed the boatmen to wait his return on the beach ; but no sooner had the Master turned his back, than, disobeying the orders given by him, they sailed to the vessel, to put her under the command of the mutinous party. In the middle of the night, that part of the crew who were not in the conspiracy were disturbed by the sound of musquetry on deck ; and on coming up they discovered that the Second Mate, who had been on watch at the time, was shot by the mutineers. The other two Mates were roughly handled. The mutinous part of the crew soon acquired the undisputed command of the vessel, and having cut the cable, they set sail, with the avowed intention of proceeding to an enemy's port.

A short time after the mutiny broke out, the First Mate, Third Mate, and five of the sailors who would not join in the piratical scheme that had been formed, were permitted to go on shore in the whale-boat, and they carried along with them a very considerable quantity of the ship's stores and provisions : others of the seamen who were desirous of joining this party were refused permission, as their assistance, it was thought, would be necessary in the course of the future voyage. On the appearance

of the whale boat in the offing, the Master [352] proceeded in a canoe to meet it, and was then informed of what had happened; and the seven men who had been allowed to quit the vessel in the whale-boat became his companions in a voyage in quest of the ship.

The mutinous crew determined to sail for Cayenne, but none of them being able to navigate the ship, they were obliged to apply for assistance to the Boatswain, Mr. Sherborne, to whom, on this account, they had refused permission to land. The Boatswain, with pretended readiness, undertook the task, appearing to favour the views of the crew; but secretly determined, with the co-operation of one or two whom he could trust, to steer a different course, and accordingly conducted the vessel to Barbadoes, where she was boarded and taken possession of by a ship of war. The mutineers were put in irons, and some of the ringleaders tried and executed.

The Government Agent at Barbadoes took charge of the ship; and, in the absence of the Master, and without waiting for orders from this country, he found it necessary to dispose of the whole of the cargo and stores that still remained in the ship on her arrival at Barbadoes.

The captain and his followers, in the mean time, sailed in the boat for St. Thomas's, where he supposed the ship might touch; from thence he went to Demarara, and then to Barbadoes, where he found the ship, with nothing but the hull and rigging remaining.

The Government Agent, before he disposed of the ship, wrote to the Appellants a letter containing [353] this passage:—"I observe, in your instructions to Captain Lane, that, after selling the cargo of negroes, if he could obtain £2000 sterling for the ship, he was to do so; and did I not conclude that the vessel and cargo were insured, I should buy her on your account, and load her to you; but on considering the voyage is broken up, and peace having taken place, which will reduce the price of shipping, I think it will be more advisable to sell every thing, and remit you the net proceeds, with the proper documents for recovery from the underwriters." On the 2d day of March, 1802, he again wrote the Appellants:—"I am very anxiously waiting to hear from you, as should it be your wish to purchase in the ship *Friendship*, (should she sell very cheap and below your limits considerably of £2000,) I would do so, and obtain for her a load home; but should that not be the case, she shall be sold, and the affairs closed immediately."

Captain Lane, the Master of the vessel, after his arrival at Barbadoes, wrote to the Appellants, and the following passage occurred in his letter:—"I found upon my arrival here, the cargo had been disposed of by Mr. Maxwell, being the King's Agent here. He informed me he had not disposed of the ship until your answer to him respecting your wish to buy the ship, (which he said he daily expected,) in which case he would immediately load her for Liverpool; and as he had seen your orders, desiring I would sell the vessel for £2000, and that he had every reason to believe she would go [354] off for much less than the value you set upon her, he thought it proper to consult you," etc.

In answer to Mr. Maxwell's letter of 6th December, 1801, the Appellants wrote in the following terms:—"We are duly favoured with yours of the 6th of December, informing us of the melancholy fate of the ship *Friendship*. We are, however, glad the business has got into your hands; and as the time is particularly hazardous with regard to the stability of the underwriters, as they are winding up their accounts, and several are expected to be found wanting, therefore we must earnestly request you will hand us immediately the sales, and a remittance for the proceeds of the ship and cargo, without which we can make no settlement with them. You see, therefore, how precariously we are situated in this unfortunate affair, and that dispatch in the settlement may prevent us suffering a very heavy loss. We, however, hope to be favoured with the needful before you receive this; and in the expectation of hearing from you, we are," etc.

In consequence of this letter, Mr. Maxwell determined to sell the vessel immediately, and he accordingly wrote to the Appellants:—"Annexed you will be pleased to find copy of my last respects, since which I have received your favour of the 4th February by the ship *Ham*, and observed that you had abandoned to the underwriters. You say nothing about buying in the ship and loading her home to you, which has determined me immediately to advertise her for sale for the most she [355] will bring.

"She will be sold on Monday the 22d instant, when all the transactions shall be closed, and forwarded with net proceeds by next opportunity after," etc.

The ship was sold accordingly.

The Appellants, immediately upon hearing of the fate of the ship from the agent's first letter, gave notice of abandonment to the underwriters.

The question was, Whether or not, under these circumstances, this was a total loss?

The underwriters in Scotland having refused to settle as for a total loss, the assured raised their action in the Admiralty Court, and obtained a decree for their whole demand. The underwriters presented their bill of suspension to the Court of Session, which was passed as to the ship, but refused as to the sums underwritten on the cargo, and therefore the underwriters settled for the latter sums. The only remaining question, therefore, was as to the ship. The parties having, by order of the Lord Ordinary, given in informations to the Court, the reasons of suspension were sustained, and the letters suspended; or, in other words, the Court reversed the decree of the Judge Admiral, as to the sums underwritten on the ship, and discharged the underwriters, and thereupon the assured appealed.

The Respondents maintained,

1st. That the assured were not entitled to abandon, because the ship was not lost; but, on the contrary, as tight, staunch, and strong, as when she arrived on the coast from Liverpool. The general maxim, that if the voyage was lost the assured [356] might abandon, imported nothing more, than that they might abandon that particular interest with regard to which the object of the voyage was not accomplished. It was not meant, that if the cargo perished the owners might abandon the ship, though in perfect safety at her port of destination; nor that, if the ship was wrecked, the freighter might abandon the cargo in the above predicament. The ship, it was admitted, sustained no damage during the voyage. She arrived in the West Indies in safety, and this was the extent of the obligation undertaken by the underwriters. The general maxim might apply to cases where the ship, though not lost, nor in danger of being lost, could not reach her port of destination, but was not applicable to the present case. (*Manning v. Newnham*, Park 169. *Miles v. Fletcher*, Doug. 219. *Fitzgerald v. Pole*, 5 Brown, P. C. 131. *Marshall* 504.) The case of the *Good Fellow* privateer was directly in point, and decidedly in favour of the underwriters. There the crew mutinied, the object of the voyage was lost, but the vessel arrived at her destined port in safety, and the underwriters upon her were discharged. They also relied on the case of *Shaw v. Felton* (2 East. 109.)

2d. It was likewise contended that the assured had not abandoned in time; and,

3d. That, if they had abandoned in time, they had afterwards waved that abandonment by interfering with the sale of the vessel, in a manner contrary to the interest of the underwriters.

On the part of the Appellants, it was contended, that,

1st. The cases of capture and recapture, where the voyage was ultimately performed, had no appli-[357]-cation in favour of the Respondents. (*Mitchell v. Edie*, 1 T. R. 608.) Here the voyage was totally lost, and it was absurd to say that the ship had performed it within the meaning of the policy. The general rules which governed cases of this sort were well known and settled. They were summed up in the *dicta* of learned Judges, countenanced by a train of decisions. "Insurance being made on the ship for the voyage, if either the ship or the voyage be lost, that is a total loss." (*Mr. Justice Buller*, in *Gazalet v. St. Barb.* 1 T. R. 187.) "If the voyage be absolutely lost, or not worth pursuing, under these and many other like circumstances, the insured may disentangle himself and abandon." (*Lord Mansfield*, in *Hamilton v. Mendez*, 2 Bur. 1209.) It was contrary to every principle to say, because the hull of a ship is found in a port which falls within the general description of the places to which she was insured, brought in there in a state of mutiny, deprived of her lawful commander and officers, not under the control of the assured or their agents, but in the hands of mutineers, without cargo and without stores, and, at the time of her seizure by the mutineers, not having completed any one act of her mission, that therefore she has performed the insured voyage within the meaning of the policy. The underwriters engaged for the ship's arrival at the port of destination free from perils in the course of her legitimate trade. Here the ship has not

so arrived, and therefore it seems clear within all the decisions, that the assured may recover as for a total loss, having abandoned.

2d. The resolution to abandon was communi-[358]-cated to the underwriters as soon as the assured received information of the misfortune ; and,

3d. As to the allegation that they had waved the abandonment, they had done nothing more in respect to interference than what was agreeable to constant usage and the requisition in the policy, " that the assured shall sue, labour, and travel, in " and about the defence, recovery," etc. etc. of the property insured.

Messrs. Adam and Nolan (for Respondents.) It had lately been decided, that the loss of the voyage was not necessarily the loss of the ship. Insurance was a contract of indemnity. Suppose two insurances on a ship from Edinburgh to London, one on the ship, the other on the cargo ; the cargo, consisting, for instance, of fish, might be lost, and yet the ship reach her proper port in perfect safety. Could the assured bring in the insurer on the ship under these circumstances ? The undertaking by the underwriter on the ship was, not that she should perform her voyage, but that, until she arrived at her port of destination, he would protect the assured against a total or partial loss of the ship. The case of the assured rested entirely on *dicta* of Buller and Mansfield. The case of *Parsons v. Scott*, (in C. P. 1 Taunt. 363) and the case of *Bainbridge v. Neilson*, (in K. B. 10 East. 329) were decidedly in favour of the view of the case contended for on the part of the underwriters, though the Judges must have had all these *dicta* before them.

(Chancellor. The House of Lords determined, [359] in *Fitzgerald v. Pole*, that the loss of the voyage was not the loss of the ship ; but the Courts in Westminster Hall got out of that, no one knew how.)

By the decision in the case of *Parsons v. Scott*, the old rule was restored, in opposition to the *dicta* above mentioned, which were mere *obiter dicta* : as the decision, in the particular cases, did not turn upon them. In the cases of *Goss v. Withers*, (2 Bur. 695,) *Hamilton v. Mendez*, (2 Bur. 1209,) *Mills v. Fletcher*, (Doug. 219,) the ship had suffered considerable damage. Here, though the cargo was lost by barratry of the mariners, the ship was safe. Another point was, that the instructions to the Master were, to go first to Surinam and Demarara, and then to St. Vincent's, etc. whereas, the words of the policy were, to her port, etc. in the British or Foreign West Indies, and afterwards to America : and it was decided, that where a vessel was to go to more ports than one, they must be taken in the order of the policy.

Messrs. Park and Brougham (for Appellants.) In the trading map, Surinam and Demarara were in the West Indies : but, at any rate, the vessel had been carried to Barbadoes first, owing to the mutiny of the crew. This, like every case of abandonment, depended, in some measure, on peculiar circumstances. What they went upon was this, that, under the special circumstances of the case, the underwriters ought to be put in their place. They were not called upon to maintain, that, in all cases, the loss of the voyage was the loss of the ship. The case of *Fitzgerald v. Pole* (5 Br. P. C. 131) was quite different [360] from the present : and the case of *Parsons v. Scott* (1 Taunt. 363) applied as little. Here there was an utter dilapidation, which was wanting in both these cases. The underwriters might as well say that a vessel was in good safety if the hull was raised up again, though she had before sunk, and the whole crew had perished. As to the question of abandonment and waiver, they would only just notice, that the assured had, by the first post, communicated their resolution to abandon, and had only interfered afterwards for the interest of all concerned, the underwriters having refused to act.

Lord Chancellor. Under the particular circumstances of this case, he was of opinion, that the assured were entitled to abandon, that they did abandon in time, and that the abandonment was not waved.

Ordered and adjudged, that the interlocutor complained of be reversed, and that the decree of the Court of Admiralty, of 11th Nov. 1803, be affirmed.

Agent for Appellant, CHALMER.

Agent for Respondent, MUNDELL.

[361] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

COWLEY, and Others,—*Appellants* ; M. W. HARTSTONGE,—*Respondent*

[June 3, 1813].

[Mews' Dig. iv. 276 ; xiv. 506. Discussed and distinguished in *Evans v. Ball*, 1882, 47 L. T. 165.]

[John Hartstonge by his will devises and bequeaths certain real estates, and sums of money charged upon his nephew, Sir H. Hartstonge's estates, etc. to trustees, on trust, to lay out the residue of his personal property (after payment of legacies) either in the purchase of lands of inheritance, or at interest, as his trustees should think most fit and proper ; and then, upon trust, to pay the rents, profits, and interest, to Sir H. Hartstonge, for life ; and after his decease, to convey and assign the whole to the first and other sons of Sir H. Hartstonge, in tail male ; remainder to the daughter or daughters of Sir H. Hartstonge, in tail general ; remainder to his niece, Anne Cummings, for life ; remainder to her first and other sons in tail male ; remainder to his natural daughter, Anne Hartstonge, for life ; remainder to her first and other sons in tail male ; remainder to her daughters in tail general ; remainder to his niece, Mary Ormsby, for life ; with remainders, as above, to her sons and daughters ; remainder to testator's own right heirs, executors, and administrators. The trustees never acted. Anne Cummings and Sir H. Hartstonge died without issue, and John Vesey, first son of Anne Hartstonge, became tenant in tail upon the death of his mother. John Vesey, and his children (infants) died, and his wife obtained administration, and claimed the personal fund as personal property, the same never having been invested in lands. The next remainder-man claimed it as land ; and the question was, Whether it was to be considered as land or personal property ? Decided, that it was to be considered as land, the discretionary power given to the trustees being limited by the intention of the testator, as collected from the whole of the will taken together.]

John Hartstonge, of the City of Dublin, the Respondent's grandfather, by will, dated May 23, 1766, [362] after various bequests (and, among others, a sum of £5000) to his natural daughter Anne Hartstonge, devised and bequeathed to trustees, their heirs, executors, and administrators, his lands of Camas, in the county of Limerick ; an annuity of £150 charged on his nephew, Sir H. Hartstonge's estate in the county of Limerick ; his house in Limerick, a charge of £4000 on his nephew's estate of Bruff, a charge of £2000 on his nephew's estate of Glenduff, and whatever sums remained due to himself on a mortgage of Lord Fane's estate, etc. in trust, in the first place, to pay the sum of £5000 to his daughter, an annuity of £150 to his niece, Anne Cummings, for life ; and next followed that part of the will which gave rise to the present question ; viz.—

" Then, upon trust, to lay out the residue of the said two several charges of £4000 and £2000 on my said nephew's estate, herein before particularly mentioned, with
 " all such further or other sum or sums of money as shall be due to me, by mortgage, judgment, or upon any other security whatsoever, either in the purchase of lands
 " of inheritance, or at interest, as my said trustees shall think most fit and proper,
 " (but without any risk or hazard to my said trustees, or either of them ;) and then,
 " upon this further trust, to pay the rents of the said lands of inheritance, so to be
 " purchased by my said trustees herein before named, or the interest money of the
 " residue of the said charges of £4000 and £2000 ; and also the interest and produce
 " of all other sums of money as shall be due to me, in manner aforesaid, if the same
 " shall [363] be laid out at interest ; and also the residue of the said rents, issues,

“ and profits, of the said lands of Camas, and of the said House in Limerick, and of
 “ the said annuity or rent charge of £150 a year ; and also the interest and produce
 “ of the said mortgage on the late Lord Viscount Fane’s estate, to said Sir Henry
 “ Hartstonge, for and during the term of his natural life ; and from and after his
 “ decease, I appoint my said trustees, and the survivor of them, and the heirs, exe-
 “ cutors, or administrators of such survivor respectively, to grant, convey, and assign
 “ my said real estate, the said rent-charge, or annuity, of £150, my said house in
 “ Limerick, the said charges and mortgages, or such estate as shall be purchased for
 “ the same, (and all other sums due to me upon any other security whatsoever,) to
 “ the first, and every other son, of my said nephew, Sir Henry Hartstonge, lawfully
 “ to be begotten, and to the heirs male of their bodies, severally and successively,
 “ the eldest of such sons, and the heirs male of his body being always preferred, and
 “ to take before the younger of such sons ; and in default of issue male of my said
 “ nephew, Sir Henry Hartstonge, to the use of all and every the daughter and daughters
 “ of my said nephew, Sir Henry Hartstonge, and the heirs of her and their body and
 “ bodies, as tenants in common, and not as joint tenants ; and, for want of such issue,
 “ to my niece, the said Anne Cumming, otherwise Hartstonge, for and during her
 “ natural life, with remainder to her first, and other sons, successively in tail male ;
 “ and on failure of issue male of my said niece, Anne Cumming, to my [364] said
 “ reputed daughter, Anne Hartstonge, for and during her natural life, with remainder
 “ to her first and other sons successively in tail male. On failure of issue male of my
 “ said reputed daughter, Anne Hartstonge, to the use of all and every the daughter
 “ and daughters of the said Anne Hartstonge, my said reputed daughter, and the
 “ heirs of her and their body and bodies, as tenants in common, and not as joint tenants ;
 “ and in default of such issue of the said Anne Hartstonge, my said reputed daughter,
 “ to my niece, Mary Ormsby, otherwise Hartstonge, wife of Henry Ormsby, Esq.
 “ for and during her life, without the control or intermeddling of her husband, the
 “ said Henry Ormsby, or without his having any manner of power over the same,
 “ or any part thereof ; but that the receipt and receipts of the said Mary Ormsby
 “ alone, and no other, notwithstanding her coverture, shall, from time to time, be good
 “ and sufficient for the rents, issues, and profits, of my said real and personal estate
 “ and fortune, with remainder to her first and other sons respectively, in tail male ;
 “ and on failure of issue male of my said niece, Mary Ormsby, to the use of all and every
 “ the daughter and daughters of my said niece, Mary Ormsby, and the heirs of her
 “ and their body and bodies, as tenants in common, and not as joint tenants ; and
 “ in default of such issue of my said niece, Mary Ormsby, to my own right heirs, exe-
 “ cutors, and administrators, ~~for ever~~.

“ And my will and intention is, that when my trustees shall invest my said per-
 “ sonal estate in [365] lands of inheritance, that the present persons, whom I intend
 “ and make tenants for life thereto, shall have, as they come into possession, power
 “ to make leases for such lands for three lives, or thirty-one years in possession, and
 “ not in reversion, and at the full improved rent, without fine.”

The trustees renounced the execution of the will, and administration with the will annexed was granted to Sir H. Hartstonge by the Prerogative Court. Afterwards, one of the trustees (the other having died without acting) assigned the whole of the testator’s trust property to Sir H. Hartstonge, subject to the trust.

Sir H. Hartstonge received a sum of about £10,000 in the whole, personal property of the testator, and paid the interest of her £5000 to Anne Hartstonge. He had, of course, after deducting the £5000 belonging to Anne Hartstonge, an additional sum of about £5000 in his hands, subject to the ulterior trusts of the will. The niece, Anne Cummings, died, without issue, before Sir H. Hartstonge ; afterwards Sir H. Hartstonge died without issue, and without having invested the surplus money in lands, and the Earl of Limerick became his personal representative. Anne Hartstonge intermarried with a Mr. Vesey, by whom she had one son, John ; and, upon the death of her husband Vesey, she intermarried with Edmond Weld, by whom she had the Respondent, who was the eldest son by him, and several children. Anne Weld died ; upon which her son, John Vesey, became entitled to an estate tail in possession, in the testator’s real pro-[366]perty devised as aforesaid, and to the residue of the testator’s personal property, after payment of the £5000 specifically bequeathed to his mother ; and he received £1000, part of such residue, from Lord Limerick.

In March, 1803, John Vesey died, leaving the Appellant, Catherine, his wife, and one son and two daughters; all of whom died before the eldest attained the age of six years. By the death of John Vesey and his children, the Respondent, Matthew Weld, who assumed the name of Hartstonge pursuant to the directions in the will, became entitled to an estate tail, in possession, in the testator's real property, under the trusts of the will.

Catherine, the widow of John Vesey, on his death, and that of his children, obtained letters of administration to them, and afterwards intermarried with James Cowley, who, in her right, claimed the above-mentioned residue of the testator's personal fortune; the trustees having, in the exercise of their discretion, suffered it to remain out at interest, instead of purchasing lands.

The Respondent filed his bill in Chancery against the Appellants, to have the money paid over to him, or laid out in the purchase of lands, to be settled according to the limitations in the will. After answers, and issues joined, the cause came on to be heard before the Master of the Rolls, who, after three days' hearing, dismissed the bill, and ordered the costs to be paid out of the fund. The Respondent appealed to the Chancellor, who reversed the decree of the Master of the Rolls, and "decreed that the Plaintiff (Respondent) was entitled to have the [367] money invested in "lands, to be settled subject to the uses and trusts of the will;" but gave no costs on either side. The Appellants thereupon appealed.

It was contended on the part of the Appellants, that the intention of the testator was, to give an option to his trustees to lay out the residuum of his personal fortune in the purchase of lands, or at interest. This appeared most manifestly from the strong and emphatic expressions which the testator had used in his will: he devised and bequeathed to his trustees, their heirs, executors, and administrators, his real and personal estate, "To lay out the residue of the two several charges in his will "specified, with all such further or other sum or sums of money as should be due "to him by mortgage, judgment, or upon any other security whatsoever, either in the "purchase of lands of inheritance, or at interest, as his said trustees shall think fit "and proper, but without any risk to them." Here the testator had in express terms given his trustees an option, and invested them with the uncontrolled power of laying out the residue of his personal property either in the purchase of lands, or at interest; and yet it was contended, on the part of the Respondent, that although the trustees did not vest this residuum in lands, but, on the contrary suffered it to remain at interest, it was to be observed as land, and not as money; but this construction was equally repugnant to the letter and spirit of the will: for if the testator had intended that the surplus of his personal fortune should absolutely be laid out in the purchase of land, for what purpose did he give [368] the trustees a discretionary power of laying it out at interest, which must be nugatory and inoperative, if this construction was to prevail? This would be to make, and not to expound the testator's will: a liberty that courts of justice had never assumed. That such was not the testator's meaning might still further be inferred from the directions given to the trustees in a subsequent passage of his will. The testator directed his trustees "to "pay the rents of the lands of inheritance, so to be purchased, or the interest money "of the residue of the said charges, and also the interest and produce of all such other "sums of money as should be due to him, if the same should be laid out at interest, "and also the residue of the rents, issues, and profits, of the lands of Camas, and of "the house in Limerick, and of the annuity of £150, and also the interest and produce "of the mortgage on the late Lord Viscount Fane's estate, to his nephew, Sir Henry "Hartstonge, for life; and from and after his decease, the testator appointed his "said trustees, and the survivor of them, and the heirs, executors, and administrators, "of such survivor respectively, to grant, convey, and assign, his said real estate, said "rent charge, the said house at Limerick, the said charges and mortgage, or such "estate as should be purchased for the same, and all other sums due to him, upon "any other security whatsoever, to the first and other sons of his said nephew, in "tail general, with several remainders over. The testator also by his will provides, "and declares it to be his express will and intention, that all and every, or any person "or persons what [369]-soever, who were in remainder to his said estates and fortune, "by his said will, as they should come into the possession thereof, by virtue of the "limitations aforesaid, should always bear and take upon them the surname of Harts-

"tonge, and no other ; and use the arms belonging to his name, and no other." Here it was observable that the testator had made use of terms properly applicable to personal property only, with a view evidently to provide for the event of his trustees continuing the money at interest, upon the old securities ; or laying it out at interest upon new securities. In the case of *Curling v. May* (3 Atk. 255), a sum of £500 given to a trustee, to be laid out upon a purchase of lands, or on good securities, for the separate use of the testator's daughter, her heirs, executors, or administrators, (who died before the money was vested in a purchase,) was decreed to the administrator of the daughter. The words of Lord Talbot, in that case, were very strong, and, as it was presumed, conclusive, upon the present case. He observed, that it was originally personal estate, and then remained so ; and that the Court would take it as it was found. The decision of Lord Talbot was recognized in the case of *Amler v. Amler* (3 Ves. 583). In that case, the testator bequeathed "a sum of money to A to remain "at interest, or to be by him laid out in real estates, and to go with other estates devised. A, being tenant in tail of the real estates, disposed of the money by will. The Court inclined in favour of the disposition by will, upon the ground, that A might have called for the money as absolute owner. [370] but it was established upon the option to continue it personal estate. The Chancellor there observed, that an option was given to the legatee either to lay out the money at interest, or in the purchase of lands ; and surely, in the present case, an election was given to the trustees, in the most unequivocal terms, to lay out the money either in the purchase of lands, or at interest. The case of *Earlom v. Saunders* (Amb. 241) would, as it was apprehended, be principally relied upon as an authority in favour of the construction contended for by the Respondent ; but that case was very distinguishable from the present ; and even were it to be considered as an authority in point, it had been over-ruled by subsequent decisions. In that case, the testator directed his executors "to raise the sum of £400 "out of his personal estate, and to pay it to his trustees, who should lay out the same "in the purchase of lands, or any other security or securities ; and that the lands "so to be purchased, and the security or securities on which the £400 should be so "laid out, should be made to, and settled on the trustees, their heirs and assigns, in "trust and to the use of his wife for life, and after to such uses, and under such provisions, conditions, and limitations, as his lands before devised were limited." Here it was to be observed, that the executrix (who was the widow of the testator) died before the £400 was raised out of the personal estate, or paid over to the trustees, and consequently that sum never vested in them, and therefore they could not have exercised any discretionary power over it. Lord Hardwicke, in [371] giving judgment in that case, admitted that trustees had an election to change the rights of parties, if it was expressly given to them.

There was no doubt that a power might be given to trustees, to prefer one set of objects to another, and that this might be done by giving them discretionary power to render the fund real or personal estate. This was clear from the case of *Walker v. Denne* (2 Ves. 170), *Curling v. May* (3 Atk. 255), and *Amler v. Amler* (3 Ves. 583). The principle was recognised in *Earlom v. Saunders* (Amb. 241) ; though, from the particular circumstances of that case, the principle was held not to be applicable to it. The only questions therefore were, 1st, Whether the direction to the trustees conferred on them an imperative trust, or a discretionary power ? and, 2d, If it conferred on them a discretionary power, whether the fund must not now be considered as personal estate, either from legal presumption of its having been made such by an exercise of the power, or from its having been personalty at the testator's decease, and its being now too late to make it real estate by an exercise of the power ?

Now, it seemed impossible to confer a discretionary power of choosing between two acts more explicitly than by saying, that it should be lawful for the donee, or trustee of the power, to do one or the other of them, as he should think proper ; and it was obvious, that the testator thought the fund might continue personalty through every stage of the trust, and, in its final determination, have the nature of personalty. The first appeared from the regular repetition of his directions for the payment of the interest of the money. The second, from his [372] direction, that when the trustees were finally to divest themselves of the fund, and make it over to the *cestui que* trust, becoming absolutely entitled to it, they should then assign to him the money and the securities for money, and convey the land to him, if it should have been laid

out in land. Then, from the length of time (above 40 years) during which the personal fund had been permitted to remain in that state, an exercise of the trustees' direction in favour of the personal quality of the fund must be legally presumed. It was submitted, that it was now too late to exercise it, as the testator expressly directed the transfer of the fund to be made, on the death of the devisee of the life interest, to his issue. This was to be the completion of the trust, and the discretion of the trustee was therefore to cease with it.

On the part of the Respondent, on the other hand, it was contended, that the Chancellor's decree ought to be affirmed, because money devised upon trust, to be invested in the purchase of lands of inheritance, was in equity regarded as real estate, and passed as such, although not so invested. As to the option here given to the trustees, either to purchase lands of inheritance, or lay out the money at interest, the latter could only be construed to mean a temporary investment until lands could be purchased, or, at most, until the death of Sir Henry Hartstonge, the first tenant for life, upon whose death a settlement was directed to be made in terms which manifestly shewed the testator had real estate, and that only, in contemplation. All the limitations in the will directly applied to land, and [373] were analogous to the limitations of real estate: and it was worthy of remark, that there was no limitation or provision whatever throughout the will that applied to the fund as money: but, on the contrary, all the limitations of the will expressly applied to land, and all the remainders, even the most remote, were limited to the testator's kindred. If the property was supposed to be personal estate at that period, the limitations prescribed by the testator to be made, would not only have been liable to be defeated: but, in the very probable event of a person, designated as a remainder man in tail, having then come *in esse*, and being the first to take, would all have been void in the very moment of their creation. In this respect, the case of *Earlom v. Saunders* (Amb. 241), was a direct authority in point: and the case, too, of *Thornton v. Hawley* (10 Ves. 129) bore most strongly indeed in confirmation of the principle laid down by Lord Hardwicke. As to the pretence of John Vesey having elected to take the fund as personal, and thereby determined its real nature in equity, it had no foundation in fact. He did not act evidencing even an intention of that kind: and if he had, his intention alone, as tenant in tail, would not have been sufficient to defeat the right of the remainder men. The peculiar circumstances of the trustees having refused to act, and having assigned the funds and their trust to the first tenant for life, who was also debtor to the testator's estate for the principal part of the monies directed to be invested, and therefore had an interest in omitting to invest it in the purchase of land, would distinguish this case, if necessary, from others, in which an election in [374] the trustees, as to the nature of the investment, had been thought to vary the equitable rule. And here the question did not arise between the real and personal representatives of a party who had a power over the fund to alter its nature, but between a perfect stranger in blood to the testator, and to all the parties in the intended settlement, on the one side, and the testator's grandson, to whom an estate tail was limited by the intended settlement, on the other. The respondent has also taken the testator's name and arms, and become thereby the representative of his family, according to the direction of the will, and was admitted to be thereby entitled to such part of the devised property as was and continued to be real estate: there could be no doubt, therefore, that the decree appealed from, in giving the money in question as real estate to him, best effectuated the general intent of the testator.

Sir S. Romilly and Mr. Hart (for Appellants.) This was a mere question of construction. Where trustees were bound sooner or later to invest money in land, Courts of Equity would not allow their negligence to defeat the testator's purpose or vary the rights of the parties, upon the principle of Courts of Equity to consider that as done which ought to be done. But then that supposed that there were rights of parties. It was clear that the testator, who was the absolute owner, might give a power to trustees to vary the destination of the trust funds. The question then was, Whether the testator could be considered as having used language which, at the hour of his death, imperatively fixed on this money [375] the character of land? It was perfectly clear, upon the face of the will, that an option was here left to the trustees: and where that was evident, neither on principle nor on decided cases had

the Courts any authority to control it. The testator might perhaps have intended that the personal property should go in the same course of limitations as the real ; but the law did not permit this ; and Courts of Justice could only act on the language of the will according to the rules of law and equity.

Messrs. Richards and Leach (for Respondent.) A testator might give trustees an election, but it was not very probable, at least, that it should be given to strangers. The trustees here did not choose to act, and there was no person to exercise the discretion, and, in such a case, the Court would say that it would exercise the discretion, and do that which was most consonant to the intent of the testator. But even if the trustees had acted, they had no discretion, except as to time ; and they ought to have purchased land as soon as a proper purchase could be found. The case of *Amler v. Amler* (3 Ves. 583) was totally different from the present. That of *Earlom v. Saunders* (Amb. 241) was decidedly in favour of the Respondent ; and that of *Thornton v. Hawley* (10 Ves. 129) contained much matter applicable to the question of option, though not exactly such an option as this. The testator had no male issue, but was desirous to continue his name ; and the object evidently was, that the personal property should attend the succession. He gave his trustees a discretion to lay out the fund as circumstances and convenience required ; but [376] this was perfectly consistent with fixing upon it the qualities of land. The discretion was, to manage the property according to the intent. Suppose an unlimited discretion in the trustees, and that, if called upon to invest the personal fund in land, they were to say, ' We don't choose it ; ' would that have been an answer to a Court of Equity on this will ? ' No,' the Court, would say ; ' the testator must be supposed to have meant such a discretion as was consistent with the general purposes of his will, and the discretion must be exercised accordingly.'

If the trustees had acted, as it was a principle of equity that what ought to have been done must be considered as having been done, it might be shewn here, that they acted contrary to the intent of the testator, and committed a breach of trust. But they had refused to act ; and who took the property instead ? Sir H. Hartstonge ; who, besides his interest in keeping the debt unpaid, had another cogent reason for keeping the fund in the state of personal property. If he had a son born who only lived an hour, the whole of the personal property would have been his own. Suppose, then, a bill filed against Sir H. Hartstonge ; the Court would have said, ' You are in such a situation of interest that you cannot be heard, and the money must be invested in land.'

Sir S. Romilly (in reply.) If the question as to the extent of the discretion were doubtful, the cases cited, and arguments used for the Respondent would have great weight. But they went for nothing [377] where the testator, as here, said, in express unequivocal terms, that his trustees should have the option. By the ultimate limitation in the will, he gave the property to his own right heirs, executors, and administrators, clearly supposing that even then the money might be personal property. This was directly contrary to the supposition, that it was the intention of the testator that some time or other it should be absolutely converted into real estate. Suppose the limitations spent, and the question had been between the heir at law and next of kin ; by what legislative authority could Courts of Justice strike out these words, which established the claim of the next of kin ? The cases relied upon on the other side were inapplicable, or, in principle, directly in favour of the Appellants. Sir H. Hartstonge stood in the place of trustees, and was willing to exercise the discretion ; and he should be glad to hear of a case where the Court had taken from trustees willing to act a discretion expressly given them. As to the Court compelling Sir H. Hartstonge, as against himself, to invest the money in land, he thought the Court would do no such thing. The utmost the Court could do would be to say to him, ' You don't stand in a situation of perfect impartiality, and therefore we shall execute the trust ; ' but it did not follow that the Court would absolutely invest the money in land. It would merely, as standing in the place of the trustees, exercise a sound discretion.

Lord Eldon, (Chancellor,) after reading the material part of the will, (*vide ante*.) said, The [378] question now was, Whether, considering the whole will together, and the intention of the testator, as far as it can be collected from the will, this fund ought to be regarded as money, according to the decision of the Master of the Rolls ;

or as land, according to the decision of the Chancellor. It appeared to him that the decision of the Chancellor was the right one, and that his decree ought to be affirmed, subject to certain directions in regard to costs.

They had heard many cases cited at the bar, and he thought he might say this, that if a testator clearly manifested his intention on the face of the will, that his trustees should have such a discretion as that contended for on the part of the Appellants, the Court would not control that discretion. But where the trustees did not act, he could not agree that the Court was precluded from looking at the object which the testator had in view, in order to ascertain with more exactness the meaning of his expressions, if otherwise at all doubtful. The question here was, What was to be done by the Court, where no discretion at all had been exercised by the trustees? In his opinion, the discretion, in this case, was purely personal in the trustees: and then the Court had to consider what was a proper execution of the will, when the trustees had refused to act, or to exercise any discretion on the subject. The testator gave his real and personal estate under the various limitations of this will, and to these limitations the discretion given to his trustees must be held to refer. Now, what was his intention? He meant that the real and personal estates should go to the same persons. It was very [379] true: the nephew, if he had a son born, though he died the hour after, might say, that, as the trustees had exercised no discretion, the money should be considered as the estate of the son dying intestate: but the trustees might come in and say, 'No; we, in the exercise of our discretion, determine that it shall be invested in land, and considered as such, that it may go according to the limitations in the will;' and the very occurrence of such a circumstance as the above might be a good reason for their interposition.

They had, then, three points to determine:—

1st, Whether this money was to be considered as personal property or as land.

2d, Whether the testator did not mean that the discretion given to his trustees should be exercised according to his general intent and meaning; and,

3d, Since the trustees had done nothing, whether the Court ought not now to act, and do what was most fit and proper to be done.

He thought that, taking the whole case into view, it could not be determined that this was personal estate; for if the discretion had not been exercised, it remained to be exercised. This case depended on its own peculiar circumstances and the language of the testator in his will. He thought the judgment of the Chancellor right on the principal point: but he appeared to him to have mistaken the course of the Court in regard to costs. The question was a fair one, and therefore the Master of the Rolls had taken a more proper view of this point, in directing the costs of all parties to be paid out of [380] the fund. If they agreed with him, therefore, the judgment of the Court below must be affirmed as to the principal point, but varied in regard to costs.

Lord Redesdale. After considering the grounds of the other cases, he had no hesitation whatever in concurring in the opinion that had just been given. The argument at the bar in favour of the Appellant was, that the trustees had a discretionary power, and that, if they never exercised that power, then the fund must be considered as money. That, however, was certainly never the intention of the testator: for, upon that principle, if the trustees had died in his life time, the fund could have been nothing else than money. In the exercise of the discretion given, it was evident the testator intended that the money should some time or other be invested in land; and where, under such circumstances, an option was allowed, it must be understood with reference to the testator's intention, unless where the words were so express and clear, that the design to give an absolute uncontrolled discretion could not be misunderstood. The case of *Earlom v. Saunders* was exactly of the same nature, and to the same effect, as the present. The keeping the property as money would clearly defeat the intention of the testator. But there was another analogous case, which had not been noticed at the bar: that of *Johnson v. Arnold* (1 Ves. 169). Lord Hardwicke, in that case, observed that it was a very blundering will; but the intention was that the property in dispute should go in a course of limitations, and, therefore, that the will ought to be so construed. [381] This case, to use a familiar expression, went on all fours with the case of *Johnson v. Arnold*: except that this was a clearer case.

The time given here was evidently intended to enable the trustees to lay the money out in the mean time, without risk or hazard, until it should be convenient to invest it in land. The intent was, that it should be laid out either in the purchase of lands of inheritance, or at interest, as should be thought most fit and proper. Fit and proper for what? For executing the trust, and intent of the will, unquestionably. Then the trustees were bound to consider all the limitations of the will, and give effect to them, and were therefore bound to lay out the money in land, as they could not give effect to the limitations without so vesting it.

But an argument in opposition to this had been founded upon an expression at the close of the will, "to my own right heirs, executors," etc. That expression, however, in his opinion, told rather the other way. The meaning was, that, if all the limitations should fail in the lifetime of Sir H. Hartstonge, there could be no further cause for investing the money in land: and that, therefore, the real estate might be left to go to the testator's heir at law, and his personal estate to his personal representative. The previous limitations, however, were not applicable at all to personal estate, and the desire of the testator, that it should go along with the real estate, clearly proved his intent that it should be invested in land: so that the conclusion drawn from the words above mentioned appeared to lead precisely the other way.

[382] But the extent to which the discretion was attempted to be carried on the other side was quite extravagant. If the trustees, and their representatives, might defer the exercise of their discretion as long as they pleased, then the question might always be kept in suspense, and nobody could claim the property, either as land or money. At any rate, the discretion in the present case was never executed, and the matter was in suspense at the time of filing the bill; and therefore it devolved upon the Court to say what was fit and proper to be done. The testator did not mean that Sir H. Hartstonge should have the personal estate, and that the real estate should go on in the prescribed course of limitation, but that both should go on together. The trustees having done nothing, it was for their Lordships to say what ought to be done. The Master of the Rolls had said that this money was to be considered as personal property: the Chancellor had said that it was to be considered as land: it remained now for their Lordships to determine the point: for, as no discretion had been exercised, the matter was still in suspense. It was difficult to believe that such a discretion should have been intended to be given to the trustees as to enable them to alter the rights of the parties. At all events, it was the clear intention of the testator, in the present case, that the money should go along with the real estate: and therefore he was decidedly of opinion that the judgment of the Chancellor (Ponsonby) was right. But in regard to the costs, the Chancellor had acted contrary to the course of the Court. All the parties to the suit were necessary parties. [383] Lord Limerick acted as trustee, and it could not be said that he should not have his costs: and the other parties were necessary for the indemnity of the person who held the fund *quasi* trustee.

The case was upon the whole a very clear one, notwithstanding the keenness with which the argument at the bar had been urged in favour of the Appellant.

Lord Carlton concurred in the above view of the case. The Chancellor's decree tended to effectuate the purpose of the testator. The great object of the testator was to create a succession of estates tail; and for that purpose his intention clearly was, that the personal estate should accompany the limitations of the real property. As to the case of *Earlom v. Saunders*, there was nothing in the will there to point out the main object of the testator, so that this was a much stronger case. In the present case, it was clear that the discretion was to be executed in the most fit and convenient manner, according to the intention of the testator.

Ordered and adjudged, That the decree complained of be affirmed, so far as it reverses the decree of the Master of the Rolls, save as to the matter of costs: and that, with respect to the costs, the same should be paid according to the decree of the Master of the Rolls.

Agents for Respondent, FORBES and POCKOCK.

Agent for Appellants, J. PALMER.

[384] ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

N. CLAYTON, Esq.—*Plaintiff* (in Error); RICHARD ROE, on demises of Cecilia Wren, John Bacon, and Isabella his Wife,—*Defendant* (in Error) [March 15, 1813].

[Devise of all devisor's lands to his niece for life : same to trustees, to preserve contingent remainders ; remainder to her first and other sons, successively, in tail male ; remainder to her daughters, as tenants in common ; and, for default of such issue, to issue of his four sisters, in such manner as he had limited the same to his niece's issue ; and, for default of such issue of his sisters, to his own right heirs. Decided, that cross remainders were raised as between the issue of the four sisters.]

In Easter Term, 1804, an action of ejectment was commenced in the Court of King's Bench at Westminster, by the nominal Plaintiff, Richard Roe, on the joint and several demises of Cecilia Wren, and John Bacon, Clerk, and Isabella his wife, for recovery of three undivided fourth parts of certain land situate at Elly Hill, in the parish of Haughton, in the county of Durham, to which action Nathaniel Clayton, Esq. having been admitted Defendant, and having pleaded the general issue, the cause came on to be tried at the Durham assizes, 1804, when the Jury found a special verdict, stating as follows :—

Cuthbert Ellison, being seised in fee of the estate in question, on the 20th day of June, 1765, made his last will duly executed, and thereby devised, [385] among other things, as follows :—" I give and devise all my lands, tenements, and hereditaments, at Elly Hill, aforesaid, (subject as aforesaid,) and all other my real estate, whatsoever and wheresoever, to my said niece, Sarah Ellison, for the term of her natural life ; and after the determination of that estate, I give and devise the same to my cousin, James Bland, of Hurworth, in the said county of Durham, Esq., and his heirs, during the life of my said niece, Sarah Ellison, to the intent to preserve and support the contingent uses and remainders hereinafter limited : but, nevertheless in trust, to permit my said niece, Sarah Ellison, to receive the rents and profits thereof during her life : and from and after the decease of my said niece Sarah Ellison, then to remain to the first son of my said niece, Sarah Ellison, and the heirs of the body of such first son lawfully issuing ; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, and all and every other son and sons of my said niece, Sarah Ellison, lawfully to be begotten ; the elder of such son and sons, and the heirs of his body lawfully issuing, to be always preferred, and to take before the younger of such sons, and the heirs of his body ; and for default of such issue, then to the use and behoof of all and every the daughter and daughters of my said niece, Sarah Ellison, lawfully to be begotten, and the heirs of their bodies, lawfully issuing, to take as tenants in common ; and for default of such issue, then to the issue of my sisters, Susanna Swinburne, Isabella Wren, Barbara Ellison, and Jane Mills, in tail, in such manner as I have limited [386] the same to my said niece, Sarah Ellison's issue ; and for default of such issue, to remain to my own right heirs for ever," etc. etc.

On 3d February, 1776, the testator died seized, without having revoked his will, leaving his niece, Sarah, the only child of his deceased and only brother, Robert Ellison ; and also leaving his four sisters, Susanna Swinburne, Isabella Wren, Barbara Ellison, and Jane Mills, him surviving.

On the testator's death, his niece Sarah, being the devisee named in his will, and also his heir at law, entered on the estate in question, and enjoyed the same till her death, which happened on 28th March, 1801 : she died without issue, having, by her last will, duly executed, and bearing date 28th August, 1788, devised all her estate and interest therein, to the Plaintiff in error, Nathaniel Clayton, and his heirs.

On 1st September, 1781, Susanna Swinburne died without issue.

On 8th July, 1800, Jane Mills died without issue.

On 20th May, 1801, Barbara Ellison died without issue.

On 1st July, 1795, Isabella Wren died, leaving issue two daughters and one son ; viz. Cecilia Wren, and Isabella, now the wife of John Bacon, the lessors of the Plaintiff below, and Charles Wren, who were all living at the time when Cuthbert Ellison made his said will.

On 29th January, 1799, Charles Wren died without issue, leaving his sisters Cecilia and Isabella his coheirs at law.

The lessors of the Plaintiff below, Cecilia Wren, [387] and Isabella Bacon, claimed the whole estate devised by Cuthbert Ellison's will, as the surviving issue of his sister, Isabella Wren, his other three sisters having died without issue ; and contended, either,

1st, That by his will, cross remainders were limited between the issue of his four sisters ; or,

2d, That the issue of the four sisters took as a class, and not severally ; so that they and their deceased brother, being the only issue of any of the four sisters, took the whole estate.

The Defendant below, Mr. Clayton, on the other hand, claimed three undivided fourth parts of the estate in question, as the devisee of Sarah, the niece and heir at law of Cuthbert Ellison ; contending, that those three parts went over to the testator's heir at law, on default of issue of his three sisters ; for that,

1st, The words of the will were not sufficient to create cross remainders, as between the issue of the niece ; or,

2d, That if sufficient for this purpose, they were not sufficient to create a double set of cross remainders, the one within the other, which was a thing unprecedented, and yet was necessary to give validity to the construction contended for on the other side.

The case came on to be argued before the Court of King's Bench, which Court, in Trinity Term, 1805, pronounced judgment in favour of the lessors of the Plaintiff below : being of opinion, that cross remainders were limited by the will, as between the issue of the four sisters among each other.

[388] Against the judgment, the Defendant below brought this writ of error, and insisted that the judgment ought to be reversed for the following reasons :—

1st, That the true construction of the will was to give the estate in quarters to the families of the four sisters, in like manner as the whole had been before given to the niece Sarah, and her family ; and that, therefore, when the takers of one quarter failed, that quarter went over. To establish the contrary, it must be held, not only that cross remainders were limited as to the fractions of each quarter among the females, who might take that quarter as tenants in common ; but also that another set of cross remainders, behind the former set, was limited as among the several takers of the several quarters : whereas, no authority or principle of law had ever been carried to that extent.

2d, That the issue of the four sisters would not take jointly ; because, by the express terms of the will, the issue of the sisters were to take in such manner as had been before limited to the issue of the niece, which was not jointly. And, besides, from giving the estate to the issue of the four sisters jointly, it would follow, that the surviving child, and that, perhaps, a daughter of one sister, would take the whole, to the exclusion of the sons, if any, of her deceased brother ; and also in exclusion of the grandchildren, if any, of the testator's other three sisters ; which would be a construction manifestly repugnant to the intention of the testator.

It was on the other hand contended, on the part of the Defendant in error, that the judgment of [389] the Court of King's Bench ought to be affirmed for these reasons :—

1st, Though it had been established, that where cross remainders were to be raised by implication between two and no more, the presumption was in favour of cross remainders ; and that where they were to be raised between more than two, the presumption was against them ; yet it was to be considered as now equally well established, that that presumption might be answered by circumstances of plain and manifest intention. In this case, the cross remainders, if they were to be raised between the issue of the testator's four sisters, it was true, were to be raised between more than two ; but it was submitted, that there were in the will itself circumstances of plain

and manifest and declared intention to rebut the presumption against raising cross remainders between such issue; and that, without raising such cross remainders, the testator's plain and manifest and declared intention could not be carried into effect, but would be defeated. It was the plain and manifest intention of the testator, declared by his will, where he devised his estate over, in default of issue, from one person, or class of persons, to another, that nothing should pass over till all the issue of the former person, or class of persons, became totally extinct; and that the whole that he had given to the first, should go over to the succeeding person, or class of persons, together. That which was given and devised, both to the first and the last, was stated in the former part of the will, and ran through all the devises; and it was "All his lands, tenements, and hereditaments, at [390] Elly Hill, and all other "his real estate, whatsoever and wheresoever:" all these he devised first to his niece, Sarah Ellison, for life; and after the determination of that estate, then to a trustee and his heirs during her life, in trust, to preserve contingent remainders; and after her death, to her first and other sons successively in tail, "and for default of such issue, then to her daughter and daughters, and the heirs of their bodies lawfully issuing, to take as tenants in common; and for default of such issue, then to the issue of the testator's sisters in tail, in such manner as he had limited the same to "his niece, Sarah Ellison's issue; and for default of such issue, to remain to his own "right heirs for ever." Now that which he had devised, first to his niece, Sarah Ellison, for life, which was, "all his lands," etc. and "all his real estate, whatsoever and wheresoever," was what he gave over, after her death, to her sons successively in tail, and to her daughters, as tenants in common, in tail; and when those estates tail were spent, and not before, (that was, when all the issue of all her daughters were extinct, and not before), the devise over to the issue of his sisters took place; and when that took place, it was a devise over of what was first given; namely, of all the lands, etc. and all the real estate. That devise over of all the lands, etc. and all the real estate could not wholly wait taking place till all the issue of all the daughters of the testator's niece were extinct, without raising cross remainders in tail between those daughters; nor could all the lands and real estate go over at the same time, and on the same event, together, without, in like manner, raising cross remainders in tail between those daughters, as nothing was given over to the issue of the testator's sisters, until default of all the issue of his niece; and as on that event, and not before, all his lands, etc. and all his real estate, were then given over together; and as that devise over could not entirely wait to take effect till that event, and then take effect altogether, without raising cross remainders in tail between the daughters of the testator's niece, so the devise over in default of issue of the testator's sisters could not entirely wait to take effect until that event, and then take effect according to the will, without raising cross remainders in tail between the respective issues of those sisters. For all the testator's lands, etc. and all his real estate, could not entirely wait until that event to go over, and then go over altogether, according to the will, to the testator's right heirs, without raising cross remainders in tail between those issues; and unless such cross remainders were raised, part of the testator's lands, etc. and real estate, would go over to the testator's right heirs on the death of any one or more of his sisters without issue, though the issue of his other sisters were still living; whereas, by the will, the testator's right heirs were not to take until the extinction of all the issue of all the sisters; and whereas, on the event happening on which the testator's right heirs were to take, when they took at all, they were to take the whole; the raising of cross remainders in tail between the respective issues of the testator's sisters was essential, therefore, in order to [392] carry the testator's intention into effect, and to prevent it being defeated.

2d, That cross remainders would be raised where they were essential to carry the testator's intention into effect, and to prevent it from being defeated; and that the above reasoning was correct (as to the construction of the above will, with respect to the intention of the testator; and as to the rules of law with respect to raising contingent remainders, to prevent that intention from being defeated, and to carry it into effect) was fully established by many late decisions.

3d, Whether cross remainders were to be raised or not between the issue of the testator's sisters; yet the lessors of the Defendant in error were entitled to the whole of the premises in dispute, on the ground, that under the devise to such issue a joint

estate for life passed to all the children of those sisters, as joint tenants; to which joint estate for life, in all the testator's real estate, the lessors of the Defendant in error, as survivors, were still entitled, with several inheritances in remainder to them respectively in tail. (*Vide* 6 East. 628.)

(*Wright v. Helford*, Cowp. 31. *Phippard v. Mansfield*, Cowp. 797. *Atherton v. Pye*, 4 T. R. 710. *Watson v. Foxon*, 2 East. 36. *Doe v. Burville*, 2 East. 47. (n.) *Wild's case*, 6 Co. 16 b. *Cook v. Cook*, 2 Vernon, 545. *Doe v. Collis*, 4 T. R. 294. Litt. S. 283, 284. Co. Litt. 184, a.)

Ordered and adjudged, That the judgment of the Court of King's Bench be affirmed.

Agents for Plaintiff in error, CLAYTON, SCOTT, and BLAMIRE.

Agent for Defendant in error, GREY.

[393] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DUKE OF HAMILTON, and Others,—*Appellants*; REV. J. SCOTT, D.D.—

Respondent [July 13, 1813].

[3 Scots R. R. 95. See Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, s. 12.]

[Manse of Strathaven repaired in 1786—declared sufficient in 1790. Further repairs demanded, and resisted on ground that the manse had been declared free in 1790. Decided by the Court of Session, that the manse had not been declared free in terms of law. Affirmed on appeal.]

This was a question as to the repairs of a manse, Whether the expense ought, under the circumstances, to be defrayed by the minister or the heritors?

The Act 1663, cap. 21, contains the following clause:

"And because, notwithstanding of divers Acts of Parliament made of before, divers ministers are not yet sufficiently provided with manses and glebes, and others do not get their manses free at their entry: therefore our Sovereign Lord, with advice aforesaid, statutes and ordains, that where competent manses are not already built, the heritors of the parish, at the sight of the Bishop of the diocese, or such ministers as he shall appoint, with two or three of the most knowing and discreet men of the parish, build competent manses to the ministers, the expenses thereof not exceed-[394]-ing £1000, and not being beneath 500 merks; and where competent manses are already built, ordains the heritors of the parish to relieve the minister and his executors of all costs, charges, and expenses, for repairing the foresaid manses: declaring hereby, that the manses being once built and repaired, and the building and repairing satisfied and paid by the heritors in manner aforesaid, the said manses shall thereafter be upholden by the incumbent ministers during their possession, and by the heritors in time of vacancy, out of the readiest of the vacant stipends."

The Respondent became minister of the parish of Strathaven in 1782, and, in 1786, applied for repairs, which, to a certain extent, were granted. In 1790, upon application by some of the heritors to the presbytery, tradesmen were appointed to examine how the money which had been committed to the management of the Respondent had been expended. The tradesmen reported that the Respondent had "not followed the scheme of repairs that was laid down in the regulations, but has finished them in a more elegant and better manner;" and they reported that it was necessary he should still do some small things in order to put the manse into repair. The presbytery then pronounced a decree in these terms:—"Find the manse of this parish and its offices, are sufficient, when those deficiencies specified in the report are

"executed; and the presbytery appoint Mr. Scott to have said deficiencies executed against Whitsunday next, and that the expense of the same shall be entirely on Mr. Scott."

[395] A further demand was made in 1796, and the Presbytery gave a decree for a small sum (£34 12s.). The heritors resisted this, on the ground, that the manse having been already repaired, and declared sufficient, the Respondent was not entitled to ask any additional repairs during his incumbency. The cause having come before Lord Glenlee, as Ordinary, his Lordship reported it to the Court upon informations. The Court were of opinion, that the previous repairs could not preclude the Respondent from an additional claim of repairs, in so far as they were necessary and just; and they remitted the cause to the Lord Ordinary, to hear parties further upon the amount of the repairs required.

The cause having come again to be considered by Lord Glenlee, his Lordship was of opinion, that a considerable portion of the repairs decreed by the Presbytery should be allowed; and they were sustained accordingly by the following interlocutor:—"The Lord Ordinary having considered the interlocutor of the Lords of the 7th February current, and resumed consideration of the process in as far as remitted to him, finds the articles of repairs on the manse, decreed for by the decret of Presbytery under suspension, which fall to be considered as not provided for when the former decret of the Presbytery in 1790 was pronounced, are articles second of the estimate decreed for by the Presbytery, being rones for the two sides of the manse; article 6th, for building and roofing a cart-house; article 11th, for paving the milk-house; article 12th, for shelves in ditto; article 13th, for one coat of plaster on the walls thereof; article 14th, [396] for lathing and plastering the ceiling of the manse garret; and article 15th, for an open siver at the back of the manse; finds the letters orderly proceeded in as far as concerns the articles aforesaid; but *quod ultra* of the repairs on the manse, suspends the letters *simpliciter*, and decerns: allows a decret in the terms above-mentioned to go out and be extracted, and finds the suspenders liable in the expense thereof; but finds no expenses of process due to either party, in as far as concerns the matters remitted to the Ordinary."

The heritors stated, that the Respondent then rested his case on the omissions in the former estimate and award, and that the interlocutor of the Lord Ordinary proceeded on that principle. The heritors, however, acquiesced in that decision.

In 1803, the Respondent applied for further repairs; and, after the usual survey and estimate, the presbytery awarded £48 for that purpose; but the heritors having intimated that they would resist payment, the matter lay over till 1809, when he applied for further repairs, and, upon survey and estimate, the presbytery awarded £95 in addition to the former sum of £48. From the report of the surveyors, the repairs appeared to be certainly necessary, or at least much needed. The heritors brought the cause before the Court of Session, by bill of suspension against a threatened charge for these two sums.

The bill having passed, and the reasons thereof having come to be discussed before Lord Robertson, his Lordship pronounced the following interlocutor:—"The Lord Ordinary having heard parties [397] procurators on the grounds of the charge and reasons of suspension, finds in the circumstances of this case, that the manse in question is not a free manse in terms of law, and therefore repels the reasons of suspension founded on that alledgance; but, before farther answer, allows the suspender to give in special objections to the presbytery's decree charged on, and that against next calling." And, upon advising a representation for the heritors with answers for the Respondent, his Lordship adhered to his former interlocutor.

The heritors reclaimed against these interlocutors to the second division; but the interlocutors of the Lord Ordinary were twice unanimously adhered to: whereupon the heritors appealed.

The Appellants insisted on the benefit of the statute 1663, cap. 21, which, they contended, clearly enacted, that after manses had been put in sufficient repair, they should be upholden by the incumbent ministers. The presbytery had, in 1790, solemnly declared the Respondent's manse sufficient; and the words sufficient manse, legal manse, free manse, were used by the writers synonymously: (and they referred to Sir G. Mackenzie—Forbes on Church Lands—Bankton's Inst. vol. 2, p. 47, s. 21.—Erskine, 422. Kilkerran, (*voc. Manse*.) 312.)—The Botriphney case, relied on

by the Respondent, was one of very special circumstances, no way resembling the present. In that case, there was no declaration of sufficiency by the presbytery, no inspection by the appointment of the presbytery of the manse which was built, no plan of it approved [398] by the presbytery, no order for its being built, and no application for such order.

On the part of the Respondent, it was contended,—

1st, That the proceedings in 1790 did not import that his manse was declared free, and that the declaration meant no more than that the repairs were sufficiently executed; but that, in order to have a manse declared free, the words must be introduced as *verba solennia*: (and for the mode, Erskine, 422, was referred to;) that the proceedings before the presbytery in 1796, and those before the Court of Session in 1797 and 1798, proved decisively that the declaration in 1790 was not considered as conclusive, otherwise the further repairs would not have been decreed by the presbytery, nor would their sentence have been confirmed by the Court of Session, whose judgment had not been appealed from, and therefore this point was *res judicata*.

2d, That, though the manse had been declared free in 1790, it would not have protected the heritors against those repairs which became necessary by the natural decay of the building, as the clergy of Scotland were mere life-renters of their benefices, and the law in regard to life-renters was expressly applied by Erskine (b. 2. t. 9. s. 6.—b. 2. t. 10. s. 58,) to their situation as connected with their manse: that the Act of 1663, cap. 21, was framed in the times of episcopacy, when many of the clergy were proper beneficiaries, and when the Act of 1612 was in force, which entitled the executors of a beneficed person who had repaired his manse to claim a portion of the expense [399] from his immediate successor; that it was doubtful whether it was ever meant by the act that the incumbents should rebuild and repair their manse when they became uninhabitable by natural decay; that Mackenzie, who was contemporary with the Act of 1663, stated, that manse were to be built or repaired (by the heritors) when they were wasted *casu fortuito*; and, at any rate, that the construction contended for by the Respondent had now been established, that the general point of law had a few years ago received a full discussion in the case of the minister of Botriphney, which very much resembled the present. That case was stated as follows:—

“When the minister was inducted to this parish, he received a manse entirely new; and some proceedings took place before the presbytery, which were held to import that the manse was declared free. At the distance of thirty years, the manse became uninhabitable, and the minister applied to the presbytery for having it rebuilt or repaired. The presbytery issued their decree for £120 sterling of necessary repairs. The heritors brought the cause to the Court of Session by suspension, and pleaded, that the manse having been declared free in the minister's time, he was bound to uphold it during his incumbency. The minister answered, 1st, That the manse had never been properly declared a free manse by the presbytery. 2d, Although it had been declared free, that this did not prevent him from asking for those repairs which became necessary by the natural decay of the building.

[400] The Lord Ordinary found that the proceedings before the presbytery did not import that the manse had been declared free and *separatim*, found, that although the manse had been declared free *debita opera*, the present condition of the manse and offices, as ascertained by the presbytery, is such as ought, especially after the lapse of so many years, to subject the heritors in reasonable repairs. To this interlocutor of the Lord Ordinary the Court adhered, upon advising a petition and answers.

Against the judgments of the Lord Ordinary, and of the Court of Session, the heritors appealed; but when the cause was about to be heard, the heritors withdrew their appeal, and the judgments became final.”

Messrs. Brougham and Mackenzie for Appellants; Sir S. Romilly and Mr. Thomson for Respondent.

Lord Eldon (Chancellor.) This case had been six years depending in their Lordships' House, and had been represented as one of general importance to the heritors of Scotland. But it did not appear to him that this representation was well founded. The case did not necessarily involve any important general question of law as between

the heritors and clergy of Scotland, but rested entirely on its own peculiar circumstances.

Much had been said by the parties on both sides respecting the litigious disposition of each other. But with that their Lordships had nothing to do. [401] It was their duty, when a question was brought before them, to decide upon it according to law, without regard to the motives by which the parties might be actuated in bringing it under their consideration.

This was a case in which all further litigation might easily be prevented. If Doctor Scott had a free manse, there could be no dispute about repairs, as the heritors could only be called upon for those repairs which were rendered necessary by the waste of time. If, on the other hand, there had been no judgment that this was a free manse, it was competent for the heritors to do the proper repairs, and then to procure a declaration that this was a free manse, and thus to secure themselves from any obligation to repair in future during the incumbency of Doctor Scott.

The real question, under the circumstances of this case, was this, Whether the heritors were liable to do such repairs, or any part of them, as were now claimed by Doctor Scott? The Lord Ordinary had pronounced two interlocutors in favour of Doctor Scott upon this question. The Court likewise pronounced two interlocutors unanimously in favour of Doctor Scott; and unless he very much misconceived the proceeding of 1796, 1797, and 1798, that too bore a judicial character in favour of Doctor Scott.

The Act of 1663, cap. 21, from which it appeared that the ministers had met with some difficulty in procuring their stipends, such as ministers met with in other places, recited—(*vide ante*.) The statutes 1563, cap. 72, 1572, cap. 48, and [402] 1592, cap. 116, contained a variety of provisions for securing to the parochial clergy sufficient, commodious, and reasonable manses and glebes; but these words were used as applicable to the size of the house and acres, and not to the quality of the house as to repairs. He found nothing in them on the subject of repairs.

He agreed that the legislature meant, by the Act of 1663, that when the manses should have been once built or repaired, the burthen of upholding them should rest on the ministers. But it had not been so construed; and when a different construction had been for so long a time put upon it, and acted upon, especially considering the effect of desuetude, as connected with the Scotch Acts, they were not now to go back nearly two centuries to give it a new construction. The statute as it had been construed was now to be taken as the law. The heritors might relieve themselves. The mode of doing it was by ordering a new manse to be built if necessary, or the existing manse to be repaired in such a manner as entitled them to call for that species of declaration which discharged them; not merely a declaration that the manse was for the time sufficient, but a declaration that it was free in this sense, that they were liable for no future ordinary repairs during the incumbency. It was then insisted that the manse had been pronounced free in 1790 by the decree of the presbytery, "Finding that the manse of the parish and its offices were sufficient." But if the proceeding of 1796 could not be considered as *res judicata*, it was impossible to look at it without taking it as evidence that the presbytery [403] itself did not consider the manse as having been declared legally free. These proceedings, under the circumstances, he could not help considering as an additional judgment in favour of Doctor Scott.

He did not rely on the Botriphney case; but there it was clear that the manse was held not to be a free one, and that the repairs were decreed.

If, then, it was proper that the judgment of the Court of Session should be affirmed, the question arose as to the matter of costs. This was a case involving no general doctrine, but resting upon its own particular circumstances. The proceedings on both sides had probably been carried on at a greater expense than would uphold competent manses for two or three of the clergy of the kirk of Scotland; and if it appeared that through all this course of litigation, the judgments had been uniformly in favour of Doctor Scott, although it might be perfectly fair in the heritors to take the opinion of their Lordships, it was also fitting that they should pay for the experiment.

Interlocutors of the Court of Session affirmed, with £150 costs.

Agent for Appellants, CHALMER.

Agents for Respondent, SPOTTISWOODE and ROBERTSON.

[404] IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER CHAMBER.

TOMKINS, *Plaintiff* (in Error): ATTORNEY-GENERAL,—*Defendant* (in Error)
[July 12, 1813].

[See Merchant Shipping Act, 1894, s. 283, and cp. ss. 274, 695, 719.]

[Upon an information against the Master of an American vessel on 48 [43] Geo. 3, cap. 56, sect. 11, to recover penalties incurred under that statute. Copy of entry in a Custom-House book offered to be given in evidence. Objected, that the original ought to have been produced. Court of King's Bench decides that copy ought not to have been received, but this reversed by Court of Exchequer Chamber. House of Lords decides, that, under the circumstances of the particular case, the copy might be read, and judgment of Court of Exchequer Chamber was affirmed.]

An information, *ex officio*, was filed in the Court of King's Bench, in Ireland, by his Majesty's Attorney General there, as of Hilary Term, in the 48th year of his Majesty's reign, against the Appellant, who was the Master of an American ship called the *Charles Carter*, of Norfolk, of four hundred tons burthen, to recover penalties incurred under the statute 43d Geo. 3, cap. 56, sect. 11, by having on board his said ship more persons than the number allowed by that statute, which enacts, "That it shall not be lawful for any Master or other person taking or having the charge or command of any ship or vessel, other than a British ship or vessel, owned, navigated, and registered according to law, clearing out from any port or place in the United Kingdom aforesaid, from and [405] after the said 1st day of July, 1803, to have or take on board a greater number of persons, including the crew, than in the proportion of one person for every five tons of the burthen of such ship or vessel; and every such ship or vessel shall be deemed and taken to be of such tonnage or burthen as shall be ascertained by the oath of the Master or other person having or taking the charge or command thereof, taken before the Collector, or other chief officer of the Customs, at the port from whence such ship or vessel shall be cleared out; which oath the said collector or chief officer is hereby authorised and required to administer; and it shall and may be lawful for such collector or chief officer to muster the passengers and crew, and to search and inspect every such ship or vessel, and if more persons shall be found on board than the proportion herein allowed, every such Master or other person, as aforesaid, shall forfeit and pay the sum of fifty pounds for every person so taken on board beyond the proportion herein allowed: one moiety whereof shall go to his Majesty, his heirs or successors, and the other half to such Collector or other officer aforesaid, who is hereby empowered to seize and detain such ship or vessel, until such penalties shall be paid."

The information stated that John Tomkins, having the command of the said ship, which was clearing out of the port of Newry, on the 6th July, 1806, had and took on board forty-two persons more than in the proportion of one person for every five tons of the burthen of said ship, whereby he [406] forfeited fifty pounds for each person so taken on board, beyond that proportion, amounting in the whole to the sum of £2100. And the information concluded in these words:—"Whereby His Majesty's Attorney General, on behalf of his said Majesty, prayeth the consideration of this Court in the premises, and that the said sum of two thousand and one hundred pounds so forfeited by the said John Tomkins may be adjudged to his said Majesty, and that the said John Tomkins may appear here in Court to answer concerning the offence aforesaid, and concerning the said sum of money."

The Plaintiff in error pleaded the general issue, and the trial took place at Downpatrick, at the Spring Assizes, 1808, when the following evidence was given for the Crown:—

"That the Plaintiff in error was Master or Captain of the American ship called

" the *Charles Carter*, lying in the port of Newry, in the summer of the year 1806 ;
 " and that the said plaintiff in error, to clear out the said ship from the said port of
 " Newry for Norfolk and Baltimore in America, applied to Robert Cosgrave, Esq.,
 " Comptroller of the said port of Newry, the 16th day of June, in the year 1806, and
 " delivered to the said Robert Cosgrave, a muster-roll, containing a list of all the persons,
 " sailors included, who intended to sail on board the said ship from the said port of
 " Newry to Norfolk and Baltimore in America, and that the entire number of persons
 " in the said muster-roll amounted to forty-nine persons. That afterwards, on the
 " 3d day of July, in the same year 1806, the Plaintiff in error again [407] applied to
 " the said Robert Cosgrave, and produced to him the persons who he said intended
 " to sail on board the said ship from Newry to the said ports of Norfolk and Baltimore,
 " amounting to forty-six persons and no more ; and that the said persons were
 " examined by the said Robert Cosgrave, and William Moore, a justice of peace,
 " on board the said ship, and were duly certified by them. That the Plaintiff in error
 " swore before the said Robert Cosgrave, that the said ship was of the burthen of four
 " hundred tons ; and that after delivering in the said muster-roll, and after the said
 " persons were so mustered and certified at the request of the Plaintiff in error, he,
 " the Plaintiff in error, again applied to the said Robert Cosgrave to clear out the
 " said ship for the said voyage. And that thereupon he, the said Robert Cosgrave,
 " gave the certificate of the clearance, or outvoice, to the Plaintiff in error, for forty-
 " six persons to go out on board the said ship, including sailors, at his the said Plaintiff's
 " request, on the 4th day of July, in the said year 1806. That a clearance contains
 " the ship's name, where she is bound to, the place she belongs to, the Master's name,
 " and her lading. That the certificate of clearance then delivered to the Plaintiff
 " in error contained these particulars. No notice to produce such certificate was
 " served on the Plaintiff in error. That the particulars of every clearance are first
 " taken from the Master, and are always entered in a book at the Custom-House,
 " for the purpose of making such entries, which are signed by the Masters of vessels
 " applying for clearances. That the said outvoice-book, containing such entries,
 " was [408] then in the Custom-House at Newry ; and it was said by Robert Cosgrave,
 " on his cross-examination, that he had heard that, many years ago, the Custom-House
 " books had been produced on a revenue trial at Down-Patrick. And the said Attorney-
 " General did further give in evidence copies of entries from the said outvoice or clear-
 " ing-book, which were proved by Robert Cosgrave, the Comptroller of the said port
 " of Newry, to be true copies in his hand-writing, and compared by him, and to have
 " been attested by the Collector of the said port of Newry : which entries contained
 " the ship's name, her destination, the Master's name, the port she belonged to, and
 " her lading. And the said Robert Cosgrave swore, that the certificate of the clearance
 " delivered to the Plaintiff in error was conformable to the said entries, and that the
 " said entries were made by him, the said Robert Cosgrave, in his own hand-writing,
 " on the application of the Plaintiff in error, and were signed by the Plaintiff in error.
 " And the Attorney-General further gave in evidence, that the Plaintiff in error,
 " after obtaining the said clearance, sailed in the said ship out of the said port of Newry,
 " and that the said ship was on the 6th day of July, in the said year 1806, stopped
 " in her voyage, and detained by one of His Majesty's cruisers, outside of the said port
 " of Newry, having then on board one hundred and twenty-two persons, passengers
 " and sailors, whom the Plaintiff in error confessed to be persons who were taken
 " on board the said ship by him at Newry, for the purpose of sailing from the said
 " [409] port of Newry to the said ports of Norfolk and Baltimore in America."

The Counsel for the Plaintiff in error insisted that no legal proof had been given of the ship having cleared out of the port of Newry ; that copies of the entries in the Custom-House books ought not to be received in evidence ; but that the originals ought to be produced. The Judge admitted the evidence, and a verdict was found for the Crown. A bill of exceptions was tendered and signed, and the question was argued in the Court of King's Bench, which gave judgment for the Plaintiff in error. This judgment was afterwards reversed in the Exchequer Chamber ; whereupon the Plaintiff in error brought his writ of error in the House of Lords.

Messrs. Scarlet and Richardson (for Plaintiff in error.) The Custom House books ought to have been produced, and copies of the entries were not admissible

evidence; and no legal evidence was given of the ship having cleared out, which was necessary to be proved in order to convict the Plaintiff in error.

This was a question of great importance as to the law of evidence, (though the case had no other merits,) and one which had very much divided the Judges both here and in Ireland. The fundamental principle of the law of evidence was, however, in favour of the Plaintiff in error. The best evidence that the nature of the case could afford ought to be produced, and the question was, Whether this was a case within the exceptions to that rule? Records were excepted (46 Ed. 3), and the Courts, upon the same [410] principle, extended the exception to documents of a public nature which it would be dangerous to remove; and on this principle, copies of the entries in the Bank and East India transfer-books were admitted as evidence; and a number of cases in the time of Holt, and succeeding Judges of the Court of King's Bench, had been decided on this ground. (*Lynch v. Clerke*, 3 Salk. 153.—*Mann v. Carey*, 3 Salk. 155.—*Gery v. Hopkins*, 2 Ray, 851, and 7 Mod. 129.) Holt said that the Bank books were by Act of Parliament the titles of the holders of stock. This was the principle. It was important that these books should be always in some secure custody. The principle did not apply to Custom-House books, and the originals had been always produced in practice here. The error in Ireland arose from their not considering the different meanings of the words 'public documents.' The principle did not apply to the books of every public body. The transfer-books of the Bank and East India Company formed the titles of a great number of individuals. Not so the Custom-House books. If a copy of any Custom-House book entry had been evidence, it would have been that of entries in the ship register-book, because the titles of a number of individuals to their ships were there concerned; and yet that book had been always produced at Guildhall and the Assizes. The argument in Ireland had turned much upon the Irish statute 14th and 15th Car. 2, cap. 9, which directed that the books should be kept at the Custom-House; but there was no magic in the word keep. It was only by distortion of its meaning that it was held to be necessary that the books should always be detained there. There could be no reason for not producing the original book, as these books need [411] not be kept continuously. One book would do as well as another. The revenue was received, and the book might be laid aside. Every tide-waiter's books, every book relating to tolls, canals, etc. were public documents, if the argument on the other side was well-founded.

Another ground was, that this was an instrument deriving its validity from the signature of the party, and there was no example of hand-writing being proved by a copy. It was admitted that Cosgrave saw the Master sign the entry; but if the original existed in circumstances in which it was possible to have it produced, it ought to have been produced. In a case where the Crown was the prosecutor, it would be dangerous to refuse the original when the Crown had the control over it, and could easily produce it.

Another objection was, that the clearance had not been proved. What was the clearance? The certificate, or cocket, was in fact the clearance. No notice had been given to the Plaintiff in error to produce the original, and they were not therefore in a situation to give the copy in evidence. But at any rate it was not a copy of the clearance which they produced; but a copy of the memorandums which formed the ground of the cocket.

There were objections also in point of form, of which they had a right to take advantage, as the whole had been brought before their Lordships on the general error. The objections were these:—

1st, the information did not state the searching for, and finding on board, the illegal number of persons.

[412] 2d. It prayed the whole penalty to the Crown; whereas, one half was given by the statute to the officer.

3d. It did not state that the men were found on board at or after the time of the clearance, which was necessary, as having them on board before was no offence. They had followed the words of the 11th section, but that had a reference to the first; and in a criminal case, it was not sufficient to follow the words of the Act, unless they imported an offence. (*Vide Rex v. Ethrington*, 2 East. C. L. 635.)

Sir R. Dallas (Solicitor General) and Mr. Abbott (for Defendant in error.) The original question was, Whether the books themselves, which the Defendant in error

contended were of a public nature, ought to have been produced in evidence ! The other points now insisted upon were wholly new, and ought (they submitted) to be laid entirely out of the case. It must be admitted, that the best evidence the case could afford ought to be produced, not only on the general principle, but also on the ground of the presumption, that where the original was withheld it contained some thing different from what appeared in the copy. But this only applied where it was as easy to produce the original as to produce a copy. The point to be proved here was the clearance out, and the evidence offered was a copy of the entries in the Custom-House book ; and the question was, Whether this was not equivalent to the original ! How could it be contended that this was not a public book ? 1st, It was in the [413] custody of the Crown in the Custom-House. 2d, It was kept by a public officer sworn to do his duty. 3d, The entries were the evidence of the clearing out and in of ships. It was then to be considered, whether, on principles of public policy, it was not competent for Courts of Justice to take copies as evidence. The rule was not so strict as to require originals to be always produced ; and they contended, that, on the sense and reason of the thing, as well as on analogous cases, these books came within the principle of the exceptions as stated by Gilbert in his book on the Law of Evidence. The reason of public policy and convenience was directly applicable to the present case. This was a public document that might be wanted every hour of the day, which was liable to be lost if carried about, and which, if it were necessary to produce the original, might be called for in many different places at the same time. This view of the question was also supported by a variety of analogous cases in regard to the transfer-books of the Bank and East India Company, Journals of the Lords and Commons, etc. (Rex v. Worrenham, 1 Ray. 705.—Lynch v. Clerke, 3 Salk. 155.—King v. Smith, 1 Str. 126.—Downes v. Mooreman, Bun. 189. 191. Jones v. Randall, Cowp. 17. Rex v. Lord G. Gordon, Doug. 569, (590.)—Rex v. James, Carth. 220.)

They did not mean that in every case a copy would be sufficient. Suppose a Master swore falsely to the tonnage, and were indicted ; there it might be necessary to produce the original ; but this was not a case of that description. Nothing depended here on the signature of the Master.

Lord Chancellor. Then you argue that the entry is the original, without the signature.

Sir R. Dallas. Yes. It was not necessary by law, though the officer might require it for his own [414] satisfaction. A clearance meant no more than that the officer permitted the Master to depart—gave him his *bene decessit*, or *quietus* ; and this fact Cosgrave's evidence would have proved, though neither original nor copy had been produced.

Lord Chancellor. Where there was a written warrant, the proof could not be by parole ; the written instrument must be produced.

Mr. Abbott. Suppose the certificate were itself the clearance, the officer (he submitted) might prove it by parole. The particulars were not wanted, but only the fact that it had been given. But the entries were the clearance ; and supposing they required the signature of the Master, the officer swore positively that they were signed, and that alone was wanted, and not the contents. Suppose, however, they had been under the necessity of proving the contents of the entries signed by the Master, the question would come round to this, whether the copies, with the evidence of the Master as to the signing, were not sufficient ? and upon the reason of the thing, and analogous cases, they must be held to be sufficient.

Mr. Scarlet (in reply.) The clearance was the certificate or cocket—(*quo quietus est* ;) and Hale, in his Treatise *de Jure Maris*, said, that the clearance was the same as the sufrageance : it began with the word ' suffer.' The whole of the Act on which the information was founded pointed to this conclusion, that the cocket was the essential document. This ought to have been produced ; but they had got no notice to that effect. Mr. Abbott [415] said that no written evidence was necessary : he did not admit that ; but suppose it was so, their Lordships must take the evidence as it was offered ; and if they struck out the written documents, the case would be left without any evidence of the clearance. Mr. Abbott also appeared to think the certificate was something different from the permission ; but, at all events, if the alleged permission was in writing, it ought to be produced : because, instead of a permission to go, the paper might turn out to be a command to stay. This book was a document

not of a public, but of a private nature : and therefore neither the reason nor the cases had any application. It derived its validity from the signature, and the hand-writing ought to have been proved.

Lord Chancellor. If the book was not evidence of the clearance, it signified nothing whether the book or a copy were produced. When had the ship cleared out ?

Mr. Scarlet. When the Master obtained the certificate.

Lord Chancellor. Then all the rest signified nothing. Suppose notice had been given to produce the certificate, and it had not been produced ; would not the copy of it then be evidence, though this book had never existed ?

Mr. Scarlet. He thought it would. Though the Master had done every thing, if he did not get that document, (certificate,) he was not cleared. The statute meant a final clearance, as there always remained a *locus penitentiae*, by returning the men from on board before the final clearance. This [416] was a criminal case, and the Act ought to be construed most favourably for the accused. He did not find that any thing had been said on the other side to show that the Plaintiff in error was not at liberty to object to the form of the record.

Lord Chancellor. If any thing turned upon that, an opportunity would be given them to argue it, as they had been taken unprepared. The House would take time to consider this question.

Lord Eldon (Chancellor). The objections in point of form, even supposing they could be gone into, did not appear to him capable of being sustained. The question then was, Whether a copy of entries in a certain Irish Custom-House book ought to be received in evidence ? Under the circumstances of this particular case, he thought that a copy of the book might be given in evidence.

Ordered and adjudged, that the judgment of the Court of Exchequer Chamber be affirmed.

Agents for Plaintiff in error. PALMER, TOMLINSONS, and THOMSON.

Agents for Defendant in error, GORDON and HAMILTON.

[417] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

THOMSON,—*Appellant* ; THOMSON, and Others,—*Respondents* [Dec. 14, 1812].

[3 Scots R. R. 99.]

[Lands conveyed to one in life-rent for his life-rent use allenary, and to the heirs of his body. He has only a life-rent interest, and not the fee ; and cannot sell the estate, nor burthen it beyond the period of his own life.]

William Thomson, of North Steelend, father of the Appellant, being owner of a small estate in the county of Fife, and of certain houses in the town of Dunfermline, made a settlement, or testamentary disposition, whereby, as for the love and affection he bore to the Appellant, his only lawful son, and to his daughters, he conveyed his lands of North Steelend, with the pertinents, in the following terms :—" To and in favour of the said Thomas Thomson, my son, in life rent for his life-rent use allenary, and to his heirs whomsoever, to be lawfully procreated of his body ; whom failing him and his heirs, viz. the said Thomas Thomson's heirs, arriving at majority or marriage, to the said Katherine and Elizabeth Thomson, my daughters, in life-rent, for their life-rent use only, and to their children procreated, or to be procreated, equally among them in fee, heritably [418] and irredeemably." " In which lands I bind and oblige me, my heirs and successors, to infeft and sease the said Thomas Thomson in life-rent, and the child or children to be lawfully procreated of his body, equally, whom failing as aforesaid, the said Katherine and Elizabeth Thomson in " life-rent, and their children equally in fee."

The settlement contained several other provisions, but not material to the point in issue.

William Thomson, the father, died in 1785, and the Appellant was subsequently infeft in the lands of North Steelend. The Appellant was married, but had no children; and, some time after his father's death, brought an action in the Court of Session against his sisters, the substitutes in the disposition, and their children, concluding that it should be found and declared, "that the fee of the said lands is in him, (the Appellant,) and that he has a full and undoubted right to sell and dispose of the lands, either for onerous or gratuitous causes; to contract debt, and burden the estate therewith, in any way, and to any extent he should think proper; and, in general, to exercise every right of property competent to an unlimited proprietor; and the same being so found and declared, that the said Katherine and Elizabeth Thomson, and their children, should be decerned and ordained to desist and cease from troubling and molesting the Appellant in the exercise of his right of property, to the full extent foresaid."

The action having come in course before the late Lord Justice Clerk, (McQueen,) as Ordinary, the [419] defenders pleaded, that the deed being conceived in favour of the pursuer, (now Appellant,) for his life-rent use alienary, he had no other right than that of a life-renter; and that the fee, if in him, was fiduciary for his children and the substitutes.

The Lord Ordinary, on the 14th December, 1792, pronounced an interlocutor sustaining the defences; and to this he afterwards adhered, upon representation and answers. Two reclaiming petitions were presented by the Appellant to the whole Court, who adhered to the Lord Ordinary's judgment.

About the same time a question arose in the Court of Session, between the creditors of Lieutenant John Newlands, on the one hand, and the son of the said Lieutenant Newlands, on the other, concerning the effect of a deed of settlement executed by Alexander Newlands, in terms similar to those occurring in the present case; for by that deed Alexander Newlands disposed his estate to John Newlands, his son (afterwards Lieutenant Newlands), "during all the days of his lifetime, for his life-rent use alienary, and to the heirs to be lawfully procreated of his body, in fee," etc.

The Court considered the two cases of Newlands and Thomson as depending on the same principle; and therefore they ordered the parties in both to plead the point at issue at their joint expense, which was accordingly done.

The creditors of Lieutenant John Newlands contended that, by construction of law, the fee of the estate was vested in their debtor, Lieutenant John Newlands, and therefore insisted, in an action [420] for the purpose, that it should be sold for their payment.

The son of Lieutenant John Newlands, on the other hand, maintained that his father was a bare life-renter; that the fee belonged to him the son; and that, therefore, the estate, so far as concerned the fee, should be struck out of the action of sale at the instance of his father's creditors.

The Lords of Session, in that case of Newlands, by interlocutor, of date 7th day of February, 1794, "ordained the whole heritable subjects there in question to be struck out of the sale of the estates belonging to Lieutenant Newlands, in so far as concerns the fee of said subjects, and decerned;" and to that judgment the Court of Session adhered, after advising a reclaiming petition, with answers, on the 9th of July, 1794.

Both cases were carried by appeal to the House of Lords, and the judgment in the case of Newlands' creditors was affirmed. Thomson withdrew his appeal, but entered another in 1806, which came on to be heard this day, (Dec. 14, 1812.)

It was contended, on the part of the Appellant, that, notwithstanding the conception of the words used by the testator in the deed under consideration, the absolute fee of the real estate of Steelend, thereby conveyed, must be held to have been vested in him, the Appellant, although he was nominally therein described a life-renter only. In support of this proposition, the Appellant maintained, that, by the law of Scotland, a fee could not be *in pendente*; that, therefore, in all cases where a grant had been made to a person in life-rent, and to his children, [421] or to other persons *nascituris* in fee, the Court had uniformly decided *ex necessitate juris*, that the fee must be understood to be in the life-renter; that although when the grant was made

to a person in life-rent, and to another existing *nominatim* in fee, the right of the former would confessedly be a bare life-renter, and that of the latter a substantial fee : yet, when a disposition in life-rent was accompanied with a grant in fee to persons unborn, and so incapable of holding it, the law reared up *ex necessitate*, and by construction, an absolute fee in the life renter, whereby he and his creditors were enabled effectually to disappoint the succession of the fiars in expectancy : and that the addition of the word *allenary*, although uniformly used in the deed under consideration, did not materially vary the case, because it did not indicate more clearly the will to confer only a life-rent, than a simple grant in life-rent in common sense ought to do ; so that there was a *necessitas legis*, which, as it required the raising by construction an absolute fee in the life-renter in the one case, authorised it equally in the other.

In support of these propositions, the following authorities were cited :—Frogg's case, Home's Coll. Dec. Nov. 25, 1735.—Lillie v. Riddell, Kilk. *voce Fiar*, Feb. 4, 1741.—Douglas v. Ainslie, Fac. Coll. July 7, 1761.—Cuthbertson v. Thomson, Fac. Coll. March 1, 1781.—Forbes v. Forbes, Kaimes's Sel. Dec. August 3, 1756.¶

On the part of the Respondents, it was contended,

1st. That, in the established practice and under-[422]-standing of conveyancers, a grant of an heritable subject to a person in life-rent for his life-rent use *allenary*, and to his children, or to other persons *nascituris* in fee, imported no more than a bare life-rent in the grantee, excluding him entirely from any right or interest in the fee for his own benefit.

2d. That there does not exist in the law of Scotland any principle, or any authority, which can authorise, and far less compel, courts of law *ex necessitate juris*, as insinuated by the Appellant, to defeat the will of the testator, by vesting an absolute fee of his estate where, as in the present case, he most evidently never intended it should be vested ; and,

3d. That, on the contrary, the principle as well as the latest and most approved authorities in the law of Scotland, concur in establishing this position, that the will of the testator, when it is unequivocally declared by competent deeds, ought invariably to be carried into complete execution.

And in support of these propositions, the following authorities were cited :—Dirleton's Doubts, *voce Fiar*, with Sir J. Stewart's Answer.—Erskine, b. 2. t. 1. s. 4.—Forbes v. Forbes, Kaimes's Sel. Dec. August 3, 1756.—Gordon v. Carlton, Fac. Feb. 12, 1758 (48).—Balfour, 103. s. 5.—Stair Inst. Life-rent Infeft. s. 10, 11.—Craig, p. 294. s. 34. p. 421. s. 20.—Thomsons v. Lawson, Stair, Dec. February 4, 1681.—Gerron v. Alexander, Fac. Coll. 1781.—Ross v. his Children, Fac. Coll. March 8, 1791.—Watherstone v. Rentons, Nov. 25, 1801.—Newlands' Case, Dom. Proc. 1798.

[423] Ordered and adjudged, that the appeal be dismissed, and interlocutors complained of be affirmed.

Agent for Appellant, CHALMER.

Agent for Respondent, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TURNER AND WATSON,—*Appellants*; TURNER, and Another,—*Respondents*

[July 12, 1813].

[3 Scots R. R. 101.]

[Entail, with prohibition against alienation, and against "letting tacks in "diminution of the true worth and rental MAY BE PAID for the said tacks." Lease of part of the lands for 1000 years, with growing timber, and mines and minerals, at a rent below that which was paid at the time of the expiration of the preceding lease of the same lands. This lease was reduced by the Court of Session on the ground that it was an ALIENATION; and the judgment was affirmed by the House of Lords on the ground that it was in diminution of the true worth and rental of the lands at the time of the expiration of the preceding lease.]

This was a question as to the validity of a lease for 1000 years, under an entail containing a prohibition against alienation and letting at a diminished rental.

John Turner, merchant in Dantzic, (a native of Aberdeenshire,) who died in 1688, by his last will and testament, directed certain executors and trus-[424]-tees therein appointed to invest so much of his property in the purchase of lands in Scotland as might yield fifty chalders of victual yearly rent; and ordained them to be entailed on a certain series of heirs, under the conditions and limitations therein specified. The will provided that "whosoever, in the order settled by the testator, fell to be "his heir and successor of these lands, should be strictly bound to adhere to the directions of the testator, under penalty of losing his right of heritage;" and the testator then directed "that his heirs and successors should not have the power to sell, poind, "or wadset, or burthen the said lands with debts, or any manner of way whatsoever;" "but that the same lands should in all time coming continue in the same free estate "and condition in the name of Turner," etc. And he also directed "that they should "not heighten their tenants' rents, nor put them out of their lands, so long as they "duly paid what they were addebted by their contracts; conditionally, they should "be bound to plant one oak or fir tree in convenient place, that might serve for decoration to the lands, and, in time coming, might be useful to their master for building," etc. The testator then directed "his heirs and successors to pay certain legacies, "partly in meal, and partly in money, out of the rents of the estate, to any Regent "of the University of Aberdeen who should be of the name of Turner, to maintain "two children of the same name at school, and four scholars at the University," etc.

The executors first purchased the estate of Rose-Hill, now called Turner-Hall, yielding $41\frac{1}{2}$ chalders [425] of victual; and afterwards the adjoining estates of Newark and Tippetty, yielding $9\frac{1}{2}$ chalders of victual. This joint estate exceeded the quantity of victual by one chaldar, and therefore the institute in the entail (Robert Turner) advanced £100 the value of the excess, and a power was reserved to him to burthen the estate to that extent, which he afterwards exercised in favour of his daughters. The lands of Newark and Tippetty, to which the present action chiefly related, were disposed to the different heirs with and under the burthen of all the irritant, resolute, and prohibitory clauses therein contained; and among the prohibitions there was the following:—

"Providing, like as it is hereby specially provided and appointed to be contained "in the infeftments to follow hereupon, that it shall no ways be lawful to the said Robert "and John Turners, and them and the other heirs of Tailzie foresaid, to sell, annalizie, "and dispose the lands, and others above written, or any part thereof, heritably "and irredeemably, or under reversion, one or mair; nor to grant infeftments of "annual rent, or yearly duties, greater or smaller, forth thereof; nor to let tacks "of the same in diminution of the true worth and rental may be paid for said tacks, "without being obliged, nevertheless, to raise the rental in manner after provided:

"nor to contract debt, or burden the said lands, nor do any other deed whereby the samen may be evicted, apprised, or adjudged from them, or any ways impaired to their prejudice." After some other provisions, the [426] deed contained this clause :—"And if the said Robert and John Turners, or either of them, or their heirs of tailzie above written, shall contravene, or do in the contrair, in any point of the premises, then not only shall all such deeds be void and null of themselves, and no ways binding or obligator to infer any action, personal or real, against the next heir of tailzie of the lands, mill lands, and others foresaid; but also the persons contravening, and descendants of their body, shall forfait, amit, and tyne all right, title, and interest they have, or can pretend, to the lands and others foresaid, *ipso facto*; and the same shall pertain, descend, and belong to the next heir of tailzie, to establish the rights of the lands, and other foresaid, in his person, by service, and retour, to the person immediately preceding the contravener, or by way of declarator, or any other manner of way, without being liable for any of the contravener's debts or deeds, or the debts of the predecessors abovementioned."

In 1763, John Turner, one of the heirs of entail, executed to George Turner, of Menie, the Appellant (Turner's) father, a lease of the lands of Newark and Tippetty for 1000 years, reserving a rent or tack duty of 950 merks Scots, of which 850 were to go towards the payment of the mortifications upon the estate. The lessee also agreed to pay the £100 and interest which had been charged on the estate as above, and the non-entry duties, which a former heir of entail had neglected to discharge. The extinguishing of these burdens was stated in [427] the lease to be in the name and by way of grassum. The lease gave the growing timber, and mines and minerals, to the tenant, and contained a precept of seisin for infetting him and his heirs in the lands. It appeared that immediately after the execution of this lease, the lessee, having acquired right to the above-mentioned sum of £100 and interest, deduced an adjudication of the lands of Newark and Tippetty, and obtained a charter of resignation and adjudication under the great seal.

At the expiration of the previous leases, (1766,) George Turner (before the death of the lessor) entered into possession of the lands; and, at his death, was succeeded by the Appellant, his son and heir, who subset the lands to one Kenneth Mackenzie for fifty-seven years; and this sub-lease was purchased by the Appellant Watson, who, it was stated, with the full knowledge and acquiescence of the heirs of entail, laid out about £9000 in improving the farm.

On the death of John Turner, in 1802, an action of reduction of the lease in question was raised by his son, Keith Turner, father of the Respondent, John Turner. The material reasons in the summons of reduction were:—"1st, The tack, or feu-tack, and right of infetment, is so very far beyond and different from the usual nature and duration of leases, that it is, to all intents and purposes, an absolute alienation of the lands, etc. 2d, The tack and right of infetment was granted in defraud of the subsequent heirs of tailzie, for far less rent than the value of the lands, or even the actual rent thereof, at the date of the same and since."

[428] Certain preliminary objections were stated on the part of the Appellants:—

1st, If the Respondent's grounds of reduction were correct, his father had forfeited for himself and his descendants; and the decisions of the Court of Session in *Little Gilmour v. Caroline Hunter*, and *Dick v. Drysdale* (March 6 and 7, 1801), were cited in support of this objection. The answer was, that as no action had on this ground been brought against the alleged contravener, none such was competent after his death against the next heir of entail; and in support of this answer, the case of *Mackie v. Dalrymple* (Nov. 23, 1798,) was cited. But further, in order to get rid of this objection, Thomas Andrew Turner, the next heir of entail, failing issue male of the Appellant (Turner's) father, brought another action jointly with Keith Turner.

2d, Prescription (as against the joint action.) To this it was answered, 1st, That though the lease was dated 1763, possession had not been taken till 1766; that prescription only began to run from the latter period; and that therefore the time (forty years) had not elapsed before the commencement of the joint action. 2d, That though the prescription were to be considered as having begun to run from the date of the lease, it had been interrupted by the previous action of Keith Turner, and by the minority of Thomas Andrew Turner (*Erskine*, b. 3. t. 7. s. 41). *Vide Mackie v. Dalrymple*.)

The Lord Ordinary at first refused to sist proceedings in the previous action till the other came into Court, and repelled the reasons of reduction; but afterwards, on representation, he recalled the [429] interlocutor, conjoined the actions, and ordered informations. Upon report of the Lord Ordinary and advising the mutual informations, the Court pronounced an interlocutor "sustaining the right of Keith "Turner and Thomas Andrew Turner to pursue in the present action, repel the "defences pleaded for Robert Turner and his sub-tenant, and find that the tack under "reduction is an alienation of the estate and contrair to the entail; and therefore "reduce, decern, and declare in terms of the rescissory conclusion of the conjoined "libels of reduction, and, *quoad ultra*, remit to the Lord Ordinary, etc. etc." The Court, on advising a reclaiming petition and answers, adhered to this interlocutor: whereupon the Appellants appealed to the House of Lords:—

1st, Whether this lease was an alienation?

Mr. Adam and Sir S. Romilly (for Appellants.) The will contained the instructions for the entail, and the heirs were only bound by the entail in as far as it was conformable to the will. The object of the testator was merely that the heirs of entail should have fifty chalders of victual yearly rent. There was no prohibition against leases of any duration, if granted without diminution of the existing rents. Entails were "*strictissimi juris*, so that no prohibitions nor irritancies were to be inferred by "implication." (Ersk. b. 3. t. 8, s. 29.—Duntreath case, 1769; decided in Dom. Proc. April 15, 1771.—Stewart v. Home, July 7, 1789; Dict. vol. 4, p. 339.—Tillincoultry case, 1799–1801, Fac. Coll. [430] No. 99.) Since, then, there was no express prohibition here against leases of any duration, it ought not to be implied. It was said, however, that long location was considered by the law of Scotland as alienation; and therefore this lease for 1000 years came under the prohibition to "sell, annalizie, "and dispone." But these words referred to the alienation of the property; and the grant of a tack, and the alienation of the property, were, in both legal and popular acceptation, acts essentially different. A lease was, by common law, a mere personal contract, and not a real right; and the Statute 1449, cap. 17, (protecting leases against singular successors,) clearly recognized the distinction. The Respondent, however, relied on certain passages from Craig, Balfour, and Stair. Craig and Balfour spoke of long leases as sometimes a kind or species of alienation. But Craig was treating of the feudal law generally; and there, it being necessary that the lord should always know who was his tenant, a long lease might be considered as a species of alienation; and, with reference to that system, a term of ten years might be regarded (as Craig said it was) as a long lease. The passage in Stair, chiefly relied on by the Respondent, was an interpolation after his death. In the edition revised by himself before his death, the distinction between location and alienation was clearly marked (Stair, Ed. 1693, b. 2, t. 11, s. 13.—b. 1, t. 15, s. 4.—b. 2, t. 9, s. 2.—Mack. Obs. on Act of 1621, p. 8.—Dallas, p. 648.) No illustration ought to be drawn from the rules of interpretation in regard to the rights of the Crown; [431] as, both in Scotland and England, the rights of the Crown and the subject often stood, in this respect, on a different footing. The words "sell, annalizie, and dispone," were technical expressions appropriated to the transmission of the feudal right; but, after the grant of a tack, the feudal right still remained in the grantor; and therefore these words could, on no principle of law or reason, be held to include a tack. This interpretation had been also established in more than one decided case, and in the language of the legislature, not many years ago. (Leslie Grant v. Orme, March 2, 1779.—Ker v. Cairns, Feb. 1774.—Act of 10 Geo. 3, cap. 51.) It was clear, from the tenour of the will, that the testator wished to encourage, instead of prohibiting, long leases. His words were, "they (the heirs of entail) shall not heighten their tenants' rents, "neither put them out of their lands." This could not be intended as a personal favour to the tenants in possession at the time, as the lands were not then purchased. The will ought to govern the entail, and the lease in question was contrary neither to the letter nor the spirit of the instructions of the testator.

Another point was, that the lease could not at any rate be void as against Keith Turner, who had stood for nearly forty years observing the improvements going on upon the estate, without challenging the lease; and Thomas Andrew Turner had no right as yet to insist in the action.

2d, Whether the lease was in diminution of the rental?

[432] The only rental which the will, or testamentary settlement, supposed and presumed was not to be diminished, was the rental of 50 chalders, of which the estate was to consist at the date of the purchase. The presumed prohibition, then, against letting leases at a diminished rental, must have reference to the original rental, as ascertained at the time of the purchase. The entail likewise declared that the heirs "should nowise have power to heighten, raise, or augment the rent of the said land, as the same is presently paid." It lay, then, with the Respondents, as a preliminary step, to prove the amount of the rent at the date of the purchase: keeping in view that the testator evidently intended that a considerable portion of the victual should be converted into money, and that the amount of the conversion was 100 merks for each chaldar.

It was also observed, that all that was provided by the settlement in the will was, that the heirs should enjoy an income of 50 chalders annually from the whole estate, without stipulating that the rent of no one farm should at any time suffer diminution. Therefore, supposing there should be a trifling loss on the rent of Tippetty and Newark, it was more than compensated by an increase on the Turner Hall estate.

But supposing the rent payable by the Appellant Turner was to be compared with the rent paid for the lands immediately before the commencement of the lease, the present rent, in point of fact, considerably exceeded the former.

It was no objection to say that the present tack was executed some time previous to the expiration [433] of the preceding lease, as the lessor lived to put the lessee in possession.

Messrs. Leach and Horner (for Respondents.)

1st, It was clearly established that any substitute in the entail might insist in such an action as this. And the deed of entail could alone be looked to, because it remained unredressed.

It was admitted that entails were *strictissimi juris*, and that no prohibition was to be extended by implication. But neither the principle of law, nor the decided cases on which they relied, would support the conclusion of the Respondents. The case of *Leslie v. Orme* depended on special circumstances.

The grant in question was an alienation in substance on two grounds:—1st, It gave all that could be conveyed by a feu contract, which was unquestionably an alienation. 2d. Because there was no tangible difference between 1000 years and a perpetuity: and therefore the lease was void for want of a legal *ish*. The authorities that long location (leases exceeding the customary duration of leases at the time they were granted) was an alienation, were decisive in favour of the Respondents. (Craig. b. 3, dieg. 3, s. 24.—Dieg. 4, *de jure protimeseos*.—B. 2, dieg. 10, *de locationibus sive assedationibus*; where he must be allowed to have confined himself exclusively to the law of Scotland.) Lord Stair, also, in speaking of the cases inferring recognition by alienation, made use of these words:—"Subinfeudation, in all cases, is accounted 'alienation'; and where alienation is prohibited, subinfeudation [434] is understood, 'and also long location.'" It was said that these last words were not in the edition revised by Stair before his death; but the alterations, except they were from manuscripts, were placed between crotchets, and the words in question were not between crotchets, and therefore ought to be considered as taken from a manuscript.

Illustrations of the doctrine that long leases amounted to alienation were also to be found in the limitations anciently imposed on the Crown in the management of the royal demesnes: (Act of 1455, cap. 41;) and also those which affected ecclesiastical beneficiaries in the management of church property. (Bishop of Aberdeen v. Forbes, Dec. 14, 1501.—Abbot of Crossraguel v. Hamilton, March 12, 1504.—Balfour's Practicks, p. 203.) Another illustration was to be found in the principles of the law of death-bed, by which tacks of extraordinary duration were reduced as being a species of alienation. (Chrystisons v. Kerr, Dec. 1733. Dict. I. 215.—Bogle v. Bogle, June 19, 1759. Fac. Coll. 335.)

It had been determined that a tack wanting a legal *ish*, or one which was equivalent to a grant in perpetuity, (as this was,) could not be sustained against singular successors. The principle was recognized in several cases. (Alison v. Ritchie, Feb. 3, 1730.—King's Advocate v. Fraser, Dec. 6, 1758.—Irvine v. Knox, 1760.—Wight v. Hopetoun, Nov. 17, 1763.)

If a lease of this kind were not prohibited under the word "annalzie" in the Act

of Entails, 1685, cap. 22, it followed that the legislature meant that an [435] heir of entail might grant a lease of 1000 years of the entailed property at a pepper-corn rent, which it was impossible the legislature could mean. Dallas, though an eminent conveyancer, was no great authority on this point : and Craig, in the passages on which the Appellants relied, was treating of the general feudal customs. There was nothing in the objection that Keith Turner suffered the improvements to go on without challenging the lease, as it did not appear that he was then aware of his right.

2d. Tacks were not to be let " in diminution of the true worth and rental that " MAY BE PAID for the said tacks : " the obvious import of which words were, that a rent equal to the true worth and value of the lands at the time when a lease was granted ought to be stipulated for. Whether the lease to George Turner was below the true worth and rental in 1763 was a matter of fact and calculation ; and it was a matter of history, as well as in proof even upon the principles of conversion contended for by the Appellants, (though below the real rate of conversion of victual into money,) that the rent reserved by the contravening heir of entail was not equal to the true worth and rental of the lands at the time of the granting of the lease.

Lord Eldon (Chancellor.) The question in this case had been argued on two grounds :—1st, Whether a lease for a thousand years was supportable under the deed of entail, as containing a prohibition against alienation ! and with reference to this point, it had been largely argued on the same ground as that which occurred in the Queensberry [436] case. (*Vide post.*) 2d. Whether the lease, or tack, was " in diminution of the true worth and value of the rental ? " On giving the best attention in his power to the subject, it appeared to him that this was a tack which could not be supported on this latter ground. The prohibition was against letting tacks " in diminution of the true worth and rental may be paid for said tacks, without " being obliged, nevertheless, to raise the rental in manner after provided ; " that was, to raise it (as he understood the expression) with reference to present contracts. He was clearly of opinion that, taking the grassum into account, and independent of it, this was not a lease without a real diminution of the rental. He confined himself here, however, to this particular case, without reference to the other. (Queensberry case, *vide post.*) where there was a material distinction. There was no occasion here to say anything as to the question of alienation. He proposed, therefore, that the decision of the Court of Session be affirmed, with the findings stated in the judgment which was as follows :—

" The Lords find, that the tack under reduction was a tack in diminution of the " true worth and rental which might be paid for the same, and was in contravention " of the express prohibition contained in the deed of entail ; and therefore find, that " it is not necessary to determine whether the said tack was liable to reduction on " any other grounds. And it is ordered and adjudged, that the interlocutors of the " 14th, signed 15th, May, 1806, and 17th November, 1807, be affirmed. [437] " And it is further ordered, that the cause be remitted back to the Court of Session, " to do thereupon as shall be just."

Agent for Appellant, MUNDELL.
Agent for Respondent, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MUNRO, and Others,—*Appellants*; COUTTS, and Others,—*Respondents*

[July 7, 1813].

[3 Scots R. R. 107. See *Whyte v. Pollok*, 1882, 7 A. C. 400, 408.]

[Testator executes a trust-deed of the whole of his property, and also a will in the English form, giving the whole of his property not situated in Scotland to the trustees, for the uses of the trust. The will proved in the English Ecclesiastical Court. Testator afterwards wishing to alter his settlement in regard to the personal or moveable property, writes and signs two papers, conceived in testamentary language, which he called his codicil: one of which he sends to his agent, with whom he was corresponding on the subject of the intended alteration, and lays up the other in his repositories. Testator dies before a more formal instrument is prepared, but no pretence that he was prevented by sudden death from executing it. The Court of Session decides that the paper sent to the agent was in itself testamentary; but this decision reversed on appeal.]

Sir Hector Munro, of Novar, on the 30th October, 1798, executed a deed of entail, and likewise a trust-deed of the same date, whereby he conveyed and made over the whole of his property, real and personal to the Respondents, (trustees,) in trust, to [438] complete the entail as therein pointed out, and to pay certain legacies to the Appellants, etc. Sir Hector also executed a will in the English form, of the same date, bearing reference to the trust deed, and bequeathing to the trustees, for the purposes of the trust, his whole property situated out of Scotland; and in 1798 and 1799, he made two codicils to his trust disposition. The will was proved by the trustees, or some of them, in the English Ecclesiastical Court.

In 1805 Sir Hector conceived the intention of making an alteration in his settlement, and wrote to his agent, who was then at Inverness, enclosing a paper stating the alterations he wished to be made, and which paper he called a codicil. A paper, called a duplicate of the paper in question, (though not in so perfect a state,) subscribed with Sir Hector's initials, was laid up by him in his repositories, with a memorandum referring to his settlement, then in the hands of his banker in London, and containing these words:—"Copy is sent to Charles McIntosh, Esq." The paper sent to McIntosh was subscribed with his name at full length. The chief question was, Whether this paper, sent to McIntosh, was, or was not, under the circumstances, testamentary? To see distinctly the grounds on which the ultimate decision rested, it is necessary to have in view the paper itself, and the correspondence relating to it between Sir H. Munro and his agent.

The letter, (21st Oct. 1805,) inclosing what was called the codicil, was as follows:—

[439] "As I do not find by your letter that it is certain you will be here, I send you the codicil I wish to be made to my last will and testament. The reason for my wishing as much land as possible to be purchased is, that I find the estate I can now leave is not sufficient to let the proprietor live as he should do, and keep up the place and improvements: and as to the alterations in the trustees, my worthy friend Provost McIntosh is now of such an advanced age, he would [not] long be one, and Mr. John Ogilvie has enough of his own affairs to mind, and could not attend much to mine, etc."

The paper was in these terms:—

"*Novar House, 21st October, 1805.*

"I wish a codicil to be made to my last will and settlement in the following manner:—

"All the money I directed to be divided in different proportions, to such and

" such persons by name, after my debts were paid, and my bequeaths, etc. discharged ;
 " that is to say, whatever part of my personal estate was unappropriated, including
 " whatever I might be entitled to receive from the Nabob of Arcot's debt to me, I
 " now revoke, and make null and void by this codicil ; and instead of applying such
 " monies as above stated, it is now my will and pleasure, and I now direct, that what
 " remains of my personal estate, together with the patrimony or portion I directed
 " after my death to be given to my natural son Alexander Munro, who died in
 " November, 1804, [440] at Bombay, shall be laid out by my trustees in the purchase
 " of lands as contiguous to any of my estates of Novar, Culrain, or Muirtown, as
 " possible, and entailed with the rest of my landed property six months after the pur-
 " chase is made, and to be immediately afterwards put upon record ; and if I have
 " given, as a patrimony or portion after my death, to my natural son Hugh Munro
 " more than £10,000, I revoke and recall all the rest of the money, if any more is
 " given to him in my last will and settlement, and direct it to be laid out in the pur-
 " chase of lands, with the rest of my unappropriated personal estate, as before
 " mentioned, and to be entailed and put upon the record in the same manner with
 " the other purchases to be made.

" It is also my will and pleasure that the following gentlemen shall be my trustees,
 " and I desire that such as were formerly named by me, and who are not included
 " in the following list, shall be left out. Those now named by me are Thomas Coutts,
 " Esq., banker in the Strand, Edmund Antrobus, Esq., Coutts Trotter, Esq., Edward
 " Majoribanks, Esq., partners of the banking-house of Thomas Coutts, Esq., and
 " Alexander Brodie, Esq., of Arnhall ; and that the directions I gave to my former
 " trustees may be followed by my present ones in all respects, except as far as this
 " codicil may make any alteration necessary. It is also my will and pleasure, that
 " if I have not already, in my last will and settlement, left my sister, Mrs. Ann
 " Watson, £50 sterling, yearly, and £50 sterling, yearly, to my sister, Betty [441]
 " Munro, all the days of their life, including what they now receive from me ; and
 " the longest liver to have the £100 sterling yearly all the days of her life. It is also
 " my will and pleasure, that those who are my house servants at the time of my death
 " may receive a year's wages, exclusive of the year's wages current and running ;
 " and if my own servant, Donald Aird, shall be in my service at the time of my death,
 " it is also my will and pleasure that he shall have his yearly wages all the days of
 " his life ; and if my present grieve, Donald Allan, and my present gardener, George
 " Munro, and my present house-carpenter, Hugh M'Lean, are in my service at the
 " time of my death, I leave and bequeath to each of them £100 sterling.

(Signed) " HECTOR MUNRO."

Before this letter and its enclosure arrived at Inverness, Mr. M'Intosh had set out on a visit to Sir Hector Munro. Upon his return to Inverness, he wrote Sir Hector the following letter, enclosing the scroll to which it referred :—

" I sincerely wish this may find you better than when I left you yesterday morning.
 " I, immediately upon my arrival here, sat down to peruse your letter, and memo-
 " randum contained in it, which is so distinct and explicit, that it occurred to me
 " that I might make out the scroll of your intended new deed, without waiting till
 " I had an opportunity of perusing the scroll of the former [442] after my return to
 " Edinburgh ; and I now send you enclosed the new scroll, which I have just finished.
 " You will observe that it recalls and revokes the former nomination of trustees, and
 " all the former legacies, and substitutes the new nomination and new legacies in
 " their place ; and refers to the former deed as to the keeping up your house and place
 " of Novar, the annuity to the heir, the purchase of lands, and as to all the formal
 " parts of the deed, which must still be preserved, as being the deed referred to in the
 " tailzie, and most material part of your family settlement. If this scroll meets your
 " approbation, you may cause Mr. George Munro to copy it over upon a sheet of
 " paper, having a twenty-nine shilling stamp.

" The scroll now sent revokes all your former legacies ; and, from what you told
 " me, I presume this is your intention, so far as regards the legacies left in money ;
 " but, although I cannot charge my memory with particulars, yet I recollect that
 " your former deed contained some distribution of your jewels, arms, watches, rings,
 " etc. : now, if you wish to leave any of those, or any other trinket, as marks of

" remembrance to particular friends, it may be done in your own plain, expressive words, without any formality, and copied at the place marked ×, after the words 'and 'thirdly,' upon the third page of the scroll."

On the 26th of October, Sir Hector returned this scroll to Mr. M'Intosh in the following letter :

[443] " I wish to see the scroll of the first settlement and deed of entail I made, before you make a fair copy of the present one : as, in the first place, I do not wish Mr. George Munro, or any other person, to know my settlements, for many obvious reasons : and it may be proper that the names of those to whom the residue of my personal estate was to have been left to, in different proportions, ought to be named, as well as annulled and revoked. My natural son Hugh was not an officer, but in the civil service of the Company, on the Bombay establishment. I have left my servant, Donald Aird, £20 yearly for his life, if he is with me at the time of my death. What I give and bequeath to my sisters is including what they have now from me to make up the £100 yearly. My trustees are to follow my former directions, except this last deed makes any necessary alteration. I do not mean to revoke or annul the annuity I left in my former deed to Hugh and Alexander's mothers. I thank God I am not worse than I was when you was here : if any thing, I am rather better, and so Dr. Urquhart thinks."

Mr. M'Intosh's answer was as follows :—

" It gave me great satisfaction to find, from your letter of yesterday's date, that you was then better than when I saw you. I shall attend to the directions you give : but there are still one or two things that require explanation. In the first place, the gentlemen appointed trustees by the former deed (who are pretty numerous) were by [444] it entitled to £500 each of them. Now is it your intention that these legacies are to remain, although their nomination as trustees is revoked ? or are you to give them to the new trustees, or to both old and new ? Secondly, if I recollect, the most valuable part of your jewels were left to Mrs. Ferguson. As she is dead, do you mean they should go to her children ? or how are they (as well as the arms, watches, and other articles bequeathed to your deceased son) to be disposed of ? Please to inform me of your intentions as to these or any other particulars you wish to have noticed ?"

To which Sir Hector replied :—

" I do not mean that any trustees of mine should receive any part of the £500 but those who are now mentioned in my codicil : viz. Mr. Coutts, Mr. Antrobus, Mr. Coutts Trotter, Mr. Marjoribanks, and Mr. Alexander Brodie, or such of them as shall accept of being one of my trustees. I could not think, if I desired it, that the others would accept of any money when they did not act, or were even mentioned in my last list of trustees. I am sure one of them at least would not. As to my jewels, I leave and bequeath to my granddaughter, Jane Ferguson, my large single stone diamond ring ; and to my grandson, Robert Ferguson, my antique stone of a Parthian King's head, made of a fine oriental stone, in a ring ; and I leave to my brother, Sir Alexander Munro, my ring with my mother's hair in it, set with large diamond sparks ; and I now revoke [445] and annul the manner these rings were disposed of in my former settlement. I leave it in my own power to give my ruby ring, set round with ruby sparks, and my ruby spinelle ring, that is, a ruby not come to perfection, or in its infancy, away in my life-time, or after my death, should they then be in my own possession. I have but one gold watch, which I leave to Mr. George Munro, writer in Dingwall, my factor ; and arms, or any other trinkets, I leave as they are disposed of in my former settlements. And if I have left the Order of the Bath, set with jewels, my plate, books, pictures, household furniture of every sort, to any but my heir of entail, as also my horses, carriages, farming cattle, farming implements, milk cows, sheep, and poultry, to any other but him, I revoke and annul the same : and I leave those articles and live-stock to my heir of entail : also all the liquors in my cellar in Novar House to him. I wish you a good journey south : and when you have finished my last codicil, or additional settlement, I request you will send it to me to be signed as soon as possible."

This was the last letter written by Sir Hector on the subject of his settlements ; and Mr. M'Intosh having returned to Edinburgh wrote Sir Hector as follows :

" Upon my arrival at Edinburgh, I searched among my papers for the scrolls of your deeds of settlements ; but the only ones in my possession [446] are the scroll of your original tailzie and trust-deed in 1792. Since that time many alterations were made by other deeds ; and, in particular, I find that the tailzie and trust-deed were completely new modelled, and wrote over again by me in 1798 ; upon which occasion the deeds of the year 1792 were most probably destroyed, and the new deeds (1798) being wrote by me in the country, I either did not make out a complete scroll, or did not preserve it ; so that, unless you think that a general deed (such as I sent you a scroll of from Inverness) will be sufficient, we must delay making out this new deed until you have an opportunity of examining the present subsisting deeds, which are in Mr. Coutts' hands. But if you incline it, the material alterations, such as the change of trustees, etc. may be done on a separate sheet of paper, without waiting for the present deed ; and perhaps your late bargain with Culcairn may induce you to make some other alterations."

When this letter arrived at Novar House, Sir Hector was too near his end to be able to answer it : but a letter, of which the following is an extract, was written to Mr. M'Intosh by his factor, Mr. George Munro.

" Sir Hector has received your letter of the 20th : and I am exceeding sorry that he is under the necessity of employing me to write you. He has been for some days very poorly indeed, and mostly confined to bed ; yet his faculties are per [447]-fectly active, and he is transacting business, and granting leases to his tenants ; and desires me to say, that what he wished you to make out for him would be done on his going to London, which is impossible, and quite contrary to every appearance, as I do not suppose he will ever walk down stairs : and if what he employed you to draw up is material to himself or others, I should beg leave to suggest the idea that you should extend it, and send it to him to be executed."

Sir Hector died a short time after the date of this letter, without carrying into effect the suggestion of Mr. Munro, or taking any farther steps towards the alteration of his settlements.

While the above correspondence was going on, Sir Hector commenced and concluded a treaty for the purchase of a neighbouring estate belonging to Mr. Munro, of Culcairn. The minute of sale, dated the 4th December, 1805, stipulated that the property should be conveyed to Sir Hector, and the heirs of entail succeeding him in the lands and estate of Novar.

Soon after Sir Hector's death, the Respondents brought their action against the Appellants, concluding for a declaratory decree, finding, " that the writing of the 21st of October, 1805, is a valid deed and an effectual part of Sir Hector Munro's settlements, having the legal effect, in the first place, of recalling the nomination of trustees appointed by the trust-deed of 1798, and of empowering the Pursuers (Respondents) to act in their room : in the second place, that, by the [448] writing of the 21st of October, 1805, the conveyance of his residuary estate to Mrs. Ferguson, Hugh and Alexander Munro, Sir Hector's children, is recalled ; and that the trustees must apply the residuary estate for the benefit of the heir of entail, including the lands purchased from Mr. Duncan Munro, of Culcairn, and any other lands which Sir Hector may have purchased subsequent to the trust-deed of 1798 : and, lastly, that the legacies mentioned, both in the writing of the 21st of October, 1805, and in Sir Hector's Letter to Mr. M'Intosh of the 29th of the same month, are effectual bequests, and ought to be paid by the new trustees."

The action came on before Lord Meadowbank, (Ordinary,) who made *acisandum* with the cause to the Court, and ordered informations, which the Court having advised, on the 20th of January, 1808, pronounced this interlocutor :—" On report of Lord Meadowbank, and having advised the mutual informations for the parties and whole cause, they sustain the codicil libelled on, executed by Sir Hector Munro upon the 21st of October, 1805, as explanatory of, and modifying, his latter will and testament, and remit to the Lord Ordinary to hear parties farther on the other points of the cause, etc." A reclaiming petition was given in, but the Court adhered to the interlocutor : whereupon the Appellants appealed.

Mr. Adam and Sir S. Romilly (for Appellants) argued, that it was clear, from the whole of the correspondence, that the paper in question was ne-[449]ver understood, either by Sir Hector Munro or his agent, to be in itself testamentary, but that

it was considered merely as a memorandum, or plan, from which a more formal instrument was to be made out ; and to establish this as a will would be changing a paper of one description into a paper of another description different from what the testator himself intended. And they referred to the Scotch cases, *M'Farquhar v. Calder*, June 16, 1779.—*Douglas v. Earl Morton*, June 19, 1771, which was affirmed on appeal January 21, 1773.—*Dempster v. Wilson*, Nov. 15, 1799.—And cited *Erskine*, b. 3. t. 1. s. 3.—B. 3. t. 9. s. 7.—*Voel's Commentaries on Pandects*, b. 28. t. 1. s. 17.—It was settled by the law of England, which governed this case, that a paper designed to operate in itself as a will of personal property, however informally executed, would be testamentary ; and even though there was an intention to execute a more formal instrument, if the party was prevented by sudden death from carrying that intention into execution, the paper would be established as testamentary. But unless it could be shewn that the party was so prevented, a paper, though dated and signed, which was merely a memorandum for a more formal instrument, would not be established. And they relied on the cases of *Griffin v. Griffin* (4 Ves. 197), and *Mathews v. Warner* (4 Ves. 186–210.—5 Ves. 23.)

Messrs. Leach and Horner (for Respondents) contended that this was not a paper of instructions, but, in itself, a settled testamentary paper. It was merely a question of construction of the instrument itself, from which its meaning was to be collected, [450] and not from other sources. The law of England, and that of Scotland, were not the same on this subject, and the case ought not therefore to be governed by the rules and authorities of a foreign system. This, by the law of Scotland, was a perfect writing, holograph and signed. (*Erskine*, b. 3. t. 2. s. 22, 23.) The intention to execute, at a subsequent period, a more formal deed, could not destroy the validity of a complete codicil executed in the mean time. The Scotch cases cited on the other side had been in reality decided on principles favourable to the views of the Respondents. The fact that Sir Hector had purchased an estate which was intended to go to the heir of entail was also relied upon, as showing that the holograph codicil was considered by him as a complete testamentary paper.

The Lord Chancellor said, that the effect of the paper ought to have been first tried in the Ecclesiastical Court. It would be curious if that Court were to differ from the Court of Session and the House of Lords.

Lord Eldon (Chancellor.) This was an appeal calling in question a judicial declaration of the Court of Session, by which that Court, "having advised the mutual informations for the parties and whole cause, sustained the codicil labelled on, executed by Sir H. Munro upon the 21st of October, 1805, as explanatory of, and "modifying, his latter will and testament." The question was, Whether this paper, of the 21st of October, 1805, [451] was, or was not, to be taken as explanatory of, and modifying, the latter will and testament ! The Court of Session considered it not as instructions, but as a paper in the nature of a testament, and affecting one regularly executed. Their Lordships would observe that the regular will had been proved in this country, and that the opinion of the Court of Session had been taken on these papers before their effect was tried in the Ecclesiastical Court, which was not the most regular mode of proceeding.

The words of the interlocutor gave the appellation of a codicil to the paper of the 21st of October, 1805, but said nothing as to the letter of the 29th of October, 1805 ; and yet, if the other was of a testamentary nature, their Lordships could not refuse to consider this as of the same character. Here, then, was a former will proved. The Court of Session had decided that the paper of the 21st of October was a codicil explanatory of, and modifying, the will, but had given no judgment as to the letter of the 29th of October, 1805, which altered the paper of the 21st. He mentioned this, as he wished to draw the attention of their Lordships to the circumstances, to see whether the judgment would affect any suit as to this matter in the Ecclesiastical Court. His opinion was, that it would not necessarily do so.

The written correspondence on this subject had been admitted as evidence, and he thought properly admitted, as the paper was of a doubtful and ambiguous character, and required explanation ; but they should have gone farther. Upon what principle did [452] they not let in such parole testimony as that of M'Intosh and George Munro, as to the conversation that took place !

He laid out of view the fact that it was the object of the testator to realize a part

of his personal estate for the purchase of an estate in land to go to his heirs of entail, as it did not appear to him to bear upon the present question.

Here too he would observe in one short word upon the fact that the paper was holograph and signed. That holograph writing and signature gave faith in Scotland was true: but still the question occurred, What was this paper? If it was not a will, its being holograph and signed did not alter its nature.

He would also remark here, that it was admitted on all hands, that, if the paper was only instructions, there was no sudden death nor accident to prevent the regular execution of a codicil. The true question then was, Whether the paper of the 21st of October, 1805, was to be taken as instructions for the will, or in its own nature and effect testamentary? He agreed that there was much in the words used in the paper of the 21st of October of the nature of testamentary language; but then, if it was meant that another should prepare the actual codicil, and this was intended as instructions, it was not surprising that the instructions should have been written in a language that should have much of the character of a will. The paper began, "I wish a codicil to be made to my last will and testament in the following manner." Now this rather denoted that the instrument should be made [453] at a future time. He agreed, however, that they were capable of being understood in an immediate and present sense, consistent with the purpose of then framing an actual codicil. But the difference might depend upon this, whether a man sat down to write such a paper for himself, or with a view to send it to another, a man of business, whom he wished to do the act. But if the correspondence should be admitted as explanatory of the nature of the paper, then they were to look at the envelope, (letter of the 21st of October,) in which it was written, "I send you the codicil." It had been ably argued by Mr. Leach, that Sir Hector Munro called the paper "the codicil;" but the whole must be taken together, "I send you the codicil I wish to be made." He could not then mean that the codicil was ready-made to M'Intosh's hands: and though he used words in the correspondence which the agent would use in making the codicil, yet they might be intended merely as instructions. M'Intosh, after his return from his visit to Sir H. Munro, wrote the letter of the 24th of October, 1805, stating, "that he found the letter of the 21st, and memorandum contained in it, so distinct and explicit, that it occurred to him he might make out," (not a will or codicil, but) "the scroll of the intended deed; and that he sent the new scroll." He should be glad to know whether it was possible to conceive that, when the agent wrote this letter, either the employer or employed had any notion that the paper in question was meant to be a will. "The scroll now sent revokes all your former legacies." By this the writer [454] meant, that the scroll when matured would revoke former legacies: but he spoke of it as present, in the same sense as Sir H. Munro did, though it was meant as future. This letter contained a paper deed of revocation, with which Sir Hector was not satisfied, and wrote upon it, "that he did not mean that this last deed should revoke the yearly annuity, etc." The letter of Sir Hector of the 26th of October, and that of M'Intosh of the 27th in answer, also clearly referred to the transaction as unfinished. Then came the letter of the 29th of October, 1805, which was material for two reasons: 1st. Suppose the last passage to be excluded, it was impossible to take the former paper without this; and, 2d. If the last passage were included, it would go a great way to prove that neither the one nor the other was held to be final till something farther was done, which he considered as his last codicil or deed. It signified nothing his calling it a codicil, unless it really was one; nor his calling a scroll a deed, if it was no deed. Unless the paper in his repositories was to operate as a will in the mean time, he himself spoke of the other as incomplete:—"When you have finished my last codicil, or additional settlement, I request you will send it to me to be signed as soon as possible." This was demonstrative that the last codicil was something which M'Intosh was to prepare or finish, and which Sir Hector was to complete by signing. M'Intosh accordingly, on the 20th of November, 1805, wrote for farther instructions; and George Munro (the factor) answered by command of Sir Hector, stating, "that he was desired to say, that what Sir [455] Hector wished M'Intosh to make out for him, would be done on his going to London." If this last letter should be taken as evidence, they had the declaration of Sir Hector in the letter of the 29th, that the codicil was not then finished, and in this last letter they had his declaration that he was resolved not to finish it till he went to London: and

therefore, unless the paper mentioned in the interlocutor was to be considered as instructions which he was prevented by sudden death from carrying into effect, the codicil never was completed. Then the sole question was, Whether the paper of the 21st of October was merely a paper of instructions, or *sua vi* testamentary? It appeared to him, from the whole of the evidence, that it was merely a paper of instructions: and if it was so meant, the terms in which it was expressed made no difference. His opinion therefore was, that the interlocutor of the Court of Session, "sustaining the codicil libelled on, executed by Sir H. Munro on the 21st of October, 1805, as explanatory of, and modifying, his latter will and testament, ought to be reversed."

Lord Redesdale. As the law at present stood, almost every case that occurred of writings of this description, left in repositories, induced a degree of litigation. He had often thought that the law in regard to the disposition of personal property by will ought to be placed on a more solid foundation. It was a curious circumstance that a million of money could in this manner be disposed of without any solemnity, when a single acre of land could not be so disposed of.

[456] The paper of the 21st of October, which the Court of Session had sustained as testamentary, was not in the hands of Sir H. Munro, but in the hands of M'Intosh. That was an important circumstance with a view to the question, Whether it was, or was not, intended as a mere paper of instructions?

It appeared that in October, 1798, Sir Hector Munro had executed a deed of entail and a trust-disposition, and likewise a will in the English form, having reference to the trust, and bequeathing his property situated out of Scotland to trustees, for the purposes of the trust: and, in 1798 and 1799, it appeared that he had executed two codicils to his trust disposition. In 1805 he conceived the intention of altering his settlement, and wrote a paper beginning with these words:—"I wish a codicil to be made to my last will and testament in the following manner." There were two papers of this description: one of which remained with Sir Hector Munro, and the other, which was more perfect, and which had been considered by the Court below as a codicil, had been given to M'Intosh. The paper was sent in a letter of the same date, in which Sir Hector gave his reasons for wishing to have certain alterations made in his settlement: and it had evidently been sent for the purpose of having a more formal instrument drawn. M'Intosh accordingly sent a scroll of a new instrument: but this not coinciding exactly with the ideas of Sir Hector, the latter wrote in reply to the former, in terms which amounted in effect to this, that M'Intosh had, to a certain extent, mistaken his meaning. This showed that the intention of the testator was [457] so imperfectly expressed in this paper, that M'Intosh did not know his meaning; and yet they were called upon to say that this was a complete will. When, in the course of the correspondence, Sir Hector spoke of his "last deed," it was evident that he meant the formal instrument which was to be prepared.

It had frequently happened, when instructions were left signed for bequeathing personal property, and the testator wishing to carry them into effect by a formal instrument, had been prevented by sudden death from so doing, that the instructions were sustained as themselves testamentary. M'Intosh appeared to refer to this in his letter of the 20th of November, 1805, when he said, "If you incline it, the material alterations, such as the change of trustees, may be done on a separate sheet of paper, without waiting for the present deed." Sir Hector's factor, G. Munro, wrote in answer to this, "that Sir Hector had been very poorly indeed for some days and mostly confined to bed: but that his faculties were perfectly active, and that he was transacting business and granting leases to his tenants;" and then he stated that he was desired to countermand the instructions formerly given to M'Intosh, as Sir Hector wished to delay the execution of his purpose till he went to London. This clearly took the paper in question out of the range of those papers of instructions where sudden death prevented the execution of an intended more regular and formal instrument: and no step had been taken to get a more formal instrument signed, though suggested by Mr. G. Munro.

[458] All the arguments in support of this paper as testamentary proceeded on the assumption that it was what it really was not. Though he called it "my codicil," as if it had then been an actual codicil; yet he evidently referred to a future act—to a codicil to be made. It was clear that Sir Hector had never made up his mind on that paper

so as that it should in itself operate as a disposition of his property. He therefore concurred in opinion with his noble and learned friend, that the judgment ought to be reversed.

" Ordered and adjudged, that the interlocutors complained of be reversed, so far as they sustain the paper libelled on (in the interlocutor of the 20th of January, 1808, termed a codicil, and therein expressed to have been executed by Sir Hector Munro upon the 20th of October, 1805) as explanatory of, and modifying, the last will and testament of Sir Hector Munro. And it is further ordered, that with this reversal the cause be remitted back to the Court of Session, to proceed therein as is just."

Agent for the Appellants, CAMPBELL.

Agent for the Respondents, FRASER.

[459] ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

HEARN,—*Plaintiff* (in Error); COLE,—*Defendant* (in Error) [May 3, 1813].

[*Mews' Dig.* iv. 1080 ; xi. 1262.]

[Action of covenant on an annuity bond against the surety in the bond.

Grantor covenants to pay on a day certain, and his surety covenants to pay in twenty-eight days from that time, in case of default. Declaration states payment to be due from the surety on 5th July, being only the day of payment by original grantor. Judgment by default against the surety, and error in Exchequer Chamber and House of Lords. Held that writ of error was not sustainable, because the bond and covenant (independent of the above inconsistent allegation) were sufficiently set forth so as to prevent any reasonable mistake as to ground of action.]

This was an action of covenant upon an annuity bond originally commenced in the King's Bench against the Plaintiff by the Defendant in error. The annuity was £33 12s., payable quarterly to the Defendant in error by one Whitelock, for the due payment by whom Hearn became security. The days of payment 5th April, 5th July, 10th October, and 5th January. The Plaintiff in error's covenant was that, in case default was made in any of the payments for the space of twenty-eight days after the time for making the same, the surety would pay.

The declaration, after setting forth the bond and covenant, stated, " that, on the 5th July, 1811, [460] two quarterly payments of the said annuity had become due from the Plaintiff in error (instead of saying from original grantor Whitelock), to the Defendant in error, under and by virtue of the said indenture ; and that, although default was made by the said William Whitelock in the payment, etc., for the space of twenty-eight days next after the day on which the same ought to have been paid, etc., the Plaintiff in error had not paid, or caused to be paid," etc.

Hearn suffered judgment to go by default, and then brought his writ of error in the Exchequer, where the judgment of the Court of King's Bench was unanimously affirmed. Upon which Hearn brought his writ of error in the House of Lords.

The errors assigned appear in the following reasons, containing an abstract of the arguments of counsel.

Mr. E. Lawes (for Plaintiff in error) argued,

1st, That the day on which the arrears of the annuity claimed by the declaration are alleged to have become due, was material to be alleged according to the fact, inasmuch as the demand is grounded upon a specialty, and does not depend upon evidence ; and on the day so stated in the declaration, no arrears of the said annuity could, by any possibility, become due upon the deed declared upon from the said Nathaniel Hearn, as alleged in the said declaration, unless by virtue of some new

stipulation or agreement, collateral to the deed, and which is not, nor could be made, the subject of the present form of action.

[461] 2d. That considering the day as rightly laid, then the name of the party from whom the arrears of the annuity are, by the declaration, alleged to have become due, is altogether mistaken; nor is the mistake aided or cured by any of the statutes of amendment or jeofail, which are only meant to apply to cases where the Christian or surname of the plaintiff or defendant was mistaken after the right name was once correctly stated, and where the mistake did not affect the right of the suit, as it does in the present case; and in the statement of the non-payment of the annuity, each subsequent allegation refers to, and is dependent on the first; so that, unless the first can be sustained, none of the others can be of any avail to support the judgment.

3d. That the allegation of the arrears of the annuity having become due, under and by virtue of the indenture, or of their remaining unpaid, contrary to the form and effect of the indenture, cannot assist the statement, inasmuch as that is a mere conclusion of law, not supported by the facts stated; nor can the matter be rejected as surplusage, inasmuch as it is not impertinent, but relevant to the action; nor is it repugnant to antecedent matter, nor impossible in itself, but quite consistent with the idea of a new and collateral contract dehors the deed for the Plaintiff in error, to pay the annuity on the day stated, at the same time that it does not shew that the Defendant in error had any claim upon the deed, on which alone he can recover, if at all, in this suit; and also inasmuch as the whole sentence cannot be rejected as surplusage; and no [462] part of an entire sentence can be so rejected without rejecting the whole; nor can the *videlicet* under which the day is alleged alter the case, inasmuch as the matter alleged thereby is material, and it is also matter of law and inference from the deed, unless it be referred to some new contract collateral thereto, on which the Defendant in error cannot recover in this action.

Mr. Abbott, (for Defendant in error,) in support of the judgment, contended,

1st. That though the arrears of the annuity were not due in the first instance from the Plaintiff in error, as stated by mistake in the declaration, but from the grantor of the annuity; yet it being alleged therein that the sum of sixteen pounds and sixteen shillings, for two quarterly payments of the said annuity, became due and payable under and by virtue of the said indenture, and that default was made by the said William Whitelock of and in the payment of the same; the allegation that they became due and payable from the Plaintiff in error being impossible, and inconsistent with the previous statement, may be rejected as surplusage at common law; and,

2d. That the mistake would be aided, if necessary, by the statute 16th and 17th Charles 2, cap. 8, which declares that judgment after verdict shall not be stayed or reversed for a mistake in the Christian or surname of either party, etc. to which the Defendant might have demurred, and shown the same for cause, or any other matters of like nature, not being against the right of the matter of [463] the suit, nor whereby the same or trial are altered, which statute is extended by the 4th Ann. cap. 16, sect. 12, to judgments by default. (*Vide Richards v. Symonds*, 3 Wils. 40.)

Lord Eldon (Chancellor) was clearly of opinion that the bond and covenant were upon the whole so distinctly set forth that there could be no reasonable mistake as to the instrument and ground on which the action was founded: and that the inconsistent allegation might therefore be rejected as surplusage.

His Lordship stated, that the resolution of the House to take the causes in their order did not preclude the discretionary power of calling at any time causes which appeared to be carried there merely for the purpose of delay. If the Counsel who signed the reasons were out of the way, the Agents might employ others.

Judgment of Court below affirmed, with expenses of Defendant in error's appearance (£110).

Agents for Plaintiff in error, STRATTON and ALLPORT.

Agent for Defendant in error, TILLBURY.

[464] ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

EAST INDIA COMPANY,—*Appellants*; ANTROBUS,—*Respondent*
[March 22, 1813].

[Commented on in *Payne v. Esdaile*, 1888, 13 A. C. 627. See Phillim. *Eccl. Law*, 2nd ed., p. 1229.]

[Bill filed for tithes in London, at 2s. 9d. in the pound, under 37th Hen. 8, cap. 12, in respect of buildings belonging to the East India Company. No present rent paid;—rents and tithes paid at various times since 1660, for some of the buildings that formerly stood on the site of the present buildings, set forth; and, as to other former buildings, no rents, nor payments of tithes, could be shown. No specific invariable customary payments alleged, and none of the stated payments carried up to time of Act 37 Hen. 8, cap. 12. Decreed, that these messuages, warehouses, etc. ought to pay 2s. 9d. in the pound, according to improved value; and this affirmed in the last resort upon appeal.]

The Respondent, as Rector of the parish of St. Andrew Undershaft with St. Mary Axe annexed, filed his bill against the Appellants for the recovery of tithes for certain messuages and premises held and occupied by them within the said parish.

The bill, after stating the title of the Respondent, recited the decree of the Archbishop of Canterbury, of the 23d of February, 1545, ordering payment of tithes by the citizens of London, at the rate of 2s. 9d. in the pound; and the statute 37th Henry 8, cap. 12, pursuant to which that decree was made. It then stated that the East India Company, before, in, and since the year 1800, had been, and then were, in possession of certain [465] messuages in the said parish, and prayed for an account, and payment after the rate mentioned in the act and decree.

The answer stated that no rent was reserved for the buildings and premises in their occupation, but that rent had been paid for some other buildings which formerly stood on part of the ground on which the buildings occupied by them had been erected; that they had, in a schedule annexed to their answer, set forth an account of the several rents, as far as they had been enabled to ascertain them, to show that less sums had been accustomed to be paid than after the rate mentioned in the act and decree; and that rents might have been reserved for all the houses, etc., which had before stood on all the other parts of the ground on which the buildings now occupied by the Appellants were at present situate, but that they neither knew nor admitted the same, and left the Respondent to bring such proof thereof as he could. The answer then stated in detail such rents and tithes as had been paid for the old East India House, in 1660, and for all the buildings subsequently purchased, at various times, that stood on the site of the present East India House, and premises in the said parish occupied by the Appellants, as far as they knew the same. And the Appellants further stated, that, to the best of their knowledge and belief, less sums than after the rate aforesaid had been accustomed to be paid for the houses, etc., which had formerly stood on the site of their present premises; and they submitted that they were therefore entitled to the [466] benefit of the provision in the act in regard to customary payments.

But no specific, constant, uniform, customary payments were alleged, and none of the payments stated were carried so far back as the date of the act and decree.

The cause came on to be heard before the Master of the Rolls, who, on the 21st of July, 1806, made a decree declaring that the Respondent was entitled to tithes after the rate of 2s. 9d. in the pound on the annual value of the messuages, warehouses, etc., in the pleadings mentioned; and ordered a reference to the Master to ascertain such annual value, etc.

From this decree the Appellants appealed, contending that, according to the true construction of the Act 37 Henry 8, cap. 12, the Respondent was entitled only to such

less sums than 2s. 9d. in the pound as had been accustomed to be paid ; or, at least, that an issue ought to be directed to try the question as to such customary payments : that when the last rents of houses formerly standing on the site of the present buildings were known, but no customary payments proved, the tithe ought to be calculated according to the last known rent, and not upon the improved value ; and that, where no last rents were known, no tithe ought to be paid.

The Lord Chancellor. Suppose several houses pulled down, some of them exempt for customary payments, others not, and one house built instead ; how was that house to pay ? Was there any case ?

[467] Mr. Leach believed the point had occurred in a late case at the Rolls, (not reported,) *Branston v. Flabber*. An issue was directed to try whether, under these circumstances, any customary payments could be sustained as to the new house, and the verdict was against the customary payments.

(N.B. It afterwards came out that the point had not been there decided, as it appeared at the trial that the new house had actually paid at the rate of 2s. 9d. in the pound on the value.)

Lord Eldon, (Chancellor,) after a review of the enactments in the statute, and of the cases decided under it, stated it to be his opinion, that where no rent was shown the payment must be according to the value ; and as to the pleadings, it was not sufficient to say that less sums than 2s. 9d. in the pound had been accustomed to be paid, but it was necessary to allege what those payments were, without throwing the burthen of proof on the clergyman : and if that was the case in regard to a single house, it was so much the more so in regard to this mass of houses. He was of opinion, upon the pleadings alone, that the judgment of the Court below was correct, (*Vide* 13 Ves. 9, and cases there cited.)

Decree of Court below affirmed.

Agent for Appellants, SMITH.

Agent for Respondent, TILSON.

[468] Two other appeals, one from the Court of Exchequer, (*East India Company v. Wightwick*,) the other from the Court of Chancery, (*East India Company v. Johnes*,) respecting certain premises belonging to the Company in the parishes of St. Botolph, Aldgate, and Allhallows, Barking, in which similar judgments had been given in the Courts below, were heard at the same time, and the decrees likewise affirmed.

VOLUME II.

ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

INHABITANTS OF WEST RIDING OF YORKSHIRE,—*Plaintiffs* (in Error); THE KING
(on Prosecution of R. BUCKLEY).—*Defendant* (in Error) [Nov. 8, 1813].

[Mews' Dig. xv. 186. S.C. 5 Taun. 284; 7 East. 588. Considered in *Reg. v. Lincoln (Mayor of)*. 1839, 8 A. & E. 65, 70, 72. See also *R. v. Bucks*, 1810, 12 East, 192; *Nottingham County Council v. Manchester, etc. Ry. Co.*, 1894, 71 L. T. 430; also, as to bridges erected after 20th March 1836, the Highways Act, 1835, s. 22.]

[By the common law, declared and defined by the statute 22 Hen. 8, cap. 15 [should be cap. 5, s. 7], and the subsequent Bridge Acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to the repair of the highway at the ends of the bridge, to the extent of 300 feet; and if indicted for the non-repair thereof, they cannot exonerate themselves except by pleading specially that some other is bound by prescription or tenure to repair the same.]

At the township of Quick, in the West Riding of Yorkshire, in a highway there leading between the towns of Huddersfield and Manchester, there had been, immemorially, a public foot-bridge, and [2] a public ford for cattle and carriages, across the river Tame. Some time previous to the year 1756, a public stone bridge was erected by voluntary subscription across the river about five yards higher up than the ford. In the year 1756, this stone bridge was swept away by a flood, and another stone bridge, a little larger than the former, was rebuilt by voluntary subscription which was also swept away by another flood in the year 1799. The present bridge was then built and completed in the year 1802, at the expense of the inhabitants of the West Riding of Yorkshire, and was made a little wider and larger than either of the two preceding bridges.

That part of the highway which lies immediately westward of the bridge is in a district called Shaw Mear, and that part of it which lies immediately eastward of the bridge is in a district called Lords Mear; both which districts are in the township of Quick and parish of Saddleworth. These two districts had immemorially repaired so much of the highway in question as lies within each of them till a short time previous to 1803, when (the highway at each end of the bridge being out of repair) an indictment was preferred against the Riding for not repairing the highway to the extent of 300 feet at each end of the bridge. The indictment was as follows:—

“That from time whereof the memory of man is not to the contrary, there was, and yet is, a certain common and ancient King's highway, leading from the market town of Huddersfield, in the West Riding of the County of York, to-[3]-wards and unto the market town of Manchester, in the county palatine of Lancaster, in,

“ through, and over, the township of Quick, in the West Riding of the County of
“ York aforesaid, used for all the liege subjects of our said Lord the King, and his
“ predecessors, for themselves, and with their horses, coaches, carts, and carriages,
“ to go, return, pass, ride, and labour at their will and pleasure, and that a certain
“ part of the same King’s common highway at the said township of Quick, in the
“ West Riding of the said county of York, to wit, a certain part thereof lying next
“ adjoining the west end of a certain public bridge there, called Tame Water Bridge,
“ and within the distance of 300 feet thereof, beginning at the west end of the said
“ public bridge, and extending from thence westwards, containing in length 45 feet,
“ and in breadth seven yards, and a certain other part thereof, lying next adjoining
“ to the east end of the said bridge, and within the distance of 300 feet thereof, beginning
“ at the east end of the said bridge, and extending from thence eastwards, containing
“ in length 150 feet, and in breadth seven yards, on the 2d day of March, in the 42d
“ year of the reign of our Sovereign Lord George the 3d, now King of the United
“ Kingdom of Great Britain and Ireland, Defender of the Faith, and continually
“ afterwards until the day of the taking of this inquisition at the said township of
“ Quick, in the West Riding of the county of York aforesaid, was, and yet is, very
“ ruinous, miry, deep, broken, and in such decay for want of the due reparation and
“ [4] amendment of the same, so that the liege subjects of our said Lord the King,
“ through the same way, by themselves, and with their horses, coaches, carts, and
“ carriages, could not, during the time aforesaid, nor yet can, go, return, pass, ride,
“ and labour, without great danger of their lives, and the loss of their goods, to the
“ great damage and common nuisance of all the liege subjects of our said Lord the
“ King, through the same way going, returning, passing, riding, and labouring,
“ and against the peace of our said Lord the King, his crown and dignity, and against
“ the form of the statute in that case made and provided ; and that the inhabitants
“ of the West Riding of the said county of York, the common highway aforesaid,
“ so as aforesaid, being in decay, of right ought to repair and amend when and so
“ often as it shall be necessary.”

The inhabitants pleaded “ Not guilty ; ” and, upon trial at York, 23d July, 1803, the Jury found a special verdict, stating the facts as above. The record and proceedings being removed by *certiorari* into the King’s Bench, the Court, after argument in T. T. 1806, gave judgment for the King ; whereupon the Defendants brought this writ of error.

Lambe and Scarlet, (for Plaintiffs in error.) This was only a ford and foot bridge at first, and who were liable to repair the highway on each side then ! The Lordships of Shaw Mear and Lords Mear. These were therefore *primâ facie* [5] liable to repair now ; for there could not be two objects of *primâ facie* liability—the Parish and the Riding—at the same time. It had been said that, having pleaded the general issue, the inhabitants of the Riding were not entitled to throw the burden on others ; but it was hoped their Lordships would be of a different opinion.

The liability of the Riding to repair the highway, to the extent of 300 feet next adjoining to each end of the bridge, is assumed as a necessary legal consequence of the liability of the Riding to repair the bridge itself. But no case is to be found where that consequence has been holden to follow ; and where the highway is repaired as dependant upon, and forming as it were a part of the bridge, and therefore to be repaired by the same persons who are bound to repair the bridge itself. There is no case to be found where an indictment has been preferred against persons who are bound to the repair of the bridge, for not repairing the highway at each end of the bridge only, though it must frequently have happened that the highway was out of repair at the time when the bridge itself wanted no reparation.

It has been the opinion of several eminent lawyers, that the modern case in which it was decided that the inhabitants of the county at large are bound to keep in repair a public carriage bridge, built by individuals for their own private benefit, where no bridge of that kind ever stood before, if such bridge be afterwards used by the public, and become of public convenience and utility, was a considerable extension of the principle of the liability of the in-[6]-habitants of the county to repair such bridge, and sufficiently hard upon them ; but there is no principle or authority to warrant the extending of that liability to the repair of the highway within the limits of 300 feet at each end of such bridge, and particularly so in a case where the inhabitants of a

district have immemorially hitherto repaired such highway, and now seek to discharge themselves from that legal obligation which they were so under, and endeavour to throw it upon the inhabitants of the Riding. The statute 22 Hen. 8, cap. 5, which has been so much relied upon, does not impose any such liability on the Riding. It looks only to such bridges as were then in existence, and where, probably by immemorial usage, the persons who were bound to repair the bridge, had also immemorially repaired the highway at each end of the bridge, but to what extent was not certainly known, and therefore that act limited the extent to 300 feet at each end of such bridge. No certain inference can be drawn from the case in the Year Book 43, Assize Pl. 37; the case is not clearly reported; and Broke, who has abridged it in title *Presentment in Courts*, Pl. 22 and 29, takes no notice of that part of the case at large which is supposed to speak of the liability of the Abbot of Coombe to repair the highway adjoining each end of the bridge. If it did pass, it was at best but extrajudicial, as the Abbot was not indicted for not repairing the highway, but only for not repairing the bridge itself.

The objection, that the inhabitants of the West Riding ought to have shown specially by their plea, that some other person was bound by tenure or pre-[7]-scription to sustain the charge, depends entirely upon the other question; namely, whether the highway at each end of the bridge is by law to be repaired by the same persons who are bound to repair the bridge itself. But it is insisted that, by law, this is by no means the case; but, on the contrary, that the inhabitants of the Riding are not bound to repair the highway at each end of this modern bridge, and, more especially, as it has immemorially hitherto been repaired by the inhabitants of the two districts of Shaw Mear and Lords Mear, the Plaintiffs in error may, on the general issue, show that other persons are bound to repair.

The Chief Justice stated the case of the Abbot of Coombe thus: (*Vide* 7 East. 588:)—“It was presented in the King’s Bench, before Knivet and Ing, that the Abbot of Coombe ought to repair the bridge of Chesterford, in the county of Leicester, upon which a distress was awarded against the Abbot: who now came and alleged a record in the same Court of King’s Bench, that how he was heretofore before Chebre impeached for the same bridge: when he came and pleaded that he was not bound to repair, except two arches of the bridge; upon which issue was joined, and it was so found. The record was read, which was, ‘Whereupon the Jury, etc. who say upon their oaths that the Abbot of Coombe is not bound to repair except two arches of the bridge, etc. and the bridge *ultra cursum aquæ*, and not the ends of the bridge.’ KNIVET. We intend that you are bound to repair the bridge and the highway adjoining the one end of it and the [8] other, although the soil may be in another, so that the easement shall be saved to the public. And you are bound to make the bridge of sufficient height and strength for the course of the water. And although, by the accretion of water, the ends shall be removed, yet you are bound to pursue the course of the water, and repair the highway without leave of him to whom the land belongeth. And inasmuch as in this case it is not found nor limited in the record who ought to repair the remainder of the bridge, and without doing so, it will be of no value: although it shall be found that the arches are sufficiently made, yet this shall not discharge you, etc.” The expression here was varied three times,—the ends,—the highway,—the remainder; and what was really meant no man could with certainty say. The Chief Justice had indeed stated, “that it was clear from this case that in those days the charge of repairing the highways at the ends of a bridge was considered as belonging *primi facie* to the party charged with the repair of the bridge itself.” Now it was submitted whether this did so appear. The case of the Abbot of Coombe was a most unintelligible one, and not a sufficient authority for the present decision.

As to the Statutes of Bridges, the Act of 22 Hen. 8, cap. 5, gave the Sessions the same jurisdiction over bridges as the Court of King’s Bench had before, and then gave them power to tax the county, in case no one else was liable. It did the same by the 9th section, in regard to highways at the ends of bridges, which it appeared to consider as entirely [9] distinct. The Statutes of the 1st Anne, cap. 18, and 12th Geo. 2, cap. 29, did not introduce any thing new, but were cautious as to shifting the obligation to repair. Unless, then, they could show that in every case the county was bound, they could not support this indictment. The Riding in some cases repaired

ten feet of the way at the ends of bridges, in other cases 300 feet, etc. according to the inconvenience in each instance. But if the Riding had been liable by common law in every case, the parishes would never have let it alone, but would have enforced the obligation to the fullest extent. If Coke, in Rep. Part 13.—33, and in 2d Inst. 700, meant to say that the county was really *primi facie* liable to the repair of highways, he had laid down a proposition which was not law; but he had excepted those instances in which others were known to be bound to repair, and his law, if correct, would not apply to this particular case, as it appeared here that others had within memory repaired it.

As they had been met by a technical objection from the other side; viz. that they could not exonerate themselves unless they pleaded that others were bound to repair, it was but fair, on the part of the Plaintiffs in error, to resort to a technical objection likewise. Why, then, on the face of this indictment, it was not charged that the county was bound to repair this bridge; and if the indictment was bad on the face of it, the special verdict could not cure it. The county could not be bound to repair the 300 feet of the highway at the ends of the bridge, unless it was also bound to repair the [10] bridge. It was a clear principle that in an indictment nothing could be supplied by intendment, but it must be sufficient on the face of it to charge the party. It was true that, *primi facie*, a parish was bound to repair a road, and a county a bridge; yet, as there were exceptions, it was clear that they ought to have stated in the indictment the liability of the county to repair the bridge, as a foundation for its liability to repair the highway at the ends. It was not sufficient to say that this was a public bridge, but it ought to have been alleged that it was one which the county was bound to repair.

The statute 22 Hen. 8, cap. 5, amounted to no more than this, that where the magistrates exercised the power confided to them by the statute, in regard to bridges, they should exercise the same power over the persons bound to repair the highways at the ends of bridges, and if there were none, that then they might tax the county, and limited the extent to 300 feet.

But then it was said that this 300 feet was only defining the limits of the common law liability of the county—reducing it to a certainty. But this argument was *felo de se*; for there was no principle on which the county could have been bound at common law to do that which was uncertain. The object of the legislature was merely the public convenience, without reference to who in particular was bound to repair.

But it was then said that Coke's Comment. 2d Inst. 700, explained the statute. He (Scarlet) could not find any such inference there as they wished to [11] draw from it. Coke was there speaking of the liability to repair bridges; the passage was this:—"If none at all were bounden to the reparation of the bridge, how then, and by whom should it be repaired by the common law? The answer is, that the whole county, that is, the inhabitants of the county or shire wherein the bridge is, shall repair the same; for of common right the county must repair, because it is for the common good and easement of the whole county." But both the statute and the comment were silent as to the common law liability of the county to repair the highway at the ends to the extent of 300 feet. If the liability had existed, it was singular that it had not been adverted to by Coke, who was so eager to communicate all he knew, and even inserted the verse in regard to the Tadcaster bridge:—

"Nil Tadcaster habet musis aut carmine dignum,

"Præter magnificè structum sine flumine pontem."

Then it was said that, in Coke, Rep. Part 13.—33, where Coke spoke of bridges and highways, it was necessary to imply that he meant highways at the ends of bridges, in order to prevent the passage from being nonsense. But the more natural supposition was, that Coke said county instead of parish.

If it was the opinion at the time of the case in the Year Books, (Edward 3.) that whoever was bound to repair the bridge was bound to repair the road at the ends, it was singular that there never had been an indictment before against the county [12] for not repairing the highway at the ends of a bridge separately from the repairing of the bridge itself. Was the county to be bound in defiance of the custom? The statutes had said no such thing, and the special verdict found that, for time imme-

morial, the bridge had been repaired by the township of Quick. If such was the principle, when one was bound to repair a road to a ford, he had only to throw a bridge over it, and cast the burden on the county. No case was to be found where an indictment against a parish for not repairing a highway was qualified by the exception of 300 feet of the road at the ends of bridges.

Topping and Holroyd, (for Defendant in error.) This case had been extremely well considered in the Court below, and an elaborate judgment given. The only really new argument was the technical objection now for the first time started. There was not a hint of this in their printed case : and when the name of Mr. Serjeant Williams appeared there, it was not to be readily supposed that, if the objection had been material, it would have escaped him.

This was an indictment against a county for not repairing a highway to the extent of 300 feet at the ends of a bridge ; and if they could show that the county was liable at common law, then the Plaintiffs in error could not, on the general issue, throw the burden on others. When it was alleged that this was a public bridge, and was so found by the verdict, the county was bound, except it exonerated itself by some special plea. The case in 5 Bur. [13] 2594. *Rex v. Inhabitants of West Riding*, etc. as to the bridge over Glushurne Beck, had been disputed ; but it was now clear that when a new bridge was built, and found useful to the public, the burden of continuing it was fixed on the county ; and this liability extended to the repair of bridges built by trustees under a turnpike act, unless the county be discharged by special provision.

But the Plaintiffs in error said, that though the county must repair the bridge, others may be bound to repair the 300 feet at the ends ; and they also said that there was no authority for throwing the common law liability to repair these 300 feet upon the county. But the case in the Year Books, which had been already mentioned, was a strong authority as to what was then the understanding in regard to the rule of obligation as to this matter. From that case it was clear, that in the time of Edward 3 the party liable to the repair of the bridge was also held to be bound to repair the road at the ends. The statute 22 Hen. 8, cap. 5, did not originally create this obligation, but was declaratory of the common law. Such was the opinion of the Court of King's Bench. The case in the Year Books was therefore fortified by the statute 22 Hen. 8, cap. 5, and the cases *Rex v. Inhabitants of West Riding*, etc. in 2 East. 342, and in 5 Bur. 2594.

But then it was said, that when Coke gave his account (Rep. Part 13.—33) of the common law on this subject, he was asleep, and said county instead of parish. If this had been the case, it was not likely it should have passed so long without notice. But Coke was speaking of the statute 22 Hen. [14] 8, cap. 5, as declaratory of the common law ; and when he mentioned highways, this must be understood with reference to the subject of which he was treating. Unless this was to be the rule in such matters, it would be sufficiently hard upon Judges. But they had farther legislative information on this subject, the statutes 1 Anne, cap. 18, and 12 Geo. 2, cap. 29, all of which supported the view of the case contended for on the part of the Crown.

As to there having been before no indictment of this sort, that was a strong argument to show that the roads at the ends of bridges had been always considered as parts of the bridges, and therefore to be repaired by the same persons. In regard to the technical objection to the indictment, it had been said that nothing was to be supplied by intendment, but that the law and fact must be stated. That proposition must be very much qualified. It might be true as to the facts, but that the law must be set forth was directly contrary to the first principles of pleading. In pleadings, both civil and criminal, the facts were set forth, but the Judges recognized the law. Then see whether the facts were sufficiently set forth here. The indictment stated that there had been from time immemorial a common highway, etc. and that 300 feet of this highway adjoining a public bridge was out of repair. The common law cast the burden of repairing this on the county. This was matter of law to be taken notice of by the Judges, and it was even unnecessary to have stated at the close that the county was bound to repair. If this had continued a ford, as before, that would have been a [15] different matter : but when it became a bridge, the county became bound at common law to repair the ends, and could only discharge itself by pleading

specially that some other was liable. The moment a bridge became of public utility, the county, as a consequence of law, became bound to repair it, and also the highway adjoining, as an appendage of the bridge. (5 Bur. 2594.) If the utility was not adequate to the burden, the bridge might be indicted as a nuisance. The case of the Abbot of Coombe was clearly in their favour, and also the comment of Coke, 2d Inst. 700; and Coke, a few pages further on, (2d Inst. 705,) stated the law, directly as they, on the part of the Crown, understood it to be; and the statutes all took it for granted that such was the law.

Lambe heard in reply.

Lord Eldon (Chancellor.) In consequence of a good deal of previous consideration, as well as present attention to the subject, he was of opinion that this judgment of the Court of King's Bench was right; meaning by that, that it appeared to him that it might be fairly inferred from the cases, Acts of Parliament, etc. that the county was bound by law, *prima facie*, to repair the ends of a bridge, which bridge itself it was bound to repair; and the statute limited the extent to 300 feet at each end. On the merits, then, he was contented with the decision of the Court of King's Bench. He put this upon the notion that the objection to the indictment [16] in point of form could not be supported. On account of this objection, he should propose that the final decision be postponed till Friday (12th November :) 1st, Because the objection was a new one, though they should be of opinion that it was fit to consider it now for the first time. 2d, Because it was questionable whether it was proper to enter into it at all. He could not give implicit credit to printed cases, but if he could, he found in the printed cases here, that in the Court below this had been taken on all hands to be a bridge which the county was bound to repair. He now therefore stated his opinion that this judgment ought not to be reversed on the other point, and in all respects the case would be duly considered.

Lambe. If their Lordships were against them on the merits, they did not wish to give the House any farther trouble in regard to the other point.

Judgment of Court of King's Bench affirmed. (*Vide* 7 East. 588.)

Agent for Plaintiffs, LAMBERT.

Agent for Defendant, ———

[17] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GRAHAM,—*Appellant*; KEBLE, and Others,—*Respondents* [Nov. 10, 1813].

[*Mews' Dig.* vi. 1240, 1408. S.C. 2 Bli. 126.]

[A partner in a house of agency in India, where a deposit is made in trust for a particular purpose, is made one of the executors of him who made the deposit, and proves the will. Power of attorney sent from the executors in Europe to the house of agency for them to act under, but held that, as the partner named executor had proved the will, the house could only act under his authority, and he himself could not renounce the executorship and act in another character.]

Page Keble, father of the Respondent, having engaged in a project of cutting a canal in Bengal, called the Banca Nullah, which was considered as a work of great public utility, in 1786 obtained from the Indian Government a loan of 40,000 sicca rupees, for 10 years, at $2\frac{1}{2}$ per cent. interest; for the repayment of which sum, he executed a bond to the Company, with Mr. John Petrie as his surety. To extinguish this debt when it became due, Mr. Keble deposited in the house of Graham, Cromeline, and Co. of Calcutta, of which the Appellant, a confidential friend of Mr. Keble, was the principal partner, securities for money to the amount of 46,428 current rupees, and gave positive instructions to the house that the money should be appro-

priated to the discharge of the bond granted [18] to the Company when it became due, with certain directions as to the management in the mean time. Mr. Keble, soon after making this deposit, set out for Europe, and left a duplicate of his will with the house, with directions that it should be opened in the event of his death.

Mr. Keble died on the passage from India, as was stated on the one side ; or soon after his arrival in England, as was stated on the other ; and his will being opened by the partners in the above house, it was found that the Appellant was named one of his executors, and Mr. Petrie and others his executors in Europe—Page Keble, the testator's son, being the residuary legatee. The executors in this country proved the will, and transmitted powers of attorney to the house of Graham, Cromeline, and Co. to act in the affairs of the estate. These powers of attorney were accompanied with a letter of instructions dated 20th March, 1787, stating that the executors in Europe had been informed that it would be more regular for the house to act under these powers of attorney, than that Mr. Graham should prove the will in India, and act as an executor, and then suggesting some alterations in the mode of managing the fund in their hands for the payment of the Company's bond. To this an answer was returned in these words :—

" Calcutta, 10th September, 1787.

" The Minerva packet brought us your two letters of the 20th March, covering a power of attorney to our late friend, which we shall not have occasion to use, as, on account of the demise of [19] Mr. Keble, our Mr. T. Graham, on opening the will left with us, and finding himself nominated an executor, took out probate," etc.

The expense of proving the will by Mr. Graham was also charged against the testator's estate. It also appeared that the Appellant himself had written a letter, dated 7th March, 1787, to the executors in this country, stating that he had proved the will, and the house would continue the management of Mr. Keble's affairs under his authority.

In 1787, Mr. Cromeline, one of the partners, quitted the house, and Mr. Graham, a brother of the Appellant, was assumed as a partner ; when the firm, instead of " Graham, Cromeline, and Co." became " Gramahs, Mowbray, and Co."

The Appellant was at this time a Member of the Board of Revenue. On the 4th March, 1789, an order appeared in the Calcutta Gazette, by the Government of India, forbidding any Member of the Board of Revenue to hold a share in a mercantile, or banking house after the 1st of May, then next. The Appellant, however, by the indulgence of the Government, was exempted from this order till the 31st October, 1790 ; when, having wound up his affairs, he ceased to be a partner in the house, and the firm then became, " Graham, Mowbray, and Co."

Almost the whole of the deposit by Mr. Keble had been invested in Company's bonds subsequent to the time of proving the will by Mr. Graham ; but these bonds were not taken in his name as executor, nor with a declaration of their being held in [20] trust for Mr. Keble's estate : nor was there any writing across the face of them to that effect. These bonds were afterwards endorsed away, the house fell into difficulties, and, in November, 1791, failed. It appeared that the executors in this country had received accounts as to the management of the fund, from the last as well as the previous firm, up to 12th March, 1791,—the management having continued with the new firm after the retirement of Mr. Graham, without any objections stated. It also appeared that an attempt had been made in India, when the bond to the Company became due, to throw the responsibility on the Appellant, but the Advocate-General was of opinion that, under the circumstances, Mr. Graham was not liable, chiefly on the ground that Mr. Graham had not acted as executor, but merely under the powers of attorney sent from the executors in Europe, and that Mr. Petrie, the surety, had acquiesced in the management of the property by the new firm, after the Appellant had ceased to be a partner.

In 1803, when the Respondent, Page Keble, the residuary legatee, became of age, he commenced an action in the Court of Session against the Appellant, who was subject to the jurisdiction, as having a considerable estate in Scotland. The summons, after stating the circumstances, concluded for payment by the Appellant of the amount of the bonds and balance due in money, making a sum of £4768 and a fraction, with interest upon the respective bonds, from their dates till cancelled or endorsed away,

at the rate of 8 per cent. : and with interest [21] at the rate of 12 per cent. from that period, being the legal rate of interest in Bengal, which the Respondent would have drawn if the money had been paid.

After various dilatory defences, (the Appellant being then in India,) the cause was, on the 14th November, 1806, heard on the merits before the Lord Ordinary, (Cullen,) who pronounced an interlocutor "repelling the defences, and decreeing "in terms of the conclusions of the libel ;" and, upon representation, he adhered to this interlocutor. This interlocutor was then reclaimed against, but adhered to by the whole Court, (5th February, and 11th March, 1808.) The Appellant then appealed to the House of Lords.

Adam and Park (for Appellant) argued the case upon nearly the same grounds as had been taken in the Court below, which came substantially to two points :— 1st, That the firm had acted under the powers of attorney sent from Europe, and not under the authority of Mr. Graham, as executor. 2d, That, as the executors here must have had notice from the Indian Gazette that Mr. Graham had withdrawn from the house, and yet corresponded with the new firm on the subject of the testator's property without intimating any objection to the transfer of the management, they must be held as having acquiesced in that transfer, and that the Appellant was therefore discharged from his liability. (Lord Eldon (Chancellor.) When Mr. Graham was qualified as executor, could he act in any other character in regard to the pro-[22]-perty ?) The firm acted under the power of attorney. (Lord Eldon. The answer stated to have been returned by you to the letter enclosing the power of attorney is, that you received it, but should have no occasion to use it.) These bonds were not deposited with the firm by Mr. Graham in his executorial character, but by Keble himself ; and Keble himself could not have taken them out without indemnifying the firm. It was true, the old firm must be liable, unless the creditor agrees to a transfer to the new firm : but specific notice was not always required. In banking partnerships here, the changes were not formally notified, but merely the name of the new firm intimated to the customers : and if no objection was made on the part of the customer, but he continued to act with the new firm, he was held to have adopted that security. In the present case, besides this kind of communication, the executors had notice by the government order that Graham had ceased to be a partner. They might have withdrawn the assets if they chose,—they might have intimated to the Appellant that they still considered him liable,—but they did nothing of all this. Then, as to the executorship, it would appear from the opinion given in India, that the mere circumstance of proving the will was not held sufficient there to render one liable as an executor, unless an inventory or account were exhibited. Even here, if an executor, under such circumstances, proved the will, was he liable to the utmost extent for the testator's property ? It was submitted that he was not. It was usual to say in wills that each should be liable only for his own [23] acts, but that was not necessary. (Lord Eldon (Chancellor.) It was a hard case for Mr. Graham, but the answer to the letter with the power of attorney was, "We have an executor here, "under whose authority we shall act." Could Mowbray, after that letter, say that they kept the deposit under the power of attorney ? The fact was, that they all acted under Mr. Graham as executor.) It was also submitted that the rate of interest claimed by the summons could not be supported.

Romilly and Horner (for the Respondents.) This case depended entirely on principles of English law, and if it had arisen in the Court of Chancery here, there could be no doubt about it. It was not sufficient to make out a case against the co-executors, even if that could be done. This was an action by the residuary legatee, and even if the co-executors had given Mr. Graham a release, he would still have been liable to the residuary legatee. The moment he proved the will, he took the whole deposit as executor, and in such a case the Court here would compel the payment of the deposit into the hands of the Accountant-General. The opinion of the Advocate-General was quite erroneous, which was not surprising, considering, perhaps, the little experience in these matters which the business in India furnished. It had been said that it would have been hard to have taken this property from the partnership ; but this was sacred property, which they could not in justice touch, and therefore the legal rate of Indian interest was properly charged. Even if the execu-[24]-torship had been out of the question, Mr. Graham would still have been liable, as no consent

had been given to transfer the securities (*Vide Henderson v. Graham*, 1800, 1801 : affirmed on appeal. And *Ersk. b. 3. t. 4. s. 22.*)

Lord Eldon (Chancellor.) There appeared no ground of reflection whatever upon Mr. Graham's conduct morally considered. But the facts, as far as it was necessary for them to know them, were these :—He was a partner in a house of agency where a deposit was placed in special trust. He was made executor under the will of him who made the deposit. They had not then to discuss a case where the executor did not prove and yet interfered. He did prove, and charged the expense against the testator's estate ; and was not then at liberty to renounce that character and act under another. He could do no act in regard to the estate for which he was not answerable as executor, and it was quite impossible to discharge him.

Judgment of the Court below affirmed.

Agent for Appellant, CAMPBELL.

Agent for Respondent, CHALMER.

[25] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WATT, Esq.—*Appellant* ; PATERSON, and Others,—*Respondents*

[Nov. 10, 1813].

[In a question of division of common, evidence of once ploughing up and taking a single crop from a piece of ground—on which persons having a right of common usually turned their cattle, without challenge, for 40 or 50 years after that act of ploughing, as being part of a commonity—not sufficient of itself to establish an exclusive right to the piece of ground so ploughed up. Clause “with pertinents” in a bounding charter held in this case sufficient foundation for title to grounds without the boundaries specifically described in the charter.]

This was an action, founded on the statute of 1695, 5th session, 1st Parliament of William and Mary, cap. 38, for dividing the commonity of Carpow. The Appellant conceived that the Court, in determining what was the exclusive property of certain contiguous proprietors, and what remained as commonity to be divided among the whole of them according to their respective valued rents, had given an erroneous judgment, by which a considerable piece of ground was partly held to be commonity, and partly adjudged to another, which, in his opinion, was his exclusive property, and therefore he appealed.

[26] The grounds of appeal were,—

1st, That the land in dispute was included in his titles.

2d, That there was parole evidence to show that the land belonged to his estate, and particularly that one of the tenants of his estate had once, above 40 years ago, ploughed up a part of the disputed land ; and,

3d, That a portion of the land in dispute had been adjudged in exclusive property to the inhabitants of the town of Newburgh, parties to the action of division, though they were excluded by their own bounding charter.

To the first it was answered, That the land in question was not included in the minute of sale relative to the estate to which, as the Appellant pretended, the land belonged, when he purchased that estate ; and also that the argument from the old titles proved too much, because it extended to other portions of ground clearly proved to be commonity :—To the 2d. That, though the evidence was contradictory, the weight of testimony was in favour of the land being commonity :—To the 3d. That the Newburgh charter contained a clause “with pertinents,” which was sufficient ground of title.

Romilly and Nolan (for Appellant.) It did not signify what the Appellant pur-

chased: the question was, What was comprehended in his titles? Two pieces of ground, portions of what he claimed, had been adjudged to the Appellant, on the presumption that they were his, from there being [27] evidence that they had been ploughed up by his or his author's tenants; and, on the same principle, the land now in question ought to have been adjudged to him. In regard to the Newburgh charter, prescription presumed a grant; but that presumption was done away when the grant was produced, and it appeared that the land claimed was not in it. (Ersk. b. 2. t. 6. s. 3.—Young.—Dict. p. 9636.)

Adam and Horner (for Respondents) not heard.

Lord Eldon (Chancellor.) This was an appeal against certain interlocutors of the Court of Session, by which Watt, the Appellant, complained that he had been deprived of certain lands to which he was exclusively entitled. Two places claimed by him, and proved to have been ploughed up by his or his author's tenants, had been adjudged to him, and it had been contended at the bar that this was presumptive evidence that he was entitled to the whole. But this presumption might be done away: and the question was, Whether there was sufficient ground in this case to induce their Lordships to reverse the judgment of the Court of Session as to that portion of the land claimed which had not been adjudged to the Appellant?

It was often, and he thought with great propriety, intimated to them from the bar, in these cases, that though a Court of Appeal, yet they sat there as if they had to decide upon a motion for a new trial on a question of facts, which they ought to try with great caution, because the law respecting the division of commons was very useful, and, if they encouraged speculating in appeals in these cases, they might destroy its utility. He did not mean to say, however, that if a decision in such cases was clearly wrong, it ought not to be reversed; but then it ought first to be very clear that it was wrong: and they might possibly misunderstand the proper effect of these acts of ownership, or interruption, as connected with rights of common. They certainly would make wild work if they were to hold that a ploughing up of a piece of ground 40 years ago would establish an exclusive right, though subsequent to that act the right of servitude had been exercised without interruption.

In regard to the Newburgh piece of ground, the argument for the Appellant did not at all apply, as it might pass under the clause "with pertinents."

Then as to the ploughing up being evidence that the Appellant was entitled to the whole of what he claimed, the Court below appeared to have gone upon this, that the servitude had been exercised subsequent to the act of ownership; and he was not prepared to say that the taking a single crop from a piece of ground, on which the cattle belonging to the neighbours had pastured for 40 or 50 years afterwards without interruption, was conclusive evidence of an exclusive right: that would be going too far. But the Court below had gone a great length, for they said, "Show us specifically what your tenants, or those of your predecessors in this estate, ploughed up, and you shall have it." The evidence as to the ground now in question did not go even to that extent. But, at any rate, as to such a claim as this, founded on having once, 40 or 50 [29] years ago, ploughed up, without challenge, a piece of ground of little or no value, on which the neighbours' cattle were afterwards pastured without farther interruption, that was all mere moonshine. There was a great deal of evidence on the other side that this was part of the common. Were their Lordships satisfied, then, that the decision of the Court of Session was clearly wrong? If not, (and he certainly was not,) it appeared to him that the judgment of the Court below ought to be affirmed without pressing the hearing further.

Judgment of the Court below affirmed.

Agent for Appellant, MUNDELL.

Agent for Respondent, ———

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

STEWART,—*Appellant* ; HALL, and Others,—*Respondents* [Nov. 10, 1813].

[Mews' Dig. xiii. 17.]

[Repairs and furnishings done at Hull to a Greenock ship, by order of the agents of the owner, at the instance and under the direction of the master. Account made out to " Captain Cowan (the master) and owners of ship *Jeanie*," attested by Cowan, and addressed to the agents for payment, but payment not demanded for some months. In the mean time, the owner pays the agents for the repairs. The agents become embarrassed in their circumstances, upon which those who did the repairs apply for payment to [30] the owner. Held that the owner is still liable ; for he can be discharged only by positive agreement, or by necessary inference that those who did the repairs have abandoned that security.]

In 1805, Hall and Richardson, the Respondents, and several other persons, made certain repairs and furnishings to the ship *Jeanie*, then in the port of Hull, and belonging to Stewart, the Appellant, a merchant in Greenock, Cowan master. It appeared that the repairs were ordered by Knox and Hay, the consignees of the vessel's cargo, Stewart's agents in Hull. The nature of the repairs and furnishings required were however pointed out by Cowan, the master. The Respondents having executed part of these furnishings, their account, (£23 9s. 6d.) made out to " Captain Cowan, " and owners of the ship *Jeanie*," was attested by Cowan, and addressed to " Knox " and Hay " for payment. Knox and Hay made out an account current as against Stewart, including the sums expended for the repairs : and upon this account there was a balance due to Knox and Hay of £157 13s. 8d., for which Cowan, the master, drew a bill on Stewart, in favour of the agents, which bill was duly paid. The tradesmen's accounts for the repairs, signed by Cowan, and making the owners debtors, were transmitted to Stewart, as vouchers for their having been paid by Knox and Hay, but no receipts were sent.

The repairs by the Respondents were done on the 5th March and 15th April. At the close of the year, according to their usual practice, the Respondents applied to Knox and Hay for payment, [31] and were then told that they had not settled with the owner. In the beginning of 1806, Messrs. Knox and Hay having become embarrassed in their affairs, the Respondents wrote to the Appellant for payment of their account, as follows :—

" When your vessel, the *Jeanie*, was here in March last, we did some work at her, " as per annexed account, amounting to £23 9s. 6d. for which we have not been paid " either by Captain Cowan or his agents, Messrs. Knox and Hay. The latter persons, " it is said, are in difficulties. We therefore hand you the account, and request you " will be so kind as remit us for the same."

The Appellant having refused to pay, the Respondents, by their mandatory, commenced an action against him in the Court of Session for the amount of their account ; and a condescendence having been given in by the Defender, (Appellant,) by order of the Lord Ordinary, (Hermard,) and answers lodged by the Pursuers, his Lordship, on the 10th February, 1807, pronounced an interlocutor in favour of the Pursuers, (Respondents.) This interlocutor was adhered to after representation, and by the Court after two reclaiming petitions ; and the Appellant then lodged his appeal.

There was much elaborate discussion in the proceedings below, and appeal cases upon the question, Whether the Respondents had a right of hypothec upon the vessel for the repairs done ? which, however, it would be out of place here to touch upon, as this appeared to be merely a personal action, and [32] as such was on all hands treated in the Court of Appeal.

Nolan and Adam, jun. (for Appellant.) They did not mean to controvert the point of law, that the captain had power to bind the owner, but they had offered to prove

that the master had not in fact bound the owner. (Lord Eldon. If the master desires and permits the agents to order repairs, which are executed, am I not entitled to conclude that the owner is liable, unless I have notice to the contrary ?) But what the Appellant offered to prove was, " that the repairs were done solely on the employment " and on the credit of Knox and Hay, that the orders were carried to the tradesmen " by their clerk, and that Cowan communicated with Knox and Hay, and with them " only." This was positively averred : and supposing the law to be that, in such a case as this, the orders of the master bound the owner, still, if there was a positive agreement that the agent alone should be liable, that would discharge the owner. This was a fact which the Court below ought to have inquired into. They also submitted that, under the circumstances of this case, payment to Knox and Hay might be considered as payment to Hall and Richardson. In foreign cases, when the goods were furnished, the account was immediately given in. Here the Respondents had allowed the matter to rest for nine months without knowing anything of the owner : they had waited a long time before they applied to Knox and Hay for payment ; and it was only when Knox and Hay failed, or were on the point of fail-[33]-ing, that they applied to the owner. The owner had actually paid the agent for these repairs, and if the tradesmen lay by, they must be presumed to have been satisfied with the security of the agent.

Abbott and Brougham (for Respondents.) From the facts in the condescendence and answer, a plain proposition of law resulted in favour of the Respondents. (Lord Eldon. Did you (Nolan) apply to the Court for a proof of the alleged fact, that the repairs were made solely on the employment and credit of the agents ? Nolan. We stated that it ought to be inquired into, and the Lord Ordinary said it was irrelevant.) It was, indeed, stated in the printed case that they had offered proof which was material ; but there was no such offer in the proceedings below. The document which, as they said, contained the averment, did not conclude with a prayer that they might be allowed to prove it. It was immaterial how the repairs were ordered : the work was done, and the account was made out to " Captain Cowan and owners of ship " *Jeanie*," and was attested by Cowan, which was decisive. There was no undue delay in calling for payment, as all work in this country was done on credit of more or less extent. The presumption of law was in their favour. The ship owner might not be personally known to those who made the repairs, but the ship was known, and the owner might therefore easily be found out. The case was plain, and would have been decided here in half an hour.

[34] Lord Eldon (Chancellor.) The Court of Session had embodied in their judgment the reasons on which that judgment was founded, (a thing not unusual with them,) and he would read the judgment, that their Lordships might be fully aware of these reasons, and how they bore upon the Appellant's answers to the claim of the Respondents. The interlocutor of the Lord Ordinary (afterwards adhered to by the Court) was as follows :—

" Having considered this condescendence, with the answers thereto, and whole " process, finds it implied, though not in express terms admitted, in the condescendence, " that repairs to the amount libelled, were made by the Pursuers, upon the ship *Jeanie*, " belonging to the Defender, when lying at the port of Hull : that these repairs were " made by order of John Cowan the master, by whose desire the account was sent " to Knox and Hay, the agents, at Hull, for the Defender : that it is stated by " the Defender that he paid this very account to Knox and Hay, which he could not " have done in any other character than that of his own agents. Finds that the " port of Hull must be deemed a foreign port in any question with an inhabitant " of Scotland ; so that, upon the principles adopted in the case of *Hamilton v. Wood*, " the Pursuers have an hypothec upon the vessel for the expenses of these repairs. " Finds nothing condescended or relevant to infer that they relinquished that right. " Repels the defences. Finds the Defender liable for the sum libelled, with interest " from one year after the date of the account, and decerns."

[35] It had been suggested at the bar that it was essential to send the case back again to the Court of Session, with directions to inquire into the truth of the several averments in the answer. Now, however much they might lament, in a question respecting £29, (£23 9s. 6d.,) which had been discussed in every possible stage in which it could be discussed, throughout that part of Great Britain and Ireland called

Great Britain, at a vast expense to the parties : however much they might regret sending back such a cause to begin again ; still, if the question of law required it, that must be submitted to, and the cause must be sent back. But before this was done, they ought at least to be fully satisfied that the necessity clearly existed.

This action was brought for furnishings done to the ship *Jeanie*, for the amount of which the Appellant was stated to be personally liable, and judgment was given for the Respondents. Such being the state of the case, if the interlocutor of the Court below contained sufficient ground to support it, accompanied however with unauthorized matter, their Lordships would merely order the objectionable matter to be expunged, and then affirm the judgment.

This was a mere personal demand : and, in defence, it was stated, on the part of the Appellant, that if these repairs had been made by the Respondents, it must have been on the employment of Knox and Hay, and upon their credit ; and that therefore they alone were liable. The Court (Lord [36] Ordinary) then called upon the Appellant to give in a condescendence of the facts upon which he relied in his defence ; and then he stated them more particularly, contending, " that the repairs " were made on the employment and under the direction of Messrs. Knox and Hay ; " that when the work was finished, the accounts were attested by the master, in order " to satisfy Knox and Hay that it had been performed ; that these accounts were " addressed by him to Knox and Hay for payment, and delivered back to the tradesmen " to obtain their payment from Knox and Hay accordingly ; " by which the Appellant must be understood to mean that Messrs. Knox and Hay were considered as the debtors, and that the credit of the owner of the vessel was not looked to. Then the parties proceeded with the discussion of the question of hypothecation, and whether Hull was, or was not, a foreign port in regard to Scotland, with all those topics which formed the subject of that infinite number of pages, printed and written, which had been laid on their Lordships' table.

If their Lordships would advert to the printed papers, and compare them with the original proceedings, they would find that the effect of one of the grounds of defence relied upon by the Appellant had been totally mistaken. It was stated " that " Cowan (the master of the vessel) communicated with Knox and Hay, and with them " only ; that he made no bargain, and gave no direction, either to the Pursuers, " (Respondents,) or any other tradesmen, who were all employed by Knox and [37] " Hay, at their own discretion, and on their own credit ; that a note was made by " one of their own clerks of what work and necessities were wanted, and then another " of their clerks carried the orders, which were consequently made out and sent round " to the various workmen they had been in use to employ." Now it was established on the proceedings, that Cowan communicated on the subject with Knox and Hay, but not that he did so with them only.

The answer to this, on the part of the Respondents, was, " that they were applied " to by Knox and Hay, and Cowan, to make the furnishings ; that the repairs were " accordingly made ; and that when completed, betwixt the 5th March and 15th " April, 1805, the Respondents made out their account with the title, " Captain John " Cowan, and owners of ship *Jeanie* ; " which having been attested by Cowan, was " by his desire handed over to Knox and Hay for payment." This title of the account had not been stated by Stewart ; but the fact appeared to be, that the Respondents had made out their account to those who would, at any rate, by law, be their debtors, unless there was a special agreement to the contrary. The matter, however, did not rest there. When Stewart came to pay Knox and Hay, if he called for a voucher, they had no voucher to show, except an account which bore upon the face of it, that Stewart himself, the owner of the vessel repaired, was considered by the Respondents as their debtor.

[38] He doubted whether, after having given in their account in this way, the Respondents could at all have called upon Knox and Hay to pay ; but, at all events, taking the whole together, he could find nothing to show that the Respondents had relinquished their right as against the owner.

If the owner was by law the debtor, it must be shown, by positive and direct evidence, or appear by necessary inference, that the creditor had abandoned that security, before the owner could be discharged from his liability. Would it not be the strongest thing in the world to say, that when the Respondents had been required to do these

furnishings, and had given in their account in a way which so clearly showed that they considered the owner as their debtor, they should be held as having given up their right as against him? And yet these were the circumstances under which their Lordships were called upon to say that the owner was liberated. He believed their Lordships could not—he himself certainly could not—come to that conclusion. The owner himself might have known that he was liable. If he called for a voucher, he must have seen that he was considered as the debtor; and if he did not call for one, his loss was owing to his own want of diligence, and he had no right to complain.

With respect to the delay, the Respondents had applied for payment at the usual time, and Messrs. Knox and Hay would probably have been very angry if they had done it sooner; but finding that Knox and Hay had fallen into difficulties, and [39] were not likely to pay, they applied to the owner. There was really nothing in that objection.

In regard to the judgment itself, it might be advisable to expunge that part which related to the hypothecation of the ship. It was not their Lordships' practice voluntarily and unnecessarily to permit assertions respecting important doctrines of law to be entered on their records; and so far therefore it might be proper to reform the interlocutor.

Then as to the matter of costs, he had often occasion to find, since he had obtained a seat in that House, that it was in many cases more difficult to settle the affair of costs than the merits of the principal question. This was a dispute about £29. (£23 9s. 6d.) but then it was said there were other cases behind, which depended on the issue of the present question. Where any great doctrine of law was involved in a particular case, and required to be settled, then certainly it would be desirable that the expense should not fall too heavily on the unhappy individual who came first, though generally there was an agreement out of doors which set that matter to rights. But as the present case brought no great doctrine of law fairly into question, it appeared fitting that the Respondents should be in some measure reimbursed the expenses to which they had been put by this experiment on the part of the Appellant. That they might proceed, however, with due caution on this point, he proposed that they should take a little time to consider the question of costs. At the same time, he was even now of opinion that some costs ought to be given.

[40] Judgment of Court below (except as to the ground of hypothecation, which was expunged) affirmed, with £60 costs.

Agent for the Appellant, MUNDELL.
Agent for the Respondents, WATKINS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DEMPSTER, and Others,—*Appellants*; CLEGHORN, and Others,—*Respondents*

[Dec. 3, 1813].

[Considered in *St. Andrews Ladies' Golf Club v. Denham*, 1887, 14 Rettie, 686, 700.]

[Servitude, or right of playing golf without obstruction on the golfing links of St. Andrew's, claimed by certain persons, inhabitants of that city and members of the St. Andrew's Golf Club, on the ground of immemorial custom, for the inhabitants, and all others choosing to resort thither for the purpose of playing golf. The title of the Respondents to pursue in the above character sustained by the Court of Session; but, on account of discrepancies, real or supposed, between the different interlocutors, the whole cause remitted for review.]

In 1797, the magistrates and town council of St. Andrew's, proprietors of the golfing links in the neighbourhood of that city, sold these links to the Earl of Kellie,

who was then Provost of St. Andrew's. The links were immediately before this let to a person of the name of Ritchie, in whose lease there was this condition among others:—"The tacksman shall not have it in his power to [41] make use of the "links as a warren: but the magistrates shall have power to give orders at any time "for the destruction of the rabbits on the said links in such way and manner as they "please," etc. In the feu disposition to Lord Kellie, the magistrates, etc. conveyed to him "all and whole the lands belonging to the patrimony of the city of St. Andrew, "called Pilmore, with the remanent links and commony of the said city, with the "whole parts, pendicles, and privileges thereto belonging, as the same were lately "possessed by James Ritchie, tenant thereof: reserving to the burgesses of the said "city, standing in the stent roll, allenarly power and liberty to cast and win divots "upon the said links and commony, for flanking and rigging, conform to use and "wont, and also for repairing the town's mills, leads, and dams, under the reservation "always that no hurt or damage shall be done thereby to the golf links, nor shall it "be in the power of any proprietors of said Pilmore links to plough up any part of "the said golf links in all time coming: but the same shall be reserved entirely as it "has been in times past, for the comfort and amusement of the inhabitants and others "who shall resort thither for that purpose."

It appeared that Lord Kellie did not conceive that he was under any restraint as to keeping rabbits, (to which kind of stock the ground seemed to be best adapted,) and accordingly he let the links to a tenant, with liberty to stock and use them as a rabbit-warren; and, in order to improve the stock, promised to send him some breeders from his own [42] links at Cambo. Lord Kellie, in 1799, sold the links to the Dempsters, holding out to them the same advantages as to the keeping of rabbits. The Appellants let them to a tenant, with liberty to stock with rabbits; and he having proceeded to do so, certain members of the Golfing Society of St. Andrew's, and inhabitants of that city, alarmed lest the golfing course should be injured or destroyed by the holes and scrapes of the rabbits, raised an action of declarator in the Court of Session against the Appellants, concluding in substance,—1st, To have it found and declared that the "Pursuers and others had good and undoubted right, at all times, and on all occasions, "to resort to the links and play at golf there. 2d. That the Defenders (Appellants) "should be prohibited from hindering or molesting them. 3d. That the Defenders "should be ordained to desist from putting or keeping rabbits, or doing any thing "to injure the golfing course, and should be ordained to remove from the links the "rabbits introduced by them therein, and to keep the said links in the same order "as they had been in for ages in times past." A neighbouring proprietor, of the name of Cheape, was also a party to the summons, on the ground that the Defenders' rabbits infested his property; and there was a conclusion, that on this account too the rabbits should be removed, etc. The magistrates and town council of St. Andrew's were not parties to this summons.

The Defenders objected *in limine* to the title of the Pursuers to insist in the action: the ground of which objection was, that the Pursuers did not [43] state themselves to be owners of heritable property in the neighbourhood, and that, by the law of Scotland, a predial servitude, such as this, could not subsist without a dominant as well as a servient tenement; and that a personal servitude could not subsist for longer than the life of the person dominant: and, in support of these propositions, they cited, Stair, b. 2. t. 6. s. 1.—Bankton, b. 2. t. 6. s. 1. —Burgesses of Dunse v. Hay, Nov. 22, 1732, Kames.—Burgesses of Kelso v. Duke of Roxburgh, decided by the House of Lords March 18, 1757.—Cochrane v. Fairholm, Fac. Coll. Feb. 8, 1759.—And it was argued, also, that other individuals of the infinite multitude of golfers might direct their conclusions against black cattle and sheep upon the same ground of their being injurious to the golfing course: and that no decree made against parties of this description could afford the Defenders a *res judicata* to protect them against future proceedings by those who had not been heard for their interests.

The Pursuers contended that the authorities cited by the Defenders did not apply, or that they had been disregarded in later decisions:—Sinclair v. Magistrates of Dysart, Feb. 10, 1779, Fac. Coll.—Coomb v. Magistrates of Edinburgh, Jan. 16, 1794.

The cause being reported to the Court by Polkamnet, (Ordinary,) they pronounced

an interlocutor "sustaining the title of the pursuers to insist in the action," without saying anything as to Cheape.

The cause being remitted to the Lord Ordinary, [44] the Pursuers gave in a condescendence, offering to prove, "that at and previous to the time of the entry " of the Defenders, there were but few rabbits in the links, and that all persons were " allowed to take and kill them for their own use; that the Defenders protected the " stock, and introduced rabbits from other quarters; that the number had greatly " increased, and that this was attended with considerable injury to the golfing course, " etc."

The Defenders, in their answers, admitted that they had protected the rabbit stock, and insisted on their right to do so; but denied that the golfing course was thereby injured. A separate condescendence was given in for Cheape, who stated that his property was infested by the rabbits of the Defenders, and that he had a right to have that species of stock removed or destroyed; to which the Defenders answered that Cheape had a stock of rabbits of his own, by which alone his property was infested.

A proof having been led, it appeared, from a contract between the town and the Archbishop of St. Andrew's, in 1552, and from the tacks granted by the town, and a variety of oral testimony, that rabbits had always existed in the links, and that the tenants sometimes protected them for their own exclusive use; though Ritchie, the tenant before mentioned, being expressly restrained from using the links as a rabbit-warren, encouraged the destroying of the rabbits as injurious to the sheep, which was his stock. There was much contradictory evidence as to the question, Whether or not [45] all injury to the golfing course, from the holes and scrapes of the rabbits, might not be prevented at a small expense, and with a little attention?

About this stage of the proceedings, the magistrates of St. Andrew's sisted themselves as parties; but it appeared, from the interlocutor pronounced, that the Court had rather proceeded on the ground of the Pursuers' title as before sustained. The interlocutor (Feb. 19, 1806) was as follows:—

"The Lords having advised the state of the process, testimonies of the witnesses " adduced, and heard counsel for the parties thereon in their own presence, with the " minute now given in for the magistrates of St. Andrew's, sisting themselves as " Pursuers in this action, the title of the Pursuers being already sustained by an " interlocutor now final: the Lords find, decern, and declare, in terms of the conclusions of the libel, excepting in so far as the same concludes for removing the Defenders " from the links, and that they should be obliged to destroy the rabbits, and for damages " and expenses of process: but find and declare, that the Pursuers and the inhabitants " of St. Andrew's and others have right to take, kill, and destroy the rabbits upon the " said links, as they were formerly in use to do; find the Defenders, conjunctly and " severally, liable to the Pursuers in the full expense of contract, but in no other expense, and decern."

A reclaiming petition having been given in against this interlocutor, the Court recalled it, to [46] a certain extent, by another interlocutor of May 18, 1806, for the reason there stated.

"The Lords having heard this petition in respect that the interlocutor reclaimed " against, in so far as it does thereby find and declare, that the Pursuers, the inhabitants of St. Andrew's and others, have right to take, kill, and destroy the rabbits " upon the said links, as they were formerly in use to do, goes beyond the conclusions " of the libel; they recall the said finding as incompetent, in *hoc statu*, without prejudice to the question when tried in a proper shape; but *quoad ultra*, adhere to the " interlocutor complained of, and refuse the desire of the petition."

Against these interlocutors the Defenders appealed.

In the mean time, the golf club and magistrates of St. Andrew's caused a multitude of the inhabitants to be assembled, who proceeded to destroy the rabbits. The Defenders presented a bill of suspension, and prayed an interdict, which was granted; and the cause having been reported by Lord Armadale, the Court pronounced the following interlocutor:—

"Upon report of Lord Armadale, and having advised the mutual informations " for the parties, the Lords find, that the Chargers must confine themselves to what " has been the immemorial practice of killing rabbits on what is denominated the " links or common of St. Andrew's, exclusive of such parts thereof as shall happen

"to be under crops at the time; and to this extent, find the [47] letters orderly" proceeded, and recall interdict, but *quoad ultra* suspend the letters, and decern."

Against this interlocutor, likewise, the Suspenders appealed. The Respondents entered their cross appeals against the interlocutor, 19th Feb. 1806; in the declarator, in as far as it did not find that the Appellants were obliged to destroy the rabbits and preserve the links entire; and, in the suspension, against the interlocutor granting the interdict.

Romilly and Brougham (for Appellants in original, and Respondents in cross appeals). There was no foundation for this action in the law of Scotland, or that of England, when considered with reference either to the nature of the servitude, or the character in which the Pursuers claimed. As to the nature of the right, it was quite unknown in the law of Scotland. The servitudes were predial or personal. The predial required a dominant as well as a servient tenement, except in the case of those rights to which ministers were entitled by statutes of 1593, cap. 165; and 1663, cap. 21. Here there was no dominant tenement. Personal servitudes were constituted in favour of particular persons, and expired with the individuals. But the servitude here was claimed for the whole society of golfers,—for all those who actually were golfers, or who chose to become so. Any one making the tour of Scotland might come under the description. The magistrates had only sided themselves as parties after the interlocutor sustaining the title of the other Pursuers had become final. These other parties were numerous and various, golfers, inhabitants [48] of St. Andrew's, and all others, and two persons besides,—*pro omnibus, et quibusdam aliis*. There were no personal servitudes but life-rents. The case of *Sinclair v. Town Council of Dysart* (Feb. 10, 1779, Fac. Coll.) had no analogy to the present. The corporation was there the party. The right to keep rabbits was implied in the right of property, (Ersk. b. 2. t. 6. s. 7. ;) and the keeping them was enjoined by statute, (1503, cap. 74.) Nothing therefore could restrain the Appellants in this respect, except an express prohibition; and here there was no such prohibition. The game of golf was prohibited by the statute law of Scotland, (Acts of 1457, cap. 62; and 1497, cap. 32.) Their Lordships had remitted the case of the Earl Morton *v. Stuart*, (*vide ante*, vol. i. p. 91,) where a species of prescription had been allowed by the Court below very far short of this.

Adam and Horner (for Respondents.) The magistrates at least were proper parties, and the previous defect in this point (if any) was cured when the proper parties came. The Appellants were bound by contract to keep the links in a state fit for the full enjoyment of the amusement of golfing, and this could not be done if the rabbit stock were to be encouraged. The acts prohibiting golf were intended merely for the encouragement of archery and warlike exercises, and fell into desuetude when gunpowder came to be generally used. The right of property, it was admitted, carried with it the right of keeping rabbits; but then the property might be conveyed by special contract, short of this right; and here every thing was pro-[49]-hibited which had a tendency to render the links less fit for golfing. The inhabitants of a borough might have such a right as this. (Tod and Stoddart *v. Magistrates of Edinburgh*, May 17, 1805, Fac. Coll.) And so the law was in England. There was no authority for saying that there was no personal servitude but life-rents. It had been settled, in the case of the town of Dysart and others, that the inhabitants of a burgh might have such a servitude. In England, the inhabitants of a vill or parish might have a right over the soil of an individual's ground for their recreation. (Fitch *v. Rawling* and others, 2 H. Black. 393.—Abbot *v. Weekly*, 1 Lev. 176.) The inhabitants here might, in case their rights had been sacrificed, have had an action against the magistrates for breach of trust.

Lord Eldon (Chancellor.) Since their Lordships were last called upon to give attention to the cause of Dempster *v. Cleghorn*, etc., in the declarator and suspension, he had felt it his duty—a laborious, but, at the same time, not altogether unentertaining duty—to look at the whole of the pleadings in the cause. The case was represented at the bar as one of great importance, and justly; for, if it was understood to be such as the Pursuers contended it was, it went almost to the destruction of the whole of the Defender's property. On the other hand, this game of golf was an useful exercise, and appeared to be a very favourite pastime in North Britain. He had hardly ever known a cause in which a warmer [50] interest appeared to be taken. The

corporation, the professors, students, inhabitants of St. Andrew's, etc. appeared to be as much alarmed at this increase of rabbits, as, according to Pliny, the people of the Baleares were when they sent to Augustus for a military force to suppress them.

The summons in the declarator was at the instance of Hugh Cleghorn, Esq., Dr. James Playfair, who stated himself to be Principal of the United College of St. Salvador and St. Leonard; and others who described themselves as inhabitants of St. Andrew's; Thomas Earl of Kellie, who was described as Captain of this golfing society; and others who appeared not to be inhabitants, but who lived in the neighbourhood of St. Andrew's, for themselves, and for behoof of the other inhabitants of the city of St. Andrew's, or others who might resort thither for the purpose of enjoying the comfort, exercise, and amusement of playing golf on the golfing links of St. Andrew's. These Plaintiffs, (as they would be called in England,) their Lordships would observe, were persons who sued on account of the interruption stated to be created to the playing at this game of golf. But the summons was also at the instance of James Cheape and John Hood, who were suing, not on account of the obstruction to golfing, but on account of the injury done to their property by this increase of rabbits. That, if not an objection to the summons, was certainly a singular mode of proceeding, as one summons was made to serve for two suits of perfectly different natures; and the interlocutors took no notice of the additional [51] expense to which the Defenders might be put by the combining of the two suits, one of which might be groundless, and the other well founded.

The summons, to which he prayed their Lordships' particular attention, stated, "that whereas the inhabitants of the said city of St. Andrew's, the professors and students of the University thereof, the gentlemen in the neighbourhood, and all others who chose to resort thither for the purpose of playing golf, have, for time immemorial, enjoyed the constant and uninterrupted privilege of playing golf on that ground lying on the north side of the said city, known by the name of the links, Pilmore links, or golf links of St. Andrew's; the magistrates, town council of the said city, knowing that the inhabitants thereof, and other Pursuers, had good and undoubted right to exercise the said privilege, to prevent any interruption thereof, in the tacks which they granted of the said links, not only declared that the inhabitants and others who should resort thither for the purpose of playing golf, should have right and liberty so to do, as they had done in former times past memory of man; but, in order that the said golf links might be preserved in the same good order for golfing in which they had been kept for past ages, the magistrates and town council appropriated the said grounds for the pasture of sheep, and restricted the tenant that he should not plough any part of the said golfing course, nor cast feal or divots thereon, nor use the same in any way by which the said golfing course might be [52] injured;"—and under these last words they might go the length of arguing that the tenants could not keep black cattle on the links, as these too might injure the golfing course:—and declared that the tacksman or tenant, should not have it in his power to make use of the said links as a rabbit-warren." The summons then stated the sale of the links by public roup. "But (the magistrates and town council) knowing that the inhabitants and golfers had, for time immemorial, and long past the years of prescription, and long past the memory of the oldest person living, enjoyed the constant and uninterrupted privilege of playing golf on the golfing course of the said links, and that they had good and undoubted right to continue in the enjoyment of the said privilege, without interruption, in all time coming, they, by a condition in the articles of the said roup, expressly reserved to the burgesses of this city, (St. Andrew's,) standing on the stent roll allenarly, power and liberty to cut and win divots upon the said links, and commonity for flanking and rigging, conform to use and wont; also for repairing the town's mills, leads, and dams, under this reservation always, that no hurt or damage shall be done thereby to the golf links, and that it should not be in the power of the feuar, or his foresaids, or any succeeding proprietor of the said Pilmore links, to plough up any part of the said golf links in all time coming." Here the summons specified the acts prohibited, but then followed the general words, "But the same shall be preserved [53] entirely as it has been in time past, for the comfort and amusement of the inhabitants and others who shall resort thither for that purpose."

If the cause should be considered as resting on this ground in the summons, then the question would be, Whether the links had been preserved entirely as in times past? This was the utmost that was claimed.

Then the summons stated that Lord Kellie, who was represented as Captain of these golfers, had become the purchaser, and that he sold the links in question to the Appellants. It had occurred to him, from what had passed at the bar, that Lord Kellie, after he had become the purchaser, certainly thought that it had been allowed to keep rabbits on these links, or that he might do it, as he had granted a missive, with a view to a lease of the ground, giving liberty to stock the links with rabbits; and it was material to observe that the town-clerk of St. Andrew's, who appeared to be also secretary to the golfing society, seemed to have acted as Lord Kellie's man of business in this transaction. The summons went on to state, "that the Dempsters, regardless of the rights of the Pursuers, and Begbie, the tenant, had stocked the links with rabbits, by bringing rabbits in great numbers from other grounds; and which rabbits, thus introduced into the links, made holes and burrows in the ground of the golfing course, whereby the same was already much injured, and, if not prevented, would soon be rendered unfit for playing golf." It then went on to state [54] that part of the case which related to Cheape and his tenant Hood.

Their Lordships would then advert to what the summons asserted, and what it did not assert. First, it asserted that the Pursuers had a right paramount to any feu, grant, or disposition, of these links, founded on immemorial enjoyment and prescription; and that the reservations made by the corporation were in view of a right antecedently existing, and not depending merely upon any present contract, or right not created, but acknowledged as founded on prescription. Their Lordships would also observe that there was no allegation that all had a right to go upon these links to kill rabbits, as was contended in the other cause. There was no such allegation here in the first cause.

Then as to that part which related to Mr. Cheape and his tenant, the summons stated, "that the said rabbits, thus brought into the said links, trespassed upon the farm of Balgrove, belonging to the said James Cheape, and possessed by the said John Hood, as tenant therein, (and which are separated from the links for more than a mile by a road only,) by coming over in great numbers and destroying the crops in summer and the wheat and turnip in winter; and upon which road the said Charles and Cathcart Dempster, and James Begbie, their tenant, have of late set traps and stamps in great numbers, and have also strewed poison and other noxious drugs on the said open links, by which the said John Hood and several others have lost dogs, and which has [55] obliged the said James Cheape and others to keep their dogs locked up to prevent their being destroyed, by which they have suffered considerable damage and inconvenience."

And then it stated that, "true it was, that the Pursuers and others, as being entitled to the said privilege of playing golf on the said links, and on that account entitled to restrain the proprietor, tenant, and possessor thereof from injuring the ground on the golfing course, or from doing any thing that may render the course unfit or inconvenient for golfing, have often desired the said Charles Dempster etc. etc. not only to desist from forming the said links into a rabbit-warren, or doing any other thing whereby the said golfing course may be injured; but also to have removed or destroyed the rabbits introduced by them, etc. into the said ground, and to preserve the same in the same state and good order for golfing as it has been for ages past." This allegation had set him right in one particular, with respect to which he had been misled by the interlocutor, which represented the summons as concluding for the removal of the Defenders from the links; whereas, it only concluded for the removal of the rabbits.

Then, having thus stated their case, in which their Lordships would observe what issues were joined and what were not joined nor mentioned, the summons went on to allege, "that it ought and should be found, decerned, etc. that the Pursuers, inhabitants of St. Andrew's, and others, who, by themselves, their predecessors, and authors, have enjoyed the free, immemorial, and [56] uninterrupted privilege, etc. and others who may resort thither for the enjoyment of the exercise, comfort, and amusement of playing golf, have good and undoubted right and title, at all times, and on all occasions, to resort to the said golfing links, etc. and enjoy the

"comfort and amusement of playing golf, etc. in the course that has, for time immemorial, been used for that purpose." Here, too, the Pursuers rested on prescription; and then it went on to allege, "that the Defenders ought to be decerned, etc. to desist from putting or keeping rabbits in the said links," (their Lordships would mark the term *putting* as well as *keeping*;) and then it prayed, "that the Defenders might be decerned to pay damages to Cheape and Hood, and to remove or destroy the rabbits to prevent such damage in time coming."

To this summons, it would be observed, the magistrates of St. Andrew's were then no parties.

Then the Court, having advised this summons of declarator, went on to make what was called its grand decerniture. "The Lords of Council and Session, etc. sustain the title of the Pursuers, and decern, etc. that the Pursuers, inhabitants of St. Andrew's, and others, who, by themselves, their predecessors, and authors, have enjoyed the free, immemorial, and uninterrupted privilege before mentioned, and others who may resort thither for the enjoyment of the exercise, comfort, and amusement of playing golf, have good and undoubted right and title, at all times, and upon all occasions, to resort to the said golfing links of St. Andrew's, and there to exercise the privilege, and [57] enjoy the comfort and amusement, of playing golf on the said links, in the course that has, for time immemorial, been used for that purpose; and decern, prohibit, and discharge the said Charles Dempster, etc. from hindering, molesting, or interrupting the said Pursuers, or others, the inhabitants of the said city of St. Andrew's, or the said other Pursuers, or any other persons who may resort thither for the purpose of enjoying the comfort, etc. of playing golf on the said links, in the free and uninterrupted exercise of the said privilege, and ordain the said Defenders from putting or keeping rabbits on the said links, or doing any other act by which the links might be rendered less convenient for playing golf, etc.; and ordain the Defenders to keep and preserve the links, or course of golfing, in the same state, and good order, and entirety, as they have been for ages in time past." Then (without saying any thing as to Cheape and his tenant) the Court found the Defenders (Appellants) liable in the full expense of extract, which expense was probably much the same as if Cheape had not been a party.

The magistrates had at length assisted the Respondents, and he wished to have an explanation of this difficulty. The case had been argued on two grounds:—1st. The title of the Pursuers independent of the acts of the corporation, the only ground on which the Court had given an opinion. 2d. Their title as flowing from the acts of the Corporation. As to the former, they had to consider what was the nature of the servitude, who they were that [58] claimed it, and whether they could be entitled to it independent of the acts of the corporation. Then, as to the latter point, it was said the Pursuers had their title by virtue of the acts of the corporation; and therefore it was to be considered whether the Court below had given any opinion on this latter point. No:—The Court had said that the title of the Pursuers, independent of the acts of the corporation, had been already sustained by an interlocutor now become final. But suppose their Lordships thought that the title depended on the acts of the corporation, how were they to deal with the interlocutor, when the Court below had given no opinion on the second ground of title?

One of the interlocutors had found, "that the Pursuers, inhabitants of St. Andrew's and others, had right to take, kill, and destroy the rabbits on the said links." But this was not claimed by the summons, and the Court could not carry the matter further than the conclusions of the summons had done; and if the magistrates came in for the rights of third parties under their charters, still the same objection applied. But supposing this to have been set right in the next interlocutor, see in what inextricable confusion the interlocutors, taken altogether, were involved in the declarator and suspension. In one interlocutor, the Appellants were assilized from the conclusions in the libel, as far as related to their destroying their own rabbits; but it was found that the Pursuers had a right to destroy them. In the next interlocutor that latter finding was recalled as incompetent *in hoc statu*; so that the effect of these interlocutors was to negative the [59] alleged obligation on the Defenders to destroy their own rabbits; and as to the other point, the right of the Pursuers to destroy them, they suspended giving any opinion upon that till the question came regularly before them.

Then followed the suspension. The magistrates had raised the people by a kind of conscription for the destruction of the rabbits, and they were destroyed in great numbers. The Appellants then gave in their bill of suspension, which was nothing more than saying this, "Pray prohibit them from killing our rabbits till the question is tried." The Court had said in the declarator, that it could not declare the right till the question came to be tried; and therefore no right had been established. But, in the suspension, the Court found, "that the Chargers must confine themselves to what has been the immemorial practice of killing rabbits on what was denominated the links or common of St. Andrew's, exclusive of such parts thereof as should happen to be under crops at the time." Now, how did they come at the conclusion that this was the immemorial practice? Why thus:—The interlocutor in the former cause, which had, in terms of the libel, said that the Defenders should not keep rabbits, implied that they might be killed, though they had altered that part of the interlocutor which found that the inhabitants had a right to kill and destroy, no such right having been claimed. And yet, having struck out of the interlocutor in the former cause that part which found the right of the inhabitants to kill and destroy the rabbits, in the [60] suspension they found the right to kill out of the words not keep!

The Defenders complained of this in another way. The Court below had looked at the proof in the other cause, which was no proof in this; and if it were, the Court could not properly have looked at it as to this point, because the right was not alleged in the summons. These were inconsistencies which required explanation. He was as friendly to the game of golf as any one, and, if he were a St. Andrew's student, he should be as sorry to lose that pastime as any other advantage to be derived from that University, or any other University. But the question was, whether a servitude could be supported which subverted the use of the property over which it was claimed? If there was a reservation, had they the full benefit of that reservation? The links were to be kept as in times past. How had they been kept in times past? There always had been rabbits there. They said sheep had been kept there, and was the best stock. But were the Defenders prevented from keeping any other animals than sheep? But the sheep had been tried, and had rather failed. But then it was said that this was a wrong kind of sheep. Did they mean to say that the Defenders had a right to keep only one sort of sheep? Look at the leases; even Ritchie's lease did not exclude rabbits, but divided the right of destroying them between the magistrates and tenant. How was the matter to stand as to other animals? Their Lordships probably never had seen any of these nice golf balls; but if they happened to get [61] into what black cattle sometimes left behind them, it would be as bad as getting into a rabbit scrape; and the same observation, to a certain extent, might be applied to horses and sheep. But the question was, Whether the right to play at golf was not to be enjoyed only consistently with all the uses to which the land could properly be applied? It had not yet been proved that the Pursuers had a right to kill the rabbits, and the Defenders were forbidden to keep them. Then, if they were neither to be destroyed nor kept, what was to be done with them?

They also said that English and other rabbits had been introduced;—but what then? A single pair would, from the extraordinary fecundity of the animal, soon fill the whole of the ground with rabbits, if the stock were protected. And it had been properly asked, how were those that had been introduced to be distinguished from them that had been there before? The strong impression on his mind was, that this right could not be supported to the extent of depriving the Defenders of the use of their property.

Lord Eldon (Chancellor.) He had before adverted to the difficulties which presented themselves in the examination of this cause, and he then stated, what he now repeated, that, inasmuch as it appeared to all that this cause must be remitted, it was important that the Court below should understand the nature of the difficulties under which this House laboured.

The summons in the declarator stated that the [62] title was not only in persons composing the golf club of St. Andrew's, and the inhabitants; but also in all others choosing to resort thither for this amusement of playing golf.

In looking into the separate cases which had been referred to in the course of the cause, where the servitudes, though not connected with a dominant tenement, were

yet not absolutely personal, it would be found that these were claimed by the corporation for the use of the burgesses and other inhabitants. But of what description were these privileges, which were stated to be not merely in the corporation and inhabitants, but also in all others ?

He had stated that the title so put had been affirmed by an interlocutor which had become final before the magistrates had sided themselves as parties. At the bar here, the title had been more strongly argued on the ground of the acts of the corporation, reserving the privilege by contract ; and certainly it was a different question whether such a title could be set up by prescription, and whether it might be reserved by bargain. But, on looking at the record, it appeared that the Court had given no judgment on the question of title, as founded on the acts of the corporation. The title, independent of these acts, had been sustained by an interlocutor which had become final ; and on this ground the other interlocutors had proceeded, and not on the ground of any title as flowing from the acts of the corporation. Then could their Lordships decide upon a point of law which had not been under consideration in the Court below ?

[63] He had stated that he had found infinite difficulty in understanding the interlocutors of the Court below. In one of the interlocutors they had found that the Defenders had no right to keep rabbits, but negatived the alleged obligation upon them (the Defenders) to destroy their own rabbits ; finding, however, that the Pursuers, inhabitants, and others, had a right to destroy the rabbits ; and if it had rested there, to be sure one could have understood what was meant ; because, if others had a right to destroy the rabbits, that might sufficiently prevent their being kept. But, on reviewing this interlocutor, the Court found that they were wrong in declaring the right in the Pursuers to kill and destroy the rabbits, and recalled this part of the interlocutor. That reduced the finding to this, —that the Defenders were not to keep rabbits, but they were not bound to destroy or to remove them. If, then, they were not bound to destroy or remove them, (nobody else having a right to do so,) and yet were bound not to keep them, what was to be done ?

Then it had been stated that English rabbits, and rabbits from other parts of Scotland, had been introduced ; and it had been contended that all the rabbits ought to be removed ; and then it was said that part of them ought to be removed. But it had been properly asked, how they were to distinguish the rabbits that had been lately introduced from those that had been there before ! The thing was totally inextricable.

But they had further to observe the confusion, not only in the declarator, but in the suspension. [64] Much had been said about scrapes in the course of the proceedings in the cause, but their Lordships could not easily extricate this cause out of the scrapes in which it was involved. The object of the suspension was to prevent the magistrates from assembling all and sundry, by beat of drum, to proceed in a body to expel or kill these rabbits. The Court had said, " that they had no right to kill them, except on what was denominated the links or common of St. Andrew's, exclusive of such parts as should happen to be under crop at the time." No proof was taken in the second cause. There was no admission in the papers. They could not regularly look at the proof in the former cause, not only because it was no proof in the second cause, but also because the Court had said that, upon that cause, they could not decide the question as to the right of the Pursuers to kill the rabbits. It was necessary, then, to remit both causes, that the Court below might review all the interlocutors.

He regretted the existence of the necessity to send this back again ; but it was a strong thing to say that all who chose to do so might play at golf on a man's ground, and, for that purpose, destroy all the produce which it was best calculated to yield, and prevent its being used for those ends to which alone it could be applied beneficially for the owner. If it were possible to feed black cattle there, he had before observed that, if these balls got into what they occasionally left behind them, they would be in a worse scrape than if they got into a rabbit scrape. He repeated, that since the time of the application to Augustus by the people of [65] the Balears for a military force to suppress the rabbits, he believed that there never had been a contest between men and rabbits carried on with so much spirit.

" It is ordered and adjudged that both the said causes be remitted back to the

" Court of Session in Scotland to review all the interlocutors complained of : but
 " in the first place, to review the several interlocutors complained of in the process
 " of suspension upon such grounds as shall be submitted to them, and, in reviewing
 " them, to consider whether there is any proof duly made in any proceedings between
 " the parties which could be properly resorted to, in the said process of suspension,
 " as establishing any such immemorial practice of killing rabbits on the links of St.
 " Andrew's, or any part thereof, as appears to be presumed to have existed by the
 " terms of the interlocutor of the 10th, and signed the 11th, June, 1807, complained
 " of in the process of suspension : to which practice it is, in the said interlocutor, de-
 " clared that the Chargers must confine themselves, and having regard to the inter-
 " locutor of the 13th May, 1806, in the action of declarator, which recalled as in-
 " competent the finding in that proceeding, that the Pursuers and others had right
 " to take, kill, and destroy the rabbits upon the said links as they were formerly in
 " use to do. And it is further ordered that the said Court of Session do, after such
 " review of the interlocutors in the process of suspension, proceed as to them [66]
 " shall seem meet : and also proceed as to them shall seem meet after their review
 " of all other the interlocutors."

Agent for Appellants, CAMPBELL.

Agent for Respondents, CHALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MACDONELL, and Others,—*Appellants* ; MACDONALD,—*Respondent*

[Dec. 2, 1813].

[See *Henderson and Brown v. Malcolm*, 2 Dow, 285.]

[In an action for damages for an assault against several persons, evidence admitted of two previous assaults on the Pursuer by one of the Defenders, (probably to show malice and premeditation in that particular Defender.) A certain sum, by way of damages, decreed against all of them, (under the circumstances,) conjunctly and severally : and a judicial remit made to the Lord Advocate " to consider whether the principal Defender ought " any longer to remain in the Commission of the Peace, etc." Judgment of the Court below remitted for review as to this last part—it being apprehended that such a remit to the Advocate was irregular—but affirmed as to the rest.]

In 1805, Donald Macdonald, surgeon of the garrison of Fort Augustus, brought an action in the Court of Session against Macdonell of Glengary, and five other persons, his dependants, charging them with having been guilty of an outrageous as-[67]-sault on his person, and concluding for reparation in damages. The damages, or *solatium*, were laid at £10,000, with £500 of expenses, less or more. The Defenders pleaded separately, but a conjunct proof was ordered, and not objected to.

The Court pronounced the following interlocutor :—

" The Lords having advised the state of the proofs, testimonies of the witnesses
 " adduced, and heard counsel for the parties in their own presence, they find that the
 " *haill* Defenders on the 30th day of December, as libelled, on the market day of Fort
 " Augustus, and at or near that place, were guilty of a violent and atrocious assault
 " on the person of the Pursuer, Mr. Donald Macdonald, to the effusion of his blood,
 " and danger of his life : find that the said assault did not originate in a sudden quarrel,
 " but was the result of long preconceived resentment, and a deliberate purpose of
 " revenge, and was attended with many circumstances of great barbarity and peculiar
 " aggravation, especially on the part of the Defender, Alexander Macdonell, of Glen-
 " gary : therefore find the *haill* Defenders conjunctly and severally liable to the Pursuer

" in damages : modify the same to two thousand pounds sterling, and decern : find
 " the Defenders conjunctly and severally also liable in expenses of process : ordain
 " an account thereof to be given in, and remit to the auditor to tax the same and to
 " report to the Court. And further, in respect the Defender, Alexander Macdonell,
 " was, at the time of the above assault, a Justice of the Peace, and a De-[68]-puty
 " Lieutenant for the county of Inverness, and was not only the aggressor in the above
 " assault, and did not interfere to preserve the peace, but did, by imprecations and
 " outrageous threats of personal violence, deter and prevent John MacKay, Head
 " Constable of the county, from interfering to assist and rescue the Pursuer, when
 " officially called on by him so to do ; thereby openly aiding and abetting the other
 " Defenders in their attack upon the Pursuer ; and did likewise endeavour to prevent
 " the military guard, when called, from coming to the Pursuer's relief ; the Lords
 " remit this case to His Majesty's Advocate, with the view that he may consider how
 " far it is proper that the said Alexander Macdonell, of Glengary, should be any longer
 " continued in the Commission of the Peace and Lieutenancy for the county of Inver-
 " ness ; and in respect of the ungovernable resentment and violence manifested by
 " the said Defenders, also to consider whether it would not be proper that they should
 " all of them be laid under proper security to keep the peace."

Both parties reclaimed against this interlocutor : the Pursuer contending that the amount of damages ought to be increased. Ronald Macdonald, one of the Defendants, died about this time : and Glengary applied by a " note " to have the cause delayed till his representatives could be cited ; to which it was answered that, as the damages were given against them conjunctly and severally, there was no ground for this delay.

The Court, upon advising the petitions, pronounced this interlocutor :—

[69] " The Lords having resumed consideration of the mutual reclaiming
 " petitions for the parties in this cause, and advised the same with what is before
 " represented and craved, allow the minute and note now given in for the Defender,
 " Alexander Macdonell, of Glengary, with the letter from the Pursuer before mentioned,
 " to be received ; and in respect of the death of the Defender, Ronald Macdonald,
 " and that the Pursuer does not mean at present to insist against his representatives,
 " reserve to the Pursuer afterwards to proceed against them if he shall see cause ;
 " but as to all the other petitioners, refuse the desire of both petitions ; adhere to the
 " interlocutor reclaimed against ; and allow the decret to go on and be extracted :
 " and of new, recommend to His Majesty's Advocate to consider how far it is proper
 " that the said Alexander Macdonell, of Glengary, should be any longer continued
 " in the Commission of the Peace and Lieutenancy of the county of Inverness ; and
 " in respect of the ungovernable resentment and violence manifested by the Defenders,
 " also to consider whether it would not be proper that they should all of them be laid
 " under proper security to keep the peace."

The following interlocutor was then pronounced in regard to the expenses :—

" The Lords having considered the account of expenses, with the objections thereto
 " and answers, with the report of the auditor thereupon, and heard parties' procurators
 " at the bar ; they allow £100 to the country agent, in full of his account, making
 " the whole expenses £814 9s. 11½d. [70] sterling ; and, *quoad ultra*, approve of
 " the Auditor's report, and decern against the Defenders, conjunctly and severally,
 " with the exception of the representatives of the deceased Ronald Macdonald, for
 " payment of the said sum of £814 9s. 11½d. sterling," etc.

A bill of suspension was presented without effect, praying that execution might be stayed for fourteen days, to enable the Appellants to present their petition of appeal, the Appellants offering to consign the money into the hands of the Court. The money was then paid under protest, (and by Glengary alone, as was stated,) and an appeal lodged.

Romilly and Nolan (for Appellants.) In the summons and condescendence averments were made respecting two assaults, one in 1798 and another in 1802, previous to the assault in 1805, for which alone the action was brought ; and a considerable part of the evidence related to these two previous assaults, to which the judgment had no reference, and at which none of the parties to this action were present, except Glengary. The damages were claimed and decreed against all the parties, jointly and severally, though only one of the parties was present at the two previous assaults,

and though in the last they were concerned in different degrees. The Appellants had pleaded separately, and the damages ought to have been apportioned. The proof did not warrant the premeditation found by the first interlocutor, which ought therefore to be amended in that particular. The Respondent himself characterized the appearances on which he relied only [71] as symptoms of premeditation. The damages were, besides, excessive, and far beyond the loss and damage really suffered by the Respondent, and ought therefore to be reduced, as their Lordships had done in a former case. (*Wright v. Gammel*, July 30, 1784 : judgment on appeal, April 22, 1785.) The judicial remit to the Lord Advocate, to consider whether Glengary ought to be continued in the Commission of the Peace, etc. was erroneous, as it was not within the province of the Lord Advocate to decide upon that question.

Adam and Brougham (for Respondent.)

Lord Eldon (Chancellor.) It certainly startled an English lawyer that evidence should have been admitted at such length of the previous assaults in 1798 and 1802, to which the judgment had no relation, and at which all the parties were not present. But such evidence might have been admitted to show malice and premeditation in Glengary.

It was clear that, in 1805, a most terrible assault had been committed, at which all the Defendants were present. It was a case of violent *mayhem*: the Respondent had been severely wounded, and in danger of death for months: and the assault was altogether attended with circumstances of peculiar aggravation.

It had been objected that the damages had been given against all the Defendants conjunctly and severally, though some of them were not present in the previous assaults, and were guilty in different degrees in the last: whereas the damages ought at [72] least (it was said) to have been apportioned. He had thrown out in the course of the argument that this ground of complaint had never been addressed to the Court below. It was answered that they had pleaded separately; but then a conjunct proof had been ordered and not objected to. No complaint had been made there but this, that the damages were too large; and it appeared to him that they were precluded from arguing at the bar here any other points than those which they had addressed to the Court below.

Then it was said that their Lordships ought not to affirm this first interlocutor, in so far as it stated that the assault was the result of long and premeditated resentment; and it was argued that the Respondent himself had characterized the circumstances only as symptoms of premeditation; but, on referring to these circumstances, every one must think the assault premeditated. It was too much to call upon them to disturb this judgment upon that ground.

Then it was said that the damages were excessive; but the sum did not appear to him to be at all too large.

In the first interlocutor it was remitted to the Lord Advocate "to consider how far it was proper that Glengary should be any longer continued in the Commission of the Peace and Lieutenancy for the county of Inverness," etc. This was part of the judgment; a remit, not merely a recommendation. He did not apprehend that the Lord Advocate could regularly consider the matter. In this country, in criminal cases, it was not un-[73]-usual to order the proceedings to be laid before the Chancellor; but that order was no part of the judgment, and was not the practice at all in cases of civil proceedings for damages. He should propose, therefore, to remit that part of the interlocutor for reconsideration. Though the Judges below must have been aware that the Commissions of the Peace and Lieutenancy passed under the Great Seal, they might have considered the Advocate as a proper *tertius interveniens*.

Interlocutors remitted for review as to the remit to the Lord Advocate—affirmed as to the rest.

Agent for Appellants, MUNDELL.

Agent for Respondent, CHALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GRANT, and Others,—*Appellants*; DYER, and Others,—*Respondents*
[Dec. 15, 1813].

[Mews' Dig. xv. 730. See Stroud, *Jud. Dict. s.v. OR.*]

[Testator gives £3000 portion to each of three daughters, the interest to be paid them in the mean time, and the principal on the event of their marriage with the consent of his widow and one or more of his trustees; and in case of their marrying without such consent, the principal sum of the daughter so marrying to go, not to the wife and husband, but to the children of the marriage; and in case of their dying unmarried, then the principal sum to revert to his estate; the residue of which he gave to his son. After [74] testator's death, the son assigned his contingent interest in the portions to one of the sisters. The mother and trustees died. Held that, as those, whose consent to the marriage of the daughters was required by the will in order to entitle them to their portions in that event, were dead, and as the son was the only other person interested in the portions, and as he had assigned his interest to one of his sisters, that sister was entitled to uplift her own portion immediately, and the portions of her other sisters with their consent, and to close the trust.]

Archibald Grant, Esq. of Pittencrief, who usually resided in London, and was resident there at the time of his death, died in 1784, having previously made his will, of which the material parts, as read by the Chancellor, are stated below, with the sections numbered for the convenience of reference, and, as far as possible, to prevent the necessity of repetition. The testator, by his will, "gave all his property, real " and personal, to trustees, (therein named,) their executors, administrators, and " assigns, upon trust that they, the survivor of them, and executors and administrators " of the survivor, should convert the whole of his personal estate into ready money, " place the same in the public funds," etc.; which money, and all other his estates, they, and the " survivors and survivor " of them, were to stand possessed of, and interested in, upon trust, for the purposes of his will: and, after reciting that he had agreed to give Thomas Dyer, husband of his eldest daughter Maria Letitia Dyer, £3000 as her marriage portion, and that £1000 thereof had been already paid, and that the other £2000 was to be paid after his own and his [75] wife's death, he directed the same to be paid accordingly. And then the will proceeded thus; viz.—

Sect. 1.—" I give and bequeath to each of my three younger daughters, Amelia " Charlotte Grant, Anne Grant, and Elizabeth Grant, the sum of £2000 a-piece, " with legal interest on the same from the time of my death. The said principal " sums of £2000 to be vested in the said trustees and executors before mentioned, " in trust, for the use and behoof of each of the said three daughters respectively, " from the time of my death, as before expressed, until the time of their respective " marriages, if such an event shall happen; when they, or such of them shall be " married, (but with the special consent and approbation of my said wife during her " life, and of one or more of the said trustees and executors, first had and obtained,) " and the husband of such daughter or daughters so married shall be entitled to " demand, uplift, receive, and grant discharges, for the said respective sums of £2000 " each, with legal interest thereof. But in case one or either of my said daughters " shall marry, at any time after my decease, without having first asked and obtained " the consent and approbation before directed, then the said daughter so married, " or the husband of such daughter, shall not be entitled at any time to demand, uplift, " and receive, the said respective principal sum or provision of £2000; but the same " shall remain vested in the said executors and trustees, in trust, for the use and " behoof of the child or children of such marriage, if any such there shall be; and " the said daughter, and the husband of such daughter, shall only be entitled to de-

"mand and receive the legal interest annually arising from the said provision, from the time of my death aforesaid."

Sect. 2.—"And in case any one or more of my said daughters shall remain unmarried and single after my death, and not be married at all, then the said daughter or daughters shall only be entitled to receive the annual interests arising from their respective provisions, after deducting such proportions thereof as shall hereafter be directed to be paid and applied for their maintenance and education; that is to say, I hereby desire and direct that my three said younger daughters, or such of them as shall [76] remain unmarried as aforesaid, shall live and reside with my said wife Anna Maria Grant, so long after my death as she shall remain a widow; and that my said trustees and executors do and shall pay and apply so much of the said interest and produce of their respective portions and provisions, as they shall in their discretion think fit and reasonable, for the maintenance and education of such daughters so remaining unmarried; and that they, or such of them, shall be entitled to receive for themselves respectively the remaining balances of the said annual interests, but that the said provisions and principal sums of £2000 to each of the said daughters so remaining unmarried, shall remain vested in the said executors and trustees, in trust, as aforesaid, during their respective lives, and shall, at their deaths, revert to and become a part of my estate, as if no such provision had ever been made."

Sect. 3.—"I also give and bequeath to each of my said three younger daughters the farther sum of £1000 a-piece, from the time of my said wife's decease, to be paid to such of them, or to the husband of such of them as shall be married, within one year from the time of her death, with legal interest thereon from that time, while it shall remain unpaid; but the said further principal sum of such daughter as shall remain unmarried shall remain vested in the said trustees before named during her or their respective lives, and shall, at her or their deaths, revert to and become a part of my said estate, in the same manner as is before expressed respecting the said £2000 before directed; and such daughter so remaining unmarried shall be only entitled to receive the annual interest of the said respective sum of £1000 from the decease of my said wife during her or their natural lives."

The testator then went on to give an annuity of £250 to his wife, and several small legacies to various persons, etc. etc.; and then the will proceeded thus:—

Sect. 4.—"It is my farther will and desire that, after deducting and reserving the several legacies, provisions, and reserved sums, left and bequeathed to my said four daughters, the sum of £1000 [77] to be disposed and bestowed of by the said Anna Maria Grant, by will, in manner before mentioned, the above recited legacy of £250 to be paid annually to my said wife from the time of my death, and the several other legacies and donations above specified, my said executors and trustees shall stand seised and possessed of, and interested in, all the residue and remainder of my fortune and estates, both real and personal, and the interests, dividends, and profits thereof, in trust, for the use and behoof of my son, the said Alexander Grant, Captain in the 13th regiment of foot, his heirs, executors, administrators, and assigns; the said interests, dividends, and profits thereof to be regularly paid to and accounted for to him yearly, as they shall become due and payable from the time of my death; but that he shall have no right or title to sell out any stock, or take up or employ any principal sum or part of the said estate, real or personal, except so much as may be necessary for the immediate payment and discharge of the several legacies and donations above bequeathed, which the said executors and trustees before named are authorised and required to do as soon as may be convenient after my decease; and excepting such sums of money as may be necessary, and as they shall approve of, to be applied towards and for purchasing the farther promotion of my said son in the army; and I further direct, and it is my special will and desire, that the said Alexander Grant shall not be entitled to, or have any claim, right, or power, to demand, sue for, uplift, receive, or grant discharges for, any part or portion of the said remaining estates, real or personal, of which I shall die possessed, either for the payment of such debts as he may have contracted, or for any other use or pretext whatever, excepting only as before excepted, until he shall have arrived at and completed 31 years of age, or be married, whichever of those two events shall first happen after my decease; but, on his having arrived at, and completed the above age of 31 years,

" or being married, as before said, they shall pay and make over to him, and he shall have a full right and title to demand, sue for, uplift, receive, and grant sufficient acquittances and discharges for all such remaining unappropriated sums of money, principal and interest, stock, and real estates and personal, as I shall die possessed of, in the same manner as I could have done in my life-time : excepting always such sums of money as above are reserved and appropriated for [78] the uses and purposes before expressed : and he shall at no time have any the least right, title, or pretext, to claim, demand, receive, intermeddle with, or grant acquittances for, any part of the said reserved and appropriated sums of money as above ; but that the said executors and trustees shall remain vested in and possessed of the same in trust, for the uses and purposes before expressed."

Sect. 5. — " And in case my said son, Alexander Grant, shall happen to die under the age of 31 years, OR unmarried, then my will is, that my said executors and trustees shall stand possessed of, and interested in, my said residuary estates and accumulations thereof, in trust for my said four daughters, and the survivor or survivors of them, and the respective heirs, executors, administrators, and assigns of such surviving daughter or daughters : and in case there shall be but one surviving daughter, then in trust for such surviving daughter, her heirs, executors, administrators, and successors, the share of my eldest daughter, Maria Letitia Dyer, to be paid, assigned, or made over to her or her said husband, Thomas Dyer, for her use and benefit, within one year after the death of the said Alexander Grant ; and the share of the survivor or survivors of my said three younger daughters to continue vested in the said trustees, from the time of the death of their said mother, Anna Maria Grant, if she shall survive her son, the said Alexander Grant, and in case she shall so long remain a widow, in trust until such time as they, or either of them, shall be married ; when such share or proportion shall be paid, assigned, and made over to her or them, or the husband of such daughter or daughters so married, within one year after the death of my said wife, in case she shall survive her son, the said Alexander Grant, as aforesaid."

Sect. 6. — " And in the event of the said Alexander Grant's dying without having attained the age of 31 years complete, AND unmarried, as is before expressed, then, and in that case, it is my will, and I desire that my said residuary estates, and accumulations thereof, shall be charged and chargeable with the payment of the farther clear yearly sum of £100 to my said wife Anna Maria Grant, etc. etc. And in case my said son shall die, as aforesaid, and my said four daughters shall all die without being married, or such of them as shall be married, and die without leaving issue of their bodies, then my will is that my said [79] trustees shall stand possessed of and interested in, all my said residuary estates, and accumulations thereof, in trust, to pay the interest and produce thereof, and of the whole thereof, to my said wife during her life : and after her death, and in the event of the death and deaths of my said four daughters, as above expressed, I leave and bequeath the sum of £500 a-piece to such of my said executors and trustees as shall have accepted of and acted in the said trust and character : and all the remainder of my property, possessions, and estates, real and personal, I leave and bequeath to, and in favour of, Maria Eleonora Grant, only daughter of the late Alexander Grant, of Arndilly in North Britain, and to her heirs, executors, administrators, and assigns, to be held, occupied and enjoyed, by her or them, as hers or their sole right and property in all time thereafter."

The testator then appointed his trustees, together with his wife, executors of his will. Two of the trustees (Colquhoun Grant, Clerk to the Signet, and Richard Mollesworth, of the Navy Pay-Office) and the widow accepted the trust. The widow and the trustee, Colquhoun Grant, having died, the management devolved entirely on Mr. Mollesworth, who acted till the son attained the age of 31, and then paid over to the son the whole of the testator's property, with the exception of £9000, reserved to answer the bequests to his unmarried sisters.

A creditor of the son then arrested in Mr. Mollesworth's hands the son's contingent interest in the £9000 ; and, in 1797, Mr. Mollesworth raised an action of multiple-poinning and exoneration, (in the nature of a bill of interpleader,) before the Court of Session, against the testator's children and the son's creditor. Mr. Mollesworth died in 1800, and, on petition by the Appellants, a factor was appointed to carry on

the trust and insist in a supplement-[80]-ary action of multiple-poin ding, to which Mrs. M'Dowal Grant (late Miss Grant of Arndilly) and her husband were made parties.

During the progress of this action, Anne Grant, one of the unmarried sisters, by agreement with her brother, in consideration of a certain advance, and by compromise with the arresting creditor, acquired both their interests in the £9000 portions, and brought an action of declarator, concluding, that, in virtue of this transaction, she ought to be declared entitled to her own £3000 absolutely, and to her two unmarried sisters' portions in case they died unmarried, etc. This was conjoined with the process of multiple-poin ding.

In 1806, Captain Grant, the son, died unmarried.

In the course of the proceedings, which it is unnecessary for the present purpose to state at length, the Appellants (Anne Grant and her two unmarried sisters) contended that Alexander Grant, the residuary legatee, having attained his age of 31 years, he and his assigns became entitled, under the will in question, to the whole residue of the testator's estates ; which, of course, included the legacies given to the Appellants, in the event of their dying unmarried.

That the Appellant, Anne Grant, having come in place of her brother, the residuary legatee, she and the other two Appellants were the only persons who had any interest in the continuance of the trust : and they were entitled, with joint consent, to uplift the trust funds *de præsenti*, and to grant valid and effectual discharges and acquittances for the same to all concerned.

[81] There were only two parties who could have any right to oppose the claim of the Appellants ; namely, the widow and trustees of the will, and the testator's son as residuary legatee. But the widow and the other trustees of the will being all dead, the trust, so far as they were concerned, was already at an end ; and the Appellant, Anne Grant, who had the sole right of the residuary legatee, expressly concurred in the Appellants' claim. For what purpose, then, or on whose account, was this trust to be still continued ? The Appellants combined in their persons every right which could, in any possible contingency, exist over the trust fund ; and if they were not allowed to call up the same, and to dispose thereof at pleasure, then was this trust continued without any end or object, and for no useful purpose whatever.

It might be said, perhaps, that they could not discharge their contingent claims until they married, because, till then, their respective provisions were not due, and as soon as the marriage took place, the wife could not grant any discharge without her husband's consent. But there was a fallacy in this argument : for the husband, taking his wife, must take her with all her debts and obligations whatever ; and if she should have received her portion, and granted a discharge, which, of course, she warranted against all contingencies, then this obligation passed with the rest of her debts over upon her husband, and bound him just as it bound her.

The Respondents, (Mrs. Dyer, eldest daughter of the testator, and her children,) on the other hand, [82] contended that, according to the just construction of the will, the residue which vested in the son on his attaining the age of 31 was exclusive of the portions, in which he could have his contingent interest only in case of his having both attained 31, and having married : for that, unless both events happened, this residue was given over to the sisters, (*vide* will, sect. 5.) and the survivors and survivor, and the representatives of such survivors and survivor. The trust ought therefore to be continued : as, in case of the Appellants dying unmarried, the principal sums would belong to the Respondents.

It was answered that the word OR, (*vide* sect. 5.) on which the Respondents' argument depended, was evidently inserted by mistake for the word AND.

The Court of Session pronounced the following interlocutor :—

" The Lords having advised the mutual informations and additional memorials " for the parties and whole cause, find that the conditions have failed on which Mrs. " M'Dowall Grant would have been entitled to succeed to the funds *in medio*, and " therefore repel her claim as residuary legatee : find that in *hoc statu* the portions " of Misses Amelia Charlotte Grant, Anne Grant, and Elizabeth Grant, being three " thousand pounds sterling each, cannot be uplifted, but must remain vested in terms " of the trust until the death or marriage of each of them, reserving the claim of the " parties to the residuary fund which may arise in the event of any of these ladies " deceasing unmarried."

[83] From this interlocutor the Appellants lodged their appeal.

Romilly and Leach (for Appellants :) Adam and Richards (for Respondents.)

Lord Eldon (Chancellor.) The question here, on the whole, was, What was the meaning of the testator's will ? and, in order to determine this, it would be necessary to look at the will and the circumstances in detail. The testator by his will gave all his property, real and personal, to certain friends whom he named executors and trustees, (all since dead,) the survivor, and representatives of such survivor, upon trust that they, and the survivors or survivor of them, should pay the same as specified in the will. First, That they should pay the sum of £2000 (secured by testator's bond) to Thomas Dyer, husband of one of the testator's daughters, Maria Letitia Dyer, which, together with a sum of £1000 already paid, he had agreed to give with his said daughter as a marriage portion. And then the will proceeded :—" I give " and bequeath to each of my three younger daughters, Amelia Charlotte Grant, Anne " Grant, and Elizabeth Grant, the sum of £2000 a-piece, with legal interest for the " same from the time of my death." (Here their Lordships would observe that this was an immediate bequest to the ladies themselves. The testator then proceeded to give directions as to the £2000, so given to each of his daughters, by immediate words.) " The said principal sums of £2000 to be vested in the said trustees, etc. " until the time of [84] their respective marriages, if such an event shall happen, " etc. but with the special consent and approbation of my wife, etc. and one or more " of my said trustees," etc. Here nothing was said as to the consent of the survivors or survivor, and yet it must be meant to include the survivor, as the trust was intended to last in the survivor ; so that it must be taken as if the words had been repeated. He adverted to this particularly, because, if there was a possibility of the marriage of the daughters without such consent as was here required, it was clear that the portions could not be immediately uplifted ; as, in case they did so marry, the portions were not given to the husband and wife, but to the children of the marriage.

But the question was, Whether such consent could now ever be given ? or, in other words, Whether the consent was confined to the executors and survivor of them personally, or meant to be extended to the representatives of the survivors ? The general course of the decisions went to confine this power of giving or withholding consent to those who were personally named, and not to extend it to representatives. If then the Appellants were not entitled to uplift the portions, he was inclined to think that it could not be on the ground that any consent might be wanting to their marriage that could now be given, but on the ground that the husbands were to receive the principal of the portions, and not the daughters,—a question which he would consider by and by.

The testator then proceeded :—" And in case any one or more of my said daughters " shall remain [85] unmarried," etc. (*vide ante*, sect. 2.) These were certainly very strong words, to show that it was the intention of the testator to suspend immediate payment in any event that might happen. But then this was to be considered, that, if the principal sums must either go to them on their marriage, or, in the event of their not marrying, fall into the residue, and the residuary legatee made over his interest to them, they were entitled to the interest of the portions under the will, and to the principal as having added to their own title the title of the residuary legatee. A supposed case had been put, of a sum of money bequeathed to A. in the event of his attaining the age of 31, and in case he did not attain that age, then the sum to fall into the residue ; and it had been said that the Court could not order the legacy to be paid to A. till he attained the age of 31, even with consent of the residuary legatee. He did not concur in that opinion. As the only other person interested was the residuary legatee, the result was that the money might be paid as much sooner as he chose ; and if he agreed that it should be paid to A. at the age of 21, the Court had nothing to do with that.

The will then proceeded thus :—" I also give and bequeath to each of my said " three younger daughters the farther sum of £1000 a-piece, from the time of my said " wife's decease, to be paid to such of them, or the husband of such of them as shall " be married, within one year from the time of her death, etc. : but the said farther " principal sum of such daughter as shall remain unmarried shall remain vested in " the said trustees, etc. and shall, [86] at her or their deaths, revert to and become

"part of my said estate," (their Lordships would notice the words 'said estate,') "in the same manner as is before expressed," etc. (*Vide ante*, sect. 3.)

The testator then proceeded to give an annuity of £250 to his wife, and the use of his household goods, with an option to his son to take them in the event of his marriage (without reference there to any age) in her lifetime, upon payment of £500 to the widow. And then he gave some small legacies, £200 to his wife, etc.; and then disposed of the residue in this way:—"It is my farther will and desire, that "after deducting and reserving the several legacies," etc. (*Vide ante*, sect. 4.)

Their Lordships would here observe that the residue of the testator's estate was given to his son, A. Grant, but with directions that the interest only should be paid him till he attained the age of 31, or married; and on his attaining the age of 31, or being married; "then the trustees were to pay and make over to him, etc. all "such unappropriated sums of money, etc. as the testator should die possessed of, "etc.; excepting always such sums of money as are above reserved and appropriated "for the uses and purposes before expressed."

Then followed a very material passage. Subsequent words might revoke prior words, but where the meaning was clear before, the revocation must be very clear in order to be effectual, and they must look at the context to ascertain from the whole what was the real meaning of the testator. "And in case my said son A. Grant shall "happen to die under the age of 31 years, OR unmarried, then my will [87] is, that my "said executors, etc. shall stand possessed of, and interested in, my said residuary "estates, etc. in trust for my said four daughters," etc. (*Vide ante*, sect. 5.)

If the will had stopped there, independent of the subsequent passage, it would still be very difficult to say that it ought not to be construed, as a will might be, so as that the word OR should be considered as if it had been AND, where such appeared from the context to be the meaning of the testator. The former part of the will gave the title absolutely in the events either of attaining the age of 31 or marrying; and then followed the passage, "that in case the son died under 31, OR unmarried, the "residue was to go to the daughters;" the effect of which latter clause, unless the word OR should be construed as if it were AND, would be this, that though by the former clause the son was to have the residue either on attaining the age of 31, or marrying, whichever should first happen; by the latter clause he might have it neither in the one event nor the other. Though he attained the age of 31, he could not have the residue till he married; and though he married, unless he also attained the age of 31, the residue must go over.

Then followed the words:—"And in the event of the said A. Grant dying without "having attained the age of 31 years complete, AND unmarried, as is before expressed; "then it is my will, that my said residuary estates shall be charged with the payment "of a farther yearly sum of £100 to my said wife, etc.; and in case my [88] said "son shall die as aforesaid," (which, referring to the last antecedent, meant in case he died under 31, AND unmarried,) "and my said four daughters shall all die without "being married," etc. (*Vide ante*, sect. 6.)

This latter clause showed, that, unless the son died both under the age of 31, AND unmarried, the residue was not intended by the testator to go over; and this was consistent with the first part of the will. Then the intermediate clause must be construed in the same way as if the word OR had been AND; and, by this construction, the son, when he attained 31, had the absolute title against all subsequent claimants.

Then it was said that the residue given to the son was minus the portions—these portions having been expressly excepted. But the exceptions extended only to the sums appropriated to other purposes mentioned in the will; and whatever remained undisposed of (including all the interest that was undisposed of in the £9000 portions) fell into the residue.

Then the effect of the will on the whole was, that it excluded all claim to the residue after the son attained the age of 31, (which he did,) or married, whichever first happened; and if the interlocutor meant any thing else, the legal effect of the will had been misunderstood.

But then it was said that the portions must remain vested in terms of the trust till it was seen whether the daughters, or any of them, should marry with the consent required in the will; and if the [89] consent mentioned in the will had extended to the representatives of the surviving trustee, then the proposition was undeniable

on the terms of the will. But this consent being properly a matter of personal confidence, was not to be constructively extended to individuals unknown to the testator.

This reduced the matter to the only other question, Whether the interlocutor was right in finding, "that in *hoc statu* the portions could not be uplifted by the "daughters, but must remain in terms of the trust till the death or marriage of each "of them?" He originally thought it was right, and it was difficult to think that such was not the intent of the testator: but then consider what was the effect of the will and the subsequent events. The effect was, that before the ladies got the title of the son the interest of the £9000 belonged to the daughters, and the principal to the son in the event of their dying unmarried: but when the daughters got the title of the son, it was impossible not to say that they were entitled to receive the £9000, unless somebody else might be entitled to it independent of any thing the daughters could do in the mean time. Here was an immediate gift to the daughters, and then a trust: and it had been argued, that if the brother had been living, and they had released to the brother, he would have the right against everybody else—even against the husbands—and he thought he would. When they, then, acquired the interest of the residuary legatee, in his judgment, this property was absolute in them, and they might uplift it immediately: and so far the interlocutor was wrong.

[90] He was authorised to state that this opinion was fortified by the authority of his noble and learned friend, (Redesdale,) who had attended at the hearing, and who had felt less difficulty in coming to this conclusion than he had.

Interlocutor altered conformable to the above opinion.

Agent for Appellants, BERRY.

Agent for Respondents, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MONTGOMERY, and Others, Trustees of the late Duke of Queensberry,—
Appellant; CHARTERIS, EARL OF WEMYSS, —*Respondent* [Dec. 10, 1813].

[See 1 Bli. 339; also *Ker v. Roxburghe* (Duke of), 2 Dow, 149, 206.]

[Entail, with prohibition against alienation, properly fortified with irritant and resolute clauses, followed by a permissive clause to let life-rent tacks without diminution of the rental. No specific prohibition against letting of leases, except as above. A lease granted by heir of entail, for 97 years, taking a grassum, or fine. Held that this lease fell under the prohibition against alienation.]

In 1693, William, Duke of Queensberry, on occasion of the marriage of his second son, Lord William Douglas, executed a deed of entail of the [91] Lordship of Nidpath, comprehending the particular lands therein described, in favour of the said Lord Douglas, and his heirs male and of tailzie, as therein mentioned. This entail contained the following proviso:—

"It is hereby expressly provided and declared, and to be provided and contained "in the said resignation, charter, and seisin, and in all the subsequent rights to follow "hereupon, of the said lands and estate in time coming, that it shall no ways be leisome "and lawful to the said Lord William Douglas, and the heirs male of his body, nor "to the other heirs of tailzie respective above mentioned, nor any of them, to sell, "alienate, wadset, or dispone any of the said haill lands, lordships, baronies, offices, "patronages, and others above rehearsed, as well those to be resigned in favour of "the said Lord William in fee, as those reserved to be disposed by the said Duke of "Queensberry in manner foresaid, or any part thereof; nor to grant infeftments of "life-rent, nor annual rents, forth of the same; nor to contract debts, or do any other "fac, or deed whatever, whereby the said lands and estate, or any part thereof, may

“ be adjudged, apprized, or otherwise evicted from them, or any of them : nor by any other manner of way whatsoever to alter or infringe the order and course of succession above mentioned : and in case the said Lord William Douglas, or any of the other heirs of tailzie above specified, shall contravene the same, all such facts and deeds shall in themselves be null and void *ipso facto*, without necessity of any declarator : and the person con [92]-travening, and his heirs, shall forfeit tyne, and amit right, title, interest, and benefit that they can anywise acclaim by virtue of this all present tailzie, and infeftments to follow hereupon : and the said lands and estate shall immediately thereafter descend, appertain, and belong to the next heir of tailzie immediately following the contravener, without the burden of all such facts and deeds, in the same way and manner as if the person, contravener, and his heirs, had never existed, or had been no member of the present tailzie : and it shall be lawful and competent to the next heir of tailzie to serve himself heir to the person immediately preceding the contravener, without the burden of all such facts and deeds, or otherwise to establish the right of the said lands or estate in his person, by declarator or adjudication, or any other manner of way agreeable to the laws of this kingdom : it is always hereby expressly provided and declared, that notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent to the heirs of tailzie above specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said lands and estate during their own life time, or the life-time of the receiver thereof, the same being always set without evident diminution of the rental : and likewise that it shall be lawful and competent to the said heirs of tailzie to grant suitable and competent life-rent provisions in favour of their wives, not exceeding the sum of 5000 merks of yearly free rent of the said estate ; and to grant provisions [93] in favour of their children, not exceeding two years’ free rent of the same ; and with this provision always, that it shall not be lawful to any of the said heirs of tailzie to grant new provisions in favour of their children until first the former provisions granted by their predecessors be purged and satisfied, and the said estate freed and disburdened thereof, under the hazard of the like irritancies and certifications above mentioned.”

The late Duke of Queensberry having succeeded to the estate under this entail, granted a lease of one of the farms (Wakefield) belonging to the entailed estate to Alexander Welsh, for a term of 57 years from Whitsunday, 1800, at a yearly rent of £86 15s. 2d. taking a sum of £301 of grassum, or entry money. Welsh afterwards renounced that lease, and received a new one for 97 years, from Whitsunday, 1802, at the same rent of £86 15s. 2d. : besides which, he bound himself to the performance of certain conditions and obligations, and also became bound to pay £318 1s. 2d. by way of grassum.

To try the validity of this latter tack, the Duke brought an action of declarator in the Court of Session. The summons in this action concluded against the late Earl of Wemyss, the late Lord Elcho his eldest son, and the present Earl of Wemyss. (Respondent,) “ that being heirs substituted to the Duke of Queensberry by the deed of entail already mentioned, they ought to be called as parties ; and being so called, that it should be found and declared that the Pursuer, the Duke, was nowise limited by the said deed of entail, nor by the clauses, prohibitory, irritant, and resolute [94]-tive, therein contained, from granting leases for the endurance of ninety-seven years, nor from taking grassums for the same, the said leases being set without diminution of the rental : in particular, that the said lease, dated 23d November, 1802, granted to Welsh, upon his renunciation of the former lease, should be valid and effectual, under the conditions and obligations therein mentioned, to the said Welsh, and to his heirs, assignees, and subtenants, for the full space of ninety-seven years from the commencement thereof.”

The Defenders having appeared to the said action, stated a defence, in general terms, that the said lease is contrary to, and in violation of, the provisions and prohibitions contained in the entail referred to in the summons.

Lord Glenlee (Ordinary) took the cause to report ; and the Court, after hearing counsel, pronounced the following interlocutor :—

“ The Lords having resumed consideration of this cause, and advised the same, with the mutual informations for the parties, and having also formerly heard the

"counsel for the parties in their own presence, they sustain the defences, assoilzie the Defenders from the conclusions of the declarator, and decern."

The Appellant gave in a reclaiming petition against the above interlocutor; and, upon advising the same with answers, the following interlocutor was pronounced:

"The Lords having resumed consideration of the petition for the Duke of Queensberry, and advised [95] the same, with the additional petition and answers, they refuse the prayer of the said petition and additional petition, and adhere to their interlocutor reclaimed against."

The Duke of Queensberry appealed against these interlocutors, and after his death the appeal was revived by the Appellants, his trustees and executors.

There were two questions made:—1st, Whether the lease in question was prohibited by the prohibition against alienation? and, 2d, Whether it was prohibited by the subsequent permissive clause? The former was considered as the principal question.

Romilly and Brougham (for Appellants.) From the effect of the irritant and resolute clauses by which, in case of contravention, the prohibited act is not only rendered void, but the contravener also forfeits his estate, and likewise from the unfavourable light in which restraints on property were regarded, entails had received the strictest construction. This was stated by the most distinguished writers on Scottish law, and especially by Erskine, (b. 3. t. 8. s. 9.) who thus summed up the doctrine of the law on that point:—"An heir of entail has full power over the estate, except in so far as he is expressly fettered, (New Col. 2, 13;) and as entails are an unfavourable restraint upon property, and a frequent snare to trading people, they are *strictissimi juris*, so that no prohibition or irritancies are to be inferred by implication. Hence, though all debts to be contracted by the heir should, by the entail be declared null, but without irritating the right of the heir contracting, (22d July, [96] 1812, Creditors of Riccarton;) or, *vice versa*, though there should be a clause irritating the right of the heir who contracts, but without declaring the debts contracted null, (11th July, 1734, Bailly;) the Court will not interpose to supply the defect from presumed intention. For the same reason, a prohibition to alter the succession, though under an irritancy, does not disable the heir from contracting debt, (Falc. 1, 116;) nor does a prohibition to contract hinder him from selling, (Falc. 2, 92.)"

This rigidly strict construction was applied in the Duntreath case, Nov. 24, 1769, appeal April 15, 1771; in the case of Stewart v. Home, 1789, (Diet. vol. 4, p. 339;) in the Tillicoultry case, Jan. 1799, affirmed June, 1801, (Fac. Coll. No. 99;) and in the case of Leslie v. Orme, (6 Fac. Coll. 1779.)

The word alienate, in the prohibitory clause of an entail, was used, not in a vague, indefinite, and popular, but in a strictly technical sense, applicable only to the feudal right or property of the lands. In this latter sense it was always used in conveyances where the feudal right was meant to be carried, and in this sense it appeared to have been used in the act of entails, 1685, cap. 22. If the word were to be understood in its more extensive sense, it would include all the prohibitions usually inserted in entails, which would hardly be contended.

The word alienate could not therefore apply to leases short or long, as the longest leases did not carry the feudal property of the lands. (Dallas, 650.) Leases [97] might possibly in some instances be set aside as being *in fraudem* of the entail, which was not here pretended. If long leases were alienations, and short leases were not, where was the line to be drawn?

The authorities relied upon by the Respondents did not bear out their conclusions. Craig (Lib. 3. dieg. 4. s. 5.—Lib. 2. dieg. 10. s. 5.) stated the opinion of foreign feudists, rather than his own; and the law of Scotland, as it stood in his time, was of no great importance with respect to the present question, considering the changes it had undergone in regard to leases. The words most favourable to their views in Stair had been interpolated (*vide ante*, case of Turnerhall, vol. i. pp. 430–434) after his death, and were not to be found in the edition (1693) revised by himself, in which he stated (b. 2. t. 11. s. 13.) that alienation was not extended to location by the common feudal customs. (*Vide* also b. 1. t. 15. s. 1.—b. 2. t. 9. s. 2.)

The illustrations drawn from the law in regard to the annexed property of the crown, and in regard to church property, as well as those from the style of inhibitions, law of death-bed, etc. were totally inapplicable, as these branches of law rested on their

own peculiar principles, which were entirely different from those by which entails were governed.

This case differed from that of *Turnerhall* (vol. i. p. 423.) by the permission to grant life-rent leases, by the permissive clause following the prohibitory, and also as to the length of time for which the lease was granted, which was material. Though a lease for 1000 years (a period as long as empires had lasted) [98] might perhaps, in some sense, be considered as an alienation, it did not follow that a lease for 100 years could be so considered; and the decision in the case of *Leslie v. Orme* (6 Fac. Coll. 1779.) had been considered as completely fixing the point, that heirs of entail, where there was no express prohibition against leases, might grant leases at the former rent, for any period not exceeding 100 years; and lawyers of the first eminence had had no hesitation in recommending such transactions as perfectly safe, and in referring to the case of *Leslie v. Orme*, as a judgment which had set that question at rest.

No inference against this lease could be drawn from the permissive clause:—1st, Because, in cases of entail, no prohibition could be implied; and, 2d, Though it had contained an express prohibition, it could have no effect, as it was not fortified by irritant and resolute clauses.

Leach and Thomson (for Respondent.) Leases for longer terms than were usually granted in the ordinary administration and management of the estate at the time were considered as alienations, and struck at by the prohibition. A lease, or tack, it was admitted, was not in its own nature an alienation, but it became so when extended beyond the term commonly granted as an act of ordinary administration—a term necessarily varying according to the fluctuations in the notions as to the proper system of management. The distinction between leases of ordinary, and those of extraordinary duration, was strongly marked in the law of Scotland; the [99] latter being regarded as alienation, as was evident from the language of the law as it appeared in the Statute Book, in judicial proceedings, and in the writings of the Scottish lawyers.

In illustration and support of these observations, the Respondents referred to the following cases, in which prohibitions against alienation were held to extend to long tacks:—

1st, The limitations imposed on the crown in the management of the royal demesnes, act of 1455, cap. 41, with Sir G. Mackenzie's observations on that act. In the Annexation Act, 25 Geo. 2, cap. 41, after the rebellion of 1745, alienation was prohibited, and this was held to extend to long tacks, which were therefore let only in virtue of a special power given to that effect.

2d, In the management of church property, life-rent assedation was considered as a species of alienation. Balfour's *Practicks*, p. 203.—Bishop of Aberdeen v. Forbes, Dec. 14, 1501.—Abbot of Crossraguel v. Hamilton, March 2, 1504.

3d, Long location of their fees by the vassals was held to be alienation by the feudal law generally, and as adopted in the law of Scotland particularly. Craig, lib. 2. dieg. 10. s. 5. *de locationibus*.—Lib. 3. dieg. 3. s. 22–24. *de recognitione*.—Lib. 3. dieg. 4. s. 5. *de jure protimeseos*.—Stair, b. 2. t. 11. s. 13.

4th, Long leases on death-bed were struck at by the law of death-bed on the ground of their being alienations. *Chrystisons v. Ker*, December, 1733, Kames, 1 Dict. 215.—*Bogle v. Bogle*, June 19, 1759, Fac. Coll.

[100] 5th, Under the alienations in fraud of creditors prohibited by the bankrupt laws, long leases were included. Act of 1621, cap. 18, with Sir G. Mackenzie's observations on that act.—Act of 1696, cap. 5.

6th, Leases of extraordinary endurance were also struck at by the writ of inhibition, under the clause against alienation of the lands.

7th, A lease granted of burgh property, in virtue of a delegated commission, was set aside on account of extraordinary endurance, as being a species of alienation. *Aberdeen case*, 1491.

8th, In cases of joint interests, and in all cases of restraint on property, alienation was held to extend to long tacks.

The construction put upon the Act of Tailzies, 1685, cap. 22, afforded another proof of the comprehensive meaning of the word alienate, or annailzie. The most direct express prohibitions against letting tacks derived their efficacy as against third parties from that act, and yet there was no word in the act to give this effect to

such prohibitions, unless the word *annailzie* had been considered as extending to leases.

This conclusion as to the meaning of the Entail Act, and the extensive import of the word alienation, was confirmed by the practice of contemporary lawyers and conveyancers, as appeared from the most considerable entails put on record prior to the year 1700 : such as the entails of Lee, of Bargeny, of Newbyth, of Blackcastle, of the Dukedom of Hamilton, of Prestonhall, of Malleny, of Nidpath, [101] of Rosehaugh, of Galashiels, of Dirleton, of Kintore, of Niddrie, of Libberton, of Craigievar, of Invercauld, and of Balnagown.

It was also contended, that independent of the ground of extraordinary endurance, a lease at a large grassum and an elusory rent would be regarded as alienation, if it deprived the succeeding heir of the due enjoyment of the estate.

The permissive clause in this entail was also irresistible evidence that the previous prohibition against alienation was understood to have extended to long leases.

The same conclusion was supported by the decided cases. In the case of *Lord Kinnaird v. Hunter*, Nov. 26, 1761, a lease for 25 years was challenged on the ground of its being an alienation, and supported only because the entail had not been properly recorded. The leases in the cases of *Ker (or Carre) v. Cairns*, and *Leslie v. Orme*, were supported only on the specialties in these cases, and rather tended to confirm than impugn the general doctrine. (*Vide ante*, case of *Turnerhall*, vol. i. pp. 423–429.)

Clerk (in reply.) There could be no question here about the right to take a grassum. The question rested almost entirely on the length of time. From 1685 down to the present time there had not been a single case of a lease reduced merely on the ground of its being an alienation, unless there was an express prohibition. A lease for 76 years (*Leslie v. Orme*, 6 Fac. Coll. 1779.) had been supported, and an additional [102] 19 years' lease would in that case have been supported, had it not been that there was no possession under it : so that it could not be supported against an heir of entail who had the privilege of a singular successor. Since that decision it had always been the opinion of lawyers, and that opinion had been acted upon by heirs of entail, that, unless in cases where there was an express prohibition, these leases were good for any period not exceeding 100 years. Though the reason for fixing upon this particular period of duration rather than any other was not very clear, yet, as the opinion had prevailed, it had been thought advisable not to recommend it to heirs of entail to grant longer leases.

There was no attempt to show that this lease was prevented by any thing except the word alienate. Strike out that word, and nothing remained. But then it so happened that some entails had not this magical word, and heirs of entail having, upon searching among their old parchments, discovered this circumstance, came for opinions whether they might not grant leases as they were not bound by the magical term. Being told that they might, leases were granted accordingly : and one of these cases was now before the Court of Session. To the astonishment of every body, it was then found that there was infinitely more magic in the word disposition than in the word alienation ; and he would venture to say that the Court was now very considerably shaken on the general principle.

By the law of Scotland, all deeds of importance must be registered, a system which was generally [103] admired. Unless an entail was properly recorded, it was not worth a pinch of snuff against creditors and purchasers. By a reference to the proper register, creditors and purchasers must know how to deal with heirs of entail. If there was nothing in the entail to strike against the particular transaction, the creditor or purchaser was safe. But unless the creditor or purchaser was safe, the heir could not be safe. If the transaction was void, the heir lost his estate. If the tenant was not safe here, the Duke had lost his right to the estate. The question whether the transaction was valid, and whether the heir had lost his right to the estate, was in these cases always the same. It was not surprising therefore that entails had received the strictest construction. Then, by the law of Scotland, there could be no unknown burdens on land, and entails were *strictissimi juris* ; the prohibitions must be clear as the sun, otherwise they could not be effectual.

To apply these principles to this case, What was this prohibition ? It was a prohibition to alienate, and a long tack was an alienation. Then what was a long

tack ? The prohibition must be precise and clear. What was a long tack ? Craig said that one of 10 years was a long tack : then any thing beyond was an alienation. Others said 19 years. One Judge (Islay Campbell) fairly acknowledged he did not know what it was. Blair, in arguing these cases, had said that a tack for a longer period than one usually granted tacks in the ordinary administration of his affairs was a long tack. If the Judges had been asked separately, without any [104] communication with each other, what was a long tack, every one of the 15 would probably have fixed on a different number of years. And yet it was said that the Duke had contravened, and of course lost his right to the estate, on a clause so dubious that no two persons ever agreed about its meaning. That was contrary to the construction which had always been given to these deeds.

The words sell, annailzie, dispoine, in the act of 1685, cap. 22, referred exclusively to the property. Nothing was here meant or said as to the possession either by tacks or otherwise. In this entail, too, they related purely to the property : and it was necessary to attend to the distinction, as the property and possession were totally different things. In the act there was not a word about tacks, and it might be concluded that those who passed it applied it exclusively to the property.

What was disposition ? and what was alienation ? Disposition was the conveyance of some real right, and in that sense it was opposed to assignation, which was a conveyance of some moveable right. A lease was transmitted, not by disposition, but by assignation. (Lord Eldon. Don't you call that assignation alienation ?) Certainly. Alienation, in its popular sense, was more comprehensive. It applied not only to real, but to moveable property. In this sense it comprehended every right that could possibly be transmitted. Giving sixpence to a common beggar was an alienation. It extended to deteriorations. Cutting a tree was alienation. But an heir of entail might cut trees, and do all manner of [105] waste, though they were alienations. In the bankrupt laws, alienation comprehended every thing by which the party might diminish his estate, real or personal. The prohibitions under alienation were so comprehensive that they could not all be specified. This was their argument. How far it was a sound one would be seen. If a life-renter cut trees, or pulled down a wall, this was alienation, and the property must be restored to the fiar as it was before. There was an attempt to prevent an heir of entail from committing waste, but without effect. He was absolute fiar, except in so far as he was restricted : and what might be alienation in others would not be so considered in him. This was the distinction. Who ever heard of an heir of entail being an administrator ? He had not his powers on the one hand, and was not limited like him on the other. The reasonable acts of an administrator were effectual against him for whom he acted : they would bind a second administrator. An heir of entail contracted for a lease at rack rent. Was it sustained against the next heir ? No, —unless clothed with possession. The acts of an administrator were not treated in this way. An heir of entail might contract with a purchaser for the sale of trees : he might put the price in his pocket and die : suppose the trees were not then cut, the next heir would say, "The trees are my property, and shall not be cut." But if this had been a contract by an administrator, it would clearly have been good, etc.

But an heir of entail might do what an administrator could not do. He had greater powers than a [106] life-renter. He might grant leases for 19 years for his own advantage, and very much to the prejudice of the successor : he might cut down woods : he might exhaust mines : he might lay waste the whole estate. There was no analogy between his powers and those of an ordinary administrator. If there had been the slightest analogy, it would follow that the acts of the heir of entail might be challenged without a resolute clause. What was the use of a declarator of irritancy, if his acts might be set aside as contrary to a prudent administration of the estate ? What was the use of the act of 1685, if this was at all analogous to a case of ordinary administration ? But the fundamental point in cases of entail was, that, on contravention, the contravener lost his right to the estate.

In this entail there was no specific prohibition against leases. The only word relied on was the word alienate. (Lord Eldon. If the Duke had a younger son, could he give him a lease of this estate for 1000 years at a pepper-corn rent ?) The permissive clause was not prohibitive, and a lease might be granted at any rent, except a lease for life. (Lord Eldon. It was a curious distinction that a lease might

be granted of the estate for 1000 years, and that the mansion house could not be let in the same way.) The act was obscure, and it had been extended by the Courts. They had thought it hard to deprive the heirs of the mansion house, and had raked up the "*Regiam Majestatem*," a book written 500 years before the act of 1685, for reasons to enable them [107] to cut down leases of mansion houses and pieces of ground about them; and with respect to these pieces of ground, they had stepped from two acres and a half in the Greenock case, to five great estates in the Roxburgh cause.

It was absurd to say that there must be in proper entails specific prohibitions against several acts of alienation, and yet to say that the general word was sufficient to prohibit the granting of long leases. It destroyed the principle of construction in regard to entails, and introduced a new and absurd construction under which it was hardly possible to avoid contravention. But then they said that the prohibitions of entails would be thus evaded; but who ever heard of *bona fides* in a case of entail? The heirs were evading them from generation to generation, and a single hole was sufficient to put an end to them. A great Judge (Mansfield) in the Court of King's Bench in this country had said, in a case where the maxim of "*strictissimi juris*" applied, that it was necessary "to hit the bird in the eye." So it was in the case of Scottish entails. (Lord Eldon. There were cases where the Court of King's Bench held that the bird was hit in the eye, but in which the Court of Chancery thought it was hit in both eyes very hard.) There was no equity in cases of entail.

The authorities in which long tacks were stated to have been considered as alienations had no application to the condition of an heir of entail. Besides other considerations, the passages in Craig might apply only to tacks that were established by [108] infeftment. A peculiar construction might be properly applied as to the property of the crown. With respect to church property, the incumbent there was merely an administrator. The principle of the law of death-bed was entirely different. Then they spoke of delegated trusts. It was new to him to hear that an heir of entail held his estate in trust.

Lord Redesdale. This case arose upon a marriage settlement entered into in 1693, on occasion of the marriage of Lord William Douglas and Lady Jane Hay, by which the lordship of Nidpath, and other parts of the estate of March, was resigned by the then Duke of Queensberry in favour of his son, (Lord W. Douglas,) and his heirs male by the said Lady Jane Hay. The settlement, or marriage contract, contained a proviso by which it was provided that "it should in nowise be leisome " and lawful to the said Lord William Douglas, and the heirs male of his body, nor " to the other heirs of tailzie, nor any of them, to sell, alienate, wadset, or dispone " any of the said hail lands," etc.; and after the irritant and resolute clauses, the instrument contained the following permissive clause:—"It is always hereby expressly " provided and declared, that, notwithstanding of the irritant and resolute clauses " above mentioned, it shall be lawful and competent to the heirs of tailzie above speci- " fied, and their foresaids, after the decease of the said William Duke of Queensberry, " to set tacks of the said lands and estate during their own life-[109]-time, or the " life-time of the receiver thereof: the same being always set without evident diminu- " tion of the rental."

The late Duke of Queensberry had become possessed of the estate under this entail, which, under the same entail, had devolved upon the present Respondent, the Earl of Wemyss. The Duke had thought fit to execute the leases in question in the cause, and the action had been brought by the Duke of Queensberry, in his life-time, in order to have the legality of these leases declared.

The lease was granted in 1802, upon the renunciation of another lease for 57 years, granted to a person of the name of Welsh, from Whitsunday, 1800; for which lease Welsh was to pay £86 15s. 2d. yearly rent, besides paying a grassum of £301 as entry-money. The lease in question was granted on the 23d November, 1802, for 97 years, at the same rent, and a grassum of £318 1s. 2d.

The question for their Lordships to determine was, Whether it was within the power of the heir of entail to grant this lease. This turned upon the general power of persons holding estates as heirs of entail, subject to the prohibition contained in the words, "it shall in nowise be leisome and lawful, etc. to sell, alienate, wadset, or " dispone," etc." It did not depend on the power given to the heirs of entail "to set " tacks of the said lands and estate during their own life-time, or the life-time of the

"receiver thereof," this not being a lease of that description. The whole depended on the general question, Whether the prohibitory words, "not to [110] sell, alienate, wadset, or dispone," extended to such leases as the present.

In construing entails under the act of 1685, cap. 22. it had been determined as in the *Duntreath* case, that they were to be construed strictly : that the meaning was not to be extended by implication, but understood according to the strict words of the entail. That had now been so firmly settled that it would be very unwise to infringe upon the decisions establishing the doctrine : and therefore the question now was, Whether the words, "it shall not be leisome, etc. to sell, alienate, wadset, or dispone," etc. had the effect contended for by the Respondent, or whether they merely prevented the entire alienation of the fee of the property ?

If the construction contended for by the Appellant, viz. that the prohibition against alienation was confined merely to the alienation of the fee of the property, was the right one, then leases of every description must be excepted : and therefore a lease of the whole estate, even of the mansion house, might be granted at a pepper-corn rent, notwithstanding the prohibition in question : and this would have the effect of allowing the destruction of every entail where there were no words expressly prohibiting the granting of tacks or leases. If such had been the general idea at the time of passing the act of 1685, cap. 22, or subsequent to that period, in every case of entail without an express prohibition against leasing, (and there were but few such prohibitions in the ancient entails,) the entailed estates would have been covered with leases.

[111] It had been said that these entails were injurious to Scotland, and ought not to be favoured. It might be so. But nothing could be so injurious as that estates might be so entailed and then let in leases. A great portion of a large estate, worth £3000, £4000, or £5000 a-year, might thus be let under lease, and then sub-let again and again : and a great part of the landed property of Scotland in this manner might be put in the same condition as that of Ireland, under leases for lives, renewable for ever : a practice which, to his knowledge, was most injurious to the agriculture and quiet of that country. These considerations, however, ought to have no weight in opposition to the law, because the law, whatever it was, must be enforced : but he mentioned this merely to intimate his opinion that entails themselves were not so bad as allowing this mode of evading them.

The question then came to be, What sense the Courts had put upon the words "sell, alienate, dispone." In all other cases except entails, it appeared to be admitted that the word alienation extended to leases which deprived the heir or successor of the enjoyment of the property : as in the case of the annexed property of the crown, leases to the injury of the successor were considered as alienation : and so with respect to ecclesiastical tenures, and in other instances, some of them not perhaps so exactly analogous to the present case.

But there was one instance in which no leases could be given to bind the heir, which threw considerable light on the question : he alluded to leases of the mansion house. It appeared to have been [112] constantly held as undoubted law in Scotland, "that in the case of a tailzied estate, the heir in possession could not let the mansion house and domain attached to it to the prejudice of the next heir, even though the tailzie contained no express prohibition against granting tacks." Upon what principle could that be ? It could only be because such a demise, being inconsistent with the full and convenient enjoyment of the estate by the heir of entail, was therefore an alienation.

On looking at deeds of entail, with prohibitions against alienation, and subsequent permissions to lease, it would appear evident that those who framed them clearly understood that leases were included under the previous prohibitory words, as the subsequent permissions gave a power which must have been supposed not to have existed before. It appeared to him clear, therefore, that a general impression had prevailed among the framers of these deeds of tailzie, that the prohibition against alienation extended in some degree to leases. This was naturally to be expected in a law derived in a great measure from the feudal system, where long leases granted by the vassal were held to be a species of alienation.

Then see how the question stood upon the decided cases. He had been able to find no decision that a lease of this description could be supported in the face of such a restriction against alienation, without something special in its circumstances. It

was stated, that after the decision in the case of *Leslie v. Orme*, (6 Fac. Coll. 1779.) it had been conceived in Scotland that the effect of that case had been to determine that heirs [113] of entail, where there was no express prohibition against leasing, might grant leases for any period not exceeding 100 years, at the former rent. That form of words, however, implied that a prohibition against alienation restrained the granting of leases, otherwise the qualification, or limitation to 100 years, would not have existed. The power of letting leases, unless restrained by the prohibition against alienation, must, in such a case, be without limit : so that the case of *Leslie v. Orme*, instead of supporting the construction contended for by the Appellants, went directly the other way : for it appeared, that, at the time when that case was decided, it was conceived that the prohibition against alienation did in some degree restrain leases.

In the case of *Leslie v. Orme*, it appeared that Patrick Count Leslie, by his original tailzie of the 8th November, 1692, "prohibited, conditioned, and declared, that it "should in nowise be leisome and lawful, nor in the power of his heirs of tailzie, to "sell, annailzie, or dispone the lands and others above-written, or any part thereof, "herely provided to them in manner foresaid, heritably and irredeemably, or under "reversion, one or more ; nor to grant infeftments of annual rent, or yearly duties "forth thereof ; nor to set tacks of the same, in diminution of the true worth and "rental they paid before the said tacks ; nor to contract debts, nor do any other deeds "whereby the samen may be evicted, appraised, or adjudged from them."

By a subsequent deed, taking notice of the original tailzie, especially of the declaration that it should not be lawful for his heirs of entail to set [114] tacks in diminution of the true worth and rental paid before the said tacks, and that George Leslie, his son and heir of tailzie, who stood infeft in the entailed lands by virtue of the said original tailzie, and he, the said Patrick Count Leslie, taking into their serious consideration the difficulties and hazards that might arise by and through the aforesaid clause : "therefore he, Patrick Count Leslie, by virtue of the powers and faculties "reserved to himself, to alter, change, innovate, and annul any irritance thereof "he might think fit or convenient, with consent and advice of his said son, George "Leslie, by these presents dispensed with and annulled the clause above specified, "sicklike and as freely in all respects as if the same had never been conceived or insert "in the bond of tailzie above deduced, and declared the same to be void and null in all "time coming : so that, in all time thereafter, it should be leisome and lawful to any "of his said heirs of tailzie TO GRANT TACKS AND ASSEDATIONS ON ANY PART OF THE LANDS "CONTAINED IN THE SAID TAILZIE, AND THAT UNDER THE PRESENT RENTAL, if they should "think fit and expedient, without incurring any hazard or danger in and through "the aforesaid irritant clause, which was thereby abrogate and taken away."

The effect of this was to leave the case as if the prohibition against letting tacks in diminution of the rental had been wholly out of it. Taking both deeds together, there was first a prohibition against alienation, and then a power to grant leases of any description.

[115] Under this entail, a person of the name of Grant came into possession, after a suit to recover the estate, in the progress of which he became very considerably indebted to Orme, his agent, who had assisted him with money to carry on the suit, and also advanced sums for his maintenance and education. To secure the repayment of these sums, he executed to Orme a lease for 19 years of the whole of the estate, (Balquhain,) for which Orme was to pay a yearly rent of £300, and to apply what might be received over and above from the sub-tenants towards the extinction of the debt. This was afterwards discharged by the parties. A subsequent deed was executed, by which the whole estate was in effect demised to Orme, for four times 19 years, for a considerable rent and fine. Afterwards, by a farther transaction between these parties, in order to provide for the engagements with Orme, Leslie Grant likewise executed in favour of Orme a trust disposition of the whole tack duty, during the lease, except £300 payable annually to himself : and in case any of the heirs should refuse to ratify the deed, the tack duty was restricted to the same sum till such time as the whole debts should be paid. Leslie afterwards executed new deeds in Orme's favour. By one of these (August, 1769) a privilege reserved in the former lease to him, his heirs, and assignees, of assuming possession of the mansion house and mains, was limited to him and his heirs. By another deed, (September 7, 1773,) Leslie further

restricted this privilege to the heirs male of his body. Afterwards, on payment by Orme of a small sum by way of grassum, the whole estate was let to him [116] at the same rent for a farther term of 19 years after the expiration of the previous four 19 years. These instruments were confirmed by the next heir of entail, (the Pursuer's father.)

On the death of this Leslie Grant, however, without issue, the next heir of entail raised a process of reduction of the deeds, but which appeared to have been abandoned by him. But after his death, his son endeavoured to set aside the deeds :—1st, On the ground of fraud. 2d, On the ground of their being *ultra vires* of Leslie, who held the estate under a strict entail. As to the ground of fraud, that was out of the question, as the deeds had been acquiesced in and confirmed by the subsequent heir of entail. As to the first term, (1795,) that was out of the question, having been given up by the parties.

The Lord Ordinary (Covington) pronounced an interlocutor in this case, finding,—

“ That as, by the two deeds of entail above mentioned, the heirs of entail were put under no restriction as to the number of years for which leases might be granted, they were at liberty to grant leases for any term of years they thought proper ; and therefore sustains the defences, and assoilzies the Defender from the reduction of this tack, in so far as challenged on account of its being granted for such an unusual term of years,” etc.

The cause afterwards came before the whole Court, and the Court pronounced the following interlocutor :—

“ Find that insisting in the tack of 5th April, [117] 1765, was inept and incompetent, and assoilzie the Defender from that conclusion in the Pursuer's summons. Repel the reasons of reduction of the tack granted by Peter Leslie Grant to the said David Orme, dated 29th March, 1769. Repel the reasons of reduction to the obligation and assignation granted, dated 29th March, 1779, in so far as respects the restriction of the tack duty and assignment of the surplus over and above the £300 during the life-time of the said P. L. Grant, and the Pursuer's father ; but sustain the reasons of reduction as to all subsequent years. Repel the reasons of reduction of the ratification by the Pursuer's father, in so far as regards the tack itself, and the restriction of the tack duty, and assignment of the surplus thereof for the purposes therein mentioned during the life-time of the Pursuer's father, after his succession to the estate of Balquhain ; but sustain the reasons of reduction *quoad ultra*. Sustain the reasons of reduction of the deed of restriction granted by the said P. L. Grant to the said D. Orme, dated 5th August, 1769 ; and of the tack and deed of restriction granted by said P. L. Grant to the said D. Orme, dated 7th September, 1773 ; and also of the tack granted by the said P. L. Grant to the said D. Orme, dated 11th September, 1773.”

Their Lordships would observe, that the effect of this interlocutor was to agree with the Lord Ordinary as to the power of granting leases, but to hold, that, notwithstanding this, the mansion house was [118] not within the power, as it was the residence of the family. They also considered the subsequent lease, by which an additional term of 19 years was given after the expiration of the previous four times 19 years as void, the entail not giving the power of granting leases in reversion.

If this, then, was an authority, it by no means supported the proposition contended for by the Appellants, that, without a power expressly given, leases not exceeding 100 years might be supported under such an entail as this. There a power was expressly given to set tacks without any restriction as to the rents to be reserved, or the duration of the term ; and, notwithstanding this, the Court held that the tack was not good as to the mansion house, that being considered as a fraud, in as far as it was contrary to the intention of the creator of the entail : for the ground of decision must have been, that this was contrary to the intention of the entail, as it was considered by the Court below, and by this House, as a fraudulent execution of the power, as the creator of the entail must have intended that each heir of entail in succession should have the mansion house to live in, if he chose, during the period of his enjoyment. The case of Leslie v. Orme was therefore no authority, except in a case of entail with a similar power to that contained in that deed of entail : viz.—

“ It shall be leisome and lawful to any of my said heirs of tailzie to grant tacks and assedations in any part of the lands contained in the said tailzie, and that under

"the present rental, if they shall think fit and expedient, with-[119]-out incurring any hazard or danger in and through the foresaid irritant clause, which is hereby "abrogate and taken away."

The effect of all this was, that the deed of entail in the case of *Leslie v. Orme* was one with words prohibiting the heirs of entail "to sell, annailzie, and dispone," but with the express power of leasing without bounds. It was clear then that it was no authority for this proposition, that a prohibition against alienation did not restrain leasing for any number of years. This case had been very much misunderstood in Scotland. It was impossible it could have any such effect. It was a case by itself, and could only apply to leases within a power so given.

This being the construction of the case of *Leslie v. Orme*, it formed no authority for contending that such a lease as this, for 97 years, with a grassum, or fine, was not restrained by the general words. This would be to give these general words of restriction a sense which they did not bear in other cases; such as those of the annexed lands of the crown, ecclesiastical lands, and lands which had been held by a vassal, where it appeared to have been clearly understood, that leases which went to deprive the successor or superior of the benefit of the property could not be sustained against such superior or successor.

Then it had been said, that it must be doubtful upon this construction, where there was a prohibition against alienation and no power to grant leases, as to what was to be the extent of the leases that [120] might be granted. It might be difficult to set any direct specific bound to any such power of leasing, supposing it to be incident to the nature of the thing; but the limit of the exercise of a general power given, or incident to the nature of a thing though not expressly given, must be the use of it, and not the abuse. The act of 10 Geo. 3, cap. 51, had, in effect, provided for such cases; for it enabled persons who were otherwise restrained from granting leases by their deed of entail, to grant leases under certain restrictions. The utmost limit allowed was 31 years, (which supposed that leases to that extent were not before allowed.) It was clear, then, that notwithstanding the restriction under the general words, leases might be granted for 31 years, but no grassum must be taken, as that was prohibited; leases for 31 years being considered merely as improving leases, and for that reason only allowed.

In the present case, a grassum was taken—a sum to be put in the pocket of the heir of entail in possession, by anticipation of part of the rent; for it was neither more nor less than rent. A long lease by that means for a grassum was in effect the very thing which, in the case of *Leslie v. Orme*, could not be done. So, as to the mansion house, the power of taking possession of the mansion house was by the subsequent lease curtailed; and that was considered as a fraudulent execution of the power, as taking a benefit which was inconsistent with the proper enjoyment of the property by the future heirs of entail.

If the power of leasing was incident to estates [121] tail, yet it must be exercised in a manner consistent with the proper enjoyment of the estate by the successor, otherwise it was, to a certain extent, a sale of the estate. Suppose the original lease had been granted at double the rent, and the Duke had then sold so much of the rent, would not that be within the words prohibiting the sale? It must be; otherwise he would have had power to dispose the estate. There had been £80 odd of rent reserved on this lease. This was said not to be an alienation, as it only disposed of the enjoyment for a term of years. But suppose he succeeded in establishing this lease, and sold £80 a-year out of £86 rent, that would be a sale. Yet the same effect might be produced by letting long leases, taking a grassum.

Upon the whole, this lease could not be supported. It was not a lease necessary for the enjoyment of the property; and the power to make such leases was not legally incident to entailed estates, without express words authorising them. It was a sale *pro tanto*. The general word must extend to this kind of leasing. The prohibition against alienation, in other cases, restrained such leasing, and so it must do here. The impression on his mind, therefore, was, that they ought to affirm the almost unanimous decision of the Court of Session. Lawyers in Scotland, from 1685 down to the time of the decision in *Leslie v. Orme*, and even from that time till 1802, when the present lease was granted, a space of more than 100 years, must have been of opinion that such leases were not allowed, other-[122]-wise there would have been

no doubt on the subject. But it appeared the Duke of Queensberry himself had doubts. The impression, for a vast number of years, had certainly been as the Court had now decided. If any doubt had been created by the case of *Leslie v. Orme*, it was because the real nature and effect of that case had been misunderstood.

Lord Eldon (Chancellor.) He did not understand it to be the intention of his noble friend to propose that the House should immediately proceed to judgment. If the duty which he had to discharge had been confined merely to the giving the result of his opinion, he could without delay discharge it. But their Lordships would remember that the question had been frequently discussed in the Court of Session, and that they had the benefit of the opinions of the bench on this subject, (*vide* *Roxburghe cause, post.*) of such infinite importance to the landed property of Scotland. It would be recollected that this question had come indirectly to be agitated in the *Roxburghe feu cause*, where much had been said about perpetual leases, and one lease of an entire estate. In the course of the argument on that question, much had also been said as to the effect of prohibitory clauses in entails.

The manner in which the noble Lord stated the case of *Leslie v. Orme* accounted well for that case, but it did not account for the arguments: for it had been argued, that when a power was given to grant leases, it was in the sense of a prudent administrator-[123]-tion of the estate, and that the heir of entail was bound to do in this respect what would be done by an husband like administrator: and that if it was to be understood in a larger sense, the heir of entail would be an absolute proprietor: that it must be wisely exercised for the benefit of the estate, even if given with liberty to diminish the rental: otherwise, that in the case of a holding, for example, of £1000 a year, such a power of diminishing the rental might be so exercised, as that a lease of the estate for 1000 years might be granted at a pepper-corn rent. He had heard an anecdote respecting this case of *Leslie v. Orme*, which, if correct, showed, that under the particular circumstances of that case, a lease for four times nineteen years was not considered as an abuse of a power confined even to a fair administration of the estate.

He threw out these observations now merely to show that there were several particulars to which they must have regard. As far as respected this lease, he was ready to discuss the question so as to go to judgment now: but it must occur, that in observing on the feu case, the discussion must go to leases as well as to feus, and that the feu question must be considered on all the grounds that occurred in this *Queensberry case*: and he should be sorry to obtrude on their Lordships' attention twice. Having, then, to go at large into the question of leases on the feu case, and the time not being distant when he proposed to do so, he thought it might be proper to defer the farther consideration [124] of this case till the same day. (*Vide* *Roxburghe case, post.*)

Judgment of the Court below affirmed.

Agent for the Appellant, CHALMER.

Agent for the Respondents, SPOTTISWOODE.

ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

HAWKINS,—*Plaintiff* (in Error); *REX*,—*Defendant* (in Error)

[Dec. 15, 1813].

[*Mews'* Dig. vi. 202. Considered in *Reg. v. Teukesbury* (*Mayor of*), 1868, L. R. 3 Q. B. 634; *Drinkwater v. Deakin*, 1874, L. R. 9 C. P. 634. See also *R. v. Parry*, 1811, 14 East, 549; *Claridge v. Evelyn*, 1821, 5 B. & Ald. 81; *R. v. Bridge*, 1813, 1 M. & S. 76; *Beresford-Hope v. Lady Sandhurst*, 1889, 58 L. J. Q. B. 316.]

[At a meeting duly held for the election of an alderman for the borough of Saltash, Hawkins and Spicer were candidates. Two votes were given for each, when they were interrogated whether they had qualified by taking the sacrament within a year before the election, as required by 13 Car. 2, stat. 2, cap. 1, sect. 12. Hawkins admitted he had not. Spicer answered that he had. Public notice then given of Hawkins's disqualification, but poll proceeds; and, after the notice, 20 vote for Hawkins, 16 for Spicer. Mayor swears in Hawkins; two of the aldermen (as they might do by the constitution of the borough) swear in Spicer. Hawkins takes the sacrament within the time limited by the Annual Indemnity Act. Held by the Court below:—1st, That though notice of the disqualification of Hawkins was not given till after the commencement of the election, all the votes for him, after that notice, were thrown away. 2d, That Spicer having the greatest number of legal votes was duly elected, and, he having been sworn in, the office was legally filled up by him, so as to exclude the operation [125] of the Indemnity Act in favour of Hawkins; that act (47 Geo. 3, stat. 2, cap. 35, sect. 6, corresponding to 42 Geo. 3, cap. 23, sect. 5, in last edition of printed Statutes) not curing the want of qualification in cases of offices legally filled up at the time of its passing. 3d, That Spicer must be presumed to have been qualified according to his own declaration, there being no evidence to the contrary. The Court below appeared to have considered it of great weight that the majority (36 out of 40) remained unpolled at the time of the notice, though not prepared to say that it would have made any difference though the notice had not been given till a more advanced state of the poll, if the votes for Spicer had exceeded the number given for Hawkins before notice. This judgment affirmed in the House of Lords.—the Chancellor (Eldon) appearing to think that those who voted for a disqualified person without notice might, if they chose to demand that privilege, vote again for another person, but that nobody was bound to call on them to do so.]

This was an information, in nature of a *quo warranto*, calling on the Defendant to show by what title he claimed to be an alderman of the borough of Saltash. The Defendant pleaded, stating the constitution of the borough; viz.—

"That a charter was granted 7th June, 1774, whereby the persons therein named, the mayor, aldermen, and free burgesses of the borough of Saltash, and their successors, were declared to be a body corporate.

"That there should be one of the aldermen who should be the mayor, and six other free burgesses of the inhabitants of the borough, besides the mayor; viz. seven capital free burgesses inhabitants, who should be the aldermen and council of the borough.

[126] "That the alderman who should have executed the office of mayor for the preceding year should be a justice to preserve the peace within the borough until another mayor should be elected.

"That the mayor, justice of the peace, and the rest of the aldermen, or the major part of them, (of whom the mayor and justice were to be two,) should, whenever it should seem convenient, elect such persons to be free burgesses as should please them, and administer an oath of fidelity.

" That when any of the aldermen should die, or be amoved from their offices, it should be lawful for the mayor, justice of the peace, and the rest of the aldermen and free burgesses, or the major part of them, to elect one or more of the free burgesses, inhabitants of the borough, in his or their place, who should hold their office during their lives, unless they should be amoved as therein mentioned, he or they first taking their oath before the mayor or justice of the peace, or two or more of the aldermen ; or, in default of the mayor, justice, and aldermen, and not otherwise, before four or more free burgesses, inhabitants of the borough, well and truly to execute their offices."

The plea then stated the acceptance of the charter ; and, " that on the 6th November, 1806, Richard Thomas, one of the aldermen, died ; and that on the 18th December, 1806, the mayor, justice of the peace, and the four other aldermen, and divers of the free burgesses, assembled at the Guildhall to elect one of the free burgesses, inhabitants, to [127] be an alderman, in the place of the said Richard Thomas ; and that the mayor, justice of the peace, aldermen, and free burgesses, so assembled, elected the Plaintiff in error, then being a free burgess and inhabitant, to be an alderman, in the room of the said Richard Thomas ; and that on the same day and year, at the borough aforesaid, he took his oath before the then mayor, well and truly to execute his office of alderman, and was then and there duly sworn into the office of alderman."

The replication, admitting the fact of the due assembling, took three issues :—

" 1st, That the mayor, justice of the peace, aldermen, and free burgesses, being so assembled as aforesaid, did not then and there, viz. on the 18th of Dec. 1806, at the borough aforesaid, elect the said Plaintiff in error to be an alderman, in the room of the said Richard Thomas, in manner and form as the Plaintiff in error hath in his plea alleged ; and,

" 2d, That the Plaintiff in error did not in due form take his oath before the then mayor, well and truly to execute his office of alderman in manner and form, etc. ; and,

" 3d, That the said Plaintiff in error was not duly sworn into the said office of alderman, in manner and form," etc.

On issues joined, a special verdict was found, stating, " that, on the 18th of December, 1806, the place of one of the aldermen of the borough being vacant, the mayor, justice of the peace, [128] and the rest of the aldermen and 34 of the free burgesses, assembled in the guildhall of the borough, on due notice, in obedience to a writ of *mandamus* commanding them to proceed to elect and swear in an alderman, etc. ; that the Plaintiff in error and Peter Spicer were proposed as candidates for the vacant office of alderman ; that, after two persons had voted for Plaintiff, and two for Spicer, the agent of Spicer asked Spicer, Whether he had received the sacrament within a year ! to which he answered, he had, (but no other evidence was given of it :) that the said agent then asked the Plaintiff whether he had so done : to which he answered, he had not : and thereupon the agent gave notice that the Plaintiff was on that account ineligible, and the votes for him would be thrown away, and read the twelfth section of 13 Car. 2. stat. 2, cap. 1 : that 20 persons afterwards voted for the Plaintiff, who were all present when the above notice was given, except two or three, and 16 voted for Spicer, that the Plaintiff was then sworn in by the mayor : that Stephen Drew, one of the aldermen, declared Spicer was duly elected, and he was tendered to the mayor to be sworn, but the mayor refused to swear him : whereupon Spicer was sworn in by two of the aldermen : that the Plaintiff had not taken the sacrament within a year before the election, but took the same on the 4th of October, 1807 ; but whether the Defendant was duly elected an alderman, or duly took his oath before the mayor, or was duly sworn into the office, [129] the jurors prayed the advice of the Court," etc. etc.

On this verdict judgment was given for the crown, in T. T. 1808 : whereupon Hawkins brought his writ of error.

Abbott (for Plaintiff in error.) The prosecutor relied on the objections to the Plaintiff in error's title, arising on 13 Car. 2, stat. 2, cap. 1, sect. 12 : but the Plaintiff in error contended that this objection was removed by 47 Geo. 3, cap. 35, which received the royal assent on the 19th of February, 1807 : he having taken the sacrament on the 4th of October, 1807, within the time limited by that act. But it was insisted that this case came within sect. 6 of 47 Geo. 3, cap. 35, because the

office was at the time of passing the act legally filled up and enjoyed by Spicer. Mr. Hawkins was a good officer by the operation of the act of 47 Geo. 3, cap. 35, except under this proviso. But it was submitted that the Defendant in error was not entitled to say, under this proviso, that the office was avoided, or legally filled up as if the act had not been made, by Mr. Spicer. There were two modes of avoidance to which the act applied, a judgment of the King's Bench, and removal by the corporation. This was neither of these cases; and, Hawkins not having been removed, the office could not have been legally filled up by another person at the passing of the Indemnity Act.

One point therefore was, whether the proviso was applicable to the case of a person claiming by a contemporaneous election. By the charter of this [130] borough, the power of swearing in lay in two distinct authorities, in the mayor, and in two aldermen. The mayor administered the oath to Hawkins, the aldermen to Spicer. But the question was, Whether this proceeding as to Spicer satisfied the terms of this proviso? or, Whether, in order to deprive Hawkins of the benefit of the act, he must not have been removed by judgment of the Court of King's Bench, or by the Corporation? If he could not be deprived of it in any other way, then the judgment of the Court below was wrong. Hawkins himself was in office at the time of passing the act; and the first point then was, that the office could not have been legally filled up by another person.

Admitting that the proviso applied to a case of contemporaneous election and swearing in, still the question was, Whether Spicer was fully in office? for if he was not, their case was at an end. The majority voted for Hawkins, and Spicer was not elected, unless Hawkins's votes were entirely thrown away. There were not many cases where it had been decided that the votes of the majority were so absolutely thrown away as to give the election to the minority. That was a strong measure in any case; and it was submitted that it could not hold here, unless the notice of disqualification had been given before the commencement of the election. The electors ought to have notice and time to speak and deliberate before they were called upon to vote. Before 11 Geo. 1, cap. 4, this inconvenience existed, that the election of officers must take place on the day fixed by the charter, and an election on any [131] other day was bad. That act made it good if done the next day, or upon *mandamus*. But all who had a right to attend must have notice; and if not, what was done was void. In one case, (*Musgrave v. Nevinson*, 1 Str. 584,) all, except one, were present, and all concurred; but the election was void. That could have been on no other ground than that the absent voter had a right to deliberate and speak, as his vote, though he had been present, would have been of no effect.

In another case, (*Kinaston v. Mayor*, 2 Str. 1051,) where the question was as to a removal, all were present except one; yet the Court held that the proceeding was bad. In another case, (*Rex v. May and Little*, 5 Bur. 2681,) which arose out of this same borough of Saltash, the meeting was not held in the usual place. All had notice of the meeting: all except two were present. Yet the proceeding was bad, as the meeting was not at the usual place, nor notice given in the usual way, by the ringing of a bell. These cases were cited to establish the principle, that on the election or removal of officers, all must have notice, that they might have time to deliberate and speak. In corporation elections, one might recommend one, another another, and all the members had a right to take a part in the discussion that might arise as to the merits of the different candidates; but all that right of deliberating, advising, and debating, might, in effect, be destroyed, if notice of disqualification was sufficient after the commencement of the election.

The persons who in this case voted for the incapacitated candidate, and who, undoubtedly, had not thrown away their votes at the time when they [132] were taken, were, by these means as much deprived of the effect of their votes, as those who had notice and voted in defiance of it. It was by no means clear, that if any other candidate had been put up in lieu of Hawkins, they could have returned to the hall and polled again for such other candidate, the same election still continuing; and Hawkins being capable of receiving their votes when they polled for him, they had no reason to remain in the hall after their votes were taken.

If the law did not require the notice to be given before the commencement of the election, at what period of the election might it be given so as to invalidate it? Might

it be done just at the period when the voters for the other candidate made a small majority over the votes given for the candidate objected to? If it might, it seemed that this doctrine might be misused, and much fraud practised, which it would be impossible to detect. Supposing the whole number of voters to be 30, of which one party had 12, and the other 18. If the person for whom the 18 were engaged should be incapacitated, and the notice must be given before the election, the 18 would have an opportunity of exercising their franchise, and might choose some other candidate; but if notice might be given during the election, the 12 might wait till 10 of their opponents had polled, and then, by giving notice, secure the election to their own candidate, who had originally a minority; the eight would be thrown away, and the 10 who were good, as polling before notice, would be outnumbered by the 12.

If it was enough to give notice of the disqualifica-[133]-tion after two votes had been given, it might be so after any number; and even though those who polled without notice were to be called upon to vote again, it would be very inconvenient; for it would be necessary to ascertain who had polled with, and who had polled without notice; and it must be often difficult, and sometimes impossible, in the tumult of an election, to know when notice was given, or who had notice and who not. But if the rule should be that the notice must be given before the commencement of the election, all that inconvenience would be avoided. In the case of *Rex v. Coe*, (27 Geo. 3, H. T.) (Heywood, County Elections, 538,) after nine had voted for the opponent of Coe, he was declared disqualified. The rest of his votes polled for another, but there were not enough; and Coe, who would otherwise have been out-voted, was, though he had only a minority, declared elected. Rule absolute against Coe. In *Rex v. Bridge*, 1 Maul. Sel. 76, (case of election for mayor of Colchester,) Sparling had 91 votes and Bridge 11, when notice was given that Sparling was disqualified. The poll proceeded, and the numbers were 123 for Sparling, 22 for Bridge. The Court was clearly of opinion that the 91 votes given before notice were not thrown away. That case showed, that if notice were given at such a period that a sufficient number did not remain to turn the majority, the party who had only a minority could not have the election. (Lord Eldon (Chancellor.) You must make out not only that Spicer is not elected, but that you are.) If Spicer was not elected, Hawkins was; as the defect was cured by the Indemnity [134] Act, 47 Geo. 3, cap. 35, provided the office was not legally filled up by another. There was a case which would remove that difficulty, *Rex v. Parry and Phillips*, 14 East, 549. That was a case of an election of six common-council-men for Haverford West. After two votes for Defendants, notice was given, that they were disqualified. The poll went on, and they had a majority on the whole, though considerably more than two votes were given for each of the candidates in the minority. The Defendants were sworn in, and afterwards qualified within the time allowed by the Indemnity Act. Held that the Indemnity Act cured the defect, the office not having been avoided by judgment of Court, and not legally filled up by any other person: so that Hawkins was clearly well elected, if Spicer was not.

In considering the point of time at which notice must be given, not merely the interests of the candidates, but the rights of the voters must be taken into account. If only two persons were candidates, one might say of these two, "I vote for Spicer." But if he had had notice sooner, *non constat* but there might have been some other candidate for whom he would have voted in preference. (Lord Eldon (Chancellor.) That point was argued in *Burke's case* (1 Doug. Rep. 241), before a committee of the House of Commons.) There was a difference between an election for a Member of Parliament and an election for a corporation officer. The election for a corporation officer might be adjourned. (Lord Eldon. Was there any finding in the special verdict that another meeting had been proposed?) No; and [135] they (for Plaintiff in error) relied upon that. No such thing was done here.

The decisions in which effect was given to the minority of votes were, *Rex v. Withers*, *Regina v. Boscawen*, and *Taylor v. Mayor of Bath*, all cited in *Rex v. Munday*, Cowp. 537. These were relied on by the Defendant in error. The disqualifications in these cases were of a different description, and nothing appeared in them in regard to what time the disqualification was notified. It might have been before the election. There was no authority distinctly in point to this case of the *King v. Hawkins*, of notice given after the commencement of the poll; and if the rule were to be established,

that notice after the commencement was sufficient, it would violate the first principle of corporation law, which required that all should have an opportunity of deliberating and speaking. If the notice must be given before the commencement of the poll, this and other inconveniences would be obviated.

Another point in the case arose from the nature of the disqualification itself. In two cases, the election by the minority was held sufficient; but there the disqualification was very different from that in the present case. It was one thing to say that votes were thrown away where there was an absolute disqualification, and another to say so, where the disqualification was not absolute. It was not meant here to rely on the Annual Indemnity Act, but on the Permanent Act, 5 Geo. 1, cap. 6, sect. 3. It was admitted that there were *dicta* against them, [136] but there was no case in which the decision did not turn upon an absolute disqualification. The 13th Car. 2, stat. 2, cap. 1, did absolutely disqualify, till 5 Geo. 1, cap. 6, which did more than was generally supposed. It removed the disqualification, not merely in case no proceedings were commenced within six months, but also "unless such person be so removed," etc.

Now it was not denied but that, by the effect of that statute, Mr. Hawkins would have been a good officer, if no proceedings for his removal had been commenced within six months from the time of election. But it would be said that here the information was filed within six months. True;—but the point contended for was, that the votes were a nullity only where the disqualification was absolute; in which case Mr. Hawkins could not by possibility have been a good officer. Here he would have been a good officer, unless the prosecution had been commenced within six months. Suppose a single candidate were elected, with notice of the disqualification, and died within six months, without any proceedings commenced for his removal:—the effect under 5 Geo. 1, cap. 6, would be, that all his acts would be good; and, he being dead, no proceedings could be commenced against him. It would be carrying the law farther than had as yet been done, to say that the votes given to one under such circumstances should be a mere nullity. It was admitted that there were opinions of Judges to the contrary, but there were no cases where the point had been determined. (Harrison v. Evans, Cowp. 393.)

[137] 1st, Then, a filling up by a contemporaneous election was not a filling up within the meaning of the sixth section of the Indemnity Act; and Hawkins having the benefit of it, his election was good. If their Lordships should be against him on that point, then,

2d, The notice of disqualification, to be of any avail, ought to be given before the commencement of the election.

3d, The act 13 Car. 2, was governed by 5 Geo. 1, cap. 6; or at least the point was so doubtful that voters ought not to be punished by declaring their votes null.

A. Buller (for Plaintiff.) The notice was not given in time to render Spicer's election good, the majority of votes being in favour of Hawkins; and if Spicer's election was not good, the Indemnity Act put Hawkins in the same situation as if he had been originally qualified. It appeared from the cases, that the Court of King's Bench had always been anxious that the voters should have time to deliberate. In one case, that Court had said, that all ought to be present to debate as well as to vote. In *Taylor v. Mayor of Bath*, and *Regina v. Boscawen*, it was clear that the notice must have been given previous to the election. In *Oldknow v. Wainwright*, the majority refused to vote at all, and were considered as consenting to what was done by the minority. In *Rex v. Withers*, five voted, and six refused to vote, and were held as having consented to what the others did. This then was the first case in which notice after some [138] had voted was held to be sufficient. The principle upon which the election was in some cases given to the minority was, that the majority might prevent the office from ever being filled up at all, by constantly voting for a disqualified person; but there was no occasion to carry the matter beyond this. In *Rex v. Coe* (27 Geo. 3. H. T. (Heywood.)), it was stated in a note by Lens, Serjeant, that two objections were made:—1st, That the other candidate had the majority. 2d, That the election was not conformable to the usages of the borough. From Mr. Serjeant Heywood's note, it would appear that the question had been decided on the second point; but from that of Mr. Serjeant Lens, as if it had not been decided merely on that point. In *Rex v. Bridge*, (Maul. Sel. 76.) the Court had said that the mayor

was not at liberty to say that the votes were thrown away, and it was always anxious that there should be no surprise upon the voters. The voters for Hawkins considered the objection as stated merely for the purpose of taking them in. True, they were bound to know the law, but still the notice ought to have been given in sufficient time to enable them to deliberate—to consider the objection, and bring forward another candidate, if they thought proper. This case therefore did not seem to have received that consideration which many of great legal ability thought it deserved. It might be said that notice of the disqualification given to the person before he voted was sufficient. In county elections, that rule might be convenient; but it was otherwise in the case of a corporation election. These persons ought to have been called [139] on to begin again. Hitherto the point had not been decided, and no injury could arise from beginning again. The voters did not intend to vote for a disqualified person; and it was only where it must be necessarily concluded that the voters did so intend, that the Court would say the votes were lost.

Pell, Serjeant, (for Defendant in error.) The cases cited on the other side did not bear at all on the question. The act 13 Car. 2, absolutely disqualified those who did not comply with its provisions. If an unqualified candidate should be elected in defiance of the act, the election was declared null and void altogether. What was this case? There were two candidates: two votes were given on each side. Notice was then given of the disqualification of one of the candidates. There were 36 votes still remaining, and yet the majority of these went on and gave him their votes; and now they complained that they were injured, after having voted for one who admitted that he was disqualified. The question then was, Whether, on such a mode of voting, Hawkins was or was not duly elected? The argument on the other side was twofold:—1st, That Spicer was not duly elected. 2d, That Hawkins was now a good officer, his original want of qualification being cured by the Annual Indemnity Act. It was admitted then that the case came within the act 13 Car. 2. It had been argued that those only were excepted from the benefit of the Indemnity Act who had been removed by judgment of the King's Bench, or by the corporation. No such [140] clause however was to be found in the act. The excepting clause was very general; it extended to all those cases where the office was legally filled up, and the argument for the crown was, that Mr. Spicer was duly elected, and that therefore the office was legally filled up. They had been hard pressed on the other side when they represented the act 5 Geo. 1, cap. 6, as qualifying the operation of 13 Car. 2, as far as regarded absolute disqualification, when they admitted at the same time that their case did not come within the terms of that act. The argument then came to the point of notice: and it was said that notice must be given before the election began. No case to that effect was cited. There might perhaps be cases where that would be necessary. But the question was, Whether it was so or not in a case like the present? That the election should be good, after the admission of the candidate that he was disqualified, appeared a very extravagant proposition. The notice, it was said, must be given before the election began. Suppose, then, that none had voted for Hawkins, and one only for Spicer: would the notice then be too late? If not, then this showed that it was not necessary in all cases to give the notice before the commencement of the election. It was submitted that the subsequent votes were lost: and it did not clearly appear that this doctrine would be attended with any inconvenience. Hawkins was not elected, but Spicer was; and therefore Hawkins was not in a situation to claim the benefit of the Indemnity Act.

[141] Adam, jun. (for Defendant in error.) As the case stood, there were three points made:—1st, That there was no filling up to bring the case within the exception in the 47th of the King, as the filling up must be after removal by judgment of the King's Bench, or by the corporation. But no reason was assigned why that should be considered as the true interpretation of the act rather than that of the Court below. The words were, "legally filled up;" and if it could be shown that Spicer was elected, and the other not, then the office was legally filled up.

2d, The general doctrine was clear, that after notice of disqualification, the votes for the disqualified person were thrown away. They (for Defendant in error) had no decision upon the point in a case where notice was given after the commencement of the election; but neither had they on the other side any decision to show that the general doctrine did not apply in a case of this kind. There was no necessity

for stating particularly the cases where the general doctrine was clearly recognized *Oldknow v. Wainwright*, *Harrison v. Evans*, *Rex v. Parry* and *Phillips*, etc.

The disqualification was established by the act Car. 2, cap. 13, whether known to the voters or not : with this difference, that if they had no notice of the disqualification, their votes were not thrown away. But the exception was to be construed strictly, and saved only the votes given before notice. Then this inconvenience had been stated,—that those who voted before would have no opportunity of deliberating, and cases had been cited to show that the Court was anxious that this opportunity should be afforded. But suppose the disqualification only became known during the election : according to this doctrine, that notice must be given before the commencement, no advantage could be taken of the information thus acquired. Suppose a still stronger case,—that the disqualification arose during the election by bribing a voter, that the candidate thus bribing was seated by this vote, and that he discharged the duties five or six years before he could be ousted : the inconvenience in this view of the effects of the rule which it was attempted on the other side to establish, rather preponderated the other way.

Then it was said, that in the tumult of an election, it was difficult to say when notice was given, or who had notice, or who not. But that lay in the mouth only of the party in the minority. There might have been another candidate, it was said : and why was there not here ? There still remained 36 voters to poll after the notice,—more than sufficient to control the election. The two persons who polled for Hawkins before notice might have voted for another person if they chose ; and here they were not injured, for they could not have controlled the 20 who voted for Hawkins after notice.

3d point. But another point was raised :—that the election was not void, but voidable. This point had been already decided. *Grose*, in *Rex v. Munday*, (Cowp. p. 537,) took this very objection without effect, (*vide Harrison v. Evans*, and also *Crawford v. Powell*, 2 Bur. 2013–2016.) The prosecution here was commenced within six months ; and the instant it was commenced, the election, if only voidable before, became void.

Abbott (in reply.) The argument was, that the office was filled up before the passing of the 47th of the King. The way in which they said it was filled up was, that the minority elected Spicer, who was sworn in by two aldermen ; and that he was then in the legal enjoyment of the office. This had led him to contend, that the office could only be filled up after removal of the disqualified person. The reason was, that as the expression, " so avoided," referred to avoidance by judgment of record, the other, " or legally filled up," appeared to refer to filling up after removal by the corporation, or in some other way, of the disqualified person.

Then he had to consider, whether, from the facts, it appeared that Spicer was so elected as to fill up the office. That brought him to the question arising from the time at which the notice was given. (Lord Eldon. That was the only point. There was no doubt among them as to the effect of 5 Geo. 1, cap. 6, that it did not alter 13 Car. 2, stat. 2, cap. 1, sect. 12. He would however avail himself of such opportunities as he might have of consulting the Judges out of the House. There was a notion in some quarters that judicial business had not increased. It had so much increased, that they could not in this case have the attendance of the Judges.) Then [144] he would confine himself to that. The question was put as to Hawkins having taken the sacrament : he replied in the negative. Information was then given to the assembly, that the votes for him would be thrown away. But no proposition was made that the election should begin again. If this had been done, and the voters for Hawkins had gone on notwithstanding, that would have raised a different question.

Then it was said, that only two on each side voted before notice, and that they neutralized each other. But then it might be 20 on each side, or any number ; and then, if three remained, it followed that the election would be made by two out of the three. That was a state of facts which their Lordships would not be very ready to recognize. These elections had been compared to elections for Members of Parliament. But cases of the latter description did not necessarily apply ; as such elections were not properly corporate acts, nor under the control of Courts of law. One mode of proceeding might be adapted to the one case, and another to the

other. He had quoted some cases to show that the members ought to have an opportunity of deliberating. (Lord Eldon. Did the Court consider it the duty of the returning officer to begin again in these cases? He could easily conceive in theory all might be considered as present during the whole time. If those who had voted without notice did not claim to vote again, was there any rule that the returning officer should desire them to do so? If that was brought before the Court below, they [145] thought nothing of it. The calling upon them to vote again, by the objecting party or presiding officer, might furnish better evidence, but neither the party nor officer was bound to do so.) Unless the election of Hawkins was a mere nullity Spicer was not well elected. Unless it should be the rule that the notice must be given before the commencement of the election, many of the voters might go away after having voted, and never hear of the disqualification; and he might put that case. They might never know that any objection was started; and yet all they had done might be unavailing, and the voice of one might elect. Though the law might presume that all the voters were present during the whole time, that was contrary to the fact. In some cases, the places were not large enough to hold them all. He was not aware, however, of any instance in which electors, under such circumstances, voted twice. They were not called upon to do so here; and it would be attended with great inconvenience, even though it were to be done at their own request. All that inconvenience would be avoided, if it were laid down as a rule, that the notice of disqualification must be given before the commencement of the election.

Lord Eldon (Chancellor.) Though before final judgment he should avail himself of the opportunities which he might have of consulting the Judges to rectify his opinion in case he should be wrong; yet, as he was unwilling to postpone the decision, in case his opinion should be confirmed, [146] he should now state what occurred to him on the question.

He would confine himself to what appeared in the special verdict; but Mr. Abbott was right in urging every point which he thought necessary to do justice to his case, and he seldom, it might be said never, submitted any point that was not worthy of attention.

The special verdict stated, that "the mayor, justice of the peace, and the rest of the aldermen of the said borough, and divers, to wit, 34 of the free burgesses of the said borough, did assemble and meet, etc. on due notice." Taking it, then, that the electors ought to have an opportunity to deliberate and speak, it must be after they were met. When deliberating separately as individuals, they were not then deliberating as a corporation. There was a fixed time and place for meeting and deliberating in their corporate capacity.

However, they met here on due notice. There were two candidates, Hawkins and Spicer. It might happen that an objection might be kept back fraudulently. In this particular case, there was no appearance of fraud. There were a considerable number of free burgesses present, -40, suppose: two voted for each candidate; and it must be supposed that the knowledge of the disqualification then appeared. Their Lordships would attend to that, as a question had been made. Whether the notice must not be given before the election commenced!

It did not appear that any of them voted either [147] for Hawkins or Spicer, that would not, at any rate, have voted for them; but he agreed that the objection might be taken by both parties, as in *Burke's case*. (1 Doug. 244.) They might say, 'We did vote for E. B. and the other candidate; but if we had known all the circumstances, we would have voted for neither of them.'

No objection of this kind was then taken. The election proceeded, and the great majority voted for Hawkins; and the election of Hawkins was an absolute nullity by the act 13 Car. 2, lib. 1. If there had been no other candidate, it was a nullity, independent of the Indemnity Act; and if there was another candidate, it might then have been to be considered whether the Indemnity Act could take effect. But there was no such question here, if Spicer was duly elected.

If the majority were unpolled at the time of the notice given, the utmost that those who had polled without notice could say would be, 'Place us in the same situation in which we would have been if notice had been given at the beginning of the election;' and that was only matter for consideration, if they could not proceed on the theory that all continued present till the election was over. The notice was given, and why

did the election continue under these circumstances ? and why did not those, who were surprised perhaps, require to vote again ? Unless it was the duty of others to call on them to do so, they ought to have done it ; and if they did not, they sanctioned all that was done ; and their complaint came too late when they [148] might have required to vote again, and have made the election effectual by voting, or ineffectual, if their votes had been refused.

But no other man would have been chosen here. The majority knowingly voted for this dead man, and that was to be attended to. If he were to go farther, he should take the ground that the majority was unpolled at the time of the notice ; and if he were to go farther, he should say, it was his opinion, that when a voter had polled without notice, it rested on him to require to be permitted to vote again. If he should alter his opinion, he would state that circumstance afterwards.

Judgment of Court below affirmed.

Agents for Plaintiff in error, SMITH, HOSKINS, and WILSON.

Agent for Defendant in error, ———.

[149] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

J. BELLENDEN KER, Esq.—*Appellant* ; JAMES DUKE OF ROXBURGHE, —
Respondent [Dec. 18, 1813].

[Considered in *Cathcart v. Cathcart*, 1831, 5 Wils. & Sh. 315, 343.]

[Entail (in 1648) of an estate consisting of about sixty thousand acres, with prohibition against alienation, disposition, contracting debt, or doing any thing in hurt of the tailzie and succession, in whole or in part ; but with a power expressly reserved to the heirs of entail “ to grant feus, tacks, “ and rentals, of such parts and portions of the said estate as they should “ think fitting, provided the same were made without hurt or diminution “ of the rental of the lands and others, as the same should happen to pay “ at the time the heir, granter, should succeed thereto.” Grant by one of the heirs of entail of sixteen feus of parts and portions of the estate, comprehending in all the whole of the estate, except the principal mansion house and 47 acres adjoining. Relative contract that the feued lands and others should be entailed upon a new series of heirs designated by the granter, and that the granter should have the entire use and enjoyment of the estate during his life, etc. ; and acts of ownership accordingly exercised by the granter during his life, in the same manner as if he had continued proprietor. These feus dated the same day, and made in favour of the same person, and the casualties taxed. Held by the Court of Session, that these feus could not be considered as granted in conformity with the reserved power in the entail of 1648 ; that they were not real feus, or dispositions *inter vivos*, but *mortis causa* settlements for the purpose of altering the order of succession appointed by the entail of 1648 ; and that each of them was liable to one or other of several special objections stated in their interlocutor, (*vide post* :) and that the whole were so bound together that they could not be separated, but must be reduced *in toto*. This judgment affirmed by the [150] House of Lords on the general grounds :—1st, That the feuing power, like that of leasing, was to be exercised, not *ad libitum*, but in a course of rational administration, (without limiting that expression strictly to the sense in which it was to be understood when speaking of the duty required of an ordinary administrator or manager :) and that the 16 feus, being in reality but ONE feu of the whole estate, were not granted in the due exercise of a power of rational administration, and on that ground could not be supported. 2d. That the real object and effect of the transaction was not to grant feus properly so called, but, under the colour of granting feus, to alter the order of succession established

by the entail of 1648 : which, under that colour, the law would not permit to be done.]

Ker, of Cessford, who had, in the earlier part of the 17th century, been advanced to the peerage with the title of Lord, then Earl of, Roxburghe, and who had obtained the unusual privilege of nominating his own successors in these honours as well as in his estates, in the year 1644 executed a deed of entail which differed from that of 1648, the entail now chiefly in question, in containing no reserved power of granting feus, tacks, etc. The deed of entail which he executed in 1648 contained the following prohibitory clause :—

“ It shall not be lawful to the persons before designit, and the heirs male of their bodies, nor to the other heirs of tailzie above written, to make or grant any alienation, disposition, or other right or security qtsomever, of the said lands, lordship, baronies, estates, and lieving, above specified, nor of no part thereof : neither zitt to contract debts, nor to do ony deeds qrbv the samen, or any part [151] thereof, may be apprisit, adjudgit, or evictit, fra them ; nor zitt to do any other thing in hurt and prejudice of thir pntis, and of the foresaid tailzie and succession, in hail or in part : all quilk deidis sua to be done by them, are, by thir pntis, declarit to be null, and of nane avail, force, nor effect.”

These prohibitions were qualified by the following exception or reservation :—

“ Reserving always liberty and privilege to our saids airis of tailzie to grant feus, tacks, and rentals, of such parts and portions of the said estate and living as they shall think fitting, providing the samen be not made nor granted in hurt and diminution of the rental of the samen lands, and otheris forsaidis, as the samen shall happen to pay the time that the saids airis shall succeed thereto.”

This deed contained the following address to the Sovereign :—

“ And seeing that we ever pressed and endeavoured to live ane faithful and dewtiful subject, and intendis till death so to remaine to his Sacred Majestie our dread Sovereine ; we therefor, in all humilitie, by thir pntis intreitit & requestis His Ma^{tie}, and his Hienes Success^{rs}, gracieouslie to be pleisit to protect and maintene the richt & successioun of our said estait, hous, & leiving, according to his pnt nomination, speciallie seing we have been cairfull to nominate & designe such as we hope will continew and persevere in that same humble dewtie & faithfull respecte to his Ma^{tie}, and his Hienes Success^{rs}, as we have done [152] heirtofoir to His Ma^{tie}, and His Hienes Predecess^{rs}.”

Earl Robert was succeeded by Earl William, the heir first named ; who again was followed by Robert Earl of Roxburghe. John Duke of Roxburghe, who next succeeded, having acquired a variety of lands which either did not belong to the original estate, or had been feued out by his predecessors, executed two new deeds of entail, one in 1729, and another in 1740. By the former, he disposed the old estate ; by the latter, the lands so acquired, to his eldest son and the same series of heirs with that in the old entail, under limitations in the same terms with those above quoted. The clause of reservation in the deed of 1740 was in the following terms :—

“ Reserving always liberty and privilege to the said Robert Marquis of Bowmont, and the said heirs of tailzie, to grant feus, tacks, and rentals, of such parts and portions of the said lands and estate above disposed as they shall think fit, providing the same be not made nor granted in hurt and diminution of the true and real rent of the said lands and others foresaid, as the same shall happen to pay the time that the said heirs shall succeed thereto : and sicklike, reserving power and liberty to the said Robert Marquis of Bowmont, and the other heirs of tailzie above specified, to grant competent life-rent provisions and conjunct fees, by contract of marriage, or other habile security, in favours of any ladies with whom the said persons or heirs of tailzie shall happen to be married.”

[153] A still later entail was executed by Robert Duke of Roxburghe in 1747, containing two dispositive clauses : the one applicable to the lands held under the old entail, and the other to those held under the deed of 1740. In the first the clause of reservation was expressed as in the deed of 1648, and in the second it was expressed as in the deed of 1740. (*Vide* the several deeds more particularly stated in the Chancellor's speech in judgment, *post*.)

Several feus were granted by the heirs of entail in virtue of the reserved power

in the entail of 1648, some of them of considerable extent. A feu of the lands of Broomlands was made in 1650, but reduced in 1733, (by judgment in appeal,) as being *ultra vires*. A feu of the lands of Greenhead was made to Sir Andrew Ker in 1663, which was not challenged. In 1742, Robert, second Duke of Roxburghe, (the family having obtained from Queen Anne a patent granting to the family the titles of Duke of Roxburghe, etc.) granted to Lord Milton (a Judge of the Court of Session) a feu of a parcel of land near Edinburgh, consisting of about 12 acres, on which the family town house had stood before the Union.

William, second Earl of Roxburghe, besides Robert, who succeeded him, had another son, John, who was created Lord Bellenden. John, third Duke of Roxburghe, was the last of the heirs male descended from the eldest son, Robert : and at his death, which happened in March, 1804, the late Duke William, seventh Lord Bellenden, succeeded to the titles and estates.

Duke William having no heirs of his own body, [154] and being advised that the entailed destination was at an end, or at least that the question was doubtful, executed a new settlement and deed of entail in favour of the Appellant, who was his near relation, and to whose family he was stated to have been under great obligations. These deeds having been reduced, it is material to state them only on account of their alleged bearing upon the question in regard to the feu dispositions which Duke William afterwards executed.

After having made a provision for the Duchess by a deed executed in the form of a post-nuptial contract of marriage, (21st May, 1804,) he then, by a trust disposition, (June 18, 1804,) conveyed the estates of Roxburghe to trustees, for certain uses and purposes therein mentioned : particularly, to pay an additional life-rent annuity of £3000 a-year to the Duchess, together with a sum of £6000 ; and also to pay a sum or sums not exceeding £100,000 to such persons as she should appoint in case she survived him ; £10,000 to Mr. Hamilton Fleming, etc. : with power to borrow money on heritable security of the estates, to discharge the various legacies and annuities. The deed contained a power of revocation.

Of the same date with this trust disposition, he executed a deed of entail referring to that of 1648, and stating that " he lay under none of the limitations of it, and was " at liberty, as absolute and unlimited fiar," to carry on the representation of the family by a new entail. By this new entail, after failure of heirs male and female of his own body, he continued the destination to Lady Essex [155] Ker, and then to Lady Mary Ker, and the heirs male and female of their bodies ; whom failing, to John Bellenden Gawler, eldest son of John Gawler, of Ramridge, in the county of Southampton, etc., and the heirs male and female of his body ; whom failing, to Henry Gawler, brother of J. B. Gawler, and the heirs male and female of his body, etc. This deed contained a power of revocation.

In September, 1804, the Duke executed another trust disposition in favour of the same persons, and nearly in the same terms as the former trust deed of June 18, 1804, for the purpose of including certain lands not comprehended in the other. The trustees were, by this deed, empowered to sell as much of the estates as might be necessary to pay the legacies, etc.

It being doubtful whether the above deeds could be supported, the Duke, to provide against the event of their failure, founding upon the reserved power of feuing in the entail of 1648, etc. on the 26th September, 1804, executed sixteen feu dispositions in favour of the Appellant, comprising the whole of the Roxburghe estate, with the exception of the mansion house of Fleurs, and forty-seven acres adjoining. These feus, it appeared, all contained the same clauses, were written by the same person, subscribed on the same day and before the same witnesses, and were all in favour of the same person. It was declared however that the feus should be void :—1st, In case there should exist heirs of the Duke's body at the time of his death. 2d, In the event of the said J. B. Gawler, or his foresaids, establishing in their persons a right to the [156] estates under the entail of June 18, 1804, or under any other entail he might execute, etc. Subject to these conditions, the Duke bound himself, his heirs, and successors, to infeft and seize the said J. B. Gawler, etc. for payment, etc. of a feu duty, stated to be more than the rent of the lands at the time of the Duke's succession. The casualties were taxed at 1s. at the entry of each heir, and 2s. at the entry of each singular successor. By another clause, it was stipulated, that in case

it should appear that the feu duty did not equal or exceed the said rent. J. B. Gawler should be bound to pay the difference between the amount of the rent and that of the feu duty. These feu dispositions contained clauses of absolute warrandice, assignation to the writs and evidents, mails and duties, from and after Martinmas, 1804, etc. It was also declared, that the feuar should be entitled to retain out of the feu duty the amount of the parochial burdens, in case the Duke had power to allow such deduction. The mansion house of Fleurs, with 47 acres, having been reserved as above, "free access and egress to and from the said mansion house, etc. by all the roads, avenues, and paths, presently leading to and from the same," were also reserved. All the other mansion houses, with their appendages, were feued. Lands not rented at the time of Duke William's succession, or not rented separately for any precise or definable rent, were included in the feus, and a conjectural annual value put on them. The woods, mines, and minerals, were also conveyed by the deeds.

In consequence of a previous understanding and [157] agreement, a mutual contract of the same date with the feu dispositions was executed by the Duke and the Appellant, for declaring their intention in regard to the feus. After referring to the trust deed and entail before mentioned, this contract stipulated, that J. B. Gawler should, within 10 days from the date of contract, execute and deliver to the Duke a deed of entail of the lands comprehended in the feus, conveying the same to himself (J. B. Gawler) in life-rent, to Henry Gawler, his brother, and the heirs male and female of his body : whom failing, to the other heirs appointed by the deed of entail of the 18th June, 1804, and with and under the conditions, etc. of that entail. It was also provided that this entail should be revocable by a joint writing by the Duke and the Appellant, etc. The Appellant also became bound to pay a sum of about £30,000 and annuities to the amount of £2900 : and in case any of the feus should be reduced, the sums and annuities were to abate in proportion. A power was also given to the Appellant to sell lands to the amount of £20,000 to pay off the legacies. The whole surplus rent was to be paid to the Duke for his life, and he was to have the lands falling out of lease, and leave to cut wood at his pleasure and for his sole benefit. Leases were to be made with his consent, and the rents were to be payable to him ; and, in short, he was to have the entire use and profit of the property for his life.

A deed of entail was executed bearing the same date with the feu dispositions and contract, though, by the contract, it was only stipulated that it should [158] be delivered within 10 days from that date : and the Respondent therefore argued, that this entail, if shown to the Duke at all, had not been accepted, as it differed in some material particulars from the entail required by the contract. The statement for the Appellant was, that this and the other deeds were delivered on the day of their date.

The Duke, after this, in his supposed character of absolute fiar, executed two entails, dated 11th January and 8th June, 1805, respectively, taking no notice of the feu transaction. By the former of these, the entail of the 18th June, 1804, was revoked, in so far as regarded the Ladies Essex and Mary Ker, and the heirs of their bodies ; and by the latter, in so far as regarded the heirs of his own body : so that the Appellant was made the direct institute and disponee. Both these deeds contained a power of revocation. In all these entails, the heirs were empowered to grant leases for 21 years, or on the terms of the act 10 Geo. 3. cap. 51. But in the last deed it was provided, that the power of leasing should not extend to enable the heir to let the mansion house of Fleurs, or such other mansion house as happened to be the chief mansion house of the heir for the time, with 400 acres adjoining, for any longer period than the life of the grantor.

The Duke also, on the 24th January, 1805, granted a commission and factory to Mr. Seton Karr, to manage his affairs and estates in Scotland. The witnesses to this were the Appellant and his brother. Mr. S. Karr, as commissioner for the Duke, granted five leases, Sept. 7, 8, 9, 1805. [159] Besides these, a sixth lease of the farms of Byreclough, etc. was granted by the Duke himself, as heretable proprietor of the lands, to Mr. S. Karr, in trust for the Duchess, for 21 years from the term of Whitsunday, 1805. The tack duties in these leases were made payable to the Duke, his heirs, or assignees. The Appellant was a subscribing witness to the execution of the lease of Byreclough by the Duke. The Duke continued to cut down and dispose of the woods at his pleasure. The Respondent relied on these circumstances

as evidence that the Duke did not conceive that any right had passed by the feu dispositions.

Infestments were taken on the feu dispositions, on the 15th, 16th, 17th, and 19th October, 1805 : and the Duke died on the 22d of the same month and year. It was stated by the Respondent, that none of the infestments were put into the register till some weeks after the Duke's death.

Among a variety of other proceedings which commenced on the death of Duke William, in regard to the Roxburghe titles and estates, the Respondent, then Sir James Innes Ker, and his then competitor, General Ker, raised actions of reduction of the whole of these deeds, on the grounds, " that they had been obtained from the Duke when infirm in body and mind : that they had never been legally delivered : " and that they were so many contrivances to defeat the entail of 1648, etc. by the " fetters of which the late Duke was bound." Two distinct questions arose in the reduction :—

[160] 1st, With respect to the deeds made by the Duke, on the supposition that he was not fettered by the entail of 1648.

2d, With respect to the validity of the feus.

It was determined by the Court of Session, (Jan. 15, 1807,) that Duke William held the estates under the fetters of an entail (1648) containing an effectual prohibition against altering the order of succession, etc. By this judgment, which was affirmed on appeal, (8th June, 1811,) the first branch was disposed of, and the deeds settling the estates on a different series of heirs found to be ineffectual.

The Court of Session then proceeded with the question as to the reduction of the feus, and in or about the month of May, 1807, the contract and entail of the feus were produced, (the other deeds having been produced before.)

On the 12th (signed 16th) of January, 1808, the Court pronounced the following interlocutor :—

" The Lords of Council and Session having advised the memorials in this case, " find that the late Duke of Roxburghe held the estates of the Dukedom of Roxburghe under the fetters of a strict entail : find that the deeds now challenged were " not granted in due exercise of the reserved powers of that entail, of granting feus, " tacks, and rentals : and therefore sustain the reasons of reduction thereof, and of " the saisines thereon."

An appeal having been entered against this judgment, and the cause having been argued in the [161] House of Lords, the following judgment of remittal was pronounced, (6th July, 1812 :)—

" Ordered and adjudged, that the cause be remitted back to the Court of Session, " to review the interlocutor complained of in the said appeal, as to all and each of " the deeds sought to be reduced, taking into their consideration all objections to " the validity thereof, whether general or special : and in their farther judgment " to state specifically the legal grounds upon which the said deeds respectively are " to be considered as not granted in the due exercise of the power of feuing, if it shall " be their judgment that the same are to be so considered. And it is further ordered, " that the Judges of the Division to which this cause, after this remit, shall belong, " shall require the opinion of the Judges of the other Division in matters or questions of law."

The cause having come on before the First Division of the Court of Session, and the opinions of the Judges of the Second Division having been taken, the following judgment was pronounced :—

" The Lords having resumed consideration of this cause, with the remit thereof " from the House of Lords, and advised the same with the mutual cases for the parties " and papers produced, and having heard Counsel at great length in presence of the " Judges of both Divisions, and considered the answers by the Judges of the Second " Division of the Court to the questions in law transmitted to them by the interlocutors " of the Court of the 21st January and 6th February last : Find, *Primo*. That the entail " of the estate of Rox-[162]-burghe, executed by Earl Robert in 1648, and subsequent " entails, under which the late William Duke of Roxburghe held the said estate, contain a general prohibitory clause against alienation, contracting debt, or altering the " order of succession : and that the reservation annexed to the said clause, giving " liberty and privilege to our said heirs of tailzie to grant feus, tacks, and rentals, of

" such parts and portions of the estate and living as they shall think fitting, providing
 " the same be not made nor granted in hurt and diminution of the rental of the samen
 " lands and others foresaid, as the samen shall happen to pay the time that the said
 " heirs shall succeed thereto, is not to be considered as a substantive clause, but is to
 " be taken in connection and consistency with the previous prohibitory clause, and
 " as modifying, and not destroying it; and that these two clauses must receive a con-
 " struction consistent on the whole: Find, That such construction necessarily imports
 " only a power of administration, according to sound discretion, by which all the
 " heirs of entail in succession may enjoy, under the control of Courts of Justice, the
 " power and privilege of feuing parts and portions for the benefit of the estate. That
 " this construction, warranted on general principles, appears also to be consonant
 " to the probable intention of the entailer, as discoverable from the context: seeing
 " that he confers the power of feuing on his heirs of tailzie in their order, which there-
 " fore cannot be competently exercised by any one heir to the exclusion of all others,
 " and to the destruction and annihi-[163]-lation of the subjects over which this power
 " is so reserved to them all: seeing also that he limits the power to parts and portions,
 " which is exclusive of the power of feuing the whole at one time, either in one or
 " more deeds: seeing also that he limits the power to such parts and portions as the
 " heirs shall think fitting: which words must be applied, not as descriptive of the
 " absolute will and pleasure of the heir, but as indicative of the parts to be feued, as
 " being in sound discretion, apt, suitable, and fitting for that purpose: seeing also
 " that he limits the power in the amount of the feu duty, which is to be without hurt
 " or diminution of the rental: all clearly indicating a restrictive intention in the
 " tailzier, for the benefit and security of future heirs: therefore find, that the 16 feu
 " dispositions sought to be reduced, all of the same date and in favour of the same
 " person, conveying away the property or *dominium utile* of the whole entailed estate,
 " with the exception of the mansion house of Fleurs, and about 47 acres of ground
 " adjoining, cannot be considered as granted in conformity to the powers conferred
 " by the said clause, or in consistency with the rights of future heirs of entail.
 " *Secundo*. In respect of the form of the transaction between the parties, and the whole
 " circumstances of the case, find, that the whole of the said 16 feu dispositions are so
 " connected and bound together, that they must necessarily be set aside *in toto*, and
 " cannot be supported in part. - *Tertio*. Find, that the said 16 feu dispositions in
 " favour of the Defender, whom the Duke had constituted [164] his heir of entail
 " in the same lands by a previous existing entail, and so continued by subsequent
 " entails, taken with all the conditions, reservations, irritancies, and defeasancies,
 " contained in them, and in a relative contract and entail of the same date, and with
 " the other deeds and conduct of the parties, prior and subsequent to the execution
 " of them, cannot be held as real feus or dispositions *inter vivos*, conferring an inde-
 " feasible right of property *de presenti* on the Defender, but as settlements of succession,
 " to take effect only after the death of the Duke, and made in order to accomplish
 " an alteration of the order of succession prescribed by the foresaid entail 1648, con-
 " trary to the prohibition contained therein against altering the order of succession
 " of the heirs thereby called. - *Quarto*. Find, that the foresaid clause of reservation
 " gives no liberty or privilege to the heirs of entail to feu any lands which did not pay
 " a rent at the time the heir so feuing succeeded thereto; and that all such feus are
 " in contravention of said entail; and that this objection applies to the feus which
 " have been numbered 1, 2, 3, 4, 6, 9, 10, 11, and 15. - *Quinto*, Find, that by the
 " law of Scotland, founded on the ancient principles and customs of the feudal system,
 " which is the common law of Scotland in all matters of land rights, Duke William,
 " under the said clause of reservation, had no power to grant feus of the family
 " mansion house of Fleurs, Broxmouth, and Byreclough, nor of the grounds adjacent
 " thereto, in the natural occupation of Duke John and himself, and [165] not rentalled
 " at the period of his, Duke William's succession: and that this objection applies
 " to the feus which have been numbered 1, 2, 3, 10, and 11. - *Sexto*. Find, that the
 " superiority of the said whole lands was in all events comprehended under the strict
 " fetters and limitations of the entail 1648: and that the said Duke had no power,
 " in virtue of the said clause of reservation, to tax the casualties of superiority naturally
 " incident to feu-holdings, and which must have remained to the heirs of entail, unless
 " they had been specially alienated by such clause of taxation, thereby depriving the

"succeeding heirs of entail of important and beneficial rights appertaining to the entailed superiority : and that this objection applies to the whole 16 feu dispositions. —*Septimo*. That the comprehending generally mines and minerals, lime and stone quarries, in the said feu dispositions, does not afford an objection to the same, under the prohibitory clause of said entail : but find, that where mines and minerals, lime or stone quarries, were let to tenants, the said Duke William had not power under the said clause of reservation to feu the same, without stipulating a separate appropriate feu duty, not less than the rent so paid : but find, that the Pursuer has not condescended on any mines or quarries which were so rented.—*Octavo*. Find, that the comprehending woods and timber situated on farms, the *solum* on which they grew being let to tenants, does not afford an objection to the same under the prohibitory clause of said entail : but find, that where woods or [166] plantations were reserved from the leases, and in the natural occupation of the heir of entail, the said Duke William had not power to feu the same under the clause of reservation in the said entail : and that this objection applies to the feus numbered 1, 2, 3, 4, 5, 10, 12, 13, 14, and 16.—*Nono*. Find, that such of the feu dispositions as contain lands composing parts of the entailed estate, which had been let along with lands not included in the said entails, at *cumulo* rents for both, are objectionable and reducible, in respect that the matter has been made inextricable by the parties, the clause of reservation not furnishing *data* for dividing the rents, and restricting the feu duties contained in these deeds to the entailed lands : and that this objection applies to the feus numbered 5, 7, 12, 14, and 15.—*Decimo*. Find, that the whole of the 16 feu dispositions are liable to one or other of the foresaid special objections : and, in respect of the nature of the rights granted and created, and that the same cannot be altered or modified by any Court, find, that each feu so objectionable must be set aside *in toto* : and on the whole find, that the said 16 feu dispositions were not granted in the due exercise of the power of feuing, contained in the foresaid clause of reservation, conferred on the heirs of entail in succession, of granting feus, tacks, and rentals : and adhere to the former interlocutor of the Court, dated the 12th, and signed the 16th of January, 1808, and sustain the reasons of reduction of the said 16 feu dispositions, and of the sasines thereon, at the instance [167] of the Pursuer. James, now Duke of Roxburghe, designed in the summons, Sir James Norcliffe Innes, Baronet, who is now served and retoured heir of entail in the said estate of "Roxburghe ; and reduce, decern, and declare accordingly."

From this judgment the Appellant again appealed to the House of Lords.

Clerk and Leach (for Appellant.) The notion that the power of an heir of entail might be a power of administration for the benefit of the estate, had originated with Lord Meadowbank : and though it had never before occurred to the Respondent's Counsel, Blair, the late President, Gillies, now Lord Gillies, etc. this new *nostrum* of entail law became on the remit the Respondent's leading proposition. The Earls and Dukes of Roxburghe had been all along granting feus, without the smallest conception that the power was given merely for the purposes of a beneficial administration of the estate. The objection to the feus comprehending lands not before rented, etc. had not before occurred. A doubt on the point was first intimated by an authority here. (Lord Eldon. When I shall be dead and gone, you will hear that my doubts in this case have been either the most beneficial or the most mischievous that ever were thrown out.) This notion of a power of administration was founded on no authority, and was contrary to every principle of law. The general rule was, that heirs of entail were absolute proprietors, except in so far as they were expressly fettered. They might be restricted from doing many things which an administrator might do ; but their power being partly for their own advantage, they might do innumerable acts not competent to an administrator (Lady Hamilton's case.)

The heir of entail had a right of property, in which the power to transfer was inherent. (Hope, *M. Prac. Tailzies*, s. 9, 10, 11.) This created the necessity of the resolute clause ; for otherwise it would have been more convenient to have established a succession of trusts, life-rents, or powers of administration. But here the resolute clause was perfect ; and the question was, Whether the Duke had forfeited his right to the whole estate by granting these feus ! The slightest violation was a contravention, and it was only by forfeiture of the [168] contravener's right that his creditors and purchasers could be defeated. This had been settled by numerous

decisions. The Appellant was not a gratuitous donee, and therefore the principle of strict construction applied as in the case of creditors, etc. The feus had all the onerosity required by the entail, and a great deal more.

If the heir of entail was only an administrator, what was the legal capacity or character according to which he must manage? Was it that of a tutor, curator, a trustee, a factor or mandatory of any sort, a bankrupt, or a person on death-bed, etc.? No analogy from any or all of these characters would define his powers, and the Court had not defined them. If the power was a power of administration, one of two things must be maintained:—1st, That the most onerous feu, to a party who had paid down his money and obtained possession, could have been set aside by this control of Courts of law, independent altogether of a resolute clause; or, 2d, That if the Duke had granted such a feu strictly according to the terms of the clause, but for his own benefit, and not for that of the estate, a declarator of irritancy might have passed against him to forfeit the whole estate. The first proposition was contrary to the act of 1685, cap. 22, and to all the authorities: the second was a contradiction in terms: for the limits of a power of administration followed from its nature, and required no aid from a resolute clause; and the necessity of maintaining that a feu to a third party could not be reduced without that clause, amounted to a demonstration that the power of the heir to feu could be nothing else than a power remaining with him as proprietor for his own benefit.

The interlocutor, too, was inconsistent, inasmuch as it did not give effect to this power as if it were a right of administration. The general rule was, that the acts of an administrator were only reducible *quoad excessum*. Upon their own principles, then, the feus ought to have been sustained in part: whereas, they had, upon this ground of excess, reduced the whole. Here it was evident they mixed the idea of an heir of entail as a restricted proprietor, with the idea of his being an administrator with powers of administration. Upon this hypothesis, it must be held.—1st, That the powers of the heir of entail were powers of administration. 2d, That if the power was exceeded, the [169] estate was forfeited. 3d, That the power of administration being undefined, must be construed according to the arbitrary notions of the Court, as to what was proper or improper in the management of the estate. It was hardly possible to imagine a doctrine more hostile to every principle of law or justice, or more mischievous in its tendency. An heir of entail could not be safe, according to this doctrine, in doing even that which was not prohibited by the entail. He might incur an irritancy by cutting a tree, by pulling down an old wall, by granting a lease at what the Court might imagine too low a rent, for a longer time than they might think proper, to a bad tenant, or on conditions as to cropping, etc. There might be an endless variety of opinions as to the proper exercise of such a power. Here, then, was a question of irritancy depending entirely on the arbitrary discretion of a Court. The very statement of such a proposition showed that it was absurd. The fixed rule of law was directly the reverse.

Besides, it was now an established rule of law, that no perpetual unknown incumbrance could be created on lands, nor any real burden which could not at once be discovered from the records by creditors or purchasers. (Ersk. b. 2, t. 3, s. 49, 50, 51.—Bell on Bankrupt Law, p. 207–213.) But how were they to discover on the face of the entail the supposed limitation of the heir to a right of administration, or the bounds of that right? Here, then, in the face of a fixed rule of law, was an unknown burden or limitation on the right of feuing, depending on the arbitrary discretion of the Judges. The right of feuing without diminution of the rental was in the present case *ex facie* absolute. A purchaser, then, must suppose himself safe by the absolute terms of the power, or it must be a matter of uncertainty whether he could safely transact or not; but it was impossible that, where a power was given, in its terms absolute, it could be an arbitrary question, whether a purchaser was safe in contracting on the faith of it.

The doctrine was no less contrary to precedent than to principle. The Broomlands and Greenock cases, (Duke of Roxburghe v. Wanhope of Don, March 5, 1733.—Cathcart v. Schaw Stewart, 1775,) which had been relied on as authorities in its favour, would be found on examination directly adverse to it.

The subordinate propositions were little calculated to aid the general doctrine. It was a power of rational administration, it was said, because it was given to the

heirs in succession. But [170] the whole must at last be feued out : and what did it signify whether this was done by one heir or by a dozen ? " Under the control " of Courts of Justice." Where were these words to be found in the entail ? A Duke of Roxburghe, before he granted a feu, must apply to the Court for permission, or he must grant it at the peril of forfeiture, depending on arbitrary discretion ! No man would then accept a feu, without having the right ascertained by declarator. But what if decree in absence only could be obtained ! The feu might be reduced at any period within 40 years, if not suited to arbitrary notions of due administration entertained by the Judges for the time. " For the benefit of the estate." Where did these words appear in the entail ! This was making a new entail, not construing the old. In questions of fetters, intention had hitherto gone for nothing. But now probable intention was, in such cases, to be the rule of construction. Where was the evidence of it to be found ! He who examined the records would look for it in vain. Nice distinctions had been made between the words fitting and fit. But in the entails of 1740 and 1747, by which half the estate was regulated, the word fit was used. From these, and the entail of 1729, it was clear that the makers considered the words fitting and fit as synonymous with, at their pleasure.

The power was applied to tacks and rentals, as well as feus : and from the analogy as to the case of tacks, it had been said, that the power to feu imported only a power of administration, without being converted into an instrument of alienation. But a permission to feu was a permission to alienate. A feu was a permanent, a tack a temporary right ; and there could be no analogy between them in point of duration, but there might be in point of extent ; and it had been asked, but not answered, Whether a tack of all or any part of the estate would have been set aside merely on account of its extent ?

The introduction of the limitation, " without diminution of the rental," proved that the entailor had no idea that he was giving merely a power of administration. The entailor himself had given the only rule. It had been said by a high authority here, (Eldon,) that in the case of an English power to let at the rent paid at a person's succession, if he succeeded at 21, the lands then paying £21,000, and lived till 90, the lands then paying £90,000, he might, at his age of 90, make a lease for his [171] own interest, at £21,000. One of the Judges below had said this was not Scotch law. But there was no principle nor authority to show that it was not.

The reduction, on the head of excess, amounted to the common case of the eviction of part of an estate sold, (as to which, *vide* Bankton, b. 1. t. 19. s. 24.—Voet, l. 21. t. 2. s. 2. 15. 35.—Diet. vol. ii. p. 356, 357. vol. iv. p. 255. 256.—Maclean v. M'Niel, June 23, 1757.—Diet. vol. ii. *voce* Warrandice, p. 513–519.—Russel v. Harrower, June 28, 1751.) The Court frequently reduced decrees arbitral, in so far as they were *ultra vires*, and sustained them *quoad ultra*. A deed of settlement might be reduced, in so far as it was to the prejudice of the *legitim*, or *jus relictæ* ; and yet it would not be reducible, in so far as it settled the dead's part, (Crauford v. Hamilton, Dec. 25, 1702.—Jackson v. Cramond, March 6, 1777. (Morrison Diet. Appendix. *voce* Arbitration.) Kyd v. Paterson, Jan. 27, 1810.) If the power was a power of administration to be exercised *secundum arbitrium boni viri*, the very idea included in these words supposed that the Court must fix what was too much, and what was not too much, (*vide* Diet. *Arbitrium boni viri*.) It was what took place sometimes in England, and almost every day in Scotland, in cases of powers to charge estates with competent provisions for wives and children.

The proper description of a *mortis causa* deed was, a deed not delivered, containing a clause dispensing with delivery, of course revocable at the will of the grantor, by which neither a legal right nor beneficial interest was vested in the grantee during the grantor's life. On the other hand, a deed not dispensing with delivery, actually delivered, and not subject to revocation, was a deed *inter vivos*. One of the Judges below (Glenlee) had stated (but without mentioning any authority) four kinds of *mortis causa* deeds, one of which was a deed, though without power of revocation, express or implied, where its effect in favour of the donee was suspended during the grantor's life. None of the Judges of the Second Division had held as a rule of judgment that there was here a power of revocation ; and the Court therefore must have decided that the deeds were *mortis causa* in the sense just mentioned. But such a thing was never before heard of as a *mortis causa* deed delivered and admitted to be

irrevocable. The description applied to marriage contracts, to conjunct fees to husband [172] and wife, to parent and child, etc. Were these *mortis causa* deeds? A great deal had been said with a view to raise an inference, that the fees were to be held in trust for the Duke: but as there was no declaration to that effect, nor any express power of revocation, the allegation was in reality an allegation of a trust to be proved neither by writ nor oath of party, which was directly in the face of a positive statute. But suppose (which was not the fact) there had been a power to revoke the fees, the Duke had power to limit the whole at his pleasure: and why should he not have power to make the fees revocable as well as conditional?

The argument of the Respondent at last ended in this,—that the feu rights had the effect of giving away the *dominium utile* of the estate, and altering the order of succession. But the question was, Whether this was within the power? It was a settled rule in the law of entails, that that might be done indirectly which could not be done directly.

The power to feu such parts and portions of the estate as the heir should think fitting, was broadly given, without any indication of intention, to confine it to those lands which had been let at the time of his succession. But the restriction of the power to the lands before actually paying rent, must be clear and express, before it could be available: as the question must be, Whether the Duke had, by comprehending in the feus lands which had not been let, forfeited his right to the estate?

The only limitation was, that the rental of the estate should not be diminished: which might mean, that the whole amount of the rents, as paid by the tenants, should be reserved, or rather the issues and profits paid or yielded by the whole estate, including lands let or unlet. No one ever heard the word rental applied to the rent paid for a single farm. Rental more properly signified an account or schedule of rents. It was true, in the entail of the *nova acquisita*, the expression was, "true and real rent:" but all these lands had been under lease, so that the question there did not arise. It would have been very inconvenient to separate lands which had been let from those which had not. (Lord Eldon. In the case of tenant for life, in England, with power of leasing only such lands as had paid rent, the inconvenience signified nothing, if the meaning was clear that he should so lease. If he wanted powers, he must come to Parlia-[173]-ment. It was worthy of notice, that in each of these feus, the feu duty referred to the rent or rental of that one in particular, and not to the rental of the whole estate.) If this were a case of English law, and a power had been clearly given to let the whole of the estate at the old rent, lands not before rented might be let at any rent the lessor pleased. The cases might be cited from a book where the principles and distinctions were accurately pointed out. "In the case of Bagot *v.* Oughton, the power was to lease all or any of the premises at such yearly rents or more as the same are now let at." (Bagot *v.* Oughton, 8 Mod. 249. Fort. 332.) A lease was made of the mansion house and demesne lands, which had not been leased before. It was determined, principally on the authority of Lady Baltinglass's case, (cited before in the same book,) that the lease was void, although it was forcibly argued that all the lands were authorised to be leased, etc. It was thought there, that the power could not be meant to extend to the mansion house, etc. and the conclusion followed the fact. Mr. Sugden then cited other cases, and observed, "that in all these cases, the intention of the parties was to govern: and "that there were several instances in which parts of the estate, never leased before, "had, in favour of the supposed intention, been considered to be within powers requiring the ancient, or usual, or present rents to be reserved." The first of these was Cumberford's case, (2 Ro. Abr. 262, pl. 15,) where, under a power to make leases of the premises, or any part thereof, "so that as much rent, or more, were reserved "on each lease as was reserved in respect of it within the two years immediately preceding," it was resolved, that lands which had not been leased within the two years at any rent, might be leased by the donee at any rent he pleased: because it appeared by the generality of the words, that it was intended he should have power to lease all the lands. The Court therefore considered the restrictive clause as applicable only to such lands "as had been demised two years before." Mr. Sugden then referred to other cases,—Pomeroy *v.* Partington, (3 T. R. 665,) Goodtitle *v.* Finucan, (Doug. 565. 1 Bur. 124,) etc.: and the conclusion was, that in the construction of powers, the intention of the parties, collected from the whole instruments, was to be the guide.

But it could not have been the intention of the entailer here, that lands by accident perhaps out of lease at the time of an heir's succession, should thereby be deprived of their quality of being liable to be rented. Suppose [174] the construction to be, that lands lately letten might be feued; what was to be considered as lately, or where was the limit in principle?

The finding as to the mansion houses rested on no authority except the Greenock case; and at any rate, the principal mansion house, with 47 acres about it, had here been reserved. The mansion house, it was true, went to the heir, and not to the widow; but if there were two, the widow took one of them. The eldest of heirs portioners had the principal mansion house, garden, etc.; but all the rest was divisible. There was no authority at all for extending the rule from one to several mansion houses.

The Greenock case was a direct precedent for the taxation of the casualties. But the only casualty taxed was that of relief, and it was doubtful whether it was a casualty at all.

The finding as to the mines and minerals was final in favour of the Appellant. The objection to certain of the feus, as comprehending woods, the *solum* of which had not been before let, and as containing entailed and unentailed lands before let at a cumular rent, was bad, on the general ground, that the only limitation was, that the rental of the whole should not be diminished. The Appellant, in case that ground should fail him as to the woods, was willing to give up the parts where considerable plantations stood, and still to pay the whole of the feu duty. In case it should fail him as to the entailed and unentailed lands, he contended that the rents might be divided. It might be stated as a general principle, that the law of Scotland furnished an universal power of division, where division was possible; as in cases of heritable and moveable subjects granted on death-bed, of heirs portioners, allocations of stipends, etc. In England, if the excess in the execution of a power could be distinguished, the execution was good to the extent of the power. The Appellant (if that should be held necessary and sufficient) offered to increase the feu duty to the full amount of the rents due by the leases, including the sums paid for the unentailed lands.

Romilly and Cockburn (for Respondent.) The whole question might be comprised under two general heads:—1st, What the power was? 2d, What had been done in the execution of it? The Respondent had not presented a cross appeal against the finding as to the mines and minerals, because, as the Court [175] had reduced the 16 feus, he did not think it necessary to insist that they should be reduced for his reasons. If any thing turned upon that, the standing order might be suspended, to enable the Respondent still to present a cross appeal, as had been done in a former case.

The power was (as the Court below had stated it to be) a power of rational administration, and evidently so intended to be by the entailer. His object was to raise a powerful support to the throne, as appeared from the invocation or address to the Sovereign, in the entail which had a reference to the public events of the time (Charles I.) But if these feus were to stand, this great feudal Lord would not have a single tenant, and a colliery might be carried on close to his window.

The Court below had not decided generally that the powers of heirs of entail were powers of administration, but that such was the case here. This principle, or *nostrum* of entail law, as it had been called, was to be found in the Greenock case. (Cathcart v. Schaw Stewart, Jan. 31, 1755. Appeal, March 19, 1756.) The entailer might have confined the heirs within a power of rational administration, and this brought the matter to a question of construction. This, it had been said, was not a power, but a right. The distinction in law was not very clear. An heir of entail was said to be absolute fiar, except in so far as he was fettered; in other words, he might do any thing within the power, which was admitted.

According to the construction put upon the entail by the Appellant, it first prohibited alienation, and then permitted it; which could not be the meaning. The power given to the heirs in succession, to feu such parts and portions as they should think fitting, imported, that each should only feu such small parts, etc. that one could not reasonably look forward to the period when all should be feued out. There was a greater distinction between fitting and fit than between rent and rental. But even if the power had been in express terms to feu parts and portions at the pleasure of the heirs, it could not, when considered in connexion with the rest of the deed,

be held as a power in one heir to feu the whole. The words, "take such as you choose," (out of a collection of pictures, for instance,) implied a selection. It was admitted, that in feuing "under the control of Courts of Justice," the heir must act at the peril of contravention; and so he must do on the Appellant's principle. Wherever there was a limited [176] power, it might be exceeded; and the legal consequences, be they what they might, must follow. It had been said that the strict letter, and not the intention, was the proper principle of construction, as in the Duntreath case. The decision there appeared to border a little on absurdity; but, admitting its authority, the rule did not apply in cases of powers.

If an heir could not feu the whole, how much, it had been asked, could he feu? Where did the excess begin? They were not bound to answer that. It was enough to show that here there was an excess.

As this was one transaction, any objection to one feu vitiated the whole.

It was clear from the deeds themselves, and the acts of the parties, (*vide ante*.) that these were not proper feus, but *mortis causa* deeds, for the purpose of altering the order of succession. It was not necessary for them to contend that they were so in form. It was sufficient that they were so in substance.

There was no rule by which an heir under strict entail could do a thing forbidden, directly or indirectly. Where a thing was not forbidden, it might be done for the purpose of accomplishing that which the entail had not intended. But where the act forbidden formed part of the original transaction, it could not be supported. Where a sale was not forbidden, an heir of entail might make a genuine sale; but if the purchaser was bound to reconvey and settle the estate on a different series of heirs, (if the alteration of the order of succession was prohibited,) this was void. In England, illusory executions of powers, though right in form, were void, as being wrong in substance; and there was no authority to show that such was not the law of Scotland. On the face of them, the deeds were to take effect *de presenti*; but they were *mortis causa*, because held under a secret trust, by which the Duke was still to remain proprietor.

In answer to the objection, that the power was confined to subjects which had been before rented, a distinction had been made between rent and rental; and it had been said, that rental meant a schedule of rents. That certainly was not the meaning here, and there appeared no foundation for the distinction. By the English law, the objection would clearly have been good. *Cumberford's* (2 Ro. Abr. 262) case had been mentioned with dissatisfaction by [177] Hale, (*Walker's case*, 1 Freem. 413,) and also by Lord Chancellor King, in *Foot v. Marriot*. (3 Vin. Abr. 429, pl. 9.) The case of *Goodtitle v. Finucan* (Doug. 565. 1 Burr. 124. 3 T. R. 671, n.) was cited by Sugden to show that the intention to be collected from the whole of the instrument was the rule of construction; and the cases of *Bagot v. Oughton*, (8 Mod. 249. Fort. 332,) *Foot v. Marriot*, and *Pomeroy v. Partington*, (3 T. R. 665,) were cited to show that it was still open to contend that the property to which the restrictive clause could not apply, should, if valuable, be rather held not to be within the power, etc. It was only requested that this case might be acted on according to these cases of English law, and that the power should be construed according to the intention of the entail.

It had been decided, that where a lease was made of all the lands, some of them within the power, and some not, at an entire rent, the rent could not be apportioned, but the lease was void as to the whole, (*vide Orby v. Mohun*, (3 Cha. Rep. 56. 2 Vern. 531, 542. Prec. Cha. 257. 2 Freem. 291. Gilb. Eq. Rep. 545.) *Cardigan v. Montagu*, and cases cited in Mr. Sugden's book on Powers, cap. 10, sect. 4.) The case of *Campbell v. Leach* (Amb. 740) was no authority against this, as the reservation there was distinct and separate. (Lord Eldon. Suppose a tenant said, 'It was our intention to reserve 'the best improved rent, but we were mistaken, and I am willing to pay a larger sum;' no Court of Equity, in my apprehension, could say that this was sufficient.) The question always was, Whether the execution was good at first? If it was not, nothing could cure it.

The Greenock case had decided the question as to the mansion houses and policies.

It was not contended that all the casualties had been taxed. The Respondent only said, that the sums payable at the entry of the heirs and singular successors (which in this case must be very considerable) had been taxed. These were clearly an incident which remained after the severance of the superiority and property. This,

then, was not merely granting feus, but giving away a part of the superiority, which the heir of entail was not entitled to do. This casualty was taxed in the Greenock case; but it was necessary there, from the nature of the thing, and the description of feus (for building) intended to be granted.

Lord Eldon (Chancellor.) It had been stated with great propriety, and with great energy, that [178] the judgment to be given would not only decide this cause, but would have a most extensive effect, with respect to the power, or rather (as Mr. Clerk would have it) the right of granting feus and tacks upon all the estates held under entails in that part of the island from which the cause came. They now knew to a certainty that these feus had been thought capable of being struck at on grounds which had not at first occurred to the Judges below; one of which grounds had been first suggested by himself. In a cause relating to property of such immense value, in a question of such vast importance to the parties, and to the law of Scotland, it could not be expected that judgment should be pronounced immediately upon the close of the argument. But considering for how long a time the parties had already been kept in painful suspense, he added, that no farther time should be suffered to elapse before judgment than was absolutely necessary for due deliberation.

Lord Eldon (Chancellor.) The entail of 1644 contained the same address to the throne as that of 1648, and held out the same inducement for the support of the entail,—the entailor's known loyalty. He thought it right to notice this instrument, as he could not find there, in terms, the same permission to grant feus, tacks, and rentals,—a difference which might possibly be considered by some as material. Then came the entail of 1648, with its prohibitory and permissive clauses, (*vide ante*;) to every word of which clauses he was anxious to point their particular attention, as it had been said on the bench [179] below, that it was material to attend to every word of the prohibitory clause. It ought to be observed, that the entailor himself granted feus, and that feus had also been granted by the heirs of entail previous to the date of the feus in question.

It was unnecessary to say any thing as to what passed in Parliament relative to the confirmation of this charter: but it was proper to call their attention to the charter of 1729, as a difference had been noticed between that and the charter of 1740. The charter of 1729, after adverting to the reserved power in the entail of 1648, to the heirs to grant competent portions, etc. and to the intention of Duke John to enable his son the more effectually to exercise that power, proceeded thus: "Therefore wit ye me to have given, granted, and disposed, like as I by these presents give, grant, and dispone, to the said Robert Marquiss of Bowmont, etc. my son, and the heirs male lawfully to be procreate of his body; which failing, to the other heirs of tailzie substitute to them, contained in the said tailzie (1648) made by the said deceased Robert Earl of Roxburghe, etc. all and hail the Earldom of Roxburghe," etc. And then followed these words, "Reserving always to me, the said John Duke of Roxburghe, my own life-rent right of the said hail lands and estate above disposed, during all the days of my life-time, with full power to me, during my said life-time, to enter and receive feuars and vassals, and to grant charters and precepts for infefting them as accords, and to set tacks and grant feus at my pleasure, without diminution of the rental, in [180] terms of the said tailzie, and that by myself alone, without the consent of my said son, or his foresaids, had thereto, and with and under the said hail provisions, conditions, limitations, restrictions, and irritancies, after expressed and contained in the said tailzie; providing that it shall not be lawful to the said heirs of tailzie to make or grant any alienation, disposition, or other right or security whatsoever, of the said lands, lordships, etc. nor of no part thereof; neither yet to contract debts, nor do any deeds whereby the same, or any part thereof, may be appriized, adjudged, or evicted from them; nor yet to do any other thing in hurt or prejudice of the said tailzie and succession, in whole or in part; all which deeds so to be done by them are declared to be null, and of no avail, force, nor effect; reserving always liberty and privilege to the said heirs of tailzie to grant feus, tacks, and rentals, of such parts and portions of the said estate and living as they shall think fitting, providing the same be not made and granted in hurt and diminution of the rental of the said lands and others foresaid, as the same shall happen to pay at the time the heirs shall succeed thereto; and sicklike reserving liberty to the said heirs of tailzie to grant competent portions and

"conjunct fees, by contracts of marriage in favours of any ladies with whom the said persons or heirs of tailzie shall happen to be married," etc.

The whole was fortified with irritant and resolute clauses as to what was expressed, or to be inferred, if any thing could legally be inferred.

[181] Then another charter was made in 1740, by the same Duke John, entailing the *novu acquisita*. There they would find that it was not to be lawful for the heirs of tailzie "to make or grant any alienation, disposition, or other right and security whatsoever, of the said lands and estate, etc.; but that a liberty was reserved to grant feus, tacks, and rentals, of such parts and portions of the said lands, etc. as they should think fit, provided the samen be not made nor granted in hurt and diminution—not of the rental, but — of the true and real rent of the said lands." And here too there was a saving, or reservation, to the author of the entail, of "full power and liberty, at any time in his life-time, and even in the article of death, to alter and innovate these presents, and to revoke and cancel the same at his pleasure, and to sell and dispose upon the lands, etc. to whatsoever person or persons he should think fit, either gratuitously, or for onerous causes; and to contract and ontake debts thereupon, and grant all such securities therefor which he should judge convenient; and to grant feu rights and tacks of the said lands for such duties as he should think proper; and generally to do every thing concerning the premises which any absolute fiar or proprietor by law might do," etc.

In this charter, also, they would have to consider what was the effect of the permissive clause, and the authority to grant feus and tacks.

Another charter, of the same nature as that of 1729, was made in 1747, by the next Duke, in favour of his son, which was not material, except [182] that it also reserved the life-rent right of the Duke, "with full power to me, during my said life time to enter and receive feuers and vassals, etc. and to set tacks and grant feus at my pleasure, without diminution of the rental, in terms of the said tailzie," etc.

These were the instruments, of which the contents were at all important, from 1644 till the new disposition and entail of the late Duke of Roxburghe, of the 18th June, 1804. There they would find this recital, which deserved attention, as it showed that the Duke thought, or had been advised, that he had such powers as he there stated himself to have. And notwithstanding it had been said, that an heir of entail, except in so far as he was expressly fettered, was an absolute proprietor, as contradistinguished to an administrator, or any other person, a difference was stated between the powers of the previous heirs of entail, and other persons there mentioned: viz. last heirs and substitutes. The recital was this:—"Whereas, upon the death of John, late Duke of Roxburghe, in the month of March last, I succeeded to the honours and estates hereinafter mentioned of the noble family of Roxburghe; and being the last heir male and substitute to whom the said estates were limited by deed of nomination and entail executed by Robert, first Earl of Roxburghe, bearing date 23d February, 1648, I lie under none of the limitations which fettered the former heirs, but am at liberty, as absolute and unlimited fiar, to carry on the representation of the said noble family by a new entail in manner here-[183] inunder written: therefore, for the love, favour, and affection I bear to the heirs of entail hereinafter mentioned, and for other good and weighty causes and considerations me hereunto moving, I do, by these presents, with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolute, declarations and reservations after specified, and subject always to the deed of trust bearing even date herewith, but which deed of trust will expire with the lives of the parties for whose benefit the same is created, and with the raising of the sums of money thereby authorised and required to be raised, give, grant, and dispose," etc. In the trust deed here alluded to, the same difference between the last heir and substitute and the former heirs was again expressed.

The motives which led to the making of this entail were no concern of their Lordships, except in so far as a knowledge of motives could assist them in gathering what was the legal effect of the instruments. He really was not competent to judge of the motives. The parties whom the Duke favoured might be, on the one hand, such as justly deserved this proof of his favour and affection; and, on the other hand, it might be said, that he ought to have continued the order of succession, out of regard to those who made the entails under which he himself came into possession. But

in point of fact, he was advised, and thought it right, to give to a new series of heirs the superiority and property over the Roxburghe estates by this instrument ; and, in case he could not do that, to give the *dominium utile* by [184] other instruments : and accordingly, on the 26th September, 1804, he executed 16 feu dispositions, to the contents of which, and every part of them, their Lordships would attend.

First, with regard to the feu of the policy of Fleurs,—that was a feu, as it purported on the face of it, “ to John Bellenden Gawler, and to his heirs and disponees “ whomsoever, heritably and irredeemably, of all and whole the lands, etc. presently “ in the Duke’s natural possession.” Nothing was said about these lands having been in the natural possession of the former Duke, but only in the possession of the Duke who executed the deed. The Duke then described the policy, as comprehending plantations and parts of farms as possessed by himself ; and then described several other portions of lands, plantations, etc. as possessed by other persons ; “ as also all “ and whole the several belts, strips, and clumps of planting belonging to the Duke, “ on his farms of Galalaw, etc. ; but excepting and reserving always from this present “ feu right all and whole the mansion house of Fleurs, with the offices and yards “ adjoining and contiguous thereto ; as also the terrace on the south side of the man- “ sion house, and the two plantations lying contiguous, etc. ; as also the north lawn, “ etc. ; containing in the whole forty-seven English acres, etc. ; with free access “ and egress to and from the said mansion house, offices, and grounds, by all the roads, “ avenues, and paths presently leading to and from the same ; and also excepting “ and reserving the large inclosure called the New Broxlaw, and Pond Park, etc. “ including [185] a small piece of land of the farm of Stodrig,” etc. The deed then went on “ to give, grant, and in feu-farm dispose to the said J. B. Gawler, and his “ foresaids, the whole stone and lime, limestone quarries, coals, marle, sand, clay, “ mines, metals, minerals, and fossils, of every kind, within the lands and others be- “ fore described, with full power and liberty to work, win, and transport, use and “ dispose of the same, at their pleasure, and to do every thing necessary for these pur- “ poses ; as also the teinds, parsonage, and vicarage, of the said whole lands hereby “ disposed ; together with all right, title, and interest which I, my predecessors or “ authors, had, have, or can pretend, to the lands and others before disposed. De- “ claring always, as it is hereby specially provided and declared, that this feu disposition, “ and the infettment following thereon, and all the obligations and prestations to “ which the said John B. Gawler, or his foresaids, is or shall be subjected in con- “ sideration hereof, either by these presents, or by any writing or deed granted, or “ to be granted, by him or them, shall become void or null, and be totally extinguished, “ in the events after mentioned ; viz.—1st, They shall become void and null in case “ there shall exist at my death any descendants of my own body. 2d, They shall “ become void and null in the event of the said J. B. Gawler, or his foresaids, establishing “ in their persons right to, and obtaining possession of, my estates contained in a deed “ of entail executed by me on the 18th day of June last, in virtue thereof, or in virtue “ of [186] any other deed of entail which I may hereafter execute in virtue of the “ powers thereby reserved to me : and which declarations shall be inserted *verbatim* “ in the infettment to follow hereon, and in all the subsequent transmissions of the “ said lands and others ; and in which lands and others before disposed, but always “ with and under the declarations before written, I bind and oblige myself, my heirs “ and successors whatsoever, to infett and seise the said J. B. Gawler, and his foresaids, “ to be holden of and under me and my foresaids, in feu-farm, fee, and heritage, for “ ever, for payment yearly, to me and my foresaids, of the sum of £720 of feu-duty, “ being more than the present MONEY rental of the lands and others before disposed,” etc.

Their Lordships would attend to the expression—“ MONEY rental.” This sum, then, (£750) was not stated with reference to what was the rental at the time the Duke succeeded. It was not said that it had a reference to the value of the produce of the land : it was merely the present MONEY rental. This could hardly mean the money rental of lands in the natural possession of the Duke which paid no money rent. If this, therefore, were to be taken strictly, the Duke had not done here what, according to the original settlement, it was necessary for him to show he had done, in order to entitle him to bind his successors. Their Lordships would also notice, that, according to the scheme of the feu disposition, if it was to take effect according to the terms

of it, the Duke was to be the Lord or Super-^[187]rior, and J. B. Gawler to take, under the declarations and conditions stated, the *dominium utile* in feu.

Then came the clause taxing the casualties, "and also paying one shilling sterling "at the entry of each heir, and two shillings at the entry of each singular successor : "and these for all other burden, exaction, or secular service, which can be asked or "required forth of the lands and others hereby disposed." There was a dispute whether this was or was not a casualty. He did not enter into that now, but only called the attention of their Lordships to the fact, that, instead of very large payments, the Superior was only to have a shilling at the entry of an heir, and two shillings at the entry of each singular successor. Then followed this clause :—"And in regard the "feu duty payable by the said J. B. Gawler and his foresaids equals or exceeds the "rental" (there the expression, MONEY rental, was dropped) "of the said lands and "others at the time of my succeeding to my predecessor in the same," etc. In what sense this passage was to be understood, with reference to what was before called "the "money rental," and now "the rental," dropping the word "MONEY," was not very clear.

The effect upon the whole, however, was, to grant the lands where the mansion house stood, except the mansion house itself, with about 47 acres of ground, and "free "access and egress to and from it by all the roads, avenues, and paths, presently leading to and from the same." And the feu was ^[188]to be void and null in case there existed at the time of his death descendants of his own body, and also in the event of the grantee's establishing a right to the lands under the deed of entail of the 18th June, etc. ; and it was said that these were irritancies that might be reserved in a feu charter. This was very singular, as it struck him ; but he dismissed that, as it had not been noticed in the Court below. After looking again and again for information on the point from the Scotch law books, etc., he was still unable to conceive how a title could be supported by which it was rendered impossible for a man to know whether he was lord or vassal when his title accrued ;—a superior, if he took under the entail—a vassal, if he took under the feus : but, *rebus existentibus*, not knowing what were his duties. He however laid that out of the question, as a circumstance not noticed any where, and as a riddle which, like other riddles, presented a formidable difficulty at first, but which, when explained, showed the seeming difficulty to be nothing.

There was a vast difference now between English leases and Scotch tacks. But if this were a case of an English lease, reserving rent as it was at the time the lessor succeeded, it might be good as a money rent, equal to what the rent was at the time mentioned, provided it were evidenced clearly by the instrument to the person bound by it, that the rent reserved was in fact equal to the rent which the grantor was bound to reserve. But here the present money rent might be more, or it might be less : and that must depend upon circumstances not ^[189]here disclosed, —on what lands were then in the Duke's natural possession, on what had, and what had not been before on lease, etc.

Another circumstance was deserving of notice. He had taken occasion before to say, and he now repeated it, that it was clear the conveyancers thought when they drew these instruments, attending to the deed of 1648, that it was proper to insert something to show that the feu duty was conformable to the rent there required to be reserved : it might however be necessary that this conformity should be evidenced in the instrument itself, or it might not : but if it had been the case of an English lease, it must be clearly shown on the face of it, that the rent reserved was equal to the former rent, instead of leaving the person bound by the lease to be informed of it by the lease itself and by some other proof in addition.

The next feu was that of Broxmouth House and policy, which deserved to be specially noticed on account of this particularity, that it contained a mansion house. There the feu duty was spoken of as "the full amount of the present rent of the lands," etc. There were 14 other feu dispositions, varying in their terms with reference to the feu duties to be paid. In some, the expression was "rental ;" in others "rent," "money rental," "money rent."

These feu dispositions appeared to have been all executed the same day : they all bore the same date, were made in favour of the same person, on the same principle, (except in the case of the feu of ^[190]Fleurs, in which the mansion house, and 47 acres adjoining were reserved, with free access and regress to and from the mansion house,) all containing the same irritancies : and on the whole, this was a feu of the

entire estate, consisting of 60,000 acres, with reservation of the mansion house of Fleurs, and 47 acres.

On the same day, the Duke executed another trust deed in favour of the same persons as formerly, but including certain estates which had been left out of the trust deed of the 18th June, 1804.

Then came the contract of the same 26th September, declaring the intention of the parties as to the feus, between the Duke as the superior, and J. B. Gawler as the vassal. The preamble narrated the two trust dispositions, the entail of the 18th June, and the 16 feu dispositions "dated the same day with these presents," the whole of which were mentioned: "and that at the time of granting the said feu dispositions," (he called their Lordships' attention particularly to the words)—

"It was understood and agreed upon between the parties, that they should enter "into a separate contract for declaring their intention relative thereto; therefore, "the said J. B. Gawler binds and obliges himself, and his foresaids, within 10 days "from this date, to grant, subscribe, and deliver, to the said William Ker, Duke of "Roxburghe, a disposition and deed of entail of the whole lands and others disposed "to him by the 16 several feu dispositions before narrated, whereby he shall dispo- "and convey the said lands and others to himself in life-rent, and to the said Henry "Gawler, his brother, and the heirs male or female, procreated, or to be procreated, "of his body, in fee; whom failing, to the other heirs of entail appointed to sue-[191]- "ceed after them to the lands and estate belonging to the said William Ker, Duke of "Roxburghe, by the foresaid deed of entail executed by him on the 18th of June last, "and with and under the conditions, provisions, restrictions, limitations, exceptions, "clauses irritant and resolute, declarations and reservations therein mentioned," etc.

And also with this provision,—

"That during the life-time of the said William Ker, Duke of Roxburghe, it shall "be in the power of him and the said J. B. Gawler, or, after his death, the institute or "heir of entail in possession for the time, by a writing to be subscribed by them jointly, "to alter, revoke, or annul, in whole or in part, the said deed of entail, and whole "clauses and conditions thereof, at their pleasure."

This last clause was to be attended to, with a view to the question, Whether the Duke alone had power to revoke?

"And further the said J. B. Gawler, in consideration of the feu rights before nar- "rated, hereby binds and obliges himself, and, after his decease, the institute and heirs "who shall take the said lands and others in virtue of the foresaid deed of entail to be "granted by him in manner aforesaid, to pay the annuities and sums after mentioned."

This part of the contract was to be attended to, with a view to the argument as to the onerous consideration given for the feus; to which argument it had been answered, that the estate which Mr. Gawler took was to satisfy the obligations. Besides payment of these life-rent annuities from the time of the Duke's death, particularly an annuity of £1000 to Mrs. Bechenoe, and, after her death, [192] annuities of £500 to each of her two daughters, Mr. Gawler agreed to pay £10,000 to Hamilton Fleming, described as Earl of Wigton, at the first term of Whitsunday or Martinmas—

"After the death of the said William Ker, Duke of Roxburghe, or as soon there- "after as the funds hereinafter mentioned shall be sufficient for paying the same, etc.; "and lastly, to pay to Mary Duchess of Roxburghe, wife of the said William Ker, "Duke of Roxburghe, executrix appointed by him, and general donee to his personal "estate, conform to general disposition granted by him in her favour, dated the 18th "of June last, or to any other executor or executors of the said Duke, or to any other "person whom the said Duke shall name and appoint, by writing under his hands, "£20,000 at the first term of Whitsunday or Martinmas after the death of the said "Duke, or as soon thereafter as the funds hereafter mentioned shall be sufficient for "paying the same."

The contract then noticed the trust disposition of the 18th June last, and the bequests made by it, and declared,—

"That though the contract and trust disposition bear no reference to each other "they are only for securing once and single payment of the said annuities and sums."

And it also declared,—

"That though J. B. Gawler, the institute, and heirs of tailzie, were bound in pay- "ment of the said annuities and sums, they should be entitled to claim and obtain

"relief thereof from the trustees acting under the foresaid trust disposition, etc. : but
 "that J. B. Gawler, the institute, and heirs, should be liable to relieve the executors,
 "and all others the representatives of the said Duke, excepting the said trustees,
 "of the foresaid annuities and sums."

[193] Then followed this declaration :—

"And whereas the several feu duties contained in the said 16 feu dispositions
 "before narrated, are equal to, or exceed, the full rent of the lands and others thereby
 "feued, as paid by the tenants thereof at the period when the said William Ker, Duke
 "of Roxburghe, succeeded to his predecessor in the said estate,"—an averment which
 "he (Lord Chancellor) did not find in any of the feus themselves : —" and as the expenses
 "of management, and other burdens and losses by the failing of tenants to pay their
 "rents and otherwise must amount to a considerable sum annually, by which, until
 "the rents of the said estates shall rise very considerably, the said J. B. Gawler, and
 "the institute and heirs of tailzie succeeding under the tailzie to be executed by
 "him as aforesaid, will not be possessed of a sufficient fund arising out of the
 "rents of the said subjects for the payment of the said annuities and sums ;
 "and as they may not be able to operate their relief of the same from the
 "trustees before named, to whom the said Duke has conveyed his estate as
 "before mentioned ; and as it is the meaning and intention of the parties that
 "the said John B. Gawler, and the institute or heirs taking or succeeding under the
 "entail to be executed by him as aforesaid, should themselves draw some reasonable
 "yearly sum out of the rents of the said feus, even during the subsistence of the said
 "annuities, etc. and before payment of the said sums : therefore, it is hereby provided
 "and declared, that the said J. B. Gawler, and the institute and heirs of tailzie who
 "shall take or succeed under the tailzie to be executed by him as aforesaid, shall, in
 "the computation of the surplus rents, be entitled to credit for the sum of £2670
 "annually ; and it is hereby farther declared, that in case the said surplus rents,
 "after deduction of the sum of £2670, shall not, at the time of the death of the said
 "William Ker, Duke of Roxburghe, exceed the foresaid annuity, etc., or in case the
 "said J. B. Gawler, or the institute or heirs of tailzie, shall have made any advances
 "on account of the said annuities or sums, before they shall be enabled so to do out of
 "the surplus rents paid them : then the said J. B. Gawler, and the institute, etc.
 "shall not be liable in payment of any part of the other annuities and sums before
 "mentioned, until the said surplus rents shall afford a sufficient fund for the payment
 "of [194] the annuities to the said (Mrs. Bechenoe and her daughters,) and until the
 "said J. B. Gawler, etc. shall have been reimbursed of any payments they may have
 "previously made on account of the said annuities before receiving the said surplus
 "rents, etc. And it is farther hereby expressly provided and declared, that not-
 "withstanding the terms of payment of the said annuities before expressed, and the
 "power to sell for raising £20,000 hereinafter inserted, the said J. B. Gawler, etc.
 "shall at no time be obliged to advance more than the surplus rents received by them,
 "after deduction of the feu duties, and of the foresaid sum of £2670 for the public
 "burdens, and other expenses and losses before mentioned, to or for payment of the
 "foresaid annuities or sums, except for payment of the annuities hereby granted to
 "the said J. E. and A. Bechenoe : with regard to which it is specially provided and
 "declared, that they shall in all events be paid to them at the terms, etc., and that
 "whether the surplus rents of the said estate shall then afford a sufficient fund for
 "paying the said annuities or not : but with regard to all the other annuities or
 "sums aforesaid, the said J. B. Gawler, etc. shall only be liable in payment thereof
 "progressively, as free funds for the payment of the same shall arise from the surplus
 "rents of the said lands and estate, after deduction foresaid, etc. And it is hereby
 "declared, that in the computation of the surplus rents, no rent shall be put upon
 "the house of Broxmouth, or the offices or gardens thereto belonging, or the pleasure
 "ground thereto adjoining, amounting to 50 acres, or thereabout, and commonly
 "known by the name of the Wilderness : and as to the other lands which may be
 "retained in the possession of the said J. B. Gawler, or the institute or heirs of tailzie
 "aforesaid, it is hereby declared that the rents or values are to be computed by the
 "profit or produce actually drawn or to be drawn for that year, and not according
 "to any calculation of what they might have been let for," etc.

It was foreseen that some of these feus might be ineffectual ; and therefore those

who prepared the instrument, acting under this foresight, (and no judicial person had been of opinion that all of them could stand,) introduced this clause, which was also [195] worthy of attention, with a view to the argument in regard to the feus being granted for onerous cause :—

“ And as it may happen that some of the said feu dispositions may, from causes unknown to the parties, become ineffectual ; therefore it is hereby specially stipulate and agreed, that in case one or more of the said feu dispositions shall become ineffectual, or be set aside, then the annuities or sums for which the said J. B. Gawler does hereby become bound shall suffer an abatement, and that in the proportion which the feu duties, stipulated by such of the said feu dispositions as shall so become ineffectual, shall bear to the feu duties contained in the whole 16 feu dispositions before narrated,” etc.

Then J. B. Gawler entered into an obligation which was said to be one of great consequence :—

“ And also the said J. B. Gawler hereby binds and obliges himself, and the heirs succeeding to him in virtue of the aforesaid feu dispositions, or the institute or heir who shall take or succeed under the said deed of entail to be executed by him as aforesaid, to pay to the said William Ker, Duke of Roxburghe, during his life, the whole surplus rents of the lands and others feued and conveyed to him as aforesaid ; that is, the whole sums which shall be paid to them by the tenants thereof, over and above the feu duties stipulated as aforesaid.”

It had been contended that these were not real feus, and the above payments were said to bear upon that question ; and then it was contended, that whatever might be the effect of the irritant clauses, in case the grantee established his right under the entail, or the Duke had issue, there was a great difference between an irritancy in a feu which at the time of the grant was completed, and one in which the enjoyment was on such terms that [196] the rents were to be paid to the grantor. He was now merely stating how they put it. The instrument then went on,—

“ And also to permit and allow to the said Duke, during his life, the possession and enjoyment of whatever part or parts of the lands and others contained in the said feu dispositions which now are, or shall be, or become out of lease, and which the said Duke shall incline to keep unlet ; and also full power and liberty to the said Duke to cut, dispose of, and carry off, the wood and trees on the lands and others contained in the said 16 feu dispositions, at his pleasure, and to apply the price or proceeds thereof to his own use, without being liable to account for the same to any persons whatever : and in order to render these provisions more effectual, it is hereby agreed, that any leases of the said estates which shall hereafter be granted during the life-time of the Duke, shall be made with his consent and approbation as party thereto, for a term not exceeding 21 years, and without any fine or grassum being taken therefor : and by such leases the tenants shall be bound to pay their whole rents to the Duke, during his life-time ; in consideration whereof he shall, on receiving such rents, grant discharges to the said J. B. Gawler, and his foresaids, for the feu duties of the said lands and others, corresponding to the periods for which the said rents are paid : and the said J. B. Gawler hereby binds and obliges himself and his foresaids, when required, to grant a life-rent tack to the said Duke of the said estate, and that at a rent equal to the feu duty stipulated by the said feu dispositions thereof respectively ; and which tack shall contain an express provision in favour of the Duke, to cut, dispose of, and carry off, the woods and trees on the said lands, and apply the price and proceeds thereof to his own use, without being liable to account for the same to any person whatever : for which, and upon the other part, the said William Ker, Duke of Roxburghe, has granted the 16 several feu dispositions before narrated, and hereby binds himself, his heirs, executors, and representatives, whomsoever, to pay the whole public burdens and expense of management of the said estate which shall become due during his life, and [197] to free and relieve the said J. B. Gawler, and his foresaids, thereof. And the said Duke also hereby reserves full power and liberty to himself, at any time in his life, to revoke the annuities and sums before mentioned hereby incumbent on the said J. B. Gawler, or to alter the same ; that is, to diminish the amount thereof, or to adject such conditions and declarations thereto as he shall think proper, provided that the sums to be paid by the said J. B. Gawler and his foresaids shall not thereby be increased.”

Their Lordships would observe, that the tenants under such new leases as might be granted by the Duke by virtue of this contract, notwithstanding the feu dispositions, were to pay their whole rents to the Duke during his life time, as much as if he had still had the *dominium utile* as well as the *dominium directum* : and the Duke was to give discharges to J. B. Gawler, etc. for the amount of the feu duties payable for the lands so to be leased. J. B. Gawler was to give a life-rent tack, if required, to the Duke, of the whole estate, at a rent equal to the feu duties, with power to dispose of the woods, etc. as he should think proper ; for which it was said the Duke granted the feu dispositions : and the Duke bound himself to pay the expenses of management, etc. and reserved the power of revoking the annuities, etc. or altering them so as to diminish them only, and not to increase the sums to be paid by J. B. Gawler.

It would be in the recollection of their Lordships, that a deed of entail was under this contract to be executed within 10 days from the date of it : but it appeared to have been executed on the same day, (26th September, 1804.) This deed contained a [198] prohibition against " innovating, altering, or infringing, the entail or order " of succession, etc. or doing or granting any act or deed that might infer any alteration, " innovation, or change of the same ; " and a clause which must receive some attention, as bearing upon the argument respecting the power of revocation, " It is hereby " specially provided and declared, that during the life-time of the said William Ker, " Duke of Roxburghe, it shall be competent for him and me, (J. B. Gawler,) by a " deed to be subscribed by us jointly, or in case of my predeceasing the said Duke, " it shall be competent for him and the said H. Gawler, etc. by a deed to be subscribed " by them jointly, to alter, revoke, or annul, in whole or in part, this deed of entail," etc. This bore upon the question which had been raised, whether the power of revocation was really joint, or whether it did not rest with the Duke alone, under the general reference in the contract to the conditions, etc. of the entail of June 18, 1804.

Now as to the matter of fact in regard to this trust deed, these 16 feu dispositions, this contract and deed of entail, all executed on the same day. The natural effect of the feus, if they could be supported, was to put J. B. Gawler in possession of the whole of this estate, with the exception of the mansion house and 47 acres adjoining, paying the amount of the feu duties ; and every thing else, whatever was then, or might be at any time thereafter, the additional value of the estate, was to be enjoyed under these feu dispositions ; thereby raising [199] in the vassal a new family, as respectable in point of property as the ancient house of Roxburghe ; and even exalting the vassal above the superior, as the Duke of Roxburghe could only go to and return from his own mansion house under the permission in one of these feu dispositions. That such was not the meaning of the author of the entail of 1648, there could be no doubt. What might be the legal effect of that entail was another question. By the contract and deed of entail, the Duke was to have all the surplus rents and profits to keep in his natural possession whatever he chose—to have full power and liberty to cut, dispose of, and carry off, the wood at his pleasure—and, in short, the whole *dominium utile* during his life. Their Lordships would mark these circumstances, as it must be agitated, whether it was possible to support the feu of the policy of Fleurs, and the feu of Broxmouth, which no Judge had thought capable of being supported ; and then, whether it was possible to support the rest, independent of these two. They might call them what they pleased, —feus, or any thing else : the question was, Were they within the reserving clause, supposing they were forbidden by the prohibitory clause ?

Then in regard to the abuse of a power. If he (Lord Chancellor) had a power to appoint a sum of money among children as he thought fit, he could not say that one should have £10,000, and another only 2s. 6d. That would be an abuse of the power, and he must do what was a substantial execution of it. So a case had happened. A man had a [200] power to appoint a sum of money among his children : he had a daughter about twenty years of age, and gave her a proper share ; but she was at death's door at the time, and he had given it to her because she must soon be in the sepulchres of mortality : he would be her administrator ; and this therefore was only a way of making a gift to himself.

In regard to the next circumstance of fact, he was sorry for Mr. Gawler, who had to deal with a man who was his benefactor ; and it was difficult to say how he could have interposed in the way it was said he ought to have done. But still these

facts must have their legal effect. Subsequent to the acts which he had stated, the Duke had executed two deeds of entail, and must be considered as then conceiving himself to have the *dominium utile* of the estate. He struck out some of the names which had been inserted in his first deed of entail, etc.; but it was unnecessary to state these deeds particularly, as they were not material to the present question, except as they showed, that the Duke must have considered himself at the time as having the *dominium utile*.

He estimated his own entail higher than he had done that under which he had succeeded. He had under the latter reserved only 47 acres, along with the mansion house, for the heirs of entail; under the former, he had reserved the mansion house with 400 acres adjoining, prohibiting the letting these in tack for any longer space than the life of the grantor. How could he do this, except he con-[201]-ceived that he had the *dominium utile*? The Duke might wish to try whether he could not make a better entail. But then, if these were real, actual feus, he would naturally have considered what their effect was as to his powers.

Their Lordships would also recollect the leases that were made by Mr. Seton Karr, to one of which Mr. B. Gawler was a subscribing witness. He agreed it did not follow that a witness must know exactly what was in the instrument; but if a lease of his (Eldon's) property were made by the person who had made a grant to him of that property about eight months before, it was not very probable that he should have become a subscribing witness to that lease, without knowing what was in it.

He also just noticed the period at which seisin was taken upon these feus, (though perhaps a circumstance of no great weight :) and that the contract, and entail executed in consequence, did not appear till after the Duke's death. These were said to have been kept back from motives which were denied, and he should say no more on that subject.

Then, after the death of the Duke, the competition arose in regard to the Roxburghe succession; and it came to be agitated whether the Duke had gone *ultra vires* in executing these details; and then, whether he had acted within his powers in alienating the *dominium utile* by the feus; and then, whether any of them were good? This competition appeared singular, when it came to be considered [202] what duties, what prestations, were to be performed by vassals to their superior. Though when the vassal disclaimed his superior he forfeited his right, though where the rent was two years in arrear the feu was gone; yet the deeds in question had given rise to this controversy, which had lasted so long; while, under these deeds, it could not be understood who was the superior, or who the vassal, or in what relation parties stood to each other.

It was then decided, that the deed of 1648 contained a prohibition which prevented the entails taking effect; and their Lordships' attention was next called to the question as to the feus, and they had to consider the deed of 1648, and the principles, as bearing upon this question, deducible from the act of 1685, cap. 22, and from the decisions. The Judges of the First Division below had declared that the feus were all bad.

It became their Lordships, however, to be fully satisfied as to the grounds of that decision. He had laboured as much as he possibly could, according to his habit, (and he thanked God that, at his time of life, he could conscientiously say that it had been his habit,) to make himself completely master of the subject, and he had formed an opinion upon several of the points, which opinion he did not then express, because, though they knew the result, yet it was difficult to say upon what particular grounds the Judges below had proceeded; and it was not, under these circumstances, fitting for their Lordships to proceed farther till the decision was reviewed. After sitting there 12 years as a Judge, it had not [203] been his habit to speak disrespectfully of Judges, or of any persons in respectable situations. He said this, because one or two of the Judges below appeared to have thought that he, in stating his reasons for sending back the cause for review, had used harsh expressions. He was not aware, however, that he had said any thing that could bear to be so construed, and he certainly did not mean it.

The present President had before thought that all the feus were good, except that of the policy of Fleurs, which, as he said, left only a stone quarry to the Duke of Roxburghe, with 47 acres about it; though his opinion now was, looking at the whole as one transaction, that all the feus were bad. He must say, that he could

not understand the grounds of the former opinion, though he could easily imagine the ground upon the feu of the mansion house and policy had been held incapable of being supported.

Another Judge, for whom he entertained the highest respect, (Lord Meadowbank,) had said, that the 16 feus could not be supported, but that one half of them ought to be reduced. Now, he could not understand on what principle the one half of them was to be reduced. Was it on the principle of excess? But why reduce eight, in preference to any other number? And which eight? It appeared to him to be a case of insuperable difficulty to say, upon the principle of excess, what ought to be reduced, and what not. Then, without going farther into the opinions of the Judges, he had only to say, that the result was, that the last judgment was the same as the former judgment; but they had now an [204] opportunity of considering the reasons on which it was founded.

He would also notice, as a matter of fact, that the general clause against alienation was held to prohibit long tacks, as not being consistent with a due administration of the estate. He had no conception, when he used these words as applied to an heir of entail, that they were to be understood in the same sense as if they had been applied to the administration or management of an estate by curators and other administrators.

It was not unnatural in him to say, that he had never seen the case of a power to grant leases without diminution of the rent actually paid for the lands, where the Court did not say, 'Let us see whether the instrument is correct in this respect,—whether it reserves the proper rent, and is confined to lands for which rent had before been paid.' He could not find that any one had before noticed this point; and then he had adverted to the English law on the subject, and this had led to a very curious conclusion, which would be matter of comfort to him as long as he remembered the word Roxburghe, (and he should remember it as long as he lived,) though this point had never been mentioned before, yet the cause now came back with a judgment, that on this ground all the feus to which the objection applied were bad. He did not find that any of the Judges thought that the feus of the policy of Fleurs and Broxmouth could be supported. The cause had been remitted, with directions to take the opinions of all the Judges; and he should have been glad to have had the opinion of the Judges [205] who had come to the bench since, but it would be improper to delay the final decision of the cause any longer. The Lord President was of opinion that the feus, one and all, were bad; and that was the opinion of the great majority of the Judges. Here, in one or two instances, there was an opinion that the excess might be corrected: how that could be done, he did not know; but the opinion of the generality of the Judges was, that they were all bad; and their Lordships had to consider whether this opinion was founded in law.

He should proceed another day to consider the law of entails before and since the act of 1685, cap. 22, the objects of that act, and the result of the decisions, particularly in the Duntreath case; with reference to which, though he considered their Lordships as now bound by it, he must say this, that if he had been in the House when it was decided, he would have been no party to that decision. They had to look at this entail, not merely with reference to the act of 1685, but as one partly prohibitory, and partly permissive; and with respect to the permissive clause, they were to look at it as applying to tacks and rentals, as well as to feus, and to consider the law of Scotland in regard to tacks under instruments of this description,—and here the Queensberry case would come to be examined: they had to consider the subject with reference to all the grounds stated at the bar, and all the grounds stated in the opinions of the Judges; the grounds of these opinions being, by their Lordships' authority, now before them, etc.

[206] Lord Eldon (Chancellor.) He had before stated what was the first judgment of the Court of Session, and that the Court had then been desired to state the grounds on which they held the feus to be bad; or, in the words of the remit, "to review the interlocutor complained of in the said appeal, as to all and each of the deeds sought to be reduced, taking into their consideration all objections to the validity thereof, whether general or special; and, in their farther judgment, to state specifically the legal grounds upon which the said deeds respectively are to be considered as not granted in the due exercise of the power of feuing, if it shall be their judgment that the same are to be so considered," etc.: and this produced the

interlocutor now appealed from. In this interlocutor, there were various findings, special and general; and all the Judges were of opinion that some of the feus were bad.

This had come after the discussion of the case of the Queensberry lease; and, in the course of that discussion, many of the principles which had been examined in the Roxburghe cause had come under observation. He should now state the grounds upon which he conceived that the Court below had rightly reduced that lease, and at every step he must tread on the grounds on which the present case rested.

The Queensberry case was one of this nature:—An entail had been made, by which it was provided, "That it shall noways be leisome nor lawful to the said Lord William Douglas, and the heirs male of [207] his body, nor to the other heirs of tailzie above mentioned, nor any of them, to sell, alienate, wadset, or dispose, any of the said hail lands, lordships, baronies, offices, and patronages, and others above rehearsed; nor to grant infeftments of life-rent, nor annual rent, forth of the same; nor to contract debts, nor to do any other fact or deed whatever, whereby the said lands or estate, or any part thereof, may be adjudged, apprised, or otherwise evicted from them, or any of them; nor by any other manner of way whatsoever to alter or infringe the order and course of succession above mentioned:" and these prohibitions were fortified by proper irritant and resolute clauses.

Their Lordships would observe, that there was nothing here, in so many words, prohibiting the letting of tacks, either short or long.

Then followed the permissive clause:—"It is always hereby expressly provided and declared, that, notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent for the heirs of tailzie above specified and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said land and estate during their own life-times, or the life-times of the receivers thereof; the same being always set without diminution of the rental."

In 1801, the Duke of Queensberry, who had lately been among their Lordships, thought proper to grant a lease of part of the entailed lands, for the [208] space of 57 years from Whitsunday, 1800, at the yearly rent of £86 15s. 2d. and a grassum of £301. This lease being renounced, the Duke granted, to the same lessee, a lease for 97 years, from Whitsunday, 1802, at the same rent of £86 15s. 2d. and a grassum of £318 1s. 2d. Disputes having arisen with the family, as to whether this lease was consistent with his powers under the entail, he instituted an action to have these doubts quieted, and to ascertain that he had not acted *ultra vires*.

In the observations which had been made upon this case the other day, (by Lord Redesdale,) considerable attention had been paid to the fact, that a grassum had been taken. He should only say of that, that he laid it entirely out of the question, thinking it wise, after the experience he had had in Scotch cases, not to take up unnecessary points, and not to carry the precedent farther than was required for the decision of the cause. He looked to this case, therefore, merely as the case of a lease for 97 years, under this entail.

In a number of tailzies, it had not been left to argument, whether or not the prohibition against alienation extended to tacks; but tacks were expressly, in so many words, prohibited. The act of 1685, cap. 22, had ordained that it should be lawful to make tailzies, and that they should be protected, if made according to the mode stated in that act. But there had been tailzies before this, though the clauses intended to protect them had been found ineffectual for that purpose. In England, too, the legislature had endeavoured to protect the entails of [209] estates: the English mode of barring the issue and remainder men was only a fiction of law; and it had often occurred to him as a very great singularity, with respect to the judicial and legislative powers, that it should have been permitted judicially to destroy these entails. But if the English statute protecting entails had been passed only about a century ago, it might be doubted whether the legislature would have permitted the exercise of such a stretch of power by the Judges.

The most effectual tailzie in Scotland was that which, like the entail of the Roxburghe estate, contained not only prohibitory, but also irritant and resolute clauses, by which a forfeiture was incurred upon contravention. But the efficacy of these clauses rested chiefly on the provisions of the act of 1685, cap. 22, by which it was

declared.—“ That it shall be lawful to his Majesty’s subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispose the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprised, adjudged, or evicted from the other substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may immediately upon contravention pursue declarators thereof, and serve himself heir to him who died last infeft in the fee and did not [210] contravene, without necessity any ways to represent the contravener : it is always declared, that such tailzies shall only be allowed in which the foresaid irritant and resolute clauses are insert in the Procuratories of Resignation, Charters, Precepts, and Instruments of Seisin,” etc.

He had noticed that there were tailzies in Scotland expressly prohibiting long tacks : and, if these were not included in the statute, under the words, “ sell, annailzie, or dispose,” etc. how came they to be in the tailzies at all ? Wherever these words were acted upon in entails, by a particular express prohibition against setting tacks, this must have been introduced upon the presumption, that under these words in the act, it was lawful to prohibit tacks, as it was upon this authority that the provision rested.

It had been said, that an heir of entail was an absolute proprietor, except in so far as he was fettered ; and in the Duntreath case, it had been decided, that fetters were not to be implied ; though perhaps there the English policy in regard to entails weighed a little in the judgment. But they were not now to touch the principle, that fetters were not to be raised by implication. That fetters could not be extended by implication from cases that were expressed to cases that were not expressed, was now perfectly settled.

Then the question came to this, Did the prohibition to annailzie extend to a lease for 97 years ? If it did, in reducing that lease, they were doing nothing by implication, but only acting according to the meaning of a generic term, [211] finding the prohibition against such a lease in fact expressed.

It had been urged, that a prohibition to make leases of one species could not operate as a prohibition to make leases of another description : and that no prohibition could be effectual, unless fortified with irritant and resolute clauses : and that the insertion of the Queensberry permissive clause, to make leases for the lives of the grantor or receiver, could not, in consistency with the principles established in regard to Scotch entails, be held by implication as a prohibition against granting leases of another kind. He laid these propositions out of view here. He considered the real question to be, Whether long tacks were prohibited under the prohibition against alienation ?

He would here also mention, that in the case of *Leslie v. Orme*, and others, there had been always a distinction made between the principles of law, as applied to fetters, and as applied to a permission. As to fetters, they could have no effect, except expressly imposed :—none could be implied. But, when they came to look at what was permitted, the permission must be construed so as to render it consistent with the meaning to be collected from the whole of the deed. And here he laid aside, in both the Queensberry and the Roxburghe cases, all that had been said on the distinction between the same principles, as applied to questions as they arose *inter heredes*, or with third persons : for, whatever was the meaning of a permission, that meaning must be the same, whoever were the parties.

The question, upon the whole, came to this.—[212] Did the word “ annailzie ” (alienate) extend to long tacks ? When he stated arguments from inconvenience, it ought to be observed, that this was not done upon a supposition that fetters could be imposed by implication ; but the argument from inconvenience became material, when the object was to settle the construction to be put upon words in a deed.

Why, then, suppose the word “ annailzie ” (alienate) did not include leases. It had been said, that a lease was not a transfer of the property : and it was not : and therefore it was said, that a lease was no alienation. Then see what the wisdom of Scotland had been doing since 1648 and 1685. It had furnished an infinite number of entails, where tacks were not expressly prohibited : it had furnished charters,

providing for a certain series of heirs, from generation to generation, menaced with irritant and resolute clauses, annexing the penalty of forfeiture to every mode of contravention; and yet, notwithstanding all this care, the institute, or heir, might the next day, in defiance of all these fetters, grant a lease for 1000 years, and thereby defeat the interests of all the subsequent heirs of entail, from the beginning to the end! If heirs of entail had this power, it was singular that those in the Roxburghe entail had so religiously attended to the pious request of its author, and never availed themselves of this power to acquire all that might be acquired.

After all that he had heard, then, it appeared clear to him, that the word *anailzie* had been understood as extending to long leases. The English leases were originally much the same as the Scotch [213] tacks, and they had something in common as to duration. They held in Scotland, that a lease must have a definite *ish*, clearly expressed. Craig spoke of 10 years as a period of too long duration; and Coke (Co. Litt. 45, 46. (k.)) said, that, "by the ancient law of England, for many respects, a man could not have made a lease above 40 years, at the most." Now, however, a tenant for life, with a power of leasing, might make a lease for 1000 years, if not restrained by the power. But there was no doubt that this was alienation, according to the English law,—alienation of the possession. They had no such principle of distinction in England, between long and short leases, as they had in Scotland. There could be no doubt, then, but long leases were included under prohibitory clauses of this sort.

Then it was said, what confusion would this not produce, when there was no certain criterion to determine what was a long lease, or what a short one? He admitted that. But, if such was the general law of Scotland, the inconvenience was only exactly the same as if a prohibition against letting long tacks were expressly inserted in a general way in the charter. If it were inserted in the charter, that no lease should be made, except such as was consistent with a due administration of the property, or no lease of more than ordinary endurance, the difficulty must be grappled with; and in the same manner it must be grappled with here.

In a great majority of the tailzies, the same difficulty occurred, in regard to jointures and provisions for children, when the heirs of entail were allowed "to grant competent portions," etc. A question [214] arising upon this would have a reference to the particular circumstances, and according to these circumstances it must be determined, whether the provision was in fact competent or excessive.

As to the case of *Leslie v. Orme*, (he did not think it material to state that of *Turner Hall*.) where a lease for four 19 years had been sustained, a noble Lord (Redesdale) had the other day accounted for that in this way:—In this entail, the author had inserted a condition, that it should not be lawful for the heirs of entail to grant leases in diminution of the rental: this condition was done away by a subsequent deed, expressly allowing the heirs to grant tacks with diminution of the rental; and if the heirs might do this, it signified nothing whether the leases were long or short, as they might almost annihilate the whole estate. This sufficiently accounted for that case; but he had some reason to believe that it was not the ground upon which it was decided.

In the due administration of an estate, it might possibly be necessary and proper to grant leases with diminution of the former rent. It might be wise, under particular circumstances, to diminish the rent, in order to increase the advantages to be derived from the estate. Prior to the Union, it might, for example, be a wise act of administration on the borders; since, to diminish the rent might be the only way to raise it ultimately, after the ground had been wasted. The noble Lord who recommended the decision in the case of *Leslie v. Orme* in the last resort, had, he believed, satisfied himself, that under the particular circumstances of that [215] case, the lease then in question was not an unwise act of administration, and it was decided accordingly.

He concurred, then, with his noble friend, in regard to the *Queensberry* case. If there was an inconvenience attending restricted powers of this nature, the remedy must be found elsewhere, as had been done by the act 10 Geo. 3, cap. 51, and not in judicial interference giving powers which the law did not give.

He came now more particularly to the *Roxburghe* case, and would recapitulate the facts in a few words. In 1648, a tailzie of the *Roxburghe* estate was made by

Robert, then Earl of Roxburghe, which evinced great anxiety to preserve the estate to the heirs who were called, (though he granted that this anxiety went for nothing, unless the author of the entail had done what was necessary to carry his object into effect :) but this anxiety appeared strongly in the clause which contained an address to the throne. He would again mention, that in 1647, or thereabouts, Earl Robert himself had made, or contracted to make, a great variety of feus, but all of small parts and portions, granted to kindly and ancient tenants, where the render was not large, and the feu duty was generally doubled at the entry of each heir.

From 1648 down to 1729, there was but little that called for particular attention in regard to the facts, except that some more feus were granted. It was unnecessary to enlarge on the feu of Broomlands, as it had been reduced by their Lordships' House : and it had been represented that several small feus were granted in virtue of the permissive clause.

[216] In 1663, Earl William granted a considerable feu to Sir Andrew Ker, of Greenhead : a feu which, with all its circumstances, it was difficult to reconcile with the original charter. But suppose it was not according to the terms of the charter,—then the utmost that could be said was, that too large a feu had been granted in 1663. But it was impossible to contend with success, that because that had been submitted to, therefore the present feus were good.

In 1742, a feu was made of about 12 acres of the Roxburghe property, in the Canongate of Edinburgh. This might have been done in the due exercise of the power ; but if not, then it was only another feu that could not be supported. The question then was, Whether their notion of the power of the heir of entail was sanctioned by the charter,—aye, or no ? And if it could be made out that it was, then there would be a farther question, Whether, even upon that ground, the feu transaction of 1804 was such as could stand ?

On the death of the last Duke but one, in 1804, the late Duke William came into possession : and, on the 18th June, 1804, he executed a trust disposition of the Roxburghe estates, for the purpose of making various payments specified in that deed. Then he executed, of the same date, a new deed of entail of the estates, under the impression that he was absolute and unlimited fiar : and, on the 24th September, 1804, he executed the 16 feu dispositions, the validity of which were now in question, which included, in fact, the whole beneficial property of the estates of Roxburghe, except the mansion house of Fleurs, with 47 acres adjoining, out of [217] 60,000 acres, reserving ingress and egress to and from that mansion house by the roads and paths presently leading to and from the same. These were all executed the same day, between the same parties, containing nearly the same clauses, and bearing to be granted in consideration of the feu duties, and "certain other onerous causes" not there particularly explained. On the same 26th of September, 1804, a contract was executed, providing for the entail of the feus, giving the interest in substance to the very same persons nominated in the entail of the 18th June, 1804, in case they could not take the benefit of the former entail, or any other entail which the Duke might think proper to make. All these feus were subject to irritancy, —1st, In case the Duke left descendants of his own body. —2d, In case the entail of the 18th June, 1804, or any other entail to be made by the Duke on the same ground, should be held effectual.

These had been called irritancies : and it had been argued, that it was no objection to a feu that it was subject to such irritancies. But their Lordships would attend to this contract, by which an entail of the feus was to be executed and delivered to the Duke within 10 days : whereas, the entail appeared to have been executed the same day : by which also it was provided, that the Duke should have the beneficial enjoyment of the property during his life : that he should have the surplus rents ; that he should be at liberty to cut down and carry away the woods at his pleasure : that leases should be made with his consent, and that the rents should be payable to him : and, in short, that he [218] should have in substance the whole *dominium utile* of the estate for life.

He took it for granted that the infeftments were taken in proper time : that the deeds were duly delivered : and that the contract and entail of the feus had appeared before the Duke's death. In his view of the case, these points were not material.

It was to be attended to, that it had been argued, that in all these deeds and agreement, the provisions were such, that the act of the Duke was not a benefit purchased by Mr. Gawler, but a gift to him under conditions.

After having executed all these deeds, the Duke took upon himself to make a new entail both of the superiority and property, and also a third deed of entail; then he executed a commission and factory to Mr. Seton Karr, and under this commission, five leases were granted of parts of the estate, thereby demising the *dominium utile*, which he had no title to do, if it had, in law and equity, passed from him by the feus; and the rents, which on the face of the feus belonged to Mr. Gawler, but which by the contract belonged to the Duke, were reserved to the Duke, his heirs, or assignees; and the Duke died in the natural possession of the estate.

The true question then was, Whether this transaction, under all the circumstances, amounted to a due exercise of the power of feuing, given under the entail of 1648,—and the other entails of 1729, 1740, and 1747, which the Court below considered as containing the same restrictions, and the same powers? When he said, this transaction, he said so, because he considered these instruments, though [219] various in number, as but parts of one transaction. It appeared to him, then, that the Duke meant, (and he wished he had meant less, and had effectually done more,)—that he meant to change the series of heirs, and “to carry on the representation of the “family in a new entail,” as he had expressed it in his first entail, (18th June, 1804;) that he intended to alter the whole course of succession. With his motives they had, as Judges, nothing to do. The only question was, Whether he had the power?

Their Lordships would then attend to the charter of 1648, with its prohibitions and permissions; upon the construction of which they had to determine this case. The prohibition (and he again mentioned that the irritant and resolute clauses went as far as the prohibition) was in these words:—

“And sicklyk it is spe'allie provydit, that it sall not be lawfull to the personnes “befoir designit, and the airis maill of their bodies, nor to the utheris airis of taillie “abovewr^m, to make or grant ony alienatioun, dispositioun, or uther right or security “q'sumevir, of the saidis landis, lordschip, baronies, estait, and leiving above spe't, “nor of na part thereof; nather zit to contract debtis, nor do any deidis q'rby the “samyn, or ony part yairof, may be apprisit, adjudgit, or, evictit fra thame; nor “zit to do ony uther thing in hurt and prejudice of thir pntis, and of the foirsaid “taillie and successioun, in haill or in part: all quhilkis deidis sua to be done be “thame, are be thir pntis declarit to be null, & of nane avail, force, nor effect.”

[220] Here they were not puzzled with the same question as in the Queensberry case, since there could be no doubt that feuing was alienation, and that the property was thereby transferred. Feuing was therefore clearly prohibited. But it became necessary, on prudential grounds, for the improvement of the estate, that the heirs should be let loose a little from these restrictions. The purposes of agriculture required the granting of leases, and also, to a certain extent, the granting of feus, which in some measure resembled leases. Stair, in treating of this subject, had the following passage:—

“Infetments feu are like to the *emphyteosis* in the civil law, which was a kind of “location, having in it a pension as the hire, with a condition of planting and policy, “for such were commonly granted of barren grounds, and therefore it still retains “that name also, and is accounted and called an assedation or location in our law: “but because such cannot be hereditary and perpetual, all rentals and tacks necessarily requiring an ish; therefore, these feu-holdings partake both of infetments, as “passing by seisin to heirs for ever, and of locations, as having a pension or rent for “their reddendo, and are allowed to be perpetual for the increase of planting and “policy. But about the nature of *emphyteosis*, see sect. 3. Inst. de Loc. Cond. tit. F. “si Ager vectig. et tit. C. de jur. Emphyt.” (Stair, b. 2. t. 3. s. 34.—Vide also Ersk. b. 2. t. 4. s. 6.)

And accordingly, Lord Thurlow, in the case of *Elphinston v. Campbell*, (April, 1787,) had said in that House, that in ancient times sub-feus were little more regarded than common tacks were now. Earl Robert [221] himself, in 1647, had therefore granted some feus, and had the advantages just mentioned.

Then came the permissive clause, where it would be observed, that the permission was to grant, not merely feus, but feus, tacks, and rentals; and that the construction

of the clause must be such as was consistent with the granting of tacks and rentals, as well as feus :—

“Reserving always libertie and priviledge to our saidis aires of taillie to grant feus, takis, and rentallis, of sik parts & portiounes of the said estait & leiving, as they sall think fitting : provyding the samyn be not maid nor grantit in hurt and diminutioun of the rental of the samyn landis and utheris foirsaidis, as the samyn sall happen to pay the tyme that the saidis airis sall succede y^rto ; and siklyk, reserving libertie to our saidis airis of taillie to grant competent portiounes & conjunct fees, by contractis of mariages, in Favo^rs of onie ladies to q^m the saidis persones and airis of taillie sall happen to be married.”

He should first discharge himself of the few observations which he had to make as to the permission to grant these feus, tacks, etc. without diminution of the rental, or rent, (for there appeared to be no distinction.) He had looked at the feus, to ascertain what attention had been paid to this in the amount of the feu duty ; and though the feus contained many subjects which had never yielded rent before, or did not yield any at the time of the succession of the granter : yet all were granted at a feu duty equal to, or exceeding, the rental, rent, or money rent, at the time of the Duke's succession. [222] At the first hearing of this cause he had felt a doubt, which had led him to suggest, whether this condition had been so punctually complied with as it ought to have been. The Judges below were called upon to state their special reasons : and the majority of the Judges held, that the lands which had not been lately rented could not be feued : and as some of the feus comprehended lands which partly had been rented, and partly not, at a *cumulo* rent, and without distinction made as to what was paid for the one description of lands, and what for the other, these feus could not be sustained. His situation was somewhat singular, as to this. It had been suggested by himself, with reference to the law of England. He had stated the case of a person holding a house in St. James's Square, as tenant for life with a power of leasing, and the next house in fee, and making a lease of both, at a *cumulo* rent, without distinguishing what was the rent reserved for each : no equity could make this good for the one, and bad for the other. The excess in the exercise of the power could not be corrected : if the parties did not state the terms, the Court could not make a new contract for them. The rent required by the power must be reserved : and it must appear by the instrument itself, that this had been done. Cases had been cited, where the Courts had held, that where the power to lease was intended to extend to the whole of the lands, “reserving the ancient rent,” such parts as had not before paid rent might be let without rent : though the tendency of the latter cases had been to establish the rule, that it was rather to be presumed, that subjects [223] which had not before been let were not within the power : and the result of the whole was, that powers were to be construed according to the intention of the parties.

But it was not necessary to decide this point, unless they disagreed on the other grounds on which it was to be proposed that this case should be decided. Though the cause had been remitted to the Court below, that they might state the special as well as general grounds on which their judgment rested, it was not therefore necessary for their Lordships to decide on all their *rationes decidendi*. He should therefore lay aside the point as to the feuing of lands which had, along with others which had not been rented at a cumular rent.

But he called their attention to another view of the case. It had been contended, that the Duke, under this power, could give away, to a different series of heirs, the whole of the *dominium utile* of estate *ultra* the value (so construing the rental) at the period when the Duke succeeded. And therefore, if the Duke lived to the age of 99 years, he might feu the lands, with all their improvements, at a rent, not as it was in his 99th year, but as it was at the time when he succeeded.

In considering whether this was a due exercise of the power, they might put the case,—What would have been a due exercise of it, independent of the condition as to the rental ? Suppose then there had been no such condition, the consequence would be this,—that the power of feuing would be without limit, except that some rent must be reserved. Alienation was prohibited, but there was a [224] permission to feu : and therefore the whole *dominium utile* might be feued out, *reddendo* a fowl, a capon, a Scotch pound ; and this, it was said, would be a due exercise of the power.

But then tacks were likewise permitted, and these could not be granted beyond a period of ordinary endurance; and was it consistent with this restriction as to tacks, that there should be such an unlimited power of feuing? The permissive clause must be taken in a sense suitable to all the terms of it, and to the terms of the whole instrument taken together. Here they were not imposing fetters by implication. The question was, What fetters were taken off? He admitted that this relaxation ought to be carried as far as could reasonably be done; but they could not reasonably loosen a prohibition so as to destroy the effect of it. Here there was a prohibition against alienation, with a permission to feu; and feuing was alienation. But the whole must, if possible, be made consistent. The nature of the power was to be collected from the purposes for which it was given. What was the meaning of the prohibition against alienation, if the heir might alienate the estate? Suppose Earl William, making up his title under the entail 1648, had said, 'I cannot dispoise, contract debt, nor do any thing by which the estate may be appraised or evicted from the heirs, as to half an acre.' But this I can do,—I can grant one feu of the whole, and thus 'alienate the property for ever. I can, in this way, destroy my own powers over the estate; and yet I cannot grant a lease for 99 years, because the power to lease must be exercised with a view to [225] the rational administration of the estate, and used, not for the destruction, but the support of the entail!'

He could not help saying, therefore, that supposing all these feus executed on the same day, in favour of the same person, and constituting a gift of the surplus rent of the whole of this estate in perpetuity, he could not help saying, that in that view of the case, and on that ground, it appeared to him impossible to support this transaction. For he could not agree that they were not to look at its real nature, but only at what it was in appearance. If the transaction could be supported against all the special objections, still, on general grounds, it could not be supported. The Duke, after the feu transaction, appeared to be the substantial owner, and reserved the rents to himself, under leases to which Mr. Gawler was an attesting witness. If Mr. Gawler had interposed to prevent these acts on the part of his benefactor, he should have had a less good opinion of him than he now had; but it was impossible not to look at these, along with other facts, as evidence of the real nature of the transaction.

The nature of the irritancies too were to be attended to. If Mr. Gawler had been in possession under these feus since 1804, if he had enjoyed the property according to their tenor, if there had been no relative contract, they would still have gone a great way to destroy the distinction between superior and vassal.

When he then found that the real intention in granting these feus was, that they should be entailed upon a different series of heirs from those [226] called by the deed of 1648, and that this intent was to be accomplished by feuing the whole estate, separated into 16 feu dispositions for the purpose of forming a colourable compliance with the condition as to parts and portions; when he saw that these 16 feus were in reality all one feu, the question then came to be, Whether the real nature and object of the whole of the transaction was not this,—I mean to alter the order of succession: 'if I cannot do it directly by a new entail, as absolute fiar, I shall do it by means of these feus?'

It was therefore on these grounds—on the two general reasons, that he was compelled to say that these feus could not stand. It did appear to him, 1st, That this power of feuing, as well as that of leasing, was to be exercised for the purposes of a rational administration of the entailed estate; and that therefore these 16 feus, constituting in reality one feu of the *dominium utile* of the entire estate, could not, on that ground, independent of the other parts of the transaction, be supported. 2d, It appeared to him, that the real intention was not to feu, but, under the colour of feuing, to alter the order of succession, which the law would not permit to be done under that colour.

He said nothing as to the feuing of mines, minerals, and woods, etc. which had never been let, as it might be dangerous in such cases to go farther than was necessary. But it was impossible to look at this part of the transaction also, without seeing this at least, that these were facts to show what was the real nature and object of the whole transaction.

It was clear, from this act of feuing itself, that [227] the Duke could not have considered it as an act of rational administration. But his requiring a contempor-

aneous entail of these feus was decisive to show that the real intent was not to grant feus, but, in another form, to make a new entail : and the Duke's own entails showed that it was not so much his object to give Mr. Gawler the feus, as to entail upon a new series of heirs, in the one case, both the superiority and property, and, in the other case, the property only.

The words of the power in the Greenock case (*Catheart v. Schaw Stewart*, Jan. 31, 1755. Appeal, March, 1756.) were, "Reserving always, etc. full power and liberty to the said Sir John Schaw, etc. to grant feus or long tacks, for such spaces as they shall think fit, of any portion of the said lands, the feu or tack duty not being under 20 shillings Scots for each fall of dwelling-houses, and five shillings for the fall of offices." The chief question there was as to the feu of the Western Barony ; and it was held that it could not be feued, as the nature of the reservation showed, that only such parts were to be feued as were fitting for dwelling-houses and other buildings, and as it was not probable that the town of Greenock should extend to that length. But it had been said in that House, that if ever the time came when the town of Greenock should extend to the Western Barony, then the heirs of entail might grant feus of it. The town of Greenock had now extended that length, and at this day the lands of the Western Barony were properly applied to the purposes of feuing. What was the meaning of that, if it was not this,—that the power was to be construed with a view to the object for which it was given ? Or, in other words, that it was to be exercised with a view to the rational administration of the estate ?

Then the judgment, on these general grounds, ought, in his opinion, to be, to affirm the interlocutor.

In stating so much, if he was in error, he protested to God that he had endeavoured to come to a just conclusion upon this case, with an anxiety which he had never before felt in his life. He had looked again and again at all that he could find in the papers,—he had tormented his mind with all the reasoning that he could possibly conceive, to try whether the feus were bad as to the whole, they might not be reduced only as to the excess ; and he once thought that they might, as there was a clause in the contract by which the obligations on Mr. Gawler were to be lessened in proportion as the feus might be reduced ; but he could find no rule or principle on which to say, what was excess, and what not. There were no distinct parts : it was all one transaction. He could not say, on any rational ground, how these feus were to be distinguished, as to what was good, or what bad, except the feus of Fleurs and Broxmouth. These two were all bad, as the mansion house could not be feued, and as the house of Fleurs could not be turned into a stone quarry, by feuing all the grounds about it, though free ingress and egress were reserved. These two were capable of distinction, but all came under the general ground, and were all good, or all bad. One of the Judges [229] had said, that one half of them were bad. But by what rule was he to take one, or two, or more ? or to say which was good, or which was bad ? The general grounds of decision went to the heart's blood of the whole, and they were all good for every thing, or good for nothing.

Lord Eldon (Chancellor.) He had not, the day before, called their attention particularly to some of the findings, such as those in regard to the taxation of the casualties, the feuing of mines and minerals, etc. These were evidence as to the real nature and object of the transaction ; but, in the terms of the judgment which he should propose, he wished to avoid affirming or disaffirming many of the findings in this interlocutor. He had not failed to attend to what had been said in regard to the proof of a trust, but he gave no opinion upon that point.

He had stated his decided opinion the other day, that the grant of 16 feus, comprehending the whole estate, was, even if there had been no other circumstances, in effect, a grant of one feu, and that one was inconsistent with the entail of 1648 ; and that the object was, under colour of feuing, to alter the order of succession : that, according to the law of Scotland, attention was to be paid, in cases of entails, to the rational administration of the estate, or what was called management. But though attention was required to management, it ought not to be too curiously inquired into, whether the management by an heir of entail was the most rational.

He had reconsidered the question, whether the feus might not be separated : but had not been [230] able to discover any rule by which that could be done.

Then having regard to the whole,—all were alienations, to operate only after the death of the Duke, and to alter the order of succession, under the colour of feuing ; and, on these general grounds, (without saying any thing as to the special reasons,)—

The judgment of the Court below was affirmed.

Agent for Appellant, CAMPBELL.

Agents for Respondent, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SELKRIG (Trustee for Creditors of FAIRHOLMES),—*Appellant* ; DAVIES AND SALT (Assignees under a Commission against GARBETT, a Bankrupt),—*Respondents* [March 23, 1814].

[Mews' Dig. ii. 314, 1322. 3 Scots R. R. 187 ; and see, further, Scotch authorities cited at p. 195. Followed in *Banco de Portugal v. Waddell*, 1880, 5 A. C. 161 ; and *In re Pim*, 1881, 7 L. R. Ir. 458.]

[It is now settled law in Scotland, founded on a principle of international law, that the assignment under an English commission of bankrupt vests in the assignees, *ipso jure*, and without the necessity of intimation, the whole of the bankrupt's personal or moveable property in Scotland ; and that the effect of all subsequent diligence, by any Scotch or other creditor, is thereby precluded. Thus, where a commission, issued in England, against a person, part of whose property consisted of certain shares of Carron stock, and a creditor in Scotland afterwards arrested these shares, [231] it was held by the Court of Session, and, on appeal, by the House of Lords, upon the above ground, that the title of the assignees was preferable.]

[Held, that the dealing by the assignees with the Company, respecting the shares, after the expiration of a sequestration, by force of which they might be supposed to have at first acted, was sufficient intimation, if it had been necessary ; and that the arrester having claimed under the commission, was thereby also precluded from availing himself of his arrestment.]

[No authority given by the English bankrupt statutes to compel a bankrupt, by legal process, to convey his Scotch real or heritable property to the assignees, but the amount sometimes brought into the common fund, by the creditors assigning their debts to an individual, who proceeds against the heritage according to the Scotch forms, or by the refusal of the certificate till the bankrupt consents to convey.]

Mr. Samuel Garbett, one of the founders of the Carron iron works, carried on considerable trading concerns both in England and Scotland. Mr. Garbett being indebted to the estate of Messrs. Fairholmes, bankrupts, Mr. Grant, trustee for the Fairholmes' creditors, in 1773, arrested certain shares of Carron stock, belonging to Mr. Garbett. In 1774, it was agreed that the arrestments should be withdrawn, in consequence of an arrangement from which the Fairholmes' creditors derived some advantage, but not the whole that was stipulated.

The arrestment instead of being formally vacated, was made over by Mr. Grant to the trustee for the creditors of Mr. Garbett's son and son-in-law, bankrupts, for the alleged purpose of extricating their concerns, which were involved with those of Mr. Garbett. No process of forthcoming was instituted ; but the arrestments were founded [232] upon in certain subsequent proceedings, which, as was contended, prevented the prescription.

In March, 1782, a commission of bankrupt in England issued against Mr. Garbett, and in April of the same year, his effects in Scotland were, on his own application,

sequestered, with the consent of, or without any opposition from, the assignees under the commission. No formal intimation of the assignment was given to the Carron Company ; but as the assignees (one of whom was a trustee under the sequestration) corresponded with the Company on the subject of the shares, and continued to deal with, or to claim the right to deal with, these shares after the sequestration had expired, the question was raised, Whether this was, or was not, sufficient intimation ?

Mr. Grant offered to prove under the English commission, upon affidavit of the debt remaining due to the Fairholmes' creditors, and that he held no other security for it, except a decree of adjudication, not mentioning the arrestment. The proof was opposed, but a claim for £15,000 was allowed to be entered. Mr. Selkrig, the Appellant, having succeeded Mr. Grant in 1793, renewed the application to be permitted to prove under the English commission, and made an affidavit, stating the agreement for withdrawing the arrestment of 1773, and produced certificates from the Signet Office, with a view to show that the arrestment had expired.

The Commissioners were ordered to report on the state of the facts in regard to this claim, but before the proceedings under the order were terminated, Mr. Selkrig, finding that the sequestration of 1782, [233] not having been renewed in terms of the Bankrupt Acts, 23 Geo. 3, cap. 18, and 33 Geo. 3, cap. 74, had expired, raised an action against Mr. Garbett in Scotland, and, in 1798, arrested the shares of Carron stock.

In an action of multiple-poining, soon after brought at the instance of the Carron Company, the question of preference, as between the English commission and the Scottish arrestments, came before the Court.

The Court of Session was unanimous in favour of the general principle, that the English assignment transferred the whole of the bankrupt's personal property, wherever situated ; and that the effect of the subsequent arrestment of 1798 was thereby barred. All, except Lord Armadale, appeared to have been of opinion, that the Appellant was, by the agreement of 1774, precluded from founding on the arrestments of 1773. Lord Meadowbank said, that if he reprobated the agreement, he must refund the benefit received under it ; and (in regard to the intimation of the English assignment) that legal assignments, like those of marriage, operated without intimation. Lord Balmuto said, that as the Appellant and his predecessor had claimed under the English commission, he could not now object to the effect of the general assignment under that commission. Lord Armadale, while he concurred in the general principle, that the assignment under the English commission transferred the whole of the bankrupt's moveable property, wherever situated, and barred the effect of all subsequent diligence, doubted whether the principle applied to this [234] particular case, as an arrestment of 1773 appeared to be still subsisting.

On the 20th November, 1804, the Court pronounced an interlocutor, " finding the assignee under the English commission preferable on the fund *in medio*." The Appellant having reclaimed, an interlocutor was pronounced on the 20th November, 1805, " finding that the assignment (the common debtor being domiciled in England) " was preferable to the arrestment of 1798, but appointing the parties to state, in " mutual memorials, their averments as to the effect of the arrestment of 1773." The Respondents gave in a memorial accordingly, but the Appellant presented a note, stating, that he had been advised not to agitate farther the effect of the arrestment of 1773 in that Court. On the 3d June, 1808, the Court pronounced an interlocutor, " finding upon the whole matter, in terms of the interlocutor of 20th November, " 1804, that the assignees were preferable on the fund."

From these interlocutors, Selkrig appealed.

Adam and Leach (for Appellant.) The arrestment of 1773 must be considered as still in force, having never been vacated, the prescription having been prevented, by its being made and continued litigious, and the creditors of the Fairholmes not having received the whole of the advantages stipulated by the agreement for withdrawing that arrestment. If the Appellant was well founded in this part of the case, it put an end to the other ; the preference by the arrestment of 1773 being clear, [235] both as against the English commission and Scotch sequestration.

But suppose the arrestment of 1773 could not be made available, that of 1798 gave the preference,—the sequestration of 1782 having expired,—the Bankrupt

Act, 33 Geo. 3, cap. 74, having laid the fund open to the legal diligence of any creditor, prior or posterior to the sequestration,—and the arrestment of 1798 being the first diligence.

Under this very important branch of the case, two questions were to be considered :—1st, Whether the English assignment, *ipso jure*, carried the Scotch property, so as to exclude the preference by subsequent attachment, without previous intimation. 2d, Whether, if previous intimation was required, it had been given.

In 1798, there was no idea, with Judge or Counsel, that Selkrig could have proceeded otherwise than he had done, or that the English assignment, *ipso jure*, transferred the Scotch property. The law, previous to the late cases of *Strothers v. Reid*, (1803,) and *Bank of Scotland v. Stein and others*, (1812, 1813,) appeared to have been founded on the *lex domicilii*, and the rule that personal property followed the person. But in this decision, and that in *Stein's case*, the Court had deserted the notion of the *lex domicilii*. A Scotchman, domiciled in Scotland, comes to England, commits an act of bankruptcy, and the commission founded on that act transfers, *ipso jure*, the whole personal property in Scotland to be distributed by a different law. This was the first appeal from that principle.

As the law stood before, the English assignment [236] was admitted on the same footing as that of a private person ; but then it gave no title in opposition to an arrestment there, unless previously intimated. The question of preference was to be judged of according to the law of Scotland (Ersk. b. 3. t. 2. s. 42.) In the case of *John Aberdeen*, a bankrupt, (Kilk. 13th Nov. 1747,) a commission issued against a Scotchman residing in England. Ogilvie, one of the creditors for a debt contracted in England, arrested effects of the bankrupt in Scotland. Upon an action of forthcoming, the assignees appeared, and claimed the preference. “The Court was of opinion, that moveables in Scotland could only be attached by diligence out of the Courts of Scotland ; and that therefore the preference could be judged only according to the law of Scotland, and preferred the arrestment.” The next case was that of *Thorold and others, Assignees of Thomson and Tabor, v. Forrest and Sinclair*, (Jan. 26, 1767,) (Appendix to Morrison’s Dict. voce Foreign.) The judgment there was, “that the assignees had a sufficient title to compare and compete in the action ; but that the proceedings under the commission did not bar the creditors of the bankrupts, whether their debts were contracted in England or in Scotland, from affecting their debtors’ effects situate in Scotland, or debts due to them by persons residing in Scotland, by legal diligence,” etc. In a case (*Assignees of Wilson v. Fairholme*, F. C. Jan. 31, 1755) decided before that of *Thomson and Tabor’s bankruptcy*, the Court preferred the assignees under the English commission to the arrester ; but on this ground, that the debts arrested in Scotland were constituted by bonds [237] granted in England in the English form, made payable in England, originating in debts contracted there, and were to be considered as English debts. So in the case of *Crauford v. Brown and Crew*, assignees under *Dunlop’s commission*, (March 6, 1759, Fac. Coll. vol. ii.) it was decided that where the debts arrested were Scotch, the arresters were preferred to the assignees. In the case of *Divison and Graham v. Fraser*, (July 3, 1798, Fac. Coll.) only a few months before the present case, it was observed on the bench, “It is not very long since assignees under an English commission of bankruptcy were allowed to sue or insist in diligence at all ; and it is still clear law, that the creditors of a bankrupt may obtain a preference over them by arresting or adjudging ; which proves, that in questions occurring here, a radical right is held to remain with the bankrupt.” The whole of these cases were in opposition to the principle, that the English commission, *ipso jure*, transferred to it the property in Scotland. Though the assignees had a title to appear, the assignment must be completed by the forms necessary in Scotland to give it full effect.

In the subsequent cases, however, a different rule had been adopted, which their Lordships were now called upon to review. In the case of *Strothers v. Reid*, (July 3, 1803, Fac. Coll.) the English assignees were preferred ; but that was the case of an English creditor arresting funds in Scotland for payment of a debt contracted in England, and the Court might have made the same distinction as in the case of *Wilson’s bankruptcy*. *Stein’s case* was the only one that exactly resembled the present, and that might be considered as also under appeal.

[238] The common debtor was stated in one of the interlocutors to be a domiciled

Englishman. In Stein's case, he was a domiciled Scotchman. The point could not turn on the domicile. What then was the principle? *Mobilia non habent situm*. The party might carry them with him. If this meant more, it led to a false conclusion. Moveables, in a certain sense, had a *situs*. They must be acquired and transferred according to the law of the place where they were situated, and not according to the law of the place where the owner might accidentally be. The owner here was in England, and personal rights followed the person. A commission was taken out against him, and the English law said, that the property belonged to the assignees, with the same rights as the bankrupt could have exercised in England. The cases of *Waring v. Knight*, (1 Cooke, 325,) *Hunter v. Potts*, (4 T. R. 182,) and *Sill v. Worswick*, (1 H. B. 665,) carried the principle no farther. But the Court of Session had gone beyond this,—had repealed the old law, and adopted an English statute on the ground of expediency.

With respect to the question of intimation, it had been said, that a legal assignment was in itself notice; but it was denied that such was the law in regard to legal assignments in a foreign country. They stood on the same footing as judgments in a foreign country which must be proved. In Stein's case, however, it had been avowed, that intimation was not necessary. Here it was contended, that, if necessary, it had been given. But the mere fact, that the Carron Company knew of the assignment, was not sufficient. The notice must be, that the [239] assignee was entitled in virtue of the assignment, and no such notice had been given; one of the assignees having dealt with the shares merely by force of the sequestration.

Romilly and Wetherall (for Respondents.) The Appellant having refused to discuss farther the effect of the arrestment of 1773, though called upon by the Court below to do so, must be considered as having abandoned that ground. It was important to have it decided, whether, after that refusal, it was competent for him to argue that point here. But at any rate the effect of the arrestment of 1773 was a question purely of Scotch law,—nay, of Scotch practice; and it must be a very strong case indeed that would justify a reversal on that ground. That arrestment had prescribed, and certificates had been produced to the Chancellor by the Appellant, to show that it had prescribed. But suppose it had not: it had been abandoned by express agreement, from which the Appellant had derived advantages which he had not offered to restore.

The question as to the effect of the arrestment of 1798 was one of the greatest importance. The principle was, that an English commission transferred all the property, wherever situated. It was not founded on any analogy to the law of an intestate's domicile. A commission might be taken out against a person, though not domiciled here. One might be in different places to different purposes, but an intestate had only one domicile. The Steins were domiciled in both countries. (Lord Eldon (Chancellor.) It had been held over and over [240] again, that if a man trading to this country was long enough here to commit an act of bankruptcy, a commission against him was good.)

It had been repeatedly decided here, that a foreign commission passed the effects in this country to the foreign commission (*Solomons v. Ross*.—*Jollet v. De Ponthieu*, 1 H. B. 131, 132, n.—*Hunter v. Potts*, 4 T. R. 182.—*Sill v. Worswick*, 1 H. B. 665.—*Phillips v. Hunter*, 2 H. B. 402, etc.—1 Cooke, 321, Index, *vide* Foreign Attachment.)

The general doctrine was this,—that the commission (or equivalent proceeding in other countries) passed the whole of the bankrupt's effects, wherever situated. "Property of the bankrupt abroad may be attached, notwithstanding the commission;"—the meaning of which was, that the law of England could not be administered in foreign countries. This was a question of international law. The law of a particular state might form an exception to the general rule of law among civilized nations. Scotland might form an exception. But there was at least a strong presumption, that this was the law of Scotland as well as of the rest of the world. The late cases of *Strothers* and the *Steins* were conformable to the law of the world. But there were other cases before, of which one only was a direct authority, and that was opposed to the two cases of *Strothers* and the *Steins*. In *Aberdeen's* case, the arrestment was prior to the date of the commission, and the Courts in Scotland paid no attention to its relation to the act of bankruptcy. So, in the case of *Wilson's* bankruptcy, the arrestment was prior to the commission, though subse-

quent to the act. The retrospect was statutory, and of no force in Scotland. In Dunlop's case, the arrestment was also prior to the date of the commission. In the case of Thomson v. Tabor, it had indeed been held, [241] that a subsequent arrestment was preferable; and this had led to the erroneous statement of the law on this point in Erskine's very valuable book (Ersk. b. 3. t. 6. s. 13.) Then came the case of Strothers, and this was a direct authority for the Respondent, unless it was a good ground of distinction, that the arresting creditor was English. On what principle was that distinction founded? What was it that made an English, and what a Scotch, creditor? How were they to be distinguished in cases of negotiable securities, for instance? One rule was easy,—that every creditor who might have the advantage of the commission should be bound by it. If two nations were at war, it might be doubted whether a commission in the one country could prevent the effect of an attachment in the other, where the attaching creditor could have no remedy under the commission. But the only distinction was, whether or not the creditor could thus have his remedy. And so it had been conceived by the Court below in these latter decisions, when these questions were more frequent, and better understood. The cases of Strothers and the Steins were not new in specie, though the circumstances had now arisen which required that the principle should be matured. The rule laid down was in analogy to that of the English law. The Courts here gave credit to foreign Courts, that they would distribute so as to do justice to the English creditors, in the same manner as they subscribed to judgments of foreign Courts. Nothing could be more unwise than a rule depending on distinctions between English and Scotch creditors. A rule founded on the *lex domicilii* presented the same [242] inextricable difficulties. The effect of having a co-existent sequestration and commission would be to create two incompatible systems of management, one pulling one way, another pulling another way, and throwing the whole into utter confusion, (*vide* Lord Meadowbank's speech in judgment in Stein's case, 1 Rose. Bank. Ca. 480.) No question arose here as to heritage, the shares being clearly personal property. (Lord Eldon (Chancellor.) My own individual opinion is, that all property involved in a partnership concern ought to be considered as personal.)

Adam (in reply.) The old cases had not been cited with a view to set up a distinction between English and Scotch creditors as a rule, but to show that there was no idea before of the rule now adopted. What they (for Appellant) now contended was, that the *comitas gentium* ought to be exercised with reference to the law of the country where the question arose; and there an arrestment was preferred to an unintimated assignment, and the English assignment had not been intimated. (Lord Eldon (Chancellor.) Does the law of Scotland require a formal intimation?) The intimation ought to be by notarial instrument, or something equivalent; and there must be an intention to intimate. The sequestration had been awarded with the concurrence of the assignees, and there could have been no intention therefore to intimate an assignment which was conceived to have nothing to do with the Scotch property. Admitting then that the commission transferred the bankrupt's rights, it [243] could only transfer the Scotch property, with the qualification annexed by the Scotch law; otherwise the Court, assuming the functions of the legislature, repealed the old law, and enacted a new. This was the error in Stein's case.

Lord Eldon (Chancellor.) Considering the nature and importance of this case, he need make no apology for requesting their Lordships' attention to the reasons why he thought that the judgment of the Court below ought to be affirmed.

He passed over much of the ground that had been taken in regard to the arrestment of 1773, which had led to the treaty under which Fairholmes' creditors had received a certain sum, though not the whole of their demand. A sequestration was afterwards awarded against S. Garbett, under the Bankrupt Act, 12 Geo. 3, cap. 72, renewed by 20 Geo. 3, cap. 43. The act 23 Geo. 3, cap. 18, (1783,) was then passed, which enacted, that sequestrations obtained under the former acts should remain in force for six months after the commencement of that act, during which time it was made competent to renew such sequestrations. Then came the act 33 Geo. 3, cap. 74, (1793,) which enacted, "That sequestrations created under the act " 12 Geo. 3, and not renewed under 23 Geo. 3, in case of failure of application to the " Court to have a scheme of division made within six months from the commencement " of this last act, should be entirely at an end; and that, if any effects falling under

"such sequestrations remained undivided, the same should be open to the legal diligence of any creditor of the bankrupt, prior or posterior." This had been referred to as the foundation of the argument, that when the sequestration of 1782 had expired in terms of this statute, the remaining personal effects were laid open to the diligence of 1798. The argument might be well founded, with reference to the sequestration; but in the case of a claim paramount to the sequestration itself, the consequence did not follow.

In 1782, a commission of bankrupt in England issued against Garbett, and the Appellant's predecessor applied for permission to come in under that commission. The application did not fully succeed, but a claim was allowed to be entered on the proceedings; and he need not tell their Lordships that this was of some consequence, as a final dividend was never made till the claim, unless substantiated, was expunged.

The Appellant afterwards applied to the Chancellor sitting in bankruptcy to be permitted to prove; and, in his affidavit made on that occasion, he stated that he held no security for the debt, except the arrestment of 1773, which he represented as having been withdrawn by agreement. He also produced certificates to show that no process of forthcoming had been instituted, and, generally speaking, that the arrestment had prescribed. He had, however, as he alleged, received nothing under the English commission; but that made no difference in the present question.

In 1798, the Appellant executed another arrestment of the Carron stock shares; and the question now was, Whether either of the arrestments—that [245] of 1773, or that of 1798—could have the preference as against the English commission of 1782? The arrestment of 1773 clearly could not. Whether that of 1798 ought to be preferred, depended upon the effect of an English commission with respect to the bankrupt's property in Scotland.

It might be fairly stated, that when the commission of 1782 issued, the general persuasion was, that both an English commission and Scotch sequestration were necessary. This fact appeared to be proved to demonstration by the proceedings in this very cause.

Stein's case, (1 Rose. B. C. App. 462,) lately decided, involved the general principle. The Bank of Scotland in that case applied for a sequestration of the property of the bankrupts in Scotland. They were met by the assignees under the English commission, who claimed the whole, both Scotch and English. In that particular case, the bankrupts had executed to the assignees dispositions, in the Scotch form, of the whole, not only of their moveable, but also of their heritable property situated in Scotland. In the very able and learned exposition of the grounds of judgment there, it appeared to have been taken for granted that the English commission imposed not only a moral, but a legal obligation on the bankrupts to convey their real property in Scotland to the assignees. But, according to the English law, there was no authority to compel a bankrupt to convey the real estate, and he knew that infinite difficulty had occasionally resulted from that circumstance. If this was a defect, the remedy must be applied, not by their Lordships in their judicial capacity, but by the legislature. [246] He understood that one mode of getting at the real property in these cases was for the creditors to assign their debts to some individual, who proceeded against the heritable property according to the forms of the Scotch law; and another way was to withhold the certificate till the bankrupt consented to convey, the moral obligation upon him to do so being clear. In this manner, the amount of the real property was frequently brought into the common fund. But if a judgment rested merely on the ground that a bankrupt could, by legal process in England, be compelled to convey his Scotch heritable property, he was apprehensive that such a judgment could not be supported.

If the Appellant's *cestui que* trusts had not had all the stipulated benefit from the transaction of 1773-4, they had at least had a considerable share; and he agreed with those Judges below who had said, that unless they had derived no advantage from the agreement, they must not be permitted now to set up the first arrestment. If they rejected the agreement, they ought to refund the benefit received under it. But more especially after the proceedings before the Chancellor, the statement that the Appellant held no security for the debt, and had no means to satisfy it, that arrestment could not be available.

He observed it had been stated that the second arrestment (1798) was affected

by the first transaction. But he took it for granted that the arrestment of 1798 was good, subject to the question whether it could be supported as against the English commission. Here difficulties presented them-[247]-selves which strongly called for legislative interposition. When one considered what was the effect of a Scotch sequestration—that it might be called for by the debtor, as well as demanded by the creditor—that the plan of distribution under it was different from that under the English commission—that it cut down all voluntary securities granted within a certain number of days previous to the first deliverance on the application, whether given *bonâ fide*, or, as they would say in England, in contemplation of bankruptcy; when one, on the other hand, considered the necessity in England of a previous act of bankruptcy as a foundation for the commission, and the relation which the commission had to a latent act of bankruptcy, the difficulty of applying to the whole of the bankrupt's property in England and Scotland the commission in one event, or sequestration in another, must be obvious. A coexisting commission and sequestration would involve the matter in still more inextricable confusion, unless the one were used for the purpose of distribution under the other. But it was at any rate clear, that the English commission passed the personal property in Scotland, and all other parts of the world.

Then it had been contended, that the assignment under the commission was like an assignment by a particular individual, and that, by the law of Scotland, an arrestment was competent, unless the assignment had been previously intimated to the debtor. Here, it was insisted, no intimation had been given before 1798, and that consequently the arrestment was good as against the commission. He [248] agreed with a distinguished writer on the Scotch bankrupt law, (Bell's Commentaries), that all the cases, prior to that of Strothers, exhibited a very distressing versatility of opinion; for he confessed he was unable to discover any principle common to them all. The true character, however, of the present case was this, that the whole Court was unanimous on the principle, one Judge only dissenting upon the ground of the transaction of 1773-4; also, that this was not the only decision upon the subject, but that judgment after judgment had been given on the same principle since 1803, and that consequently the case came with more authority than if it had stood alone.

A formal intimation, it appeared, was not absolutely necessary, something equivalent being held sufficient. But as to the question, whether intimation was at all necessary here, they must consider the difference between the assignation of a debt by one individual to another, and an assignment of the whole of a bankrupt's personal property for the use of all the creditors. If they were to hold, that the rule of law, with respect to intimation, applied to the latter case, they would cut up by the roots the use of an English commission in relation to Scotch property. In many cases, no account could be examined and settled till long after the commission had issued, and a long time might consequently elapse before intimation of the assignment of a debt could be given. Lord Meadowbank, therefore, in Stein's case, on account of the particular nature of this assignment, held, that it operated like the transference by marriage. A marriage in England ren-[249]-dered the Scotch property of the wife her husband's, without intimation; and such must be the law in cases like the present, if an English commission were to have any effect at all in Scotland.

But he went farther. If intimation was necessary, it had here been given. Mr. Adam had well argued at the bar, that it could never have been intended that the English assignment should be intimated, as the assignees had consented to the issuing of the Scotch sequestration in 1782. That sequestration however had fallen to the ground, and when it did so, nothing remained but the commission, till 1798. The question then was, Whether the intermediate transactions had not furnished intimation sufficient? and he was of opinion that they had.

But independent of other considerations, if a Scotch creditor thought proper to come in under an English commission, he was to be considered, to all intents and purposes, as an English creditor who must deliver up, for the benefit of the general creditors, all securities for his debt before he could be permitted to prove. If an English creditor attached the bankrupt's property abroad, he must account to the assignees. This did not rest merely on the principle of equality in the distribution, but on the ground that the law passed the property. The assignees said, "If you claim any thing here, you shall not keep for your own exclusive use what you have got by

"force of the law of another country." If he refused to prove at all on these terms, the Chancellor could not compel him to do so. Whether the assignees could, [250] by law in another form, get the property out of his hands, was another question. Well,—the Appellant here had claimed under the English commission, and their Lordships already knew what followed.

This, then, being personal property merely, his opinion was, that the judgment ought to be affirmed for these reasons:—1st, That in the case of transference by assignment under a commission, intimation was not necessary. 2d, That, if necessary, it had in this instance been given. 3d, That the Appellant was precluded from taking advantage of his Scotch arrestment, by his having claimed under the English commission.

Judgment accordingly affirmed.

Agent for Appellant, CAMPBELL.

Agent for Respondents, NETTLESHIP.

ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

GOODRIGHT *d.* BURTON,—*Plaintiff* (in Error); RIGBY, and Others,—
Defendants (in Error) [March 30, 1814].

[By statute 14 Geo. 2, cap. 20, a recovery is good, if the deeds making the tenant to the *præcipe* appear to have been executed at any time within the term in which the [251] recovery is suffered, though such execution should appear to be subsequent, not only to the judgment and award of the writ of seisin, but also to the execution of that writ.]

By settlement on the marriage of Richard and Sarah Williams, an estate for life, in certain lands and premises, was limited to Richard Williams, remainder to Sarah Williams for life, and (after remainders to their first and other sons in tail male, and to their daughters as tenants in common, in tail general) remainder to the heirs of the body of Sarah Williams, remainder to Mary Burton in fee. Richard Williams afterwards became bankrupt, and an Act of Parliament passed for vesting his estates in trustees for the benefit of his creditors. By this act, an estate for life was limited to Sarah Williams, with such remainders over (stating them thus generally) as were limited by the settlement, saving the rights of Mary Burton, etc.

After the death of Richard Williams without issue, Sarah Williams suffered a recovery of the property in question, and sold the same to Rigby. In this recovery, the deed making the tenant to the *præcipe* was dated 20th November, 1778,—the judgment and award of the writ of seisin were dated 6th November, 1778; and the return was, that seisin had been accordingly delivered on the 10th November, 1778.

On the death of Sarah Williams without issue, Michael Burton, claiming under Mary Burton the next in remainder, demised the premises to Goodright, the Plaintiff in error, who brought his eject- [252]-ment in C. P. against Defendant in error, Rigby. In T. T. 1792, judgment was given for Defendant in error, which was affirmed in K. B. in E. T. 1793; and thereupon Plaintiff in error brought his writ of error, returnable in D. P.

In the Courts below it was contended, that the estate for life, limited to S. Williams by the Act of Parliament, was a new estate, and, being created by a distinct instrument, could not unite to the remainder to the heirs of her body limited by the settlement; and that therefore S. Williams was not tenant in tail when she suffered the recovery. To this it was answered, that the act did not divest S. Williams of any prior interest, but operated merely as a confirmation of her previous estate for life; but suppose it had been a new estate, yet, being less than an estate tail, it could not destroy the estate tail in remainder which she had at the time of passing the act:

for even if she had by her own act divested herself of her estate for life, she would still have been capable of being vouched in a recovery, and of barring her estate tail and remainders over. (*Vide Driver v. Hussey*, 1 H. B. 269.)

But the point chiefly relied upon, and the only one insisted upon in the House of Lords, was, that the recovery was bad, inasmuch as the deed making the tenant to the *præcipe* was executed, not only after the judgment, and award of the writ of seisin, but after the time of the delivery of seisin by the Sheriff. By the common law it was necessary that the tenant to the *præcipe* should be actually seized of the freehold at the time of the judgment. [253] The act 14 Geo. 2, cap. 20, rendered the recovery good, provided the deed making the tenant to the *præcipe* appeared to be executed within the term in which the recovery was suffered, notwithstanding the previous judgment and award of the writ of seisin. But this remedy did not extend to cases where the writ of seisin had been executed; for then the conveyance is completed, by which the Recoverer's title must stand or fall. The Recoveeree, after seisin delivered, had no estate; and the legislature could never mean to say, that a good tenant to the *præcipe* could be made by one who had no estate at the time. Though recoveries were now considered as common assurances, the forms of a real action must be observed. (*Swan v. Broome*, 3 Burr. 1596.)

To this the answer in Defendant's case was, that the words of the statute were positive, that every recovery should be valid, if the deed creating the tenant to the *præcipe* appeared to be dated within the term in which the recovery was suffered.

Fonblanque (for Plaintiff in error.)—Counsel on the other side not heard.

Lord Eldon (Chancellor.) The Sheriff returned in 15 days of St. Martin, that he had delivered seisin on the 10th, and the jury might have found the fact. But they had found merely that such was the return made, which was finding the evidence of the fact, rather than the fact itself. These were amendable according to the fact, even before the statute; and if the seisin had been on the 21st, the question would not have arisen. Taking it, [254] however, that it was delivered on the 10th, and that the deed making the tenant to the *præcipe* was executed on the 20th, the question was, Whether, if the deed was executed before the end of the term, they were not bound by the statute to consider the tenant to the *præcipe* as regularly made? He was of opinion that they were; and it ought to be observed, that, besides other distinguished authorities, such had been the opinion in judgment of Lord Kenyon, who was peculiarly well versed in the law of real property. (*Vide* 2 H. B. 46.—5 T. R. 177.)

Judgment affirmed.

Agent for Plaintiff in error, FLEXNEY.

Agent for Defendants in error, VINES.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SURTEES, and Others,—*Appellants*; ALLAN,—*Respondent* [April 27, 1814].

[*Mews' Dig.* ix. 38. See *R. v. Walker*, 1761, 1 W. Bl. 286; *Campbell v. Stein*, 1818, 6 Dow, 116; 12 Ann. 2, c. 16 was repealed by 17 & 18 Vict. c. 90, s. 1. See now the Moneylenders Act, 1900.]

[Action upon stat. 12 Anne, sess. 2, cap. 16, against usury. Decided by the Court of Session, and the judgment affirmed on appeal, that the limitations in 31 Eliz. cap. 5, being understood as incorporated in the British stat. 12 Anne, applied to Scotland as well as to England.]

This was an appeal from a judgment of the Court of Session, in an action founded on stat. 12 Anne, [255] sess. 2, cap. 16, against usury. The suit was at the instance of private parties only, and more than a year had elapsed between the period of the

last of the alleged usurious transactions, and that of the commencement of the action.

The defence below was, that the limitations as to penal actions enacted by stat. 31 Eliz. cap. 5, extended to Scotland, and that consequently any proceeding by private parties was barred, the action not having been brought within a year of the alleged usurious transaction. 2d. That there was in point of fact no usury. The Court decided the case for the Defender, (July 2, 1800,) upon the ground of fact only. From this there was no appeal, and the House of Lords (March, 1802) "remitted the cause" to the Court of Session, to review the interlocutors complained of generally." In addition to the former defences, it was then pleaded, that the parties could have no title at all to insist in the action without the concurrence of the King's Advocate.

The Court of Session, (July 1, 1807,) before its division into Chambers, with three dissentient voices, gave judgment. "Finding, that all actions for treble value brought "in this country, (Scotland,) under the authority of the statute of Queen Anne, against "usury, are subject to the limitations applicable to such penal actions in England, "and that the concurrence of his Majesty's Advocate is not necessary in the present "action." The case came again to the House of Lords, and the question was, Whether the limitations in 31 Eliz. cap. 5, did, or did not, extend to Scotland.

[256] Authorities cited for Appellant in support of the argument, that the statute of Elizabeth did not apply to Scotland: —Murray v. Cowan, (Jan. 19, 1737. Dict. *voce* Foreign.)—M'Keckney v. Wallace, (Dec. 2, 1766. Fac. Coll.—*Vide* also 2 Hume Com. 396, and reference there to Wilson v. Jackson, 1775.)

Authorities relied on for Respondent to show that the statute of Elizabeth did apply to Scotland: —Booksellers of London v. Booksellers of Edinburgh, (1 Falc. 195–346.—*Vide* also Elch. Rep.) cited as a solemn opinion of the Court on the point, though not properly a judgment.—Morrison v. Connel, (June 24, 1808, Dict. App. 1, *voce* Usury.)—Bankton, b. 2. t. 12. s. 22.—Ersk. b. 4. t. 4. s. 110.

Adam and Leach for Appellants; Romilly and Horner for Respondent.

Lord Eldon (Chancellor.) This was an action originally brought in 1798, upon the penal stat. 12 Anne, sess. 2, cap. 16, against usury. It was insisted in defence,—1st. That the action had prescribed.—the limitations in 31 Eliz. cap. 5, being incorporated in the British statute 12 Anne, and applicable to Scotland as well as to England. 2d. That there was no foundation for the charge of usury. The Court, in May, 1800, pronounced an interlocutor, finding it unnecessary to give judgment upon the question of prescription, but finding that there was no ground for the charge of usury, and therefore sustaining the defences on the merits. The cause being appealed, the House of Lords (March 2, [257] 1802) remitted it back to the Court of Session, "to review "the interlocutors complained of generally."

The Appellants had very much misunderstood the remit, when they said that the House of Lords had decided that the statute of Elizabeth did not affect the statute of Anne. It meant then to give no opinion whatever upon the point. The Court below having thought it unnecessary to decide what effect the statute of Elizabeth might have on act of 12 Anne, it would have been premature then to have given judgment on that question in the House of Lords.

The subject now came before their Lordships on two interlocutors of the Court of Session; by one of which, a hearing in presence was ordered on two questions:—1st, Whether the plea of prescription was well founded. 2d, Whether the concurrence of his Majesty's Advocate was necessary in the action. On the point of prescription, the question was, Whether the limitation was one year as to prosecution by a private party, and two years from the end of that one as to the prosecution at the instance of the Crown, according to the English law, or 40 years (or whatever was the number of years) according to the old Scotch law? On June 30, 1807, the Court pronounced this interlocutor, (signed July 1, 1807.)—"On report of Lord Craig, and having "advised, etc. the Lords find, that all actions for treble values brought in this country "under the authority of the statute of Queen Anne against usury, are subject to the "limitations applicable to such penal actions in England, and that [258] the concurrence of His Majesty's Advocate is not necessary in the present action."

Having regard then to what the law of usury was in Scotland previous to the act of 12 Anne, it might be contended, that the legislature did not mean to include Scotland, or that, if it did, never had an act been passed with less consideration of

what was due to Scotland. The phraseology was entirely English. Their Scotch neighbours, however, might perhaps understand that. But then the modes of proceeding were English, to which there was nothing analogous in Scotland.

Their Lordships would please to attend to the preamble of the statute of 12 Anne, as it had been said that it was an act which had some relation to trade and public policy ; and their Lordships were aware, that, by the treaty of Union, (article 18,) the laws concerning the regulation of trade, customs, and excise, were to be the same in Scotland as in England : that the laws concerning public right, policy, etc. might be made the same throughout the United Kingdom ; and that even the Scottish laws relating to private right might be altered, provided it was for the evident utility of the subjects within Scotland. The preamble was in the following terms :—"Whereas, the reducing of interest to ten, and from thence to eight, and thence to six in the hundred, hath from time to time by experience been found very beneficial to the advancement of trade, and improvement of lands." Nobody could doubt then but that this was an act which had some relation to trade, and the including of Scotland was therefore certainly consistent with the treaty of [259] Union :—"And whereas the heavy burden of the late long and expensive war hath been chiefly borne by the owners of the land of this kingdom, by reason whereof they have been necessitated to contract very large debts, and thereby, and by the abatement in the value of their lands, are become greatly impoverished ; and whereas, by reason of the great interest and profit which hath been made of money at home, the foreign trade of this nation hath of late years been much neglected, and at this time there is a great abatement in the value of the merchandizes and commodities of this kingdom, both at home and in foreign parts where they are transported ; and whereas, for the redress of these mischiefs, and the preventing the increase of the same, it is absolutely necessary to reduce the high rate of interest of six pounds in the hundred pounds for a year, to a nearer proportion with the interest allowed for money in foreign states : Be it therefore enacted," etc.

If this statute was applicable to Scotland, when it was recollected what the former law was under act of 1597, cap. 247, etc. it must be obvious that it made a most important alteration in the law of that country ; and having done so, one would imagine that care would have been taken to make provision as to how the act should be enforced. They could easily understand in Scotland what was meant by bonds and contracts contrary to the provisions of the act being void. They might understand how the forfeiture of the treble value was to be enforced, as it might be said, if nothing had been stated [260] about the modes of proceeding, that the English forms of proceeding were intended to be employed in England, and the Scotch forms in Scotland. But then the act enumerated the modes by which the penalties were to be recovered. The second section went on to say,—"The one moiety of all which forfeitures to be to the Queen's Most Excellent Majesty, her heirs and successors, and the other moiety to him or them that will sue for the same in the same county where the several offences are committed, and not elsewhere, by action of debt, bill, plaint, or information, in which no essoin, wager of law, or protection, shall be allowed." He need not tell their Lordships that they could not sue in Scotland by bill, plaint, or information ; and as to essoin, wager of law, etc. they knew nothing at all about them. If then this was a British statute, applicable both to England and Scotland, rendering contracts of a certain description null and void, enacting penalties, and pointing out how they were to be recovered, and who was to have them, it was one which, at least as to the enumerated modes of proceeding, applied to England alone.

This being a penal statute, the informer, in England, was limited as to the period within which proceedings could be instituted, to one year from the date of the offence, and the Crown to two years from the end of that one. That arose on the statute of 31 Eliz. cap. 5, the preamble of which was in these words :—"For that divers of the Queen's Majesty's subjects be daily unjustly vexed and disquieted by divers common informers upon penal [261] statutes, notwithstanding any statute that may have been heretofore made against their disorders ;" and then the statute proceeded to enact the remedy. Upon this it might be observed, with reference to certain proceedings now and lately before Parliament, that it was no new thing, where the enactments of a statute were abused by common informers, for the legislature to interpose and remedy the disorders.

An English statute having then enacted these limitations with respect to actions, etc. upon penal statutes, and the statute of 12 Anne having enacted a penalty, the statute of 31 Eliz. cap. 5, was to be understood as forming part of it, exactly in the same manner as if it had been incorporated in it. This showed the shape of the question with respect to England; and as the act was expressed in general terms, Scotland might be included. Their Lordships had now to say whether the state of the law was this,—that in England parties were to be liable to be sued under 12 Anne, sess. 2, cap. 16, only for one year at the instance of the common informer, and two years from the end of that one at the instance of the Crown; while in Scotland, parties were to smart under that liability for 40 years, or whatever was the period of prescription under their old law.

As to the text writers, they all agreed that the Courts ought to construe the statute with respect to the subjects in Scotland in Scotch transactions in the same way as it was to be construed with respect to English subjects in English transactions. They [262] said, that the intention of the legislature was the same as to both countries,—that the act of Eliz. must be understood as incorporated in the act of Anne, and must therefore be considered as extending to Scotland. That there were authorities both ways was not to be denied, but the later authorities appeared to be in favour of the limitations in the statute of Elizabeth. The question then might be put thus,—For what time did the legislature mean that the subjects in both countries should be liable for these penalties? The act said nothing about the limitation in point of time, and that must be implied from the statute of Eliz. even with respect to England. The question then was, Whether it might in the same way be implied with respect to Scotland? Aided by those authorities whose opinions he was accustomed to take in matters of law, his own opinion was, that it might be so implied, and that the judgment of the Court below ought therefore to be affirmed.

Judgment affirmed.

Agent for Appellants, CHALMER.

Agent for Respondent, MILLS.

[263] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SIBBALD, and Others,—*Appellants*; HILL, and Others,—*Respondents*

[May 4, 1814].

[Mews' Dig. xiii. 1199. See *Ionides v. Pender*, 1874, L. R. 9 Q. B. 538; *Rivaz v. Gerussi*, 1880, 6 Q. B. D. 229.]

[A London merchant, insuring at Leith, represents (contrary to the fact) that he had done some insurance at Lloyd's, upon the same voyage, at the same premium given to the Leith underwriters, who (not being well acquainted with the nature of the risk themselves) subscribe the policy, from their confidence in the skill and judgment of the London underwriters. Held by the House of Lords, (reversing the judgment of the Court of Session,) that this was a fraud which vitiated the policy, though the misrepresentation was not such as affected the nature of the risk.]

Hill, a London merchant, (April 8, 1802,) wrote to his brother to get some insurance done at Leith on two South Sea Whalers, *Redbridge* and *Britannia*, at and from the Southern Fishery to London. The letter had these words: "I have two ships in the Southern Fishery, on which I have done as much as my underwriters here are inclined to take, and I wish to do something at an out-port, etc. I have no objection to give eight guineas per cent. on these ships, which is the highest premium I have given." The broker wrote accordingly to Robb, a Leith merchant, one of the Appellants, stating, *inter alia*, as follows:—"Mr. Hill has done as much insurance upon

"the two ships as the underwriters here are inclined to take at eight guineas per cent." Some difficulty [264] occurred in getting the insurance effected, owing to the ignorance of the Leith underwriters as to the nature of the risk. But the Appellants, trusting to the skill and information of the Lloyd's underwriters, underwrote the policy of the *Redbridge* to the amount of £1750 at eight guineas per cent. The vessel, on Dec. 30, 1801, was captured on the coast of Chili; but the underwriters having discovered that the premiums at Lloyd's on this ship had been 15, 18, and 25 guineas, refused to pay, and an action was brought by Hill in the Scotch Admiralty Court. The Judge-Admiral decided for the underwriters, on the ground of the misrepresentation; but his decree was reduced by the Lord Ordinary and Court of Session, from whose judgment the cause was appealed.

The interlocutor of the Lord Ordinary, adopted in substance by the Court, found, "that the statement given by the Pursuer, as to the amount of the premium he had given on former policies, was not a misrepresentation as to any of the circumstances attending the situation or condition of the ship, or nature of the voyage, which could affect the nature of the risk, but partakes rather of the nature of these *verba jactantia*, not very moral perhaps, but very common, and not illegal, which are used at the cheapening of goods, and other bargains, the seller alleging that such goods cannot be bought so cheap elsewhere, etc. and which representations or misrepresentations will not avail to set aside a sale, as concealments or misrepresentations may do as to the defects or qualities of the goods," etc.

[265] There was another point as to the concealment of a material fact, but it seems unnecessary to state it, as the judgment of the Lords turned on the question of misrepresentation.

Park and Nolan for Appellants; Adam and Romilly for Respondents.

Lord Eldon (Chancellor.) It appeared to him that the judgment of the Lord Ordinary and Court of Session ought to be reversed, and that of the Judge-Admiral affirmed. But whatever might be their Lordships' opinion, it would be necessary to attend to these interlocutors, and alter the terms, so that the ground of their judgment might not be misunderstood. The Judge-Admiral's interlocutor found, "that in this case the rate of premium was fixed and accepted in consequence of false information, etc. holding out the same premium of eight guineas per cent. as the highest premium exacted by the underwriters in London; whereas it appeared, and was now acknowledged by the Pursuer, that the very lowest premium paid by him on the same vessel at London amounted to 15 guineas per cent." He had not been able to find that any such acknowledgment was made by the Respondent, or that the circumstance was apparent; and therefore, if it should be their Lordships' opinion that the Lord Ordinary was wrong, still the principle of their judgment might be misunderstood, if that judgment should state a fact which did not appear in the cause.

As to the judgment of the Lord Ordinary, and [266] that of the Court, which was in substance the same, they (the Judges) did not say that this was not such a misrepresentation as would affect the premium, but that it was not such a misrepresentation as could affect the nature of the risk,— "that it partook rather of the nature of these *verba jactantia*, not very moral perhaps, but very common, and not illegal, which were used at the cheapening of goods," etc.—he should suppose that at least the word perhaps ought to be left out, for there could be no doubt but that such misrepresentations were grossly immoral—"and which representations or misrepresentations would not avail to set aside a sale," etc. Taking that as a general proposition, he could not admit the truth of it; for even in chaffering about goods, there might be such misrepresentations as would set aside the contract. When the misrepresentations were made under such circumstances and in such a way that they took the confidence of the purchaser, and induced him to act when otherwise he would not, this was a fraud which would affect the sale.

It appeared to him settled here, that if a person, meaning to effect an insurance, exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence exercised in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or had done so upon such terms as that he came under no obligation to pay, it appeared to him to be settled here, that this would vitiate the policy. (Whit-

tingham v. Thornburgh, 2 Verm. 206. Pre. Ch. 20.—Wilson v. Duckett, 3 Bur. 1361.) The Courts in this country would say that this was a fraud, not on [267] the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence, without which the party would not have acted. If one, then, sent down a policy to Leith, with the names of two or three underwriters at Lloyd's, were the Leith underwriters to send to Lloyd's to ascertain whether these were fair and *boni fide* subscriptions!—No. And where was the difference between sending policies and letters? But then another question had been raised,—Whether the real meaning of the letters was, that insurance had been effected on the same voyage at Lloyd's at eight guineas per cent.! He took the letters, in fair and obvious construction, as representing that insurance had been effected at Lloyd's on the very same voyage at eight guineas per cent., and an attempt by nice criticisms to show that they were susceptible of a different meaning would not do. Such being his opinion on the first point, he thought it needless, unless their Lordships disagreed with him, to address himself to the rest.

Redesdale *assentiente*.

Interlocutors of Lord Ordinary and Court reversed, and Judge-Admiral's decree affirmed, with an alteration as above.

Agent for Appellants, MUNDELL.

Agent for Respondents, CAMPBELL.

[268] IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MEADE,—*Appellant*; EARL OF BANDON,—*Respondent* [March 30, 1814].

[Mews' Dig. ix. 1644; xiv. 14.]

[Tender of payment by mortgagor to agent of the mortgagee, and refusal to accept, and 24 years thereafter suffered to elapse by mortgagee without demand of principal or interest. Payment of principal, and interest for whole time, decreed under the circumstances, and decree affirmed by House of Lords.]

Francis Bernard, in 1731, became entitled to a mortgage, made in 1721, of the estates of Kippagh and Killany, by Meade the proprietor. In 1736 Francis Bernard went to England, where he resided till his death in 1783. Daniel Conolly, of Bandon, was Francis Bernard's agent and receiver in Ireland, and to him, in 1754, Meade made a tender of the principal and interest due on the mortgage, which Conolly refused to accept, alleging that he had no authority.

In 1759 Meade filed his bill in the Exchequer against Bernard and Conolly, stating the tender and refusal, and his having waited on Bernard in London, who refused payment, denying that Meade was the real mortgagor, and praying that Bernard and his agent might be compelled to accept of the sum due at the time of the tender, and that redemption [269] and reconveyance might be decreed. Conolly answered, and admitted a tender, and his refusal to accept, as having no authority; but Bernard did not answer, and there the matter stopped. The payment of interest was from that time discontinued. A peculiarity of disposition, arising from the death of his only son, was alleged as the reason for the averseness of Francis Bernard to attend to this or any other business.

Francis Bernard having died in 1783, James Bernard, his representative, Respondent's father, in 1784 filed his bill in the Court of Exchequer, for account and payment of principal and interest due on the mortgage, or, in default thereof, for foreclosure and sale; and, on 8th May and 5th December, 1808, it was decreed accordingly, interest to be computed from 1759. From this decree an appeal was lodged.

There was some slight evidence of admissions by Appellant's father and grandfather, in or about 1778, of a debt due on their estate to F. Bernard.

Argued for Appellant,—1st, That acquiescence for 24 years raised a presumption that mortgage was discharged. 2d, That at any rate interest ought to cease from the time of tender, or from 1759.

Argued for Respondent,—1st, No such rule as they contended for; or suppose there were, it could only operate where there were no circumstances to account for the acquiescence; also, person to be affected was out of the jurisdiction. 2d, No evidence of tender, as one Defendant's answer could not be read against another; and, at any rate, tender to one who had no authority to receive was nothing. [270] (Cited, *Leman v. Newnham*, 1 Ves. 51.—*Task v. White*, 3 Bro. C. C. 289.)

Hart and Courtney for Appellant; Romilly and Blake for Respondent.

Judgment affirmed.

Agents for Appellant, RASHLEIGH and LEE.

Agents for Respondent, LIGHTFOOT and ROBSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GEORGE AND PATRICK WALKER,—*Appellants*; GIBSON,—*Respondent*
[April 20, 1814].

[Name of one of the attesting witnesses in a deed appears to be written on an erasure, and the word *witness* subjoined is in a different hand-writing. This is an *ex facie* vitiation *in substantialibus*, though the witness deponed to the name being his writing, but recollecting nothing farther about the circumstances.]

This was an action of reduction to set aside a commission or deputation granted Dec. 23, 1791, by Lord Ballenden, then heretable usher and door-keeper of the Treasury and Exchequer, to the Appellants, of the office of deputy usher and door-keeper of the Exchequer Court, on the ground [271] (among others) that the commission was *ex facie* vitiated *in substantialibus*.

The alleged vitiation consisted in this,—1st, That the name Charles Cummins, one of the witnesses, was written upon an erasure so complete that it was impossible to discover what had stood in the place before. 2d, That the name Charles Cummins was written in a different ink from the subscription of Lord Ballenden and William Downs, the other witness. 3d, That the name Charles Cummins was written in a different hand, and with a different ink, from the word *witness* subjoined to the name.

After the cause had been stated in mutual memorials, the Ordinary, (Cullen,) by interlocutor, July 11, 1807, at the suggestion of Defenders, and with consent of Pursuers, allowed Defenders, "before farther answer, to take the oath and deposition of Charles Cummins as to his having witnessed the deed in question, and adhibited "his subscription to the same." Charles Cummins was accordingly examined by the Ordinary himself, and deponed that he was perfectly certain the name Charles Cummins was in his hand-writing, though satisfied, from inspection of the deed, that there must have been an erasure in the place; that he did not recollect the deed itself, nor the circumstance of subscribing it; that deponent, from his official situation, (Clerk in the Exchequer in London,) was frequently called upon to witness various deeds; that, as a man of business, he certainly would not subscribe a deed which he did not see properly executed by the principal party; and that, though de-[272]-ponent did not recollect the circumstance, he was confident he must have seen Lord Ballenden subscribe this deed; that he rather inclined to suppose the word *witness* subjoined to be the hand-writing of G. Walker, one of the Appellants.

The Court, (Second Division,) on report of the Ordinary, Jan. 26, 1809, sustained the reasons of reduction founded on the *ex facie* vitiation *in substantialibus* of the commission, and adhered, June 17, 1809. From these interlocutors an appeal was lodged.

Argued for Appellants,—1st, Every alteration was not a vitiation, and here every thing essential was in the deed. Case turned on appearance of erasure and evidence of Cummins. The appearance suspicious, but evidence of Cummins did away the suspicion, (Stair, b. 4. t. 4. s. 19.—2 Dict. 152, and cases there collected.) 2d, Nothing in statute of 1681, cap. 5, to show that witness must subjoin word *witness* to his name in his own hand-writing. (Sea Box of Queensferry, Jan. 7, 1732.—Ersk. b. 3. t. 2. s. 23.) (Lord Eldon (Chancellor.) They say that another person subscribed as witness before erasure, that Cummins afterwards signed, and found word *witness* ready to his hand.) That was no objection. (Lord Eldon (Chancellor.) Whether the subscription of principal party must not be executed, or acknowledged, before both witnesses at the same time?) That was not necessary (Dict. *voce* Writ); but here there was no evidence that it had not. 3d, The evidence of Cummins was sufficient to prove that he had seen the principal party subscribe, or acknowledge his subscription. (Young v. Glen, August 2, 1770.—Sibbald, Jan. 18, 1776.—Frank, March 3, 1795.)

[273] Argued for Respondents,—1st, Clear that the deed was vitiated in material part. Attestation there equal to a deposition on oath, and as essential as execution by principal party. Forgery not imputed; only an attempt to remedy a blunder, but this fatal to the deed. No case cited on the other side of erasure of a witness's name, and another written in the place,—no case bearing upon the present. 2d, Proper that word *witness* should be subjoined in witness's own hand-writing, to show that he subscribed as such, and not in any other character. That was peculiarly requisite, where attestation was equivalent to deposition on oath, (Bankton, b. 1. t. 2. s. 41.) 3d, Cummins's testimony taken before answer, and therefore without prejudice to any legal question. A deed *ex facie* vitiated *in substantialibus* is void, and evidence of Cummins could not help it. (Patullo v. Forrester, Nov. 22, 1671. Morr. Dict. *voce* Proof.) Cummins was examined merely to show that the subscription was not a forgery, to preserve his evidence in case of a criminal charge. 4th, Evidence, if to be received, rather proved Respondent's case. Witness only said that the name on the erasure was his writing, but he did not at all account for the erasure; he knew nothing about it, and the presumption still remained. 5th, Witnesses must together see party subscribe, or own subscription, otherwise they do not attest same date of subscription or acknowledgment, and there is no legal execution of deed before two witnesses. Presumption here was, that this deed was not so executed, and evidence of Cummins did not rebut that presumption.

[274] Leach and A. Murray for Appellants; Adam and Romilly for Respondents. Judgment affirmed.

Agent for Appellant, RICHARDSON.
Agent for Respondent, CAMPBELL.

ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

WILLAN,—Appellant; WILLAN,—Respondent [May 13, 1814].

[Mews' Dig. i. 117, 141, 143, 431; xi. 797.]

[Agreement between uncle and nephew for a sub-lease to the latter at a fixed rent, with covenant for perpetual renewal, of premises held by the uncle under a church lease, renewable on fines at will of lessors, set aside on the ground of surprise and misapprehension of its effect in one or both of the parties; the facts being, that the agreement was entered into a few days before the uncle's death, when he was confined to bed by the illness of

which he died, and was in such a state of bodily and mental imbecility as rendered him incapable of transacting business which required deliberation and reflection, the agreement being at the same time one for val. con. and in that view of it unreasonable.]

[Lord Redesdale doubting whether, even if there had been no evidence of imbecility, such an agreement, made under such circumstances, would not be set aside on the ground of surprise and misapprehension.]

[And since it was unfit that such an agreement should be acted upon in equity, it was held unfit to be acted upon at law, and it was ordered to be delivered up.]

[275] [And as the agreement purported to be for val. con. the Court could not say that it was partly for val. con. and partly for natural love and affection, merely because it was made between relations; otherwise no agreement for val. con. between relations could be set aside, however inadequate the consideration.]

6 Ves. 72.

John Willan, of How Hatch, South Weald, Essex, Appellant's uncle, in 1792, held the farm of Brownswood, Hornsey, from the Prebendary of St. Paul's, under a lease renewable every seven years at a fine at the will of the Prebendary. Willan, the uncle, died August 11, 1792, at the age of 82, having devised his freehold estates to his great nephew, William Willan, for life, and to the son of W. Willan in remainder, and limited his leasehold estates as nearly as possible in the same way as the freehold. On the 6th August, 1792, while the uncle was confined to bed by the illness of which he died, an agreement was entered into between him and his nephew, the Appellant, who then held the Hornsey farm of his uncle under a sub-lease; which agreement, signed by both parties, and witnessed by the attending physician and apothecary, was in these terms:—

"It is hereby agreed, between John Willan, of How Hatch, in South Weald, Esq. of the one part, and his nephew, John Willan, of the Bull and Mouth Inn, London, on the other part, that the present lease of the farm at Hornsey, which the said John Willan, of the Bull and Mouth, now has of his uncle, shall be cancelled, and a new lease of 21 years, renewable every [276] seven years for ever, or so long as the said John Willan, Esq. or his assigns, hold the same from the Prebendary of St. Paul's, shall be granted of the farm that he now holds, and also of that farm now let to William Stap, and also of that now let to Mary Collier, at the yearly rent of £565 clear of land tax, and all other taxes, to commence at Michaelmas, 1794.

"And it is farther agreed, that if any fines shall be demanded on account of an increase of buildings on any of the above farms, the said John Willan, of the Bull and Mouth Inn, shall pay those fines."

A lease having been executed in terms of this agreement by the trustees under the uncle's will, William Willan, the great nephew, alarmed at the increase of the fines, which threatened to render the Hornsey lease of no value to him, filed his bill in Chancery, praying that it might be declared that the agreement had been unduly obtained, and that it might be set aside; and that the lease founded upon it might be declared to have been executed by mistake, and might be delivered up, etc.; or at least, that the stipulation for perpetual renewal might be declared to be unreasonable, and to have been obtained by surprise and imposition upon the uncle without consideration, and that it ought to have no effect, etc.

Elizabeth Willan, the uncle's widow, had, on the 5th August, written by his desire to the nephew, stating, that "the uncle was ill, wished to give him the preference of Hornsey, and begged that he would come and talk about it." The [277] nephew came next day along with the Rev. Joseph Baines, a clergyman of unblemished character, and much esteemed by the uncle. The nephew and Baines went into the uncle's bed-room, where the agreement was prepared, and then the physician and apothecary were called up to witness the signing. The widow was not present during any part of this transaction, but in a quarter of an hour after the nephew had left the room, the uncle sent for him again, and, in the widow's presence, said, "John, that agreement must not stand; it is giving the estate away." The Appellant replied, "You, sir, have left the estates to my son, on failure of William Willan's having

" children, so I shall be making the farm better ; " and added, " if you do not approve of it when you are better, the agreement shall be cancelled."

The physician on his examination (the apothecary and Baines had died some time before the bill was filed) stated, that on the day when the said agreement was prepared and signed, the uncle was in a state of the greatest imbecility of mind and body, and totally incapable of attending to or understanding any business that required thought, reflection, or consideration ; that he hesitated to witness the signing, and would not have done so, had he not been informed, and believed, that it was merely a common lease, of which the terms might have been before considered. The deposition of the widow and several others went to show that the uncle was of sufficiently sound mind at this time, though the widow admitted that his mind occasionally wandered.

The uncle had on the same day (August 6) executed a codicil to his will. The uncle and nephew did not appear to have lived on terms of intimacy. It ought to be observed, that in 1789, Willan, the uncle, had made an agreement for a lease of certain other premises at Hornsey, held in the same manner, with one Hoare, covenanting to renew perpetually. But there he took a fine, and an advance of rent.

The agreement was set aside in the Court below, on the ground of its having been a surprise on both parties, and the lease executed in consequence was decreed to be delivered up. The decree was affirmed on a re-hearing, and thereupon the nephew appealed.

Romilly and Leach for Appellant ; Fonblanque and Hart for Respondent. (Grounds of argument same as in Court below. *Vide* 6 Ves. 72.)

Lord Eldon (Chancellor.) He had not proceeded in his judgment below on the ground that the agreement was fraudulent, though he thought it would have been a fraudulent use of it to carry it into effect.

In the course of the evidence, a great deal of testimony had been given, to show that Willan, the testator, was not of sufficient understanding and capacity at the time of the agreement to give it validity. As to this point, there was evidence on both sides ; and if the decree were to be altered, it must be considered whether an issue ought not to be directed to try that question. He had not thought it necessary to go into that point. But this had appeared to him to be an agreement obtained by surprise, and in this sense, that it was a surprise on both parties ; and that the Appellant had agreed to give it up, if it had the effect of going beyond [279] what was intended. There had been a great deal of argument to show that the latter ground was not in issue. Every cause must be decided *secundum ALLEGATA et probata*, but on looking into the objection, he had no doubt that the pleadings were so framed as to let in the evidence on which he had proceeded.

He had stated below, and he still thought, that the testator intended to give the Appellant some additional advantage, but not the advantage of this perpetual renewal, etc. He was of opinion that the evidence bore him out in this, that the uncle was not absolutely of non-sane mind, but that he was in such a state of imbecility, arising from indisposition, that he might easily at the time misconceive the effect of the agreement ; and, in point of fact, it did afterwards occur to him that it might have a different effect from what was intended, and that the estate must in a short time be purchased at a rate which would leave nothing to the lessor. It appeared that he desired his wife to call the Appellant, who had not left the house, into his room, and that when the Appellant came, the testator said,—not in these exact words, but in effect,—" this matter must be reconsidered—the agreement must not stand—it is giving away the estate." The Appellant then honestly said,—" You have left the estate to my son, in failure of William Willan's having children ; so I shall be making the farm better. If you do not approve of it when you recover, it shall be given up." It had been strongly objected that this evidence ought not to have been received. But the Appellant had read it, and, independent of that, the evidence of this conversation was material, for the purpose of showing that there [280] existed such a misunderstanding as that against which the bill prayed to be relieved ; and besides, the interrogatories led to it.

If he could do all he wished, he should be glad to grant one lease. But the reason why he thought it could not be done was this. There was no analogy between this and cases where there were several distinct agreements, for these had been determined

on the ground that there were contracts made by the parties which might be executed. But if the whole was but one contract which could not be executed, equity could not introduce another contract for the parties. If the Appellant had a right to one lease, the Respondent should be able to compel him to take one. If the uncle had recovered, he believed they would soon have agreed; but he having died, and there being no terms in the instruments upon which one lease could be supported, he could not act upon a contract which had not been made, and so had no authority, unless he could support the agreement *in toto*.

When he spoke of surprise, he merely meant, that it was a case where, from imbecility, and the absence of proper advice, the testator did not understand the effect of what he did, and that it was unconscionable in equity that an agreement should be executed which was a surprise on both parties.

It had then been insisted, that if one lease could not be granted, at least the agreement ought not to have been delivered up; and that this was one of the cases where, though equity would not execute the agreement, it would leave the party to his remedy at law. He thought this case did not fall within that distinction. He did not say that here there was any [281] dishonesty; but if an agreement was obtained by surprise, under such circumstances as occurred in this case, (*vide* 16 Ves. 86,) it was against equity to permit any use to be made of it.

Then it had been said, that a lease had been actually executed by the trustees upon the foundation of this agreement. The answer was, that the trustees granted it without sufficient knowledge of the circumstances, and that their *cestui que trusts* ought not to be prejudiced.

These were the grounds on which he had proceeded below, and with this statement he should leave the case with their Lordships. But, in justice to himself, to their Lordships, and the parties, he had again examined the case diligently, and if he had seen cause to alter his opinion, their Lordships would give him credit so far as to believe that no one could have been more ready to avow the change, and to act upon it.

Lord Redesdale. This was a bill to set aside an agreement entered into at a time when one of the parties was on his death-bed, and clearly in a state of imbecility, and also to set aside an actual lease founded upon it, on this ground, that the uncle, when he signed it, neither knew nor understood the contents of it, and that advantage was taken of his circumstances to get his signature.

The effect of the agreement was clearly to put an end, in no very long time, to the value of the property to the lessor; for the facts were these, (states them,)—the only stipulation in favour of the lessor being, that if there should be an increase of fines on account of new buildings, they should be paid by the lessee. All the rest, arising from improvements [282] in agriculture, etc. were to fall on the estate. It was scarcely possible to suppose that any man in full possession of his faculties could enter into such an agreement for valuable consideration. Then it was said, that this was partly for natural love and affection. But where an agreement purported in the body of it to be for valuable consideration, it could never, though obtained by a relation, be supported on the ground of natural love and affection; for if it could, every agreement made with a relation must be supported, however inadequate the consideration.

The nephew came to the uncle's house in consequence of a letter written to the former by order of the uncle, and the letter stated the object to be to give him a lease in preference to others. The uncle was, at the time, not incapable of making an ordinary lease, or a codicil to his will, which he did the same day, but was incapable of applying himself to a contract of this kind, which required deliberation and calculation, for this was clearly a contract for valuable consideration. Doctor Kirkland attended as a witness: he remonstrated that the uncle was not then in a condition to attend to business, and he was informed that this was a mere lease between landlord and tenant, the terms of which had been settled before. No calculations appeared to have been entered into by the parties, or if entered into, they were perfectly false; for the agreement was such, that the lease would soon produce nothing to the lessor, who must therefore abandon it, as he was entitled to do; for there was no contract binding him at all events to renew. Suppose there had been no evidence of debility at the time, it might be questioned whether such an instrument, obtained [283]

under such circumstances, without any previous consultation as to the terms of the contract, might not be considered as the effect of surprise.

Another circumstance had been brought into the cause,—the agreement for the lease to Hoare, in which also the lessor covenanted to renew, and the lessee covenanted not to erect new buildings. Possibly the lessor might have entered into this agreement without having sufficiently considered the terms of it; but at any rate the terms were very different from those of the agreement now impeached. There the lessor received a fine of £225 and an advance of rent.

He did therefore conceive that the Respondent had made out the charge that the uncle did not understand the effect of the agreement, and that advantage was taken of his situation to induce him to sign it. There appeared to him no contrariety in the evidence as to the state in which the uncle was at the time of the signature. He was capable of making a codicil to his will, but not of doing any thing which required deliberation. This besides was a bargain, and different in its nature from that expression of volition required in making a will.

If the whole of Mrs. Willan's evidence was to be received and believed, the uncle himself afterwards considered it as an improvident act. If the conversation stated by her actually took place, it showed that the effect of the agreement had before been understood by neither the one nor the other. But then it was said that this evidence ought not to have been received, because that point was not directly in issue. It appeared to him that it ought to be received,—1st, Because he considered it as evidence [284] of the surprise which was directly in issue, as evidence of the mutual misunderstanding, or at least of misunderstanding in the uncle. 2d, Because it came out on the examination for the Appellant; and, 3d, Because it was read by the Appellant himself. He could not object to his own evidence, thus adopted, and say that he could have answered it by other evidence. According to the argument at the bar, if twenty facts were stated in the bill, and all were denied by the answer, and a single witness deposed to each fact, there must be issues to try them all. He did not think the rule went that length.

His conception of the case then was this,—that where a contract was manifestly unreasonable, if one of the parties, taken by surprise while in a state of debility, was made to depart from an original intention, and to act contrary to a previous design, then the contract ought to be set aside, as this was an advantage taken of his infirm state.

Then a question was made, whether the agreement might not have effect as to one lease. It appeared to him that it could not. When the agreement was found to be so unreasonable that it could not be executed *in toto*, they could not draw the line. They could not say what the uncle really meant to do. They had no evidence of his intention but this agreement, which was bad.

Another question was, whether the agreement ought to have been delivered up. He thought it perfectly clear, that where an agreement was obtained under such circumstances,—as by surprise, for example,—that it was not fit to be acted upon in equity, it was unfit that it should be acted upon at law, and in such cases the practice was to order [285] it to be delivered up; or, if an action was brought upon it, to order a perpetual injunction to restrain that action. He could not see why, if it was improper to act on this agreement in equity, it should be acted on at law. His opinion therefore was, that the decree ought to be affirmed, and he was authorised to state, that a noble and learned Lord, (Carlton,) not now present, but who had attended at the hearing, concurred in that opinion.

Decree affirmed.

Agent for Appellant, WHITTON.

Agent for Respondent, ———

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HENDERSON AND BROWN,—*Appellants*; SIR JOHN MALCOLM,—*Respondent*
[May 18, 1814].

[Lease for 99 years falls under the prohibition against alienation in a strict entail. Points of form. Remit for review in *Macdonell v. Macdonald*, 66 *ante*, ought not to have been made.]

The Respondent's father held the estate of Balbedie under a strict entail executed in 1725, with prohibition against alienation, etc. In 1754 he [286] granted to his second wife, by virtue of a reserved power to that effect in the entail, a life-rent locality over one of the farms of the estate called Craigend. In 1773 she granted a lease of the locality lands during her life to James Malcolm, Respondent's elder brother, and her husband's son by his first marriage, who succeeded his father as heir of entail. James Malcolm agreed with one Henderson, who was represented by the Appellants, for three leases to the latter, comprehending the farm of Craigend, and the whole estate, except the mansion house, garden, and some small enclosures in the neighbourhood, for 99 years, at low rents and grassums.

In consequence of Henderson's neglect to perform conditions, actions were raised to compel him to execute regular leases, which was done. In 1797 James Malcolm died, leaving his step-mother surviving. The Respondent succeeded to the estate as heir of entail, and he, or rather his creditors in his name, raised an action to reduce the leases upon three grounds, as stated in the summons. 1st, The length of time. 2d, Facility and weakness in James Malcolm, and enormous lesion. 3d, (Applicable only to Craigend,) James Malcolm being in possession only as lessee of his step-mother, and not as proprietor, could give no possession to his sub-lessee; and the lease not having been clothed with possession in the life-time of the grantor, was void as against the Respondent, a singular successor.

The Lord Ordinary, by interlocutor, May 16, 1804, ordered Respondent to say whether he insisted on the ground of facility and lesion, and if he did, to give in a condescendence. But his cre-[287]-ditors, confident of success on the third ground, applicable to Craigend only, and as success so far would afford them the full means of satisfying their debts, refused to give in the condescendence, and Respondent was from poverty unable to do so. The Lord Ordinary, by interlocutor, June, 1804, reduced the lease of Craigend on the third ground, "but in respect the Pursuer has "not lodged a condescendence, in terms of the last interlocutor, of facility and lesion," assolizied the Defenders from the conclusions of the action *quoad* the other leases. The Respondent had not the means of representing or reclaiming against this interlocutor within the time limited by the rules of Court; but a petition having been presented by the now Appellants against the first branch of the interlocutor reducing the lease of Craigend, the Court, after answers, remitted to the Lord Ordinary to hear parties on the ground of duration, and other points of the cause, and the Lord Ordinary ordered informations to the Court accordingly. The Appellants pleaded, that the interlocutor of the Lord Ordinary, assolizieing them from the conclusions of the action as to all the leases except that of Craigend, had become final, and that the general question as to the powers of the lessor under the entail must be considered as a *res judicata*. The Court repelled the *res judicata* plea, and reduced all the leases on the ground of long duration. The Appellants appealed from these interlocutors of the Court, and Respondent lodged a cross appeal against the latter part of the Lord Ordinary's interlocutor, June 1, 1804.

In answer to the plea of *res judicata*, it was con-[288]-tended,—1st, That the Lord Ordinary's interlocutor had become final only as to the ground there stated,—viz. facility and lesion; and that the remit as to a distinct ground,—that of duration,—was competent and proper. 2d, Suppose the Court of Session ought to have listened to the objection, then the Lord Ordinary's interlocutor must be considered a final

decree, against which Respondent had appealed; so that the question was open to their Lordships.

The Lord Chancellor considered the general question as to the powers of the heir of entail to make a lease of this duration as settled by the decision in the Queensberry case, (*vide ante*, 90.) The only question here was as to the point of form, and particular caution was requisite in interfering with the notions of the Court below on such points. The House had, in the early part of this session, remitted interlocutors of the Court below for review as to a remit made by that Court to the Lord Advocate in a case of assault. (*Macdonell v. Macdonald*, 66 *ante*.) From information which he had since received, he was now satisfied that he ought never to have consented to that remit.

Judgment affirmed.

Agent for Appellant, ———.
Agent for Respondent, CHALMER.

[289] IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

JAMES CANE,—*Appellant*; JOSHUA LORD ALLEN,—*Respondent*

[May 20, 1814].

[*Mews' Dig.* i. 367; vii. 190, 232; xiii. 1843; xiv. 1290. Considered in *Holman v. Loynes*, 1854, 4 De G., M. & G. at p. 277. See also *Luddy's Trustee v. Peard*, 1886, 33 Ch. D. 500.]

[An attorney may contract with his client, provided no advantage be taken of the confidential relation. If he be employed to sell, and chooses to deal for the estate to be sold, he must withdraw from the connexion, or put himself completely at arm's length, and show, if the contract be questioned, that he has given the same advice for the benefit of his client as he would have done if the sale had been to a third party. If employed as a general land-agent, he is bound, if he purchases any of the estates in respect of which he is agent, to communicate to his principal all the knowledge acquired by him as agent, of the real value of the estate. But the mere circumstance of his being attorney does not prevent his entering into a valid contract with his client, and therefore a decree of the Irish Court of Exchequer, dismissing a bill for specific performance of a contract, apparently on the ground that it was one between attorney and client, was reversed on appeal to the House of Lords.]

[After bill, answer, and replication, no farther steps were taken in the cause for upwards of 20 years: this not of itself a reason for refusing a specific performance, there being acquiescence on both sides. But held to be a good reason for not giving costs where otherwise they would have been given.]

In 1746 James Cane, an attorney, Appellant's father, purchased from John, fourth Lord Allen, Respondent's brother, the estate of Castle Dillon, in the county of Kildare, in Ireland. In 1751 he also purchased from the same Lord Allen the lands [290] of Inchicore, etc. in the county of Dublin, then in Lord Allen's possession, for a sum of £4126, being at the rate of 22 years' purchase; and this estate was, by deeds of lease and release, of the 7th and 8th May, 1751, conveyed to Cane.

By another deed, of the same date, it was stipulated that Cane should have credit for a sum of £962 paid by him in compromising two debts affecting the purchased estates, as part payment of the purchase money; and that he should be allowed to retain the remainder of the purchase money to pay off other incumbrances, which he did to a considerable amount, having compromised several debts, allowing Lord Allen the advantage of the compromise, and taking credit only for the sums actually paid.

A small portion of the Dublin estate had been devised by John, third Lord Allen, to one Richard Cooper for life. By articles dated the same 8th May, 1751, it was agreed, that on the death of Richard Cooper, Lord Allen should sell and convey to

Cane this part of the estate, at 22 years' purchase, computed according to the rent then (in 1751) paid for the same, the purchase money to be paid when the lands should be conveyed. Under a subsequent agreement in 1752, however, Cane advanced £261 in part of the purchase money, for which he was to be allowed interest till Cooper's death, at £4 10s. per cent.

In 1753 John, fourth Lord Allen, died, leaving Respondent his heir at law, who succeeded to the estates and title.

In 1757 James Cane died, and in February, [291] 1784, Cooper died. Appellant, eldest son and heir at law of James Cane, claimed a specific performance of the agreement of 8th May, 1751, as to the part of the Dublin estate which had been held by Cooper. The Respondent refused, and, on April 28, 1784, Appellant filed his bill for specific performance. Respondent put in his answer 8th November, 1784, impeaching the transactions between his brother and James Cane, on the ground that Cane, being Lord Allen's confidential attorney, had taken advantage of his embarrassments to purchase the estates at an under-value, and offering to account for and repay the money advanced by Cane.

The Appellant filed his replication 24th February, 1786, but having, in consequence of ill health, as was stated, gone to reside in the south of France, no farther steps were taken till 1807, when the Appellant served a subpoena to rejoin. Witnesses were examined, and Edward Cane, James Cane's brother, deposed, that he had heard and believed, but otherwise knew not, that J. Cane had been employed as attorney for John, fourth Lord Allen, and the Respondent, but never heard of his having been so employed by John, third Lord Allen. But there appeared no other evidence to show that Cane had been Lord Allen's attorney before the purchase of the Kildare estate in 1746, and no other evidence to show that he did any business for him as such before the purchase and agreement of 1751, except one item of £24 in a bill of costs which was incurred in 1750, in protecting the Kildare estate, purchased by Cane, from one of Lord Allen's creditors. Some evidence was also given, that one Howard [292] had been employed as the attorney of the third and fourth Lords Allen.

The cause having been heard on 23d February, 1809, present only two of the Judges, a decree was made, "that, upon Respondent's consenting to account to the representatives of James Cane for the sum of £261 with interest for the same at £4 10s. per cent. the bill should be dismissed without costs." From this decree the Appellant lodged his appeal.

Argued for the Appellant :—The delay in prosecuting the suit was accounted for, and at any rate Respondent had it in his power to force the cause to a hearing and have the bill dismissed, and there was evidence that he considered it as a *lis pendens*. The conveyance of the Dublin estate, then in possession of Lord Allen, and agreement for the conveyance of the reversionary part, formed only one transaction, and the conveyance was acquiesced in by Respondent himself from 1754 to 1784, and no pretence made of any new discovery of circumstances. The agreement of 1752 was besides a deliberate act of confirmation, and John, fourth Lord Allen, or Respondent after him, might, even if the case had rested on the executory article alone, have at any time filed a bill to have it delivered up to be cancelled. Even if the relation of attorney and client between the parties had been proved to have existed at the time of the agreement and purchase, imposing on Cane the duty of making out a case above all suspicion, and if there had been circumstances requiring explanation, the length of time and acquiescence would have raised the presumption [293] that all was fair. But there was no sufficient evidence of the existence of the relation. No land-agency, or agency on the subject of the purchase, had been proved : no sufficient evidence had been given of the general confidence and relation of attorney and client between Cane and third or fourth Lord Allen, nor any proof of such a relation in any suit respecting the title to the lands : but if all these had existed, and the length of time and acquiescence were out of the question, still it was sufficient that the agreement was fair, as it was in this case. In a case not then reported, Sands was attorney for Mrs. Montesquien in a matter of partition, where one of the subjects was a valuable advowson. There were two presentations before hers, and Sands, having a son intended for the church, purchased her interest for £150, which sum he deducted from a large bill of costs which he had against Mrs. Montesquieu. Under the circumstances, it was clear that more could have been got for it, and it soon came into pos-

session; but the Court sustained the sale, as all appeared fair. In any view of the case, the decree was wrong. If the agreement was not binding, the £261 advanced must be considered as a loan, and the highest legal rate of interest (6 per cent.) ought to have been allowed. Besides, the decree did not make it mandatory on the Respondent to pay it, but left it at his option to do so or not; the alternative being, that in case he did not pay it, the bill should not be dismissed. The Court ought to have decreed it to be a specific lien on the lands mentioned in the executory agreement of 1751.

[294] Argued for Respondent:—It was admitted to be not sufficient to say that Cane was Lord Allen's attorney; but here it also appeared that Lord Allen was in embarrassed circumstances, and that the agreement was improvident on his part.

Lord Eldon (Chancellor). The strong impression on his mind was, that this decree was wrong. If it proceeded on the ground that an attorney could not enter into a contract with his client, there was no such doctrine in our law. If one, not employed before as an attorney, was employed for the sale of an estate, and advised his employer to sell it to himself, (the attorney,) the Courts of Equity would say,—'The nature of your employment was such as rendered it incumbent on you to give the best advice to your employer;' and unless he withdrew from that connexion, or put himself completely at arm's length, he must show, in case the contract were questioned, that he had given the same disinterested advice that he naturally would have given if the contract had been made with another party. (*Vide Gibson v. Jeyes*, 6 Ves. 266, 278.) So, where one was employed as a general agent in the management of real estates, and by that means, and at the expense of his principal, acquired knowledge respecting the value of the property which the proprietor himself did not possess; if the agent were employed to sell, and chose to deal with his principal, he must communicate all the knowledge which he as agent had gained as to the real value of the estate. But the mere fact of his being an attorney, if he stood at arm's length, would not vitiate the contract.

[295] Here then was a contract for the sale of an estate, one part of which Lord Allen had in actual possession, the other part in reversion. The contract and conveyance, with respect to the part in possession, could clearly not be touched in any Court; and then they had to consider whether the contract as to the other portion was not part of the same transaction. If that transaction had been managed in a different way, it was clear it could not be touched. If the reversion had been granted, and the money paid at first, with an agreement that interest should be allowed for it till the death of Cooper, the whole would have been one transaction; and unless some such circumstance as he had stated should appear, the contract could not be set aside.

Then as to length of time, the suit had been suffered to sleep for 21 years before the decree. But there had been an acquiescence on both sides; and if the agreement had been unfair, a bill might have been filed to have it delivered up immediately to be cancelled.

The decree, if it were to be affirmed, must be altered, in so far as it proceeded on the undertaking, or consent, of the Defendant to account. But, on the general ground, if they were to decide now, he should say, that the appeal ought to be dismissed. From deference to the opinion of the Court below, however, it was proper that the case should be farther considered.

Lord Redesdale. The Plaintiff had a lien on the estate for the money he had advanced and the interest upon it. That was clear; and it might be doubted whether, in case the decision could be [296] supported, the Plaintiff could be bound to the rate of interest (£4 10s. per cent.) mentioned in the agreement, instead of being allowed the lawful interest of the country.

But, on the general question, he was at a loss to conceive how the mere circumstance of being an attorney, not even employed as agent to sell the estate, could vitiate the contract. There was no such case. But at any rate he could not see that Cane had been employed by Lord Allen as an attorney till the purchase of the Kildare estate. Having made that purchase, Cane had set about paying off the incumbrances which Lord Allen had charged himself to relieve.

He did not however agree that any great favour had been shown by Cane to Lord Allen in giving up the advantages which he gained in compounding the debts; for if a purchaser bought up incumbrances which the seller was bound to relieve, he ought not to charge more than he paid, as that was the amount of the damage which he

sustained by the breach of the covenant. He conceived that to be clearly the rule, and he wished it to be attended to.

Cane then purchased the other estate for a sum which was considered sufficient to pay off the incumbrances: he advanced £962, and stipulated that the rest of the purchase money should remain in his hands for discharging the incumbrances. That was perfectly fair, as the money must have at any rate been placed in the hands of a trustee for that purpose. The estate was sold at 22 years' purchase, which was a large price at that time.

[297] The only evidence that Cane was employed as attorney for Lord Allen commenced with the discharge of these judgments. It was impossible to say with certainty that he was so employed before 1750. All the evidence given by Cane's brother, who, he believed, went into the army when very young, and had been chiefly employed abroad, was this,—that he had heard and believed, but did not know, that Cane had been employed as attorney for the present and for the late Lord Allen. Then came the bill of costs. Any thing that was done arose merely from the judgments, and it appeared that fees had been refused on the ground of Cane's interest in the subject.

The case then stood thus:—After the purchase of the Kildare estate, Cane was for his own interest engaged in procuring the discharge of these judgments; and after the purchase of the Inchicore estate, he was employed in applying the money to relieve the incumbrances. He did not see any charge in his bill for the deed by which the money was to be left in his hands, which ought to be paid for by Lord Allen, and this might afford some ground of inference that Lord Allen had employed another attorney.

It did therefore appear to him, that the relation of attorney and client did not exist between these parties so as to place Cane in a situation to throw any obstacle in the way of his making this purchase. He was not employed to sell, nor in the character of a general agent or manager, and took no advantage of confidence placed in him by Lord Allen, or [298] of any superior knowledge of the value of the estate, acquired as agent.

Another view of the case was, that Lord Allen was a distressed man. But 22 years' purchase had been given, and no advantage taken. The purchase money for the reversionary part, it was true, was not to be paid till the death of Cooper, and, as the price was to be 22 years' purchase, to be computed according to the then present rent, if the lands were improved in the mean time, that would be a method of taking what was more valuable. But then the whole was one transaction—one entire estate, and Lord Allen must otherwise have borrowed money at the highest lawful rate of interest in Ireland, and it came to the same thing as if he had mortgaged his estate.

The only other ground was the delay. The cause had slept from 1786 till 1807. But no case had been stated where the mere length of time during which a suit had been kept depending, operated as a bar. Lord Allen might have applied to have the bill dismissed, and he ought to have tendered the £261 advanced by Cane, with interest. But as Lord Hardwicke had said in a certain case, of which he did not recollect the name, "he was afraid to rouse the sleeping lion."

Upon the whole, the impression on his mind was, that the decree was wrong. It would be extremely mischievous to carry the rule to such an extent as to make it impossible for an attorney to purchase the estate of a client, even though not employed in the particular transaction.

[299] No man could have a greater respect than he had for the Chief Baron, by whom, with only one other Judge, the decree had been made: and from deference to the opinion of these Judges, he agreed that the case ought to undergo some farther consideration.

Lord Redesdale. After having again considered the case, he continued of the same opinion, that the decree ought to be reversed, and the agreement of 1751 specifically performed. The costs ought to follow the judgment, but considering the delay that had taken place, it might be proper to give no costs on either side.

Lord Eldon (Chancellor.) He had again looked at the case, and repeated, that he could find no such doctrine as that an attorney could not deal with his client. If the attorney were employed to sell, if he dealt for the property, he must put an end to the confidential relation, or put himself completely at arm's length: or if the

contract was afterwards quarrelled, it would be incumbent upon him to show that he had made a reasonable use of that confidence, and had given as ample and correct advice and information to his client as he would have done if his client had been dealing with a third person. He conceived also, that if an attorney were employed as agent in the management of a landed estate, he could not deal with his principal for that estate without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent; and unless he [300] did this, the contract, if questioned, could not be supported. But independent of these particular circumstances, an attorney did not stand exactly in the situation of a trustee. The general rule, that a trustee to sell could not purchase the trust estate, was now pretty well settled. But there was no such rule with respect to an attorney.

In purchasing this estate, it was natural to deal for this reversionary corner. The whole appeared to have been considered as one transaction, and that transaction contained nothing unfair. In this case, if the suit had been prosecuted diligently, he should think the Appellant ought to have his costs; but as by his want of diligence he had given some countenance to the opposition made to it, it was reasonable that no costs should be given on either side.

Decree of the Court below reversed.

Agent for Appellant, PINKETT.

Agent for Respondent, WARD.

[301] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

FEOFFEEES OF HERIOT'S HOSPITAL,—*Appellants*; JAMES GIBSON,—*Respondent*
[May 26, 1814].

[See *Gordon v. Marjoribanks*, 1818, 6 Dow, 87; *Croall v. Magistrates of Edinburgh*, 1870, 9 M. 323, 327.]

[The mere exhibition of a plan of a new street, at the time of the sale of a piece of ground on which to build a house in the line of the intended street, does not of itself amount to a warranty or engagement that all that is exhibited on the plan shall be done, more especially where the purchaser has a distinct contract put into the solemn form of a charter, in which nothing is said about that which he claims merely on the foundation of its having been exhibited on the plan. Thus, where the Governors of Heriot's Hospital, and the Magistrates of Edinburgh, in selling certain lots of ground for building in the line of an intended new street, (York-place,) exhibited a plan of the street and some of the surrounding objects, which represented, or was supposed to represent, certain old buildings (not belonging to the Magistrates or Hospital) as taken down, so as to make the street of equal breadth through its whole extent,—though the feu charters granted to the purchasers contained nothing about any obligation on the grantors to purchase and remove these old houses,—the Court of Session held that the Magistrates were bound to remove them, and to purchase them for that purpose when an opportunity offered of doing so at a reasonable price, and that the purchasers were entitled to retain the feu duty till this was done. But the judgment was in effect reversed on appeal, on the general ground, that the mere exhibition of the plan was no warranty, especially when coupled with the silence of the charters on the point in dispute.]

The Magistrates of Edinburgh intending to continue Queen-street (New Town) on the east to a place called Broughton Loan, procured a clause to [302] be inserted in an Act of Parliament obtained by the city in 1786, (26 Geo. 3, cap. 113,) empowering them to make this street, which was to be 80 feet wide, and for that purpose to purchase houses, grounds, etc. This authority to purchase houses was made to expire Jan. 1, 1797, and the Magistrates had not an opportunity of carrying the plan into

execution till the authority had actually expired. Afterwards, the Magistrates and the Governors of Heriot's Hospital, projected a continuation in the line of what is now called York-place as far as their own property extended, making the street 114 feet wide, and a plan of the new street was drawn out accordingly. As part of the property belonged to the town, and part to the Hospital, an arrangement was made, by which the Magistrates were to have the whole of the purchase money of the several areas or lots to be sold for building, and the Hospital to have the feu duty.

On the 3d March, 1797, the lots were exposed to sale by public roup, or auction, the articles of which referred to the several lots as marked and numbered on the ground plan, which plan itself, though the articles applied exclusively to the lots to be sold, delineated some of the adjoining and surrounding objects. One of the lots was purchased by the Respondent, Gibson, for 184 guineas, (which sum was immediately paid to the Magistrates,) and £4 19s. annual feu duty to be paid to the Hospital; and he obtained a charter from the Hospital, dated April 15, 1799, in which free ish and entry by York-place were warranted.

Gibson having for eight years together refused to pay the feu duty, on the ground that certain old [303] houses at the east end of the street, delineated on the plan as intended to be taken down so as to make the street of equal breadth at both ends, had not been removed, the Appellants raised an action of declarator of irritancy *ob non solutum canonem* on the act of 1597, cap. 246, by which it was enacted, that the feuar who failed to pay his feu duty during the space of two years together should lose his feu. The Lord Ordinary (Glenlee) ordered a special condescendence of the grounds of the defences to this action, and a condescendence was accordingly given in, stating,—1st, That the feu had been purchased on the faith of the plan referred to in the articles of sale, according to which York-place was to be of the same breadth from one end to the other, and from which it appeared, by certain markings, that the old houses at the east end were to be taken down. 2d, That the ground was conveyed in the charter “with free ish and entry to the said house by the street now “called York-place.” The Defender (Respondent) therefore insisted that he had a right to retain the feu duties till the old buildings were removed, and the street of York-place completed. The answers stated, that there was free ish and entry on the west by Queen-street, and on the east by a passage admitted to be 30 feet wide, but which the Appellants contended was in fact 49 feet at the narrowest. As to the other point, it was answered, that mere lines and markings on a plan could not create an obligation, of which there was not the slightest mention in the articles of sale, in the charters, or any distinct agreement; that it could not have been reasonably conceived that the [304] Magistrates or Appellants, by such markings, could intend to come under any obligation to pull down houses belonging to individuals over whom they had no control, their power under the act of 1786 having expired: and besides, the markings could not fix the time within which the obligation was to be performed. That the plan comprehended a great part of the New Town, and was intended to exhibit the general effect in case the Magistrates should be enabled to carry into execution certain schemes which they had then in contemplation; and that, supposing an obligation could be inferred from mere markings on a plan, the markings on the plan in question were not such as to raise the inference contended for by the Respondent.

The Lord Ordinary repelled the defences, and found, that unless the Defender paid his feu duties, decree would fall to be pronounced against him; and after two representations, his Lordship decerned against the Defender, but superseded extract, etc. To these interlocutors the Court of the Second Division adhered. The Respondent reclaimed, and stated a case where the Magistrates had been prevented from going on with certain buildings which they had begun to raise opposite the present line of houses in Prince's-street, because they had represented the place as an open area, or pleasure ground, on a plan exhibited when the sites of the present houses were sold. (*Deas v. Magistrates of Edinburgh*, House of Lords, April 10, 1772.) It was also urged, that the Magistrates had neglected an opportunity that had offered of purchasing the old houses at a reasonable rate. The Court ordered a condescendence as to this latter point, which was given in and answered; [305] the Appellants contending,—1st, That the question was totally irrelevant; and, 2d, Denying the truth of the allegation. It was likewise argued, that the Appellants were not answerable

for the neglect of the Magistrates, supposing there had been any negligence : and as to the Prince's-street case, it was different from the present, inasmuch as the property there belonged to the Magistrates themselves. The Court however assoilzied the Defender, and decerned, reserving to the Governors of the Hospital their claim of relief against the Magistrates, and to them their defences.

The Appellants reclaimed, and offered to prove a new fact which had come to their knowledge,—that the dotted lines, on which the Respondent had so much relied, had been added to the plan in 1799 or 1800. The Court then pronounced the following judgment :—

“ Having advised this petition, and in respect that the interlocutor reclaimed against is founded on the Magistrates of Edinburgh having failed to embrace an opportunity which occurred of acquiring, on terms not unreasonable, the property necessary to complete York-place in the manner it was held out to the feuars thereof, as destined to be completed when such opportunity occurred, and as meant to operate agreeably to the doctrines of law as to mutual contracts, whereby retention operates as a compulsor for implement, and *loco facti imprestabilis succedit damnum et interesse* ; that the interest of the petitioners is involved by the transactions of the Magistrates ; and that the attempt now to impeach grounds in fact, on which [306] this Court sustained the obligation on the Defenders, is neither made *tempestive*, or in a shape entitling it to regard—refuse the petition.”

Against these last interlocutors the Appellants lodged their appeal.

Lord Advocate and ——— for Appellant : Adam and Romilly for Respondent.

Lord Eldon (Chancellor.) This case was important on account of the general principle which it involved : and he was therefore desirous that, before proceeding to judgment, they should see the Prince's-street case, to ascertain whether it had been decided on the points which occurred here. Lord Mansfield there spoke of “ laying the order of the House upon the Court below to pass the bill of suspension, that it might be conjoined with the action of declarator, and the question of right decided.” That appeared to be for the purpose merely of putting the question in a proper shape for the decision of the right. No one however could well doubt what would have been the opinion of that very eminent Judge if the question of right had been then to be decided : yet, with all due deference to that opinion, he should have liked it much better as a law authority if Lord Mansfield had confined himself to the dry question of law, without pressing upon feelings and principles of honour, with which, however familiar they might be to him as a private individual, he had, in judgment, nothing at all to do.

It would be very difficult to sustain the judgment [307] on the ground on which it appeared now to stand. The question was, Whether the Magistrates were bound to purchase and remove these houses ? If they were, they ought to do so, whether the price was high or low : if they were not bound, the offer at a reasonable price made no difference. Unless there was some special Scotch law on that point, the judgment could not stand merely on the ground of the offer at a reasonable price, and the neglect to purchase.

Then it was said, that there was an Act of Parliament (26 Geo. 3, cap. 113.) authorising the purchase, and that the plan laid them under the obligation to do so. But there was no such act at the time : it had expired. Mr. Adam had said, that it was a private act, and that the Respondent did not know that it had expired. His answer was, that he could not then know that such an act had existed. If he recognized the act at all, he must take it with all its circumstances.

The Magistrates of Edinburgh, who ought—if it had been so agreed—to have executed this improvement, got the whole of the consideration : the feoffees of the Hospital being entitled only to the feu duty, of which they were at present deprived, without the means in this action of compelling relief from the Magistrates.

But it was perfectly wild to say that the mere exhibition of a plan was sufficient to form a binding contract. One man might purchase on the notion that the intended street would soon be completed : another perhaps with the idea that it would not. But the whole amounted to this,—“ You may purchase on the notion that this plan will be executed, [308] but all that we have any thing to do with is our contract.” The feu then enters into a solemn contract, and if his contract contained nothing about this, how could he say that the Magistrates were bound by the plan. The

feu charter was the material document here, and must be carefully examined. There might be such an obligation in it as that here contended for, but it appeared to him that the judgment could not rest on the ground which the Court below had taken.

Lord Redesdale. He concurred in all that had been said by his noble friend. The effect of the judgment was, that the Hospital must part with their property without consideration. It was worthy of attention, that the feu charter in several instances entered minutely into particulars, but contained nothing on this head.

The Prince's-street case (*Deas v. Magistrates of Edinburgh*) would be examined, but that did not appear to be a decision on the point of right. The order was merely to pass the bill, that the right might be put in a shape for being determined.

The terms of the feu grant had been attended to by neither side. It appeared to him that it, by inference at least, excluded this claim; for it contained nothing about it, though it anxiously provided for other particulars of a similar nature.

Lord Eldon (Chancellor.) After stating the case. At this auction, or roup, various lots were sold, and Gibson bought his at what they called a slump sum to be paid to the Magistrates, reserving the feu duty for the feoffees of the Hospital. Then it was said, that the [309] Magistrates were bound to complete the street as exhibited on this plan, and that the feuar was entitled to retain the feu duty till this was done. To be sure, if that was the case, the feoffees were placed in a most improvident situation; for the Magistrates, who were bound to complete the street, were paid the whole of their demand, while the feoffees of the Hospital were to have nothing till they compelled the Magistrates to perform the contract.

When this came before the Lord Ordinary, he was not satisfied that there was any thing that could be called a contract, or any such breach of faith as to preclude the Pursuers from insisting on payment of the feu duty, and therefore he repelled the defences, and, meaning to give the feuar time to pay, that he might not forfeit his feu, found, that unless he did pay, decree would fall to be pronounced against him. Two representations having been given in and refused, the Lord Ordinary, in stronger terms, now decreed against the Defender, but superseded extract, etc. To these interlocutors the Court adhered, so that the Pursuers had three interlocutors of the Lord Ordinary, and one of the Court, in their favour.

Afterwards, on application to the Court, they ordered a condescendence of the facts which the Defender averred and undertook to prove, with regard to the opportunity the Pursuers had of purchasing the houses in question at a reasonable price, and then pronounced an interlocutor in favour of the Defender, reserving to the Pursuers their claim of relief against the Magistrates, etc. The Appellants [310] reclaimed, and offered to prove that certain dotted lines, which had been much relied upon by the Defender as evidence of the contract, had been added to the plan subsequent to the period at which the contract was made. But the Court adhered to its previous interlocutor, stating, that the attempt to impeach the facts on which the Court had proceeded was neither made *tempestive*, nor in a shape entitling it to regard. When Gibson, however, came with this allegation as to the neglect of an opportunity to purchase at a reasonable price, it might have been said, that that too would have been more *tempestive* if it had been brought forward at the beginning. The judgment appeared to rest on this principle,—that if the Magistrates, who had very comfortably got their money, who were not parties to the suit, and who could not by this action be compelled by the feoffees to perform, had neglected a favourable opportunity to purchase, the feoffees had no right to their feu duty. Then it was said on the one side that this neglect was proved, and on the other that it was not; and it was difficult for him to comprehend the nature of the proof. The purchase of two or three floors would hardly have answered the purpose, and in such a case the maxim *Cujus est solum, ejus est usque ad cælum*, would not apply. But the result was, that they altered the former judgment, and decided for the Defender, reserving to the Pursuers the claim of relief against the Magistrates. This was again brought under review. It had been contended, that certain dotted lines on the plan amounted to a warranty that the Magistrates were bound to execute all [311] that it offered to the eye. They offered to prove that these dots were added subsequent to the time of the contract. But the Court refused the petition, on the grounds stated in their interlocutor. (*vide ante*.)

From these two last interlocutors the present appeal was brought. There was

a reference to one case where the Magistrates exhibited a plan with a beautiful view of the disposition of the grounds in front of the new buildings to be erected, a thing which was done here every day without any idea that the proprietors were to be prevented from erecting other houses merely by having exhibited a different disposition of the grounds in a picture, unless it were so stipulated in the contracts between the parties. The Magistrates, the ground being their own, began to erect houses where they had exhibited terraces and walks. An action of declarator was brought to have it declared that the Magistrates were not entitled to erect these new buildings without consent of the feuars, and a process of suspension was also instituted to stop the progress of the work in the mean time. The Court refused to pass the Bill, and the question came to this House, where Lord Mansfield, who would be remembered as long as the law of England or of Scotland existed, made a very eloquent speech. But after all that he had said, what he did was merely to give an opportunity of examining the question of right. He could easily conceive that deference to his opinion had put an end to farther proceedings in that case, the Corporation having been perhaps almost frightened out of their senses by his speech; but still this was no judgment upon the question of [312] right, and at any rate there was a material distinction between that case and the present. This was not a case where one restricted himself as to the free use of his own land, but where he was supposed to have become bound, without a special contract to that effect, to make himself owner of the lands of others.

He held it in all cases to be dangerous, that when men had put their contracts into the solemn form of a charter, they should look, not at what was contained in that charter, but say that the charter should operate as if a term had been in it which was not there, merely because there had been some representation about such a condition at the time the contract was formed. He held it also to be dangerous to say, when a plan of a beautiful street was exhibited, which could not be completed till certain houses were removed, that the mere exhibition of the plan should be considered as an engagement that all that was exhibited should be done. The plan comprehended a variety of other intended improvements. Was it to be a warranty for the execution of the whole? Or, if not, where was it to stop short? One would naturally say, that merely a hope was held out. But what could be stronger than this,—that the charter expressly provided for many things being done which appeared on the plan? If the exhibition on the plan was a warranty, how came these to form part of the charter?

As to the point of ish and entry, unless the law was different from that of England with respect to ingress and egress, it appeared that the Respondent had ish and entry according to the engagement in the charter.

[313] With regard to honour and principle, it belonged to the parties themselves to consider what these required of them. He had only to declare their legal rights, and the judicial man could seldom be sufficiently well informed of motives and circumstances to enable him with safety to go farther. He dared not advise their Lordships to say that this plan was a warranty. The whole amounted to this only,—that the parties might entertain a rational hope that what was exhibited might be done in the course of improvement. But there was no ground to say that this amounted to an engagement that it should be done. With respect to their Lordships' judgment, the more temperate course would be, to remit to the Court below, so as to give the feuar an opportunity of paying the feu duty and keeping his estate.

Lord Redesdale. It appeared to him to be dangerous, when parties entered into a contract, to suffer any thing to affect it which was extraneous to what was in the contract itself. There was no undertaking by the Governors of the Hospital that this street should be completed, and they could not with propriety have entered into any such undertaking; for the effect would be to deprive them of any benefit from the property, except they compelled the Magistrates to make this street.

If this was matter of contract, the contract was absolute. If they were bound at all, they were bound whatever might be the expense; and how this neglect of opportunity to purchase at a reasonable price came into question at all he could not understand. They were bound, even if the thing had been impossible,—bound so far as to be liable to answer in damages; and it was only in the form [314] of damages that the Governors of the Hospital could proceed against the Magistrates. If there was a contract at all, it could not be of the nature supposed by the Court below. But

he concurred in the opinion, that the exhibition of the plan was no warranty. At the same time, it was fitting that the Respondent should have the opportunity of preserving his estate.

Judgment.—Fees duties, to be paid within a short period, to be fixed by the Court of Session, and remit.

Agent for Appellants, SPOTTISWOODE and ROBERTSON.

Agents for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SIR JAMES GRAHAM, and Others, Executors of the Will of Sir Welfred Lawson, who was sole Executor of the Will of Mrs. Sarah Aglianby, or Lowthian,—*Appellants*; MAXWELL, and Others, Representatives of Lowthian,—*Respondents* [May 26, 1814].

[To render the matter of a judgment a *res judicata*, so as to make this a valid plea, it is necessary not only that the subject and parties, but that the grounds of judgment, or *media concludendi*, should be the same. Thus, where one [315] had granted a general obligation (for the purpose of indemnifying others) to pay certain debts stated in a list referred to by the obligation after the death of the grantor, the Court of Session and House of Peers decided, that the obligation being of a moveable nature must affect the *jus relictæ*. It was afterwards found that a personal bond of corroboration, with interest and penalty, for payment of one of the debts in the list, had been given to the creditor himself by the grantor of the general obligation of indemnity, which bond was unsatisfied at the grantor's death. The House of Lords, contrary to the opinion of the Court of Session, held, that as the previous judgments had been pronounced solely with reference to the general obligation,—the particular bond, though produced in process, not having been attended to,—the question as to this debt was still open upon this new ground, and judgment accordingly.]

One Mackenzie, law-agent of Mr. Lowthian, of Stafford, in the county of Cumberland, who resided at Dumfries, had purchased the estate of Netherwood, for the price of which Lowthian had become his surety, and had otherwise engaged his credit for him. Mackenzie died in 1781, leaving a disposition and settlement, by which his whole estate and effects were given to trustees for the benefit of his creditors, representatives, etc. with power to sell. The trustees having found some difficulty in acting, conveyed and assigned, in pursuance of an agreement to that effect, all the estate and effects of Mackenzie to Lowthian; and Lowthian, on the other hand, executed a deed, whereby, on a recital of the transactions, etc. he became bound "to free, relieve, "and indemnify them of all the consequences of their having accepted the trust, "and acted under it, and of the conveyance, etc. to him; and for that effect, that "he would, with all convenient speed, make pay-[316]-ment of all the just and lawful "debts due by the said deceased G. Mackenzie, and procure valid discharges of the "same to all concerned." One of these debts was a sum of £10,000 borrowed by Mackenzie from Richard Glover, of London, secured by heritable bond on the estate of Netherwood.

Lowthian died in 1784, having previously made a testamentary settlement in the Scotch form, by which the whole of his heritable and moveable property in Scotland was given to his wife, who survived him. In 1793, upon action raised at the instance of the Respondents, the heirs and executors of Lowthian, the testamentary instruments were set aside by judgment of the Court of Session, affirmed on appeal, June, 1794.

Upon an action of count and reckoning which followed, it was held by the Court

of Session. (for reasons not necessary here to state,) that Mrs. Lowthian was not entitled to her terce of the Scotch real estates, and that Lowthian's obligation respecting Mackenzie's debts, being of a moveable nature, must affect the *jus relictæ*. On appeal, the first branch of the decree (as to the terce) was reversed; the second was affirmed.

The accounting having proceeded, it was noticed that Lowthian, on obtaining a delay of payment, had, in corroboration of the heritable security held by Glover, in June, 1782, granted his own personal bond, with interest and penalty, to Glover, for payment of the £10,000 at the following Martinmas.

The accountant (Wilson) stated in his report, that "this bond of corroboration "did not appear to [317] have been under the view of the parties in discussing the "question, whether or not G. Mackenzie's debts should affect the fund of *jus relictæ* : "at least, that it was not noticed in any of the written pleadings, the case having been "argued and decided only with relation to the deed of exoneration and obligation "by Mr. Lowthian to Mr. Mackenzie's trustees. That accordingly, by the judgments "of the Court of Session and House of Peers, it was found, that the obligation being "of a moveable nature must affect the fund of *jus relictæ*, and though it seemed to "have been all along understood that Glover's debt was included under the findings "of these judgments, and indeed must have been the chief and in effect the only cause "of the discussions, yet it seemed doubtful if, in consequence of the bond of corroboration before mentioned, it could be considered as affected by the decision of the "general question."

The Appellants, by leave of the Lord Ordinary, made remarks on this report, under the title of objections; to which the Respondents having answered, the Lord Ordinary pronounced an interlocutor, which, after touching upon other points not necessary now to be stated, proceeded in these terms:—

"As to the fifth point, repels the plea of the objectors, and adopts the view, according to which Glover's debt is made to affect the *jus relictæ* in respect of the judgment "of the Court, affirmed in the House of Lords; and that the Ordinary does not think "himself at liberty to consider whether the circumstance of Mr. Lowthian having "granted [318] a bond of corroboration of Glover's debt was or was not argued on "and considered at the time the said judgment was pronounced, it being unquestionable that the said debt was contained in the list referred to in the obligation "granted by Lowthian, mentioned in the said judgment, and, as observed by the "accountant, must have been the principal, if not the sole cause of agitating the "question."

To this interlocutor the Court adhered, and an appeal was lodged.

It was insisted for the Appellants, that the previous judgments of the Court of Session and House of Lords rested entirely upon the obligation to the trustees of Mackenzie, without any relation whatever to the particular obligation granted by Lowthian himself to Glover, which raised a totally distinct question; and that, this latter bond not being one of the *media concludendi*, the judgment could not be considered as extending to that point so as to render it a *res judicata*. That the plea of competent and omitted did not apply, as the cause was still in Court, and a competent defence, though omitted at the proper stage, might be taken into consideration, if made at any time during the same process. (*Grant v. Grant, Fountainhall.*—*Malcolm v. Henderson, ante.*)

For the Respondents it was insisted that the matter was a *res judicata*, as Glover's debt was included in the list of the debts to which the findings of the judgments referred. That the bond of corroboration, whether dwelt upon or not, was produced in process before any judgment was pronounced; and that the [319] judgments ought not now to be opened up, on an allegation that an argument which might have been founded upon it had been omitted; and that at any rate the bond of corroboration was merely an accessory obligation, which afforded no solid ground of distinction between this and the other debts.

Lord Eldon (Chancellor.) After stating the circumstances. One question in this cause, which had been here long ago, was, Whether the debts of Mackenzie for which Mr. Lowthian had engaged did or did not affect the *jus relictæ* of Mrs. Lowthian, the widow? The Court of Session had decided,—"that the obligation granted by "Mr. Lowthian to the trustees of G. Mackenzie for the price of the estate of Netherwood

"and debts owing by G. Mackenzie, being of a moveable nature, must affect the *jus relictæ*." One of these debts was due to a person of the name of Glover. The obligation was constituted by a deed of exoneration, by which Lowthian became bound to indemnify the trustees, and to pay Mackenzie's debts.

He had looked into the cases as they stood when the cause was before their Lordships in 1797 as to this point,—“that the obligation, etc. by Lowthian to Mackenzie's trustees, being of a moveable nature, must affect the *jus relictæ*.” He had been curious to do this, as he recollected that he had at that bar argued with great zeal, and with too much confidence as he was taught by their Lordships' decision, in favour of Mrs. Lowthian, who had at first claimed under a settlement, or will, which to his dying day he should think was a valid will, [320] except when he thought of it with reference to their Lordships' judgments. He found, that in 1797 it was contended, in one of their reasons of appeal, that the question was the same as if Lowthian had given a corroborative bond to each of Mackenzie's creditors, and then that there could be no doubt that the debts would not affect the *jus relictæ*. Why then, if it appeared that such a corroborative bond had in point of fact been given to Glover, it was to be considered whether this did not so far alter the case.

It appeared from the accountant's report, that a personal bond of corroboration was executed by Lowthian to Glover,—the very case under which, if it had been known, it was supposed the law would be clear,—Lowthian “becoming bound, in corroboration of the heritable security held by Mr. Glover, to make payment to “him of the said sum of £10,000 at the term of Martinmas then next, with interest “and penalty,” etc. If that was to be a payment merely in discharge of the old bond, it would fall under the principle of the former decision; but if it was to be in discharge of the new bond, then it should be considered what was the effect of the payment under this last bond. It was now stated by the accountant, that this bond of corroboration did not appear to have been attended to before, and it seemed doubtful whether, in consequence of that bond, the debt to Glover could be considered as affected by the decision of the general question.

The state of the question then was this:—Their Lordships had decided that the obligation of Low-[321]-thian to Mackenzie's trustees to pay this debt, being of a moveable nature, must affect the *jus relictæ*, though the original obligation was heritable. But if the nature of the obligation had been changed, if the debt and payment were different from what they had been understood to be, that might raise a different question.

It had been argued, that this might have been attended to by the Court of Session and the House of Lords before, as this debt was contained in the list of Mackenzie's debts referred to by the general obligation. If their Lordships had attended to this state of the facts, and decided upon them, then they were now bound by the decision, but not if the judgment did not go that length. The former obligation was one of indemnity. The trustees could claim nothing, except they were damnified; and to this obligation alone the former judgment referred. But if the creditor entered into a new bargain with Lowthian, that raised a new question, which had not before been decided. He was clearly of opinion, therefore, that it was competent to the Court of Session and their Lordships to entertain this new question, without trenching upon any point before decided. As to whether this debt did in fact affect the *jus relictæ*, he had an opinion upon that point; but as the question had not been entertained by the Court below, no judgment could be given upon it here. The only judgment that could at present be pronounced must be to this effect,—to declare that neither the former judgment of the Court of Session, nor that of the House of Lords, imported that, under the circumstances of this case, [322] Glover's debt must affect the *jus relictæ*, and to reverse the interlocutors, so far as they were inconsistent with this declaration.

Judgment accordingly.

Agent for Appellants, CHALMER.

Agents for Respondents, CLAYTON and SCOTT.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SCOTT AND CO.—*Appellants*; M'INTOSH, *Respondent* [May 26, 1814].

[As to militia ballot see *War Office Man. of Mil. Law*, 1899, pp. 210–13, 218, 219, 257, 258, 809.]

[Where a militia ballot was illegally conducted, it was held, that an insurance against the consequences of militia ballots did not bind the insurers to protect the insured against any consequences of such irregular ballot, as it imposed no real obligation to serve or provide substitutes, and as the insurers had a right to avail themselves of the non-liability of the assured.]

The Respondent, in January, 1808, insured with the Appellants against the consequence of any militia ballot for the county of Inverness that might take place between the time of the insurance and the 1st of September following. The premium was paid on the 2d, and the insurance was considered as then effected, though the paper called a policy was not delivered till the 11th. The Deputy Lieutenants [323] proceeded to ballot on the 5th, but having misconceived the provisions of 44 Geo. 3, cap. 54, and 47 Geo. 3, cap. 71, the militia-acts then in force, they estimated the number of men liable to the ballot in the 10th district, where the Respondent resided, at nearly 10 times its proper amount; in consequence of which, every man liable to the ballot was actually drawn. The insurers refused to pay, and an action was brought against them for performance and damages. The Court of Session decided against them, on the ground that the Respondent was not answerable for the mistake of the Deputy Lieutenants. From this decision the insurers appealed.

There was another similar appeal, *Scott v. Macdonald*. The circumstances in both were exactly the same, except that in the one case the person drawn served by substitute, in the other personally.

Lord Eldon (Chancellor.) There was enough in the papers to show that the Appellants had passed from the objection founded on the policy, as it was called, being dated the 11th, some days after the thing called a ballot had taken place.

Suppose the ballot had been regular, if one who was really exempt, without taking any steps to make that exemption available, or giving the insurers the means of doing so, provided a substitute, or served personally, he was afraid such an action as this could not be supported, since the underwriters had a right to his non-liability. Now this thing called a ballot was not a legal proceeding, and imposed no obligation on any body; and in [324] case of any attempt to give effect to it, the Court of Session might, on bill of suspension, give the proper relief.

Judgment of the Court below reversed.

Agent for Appellants, GRANT.

Agent for Respondent, CHALMER.

IRELAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

LOVELAND, on demise of Macnamara,—*Plaintiff* (in Error); LYNCH,—*Defendant* (in Error) [June 1, 1814].

[Mews' Dig. xii. 102. See *Moore v. Butler*, 1805, 2 Sch. & Lef. 255. As to the Irish Popery Acts, which are all repealed, see Howard's "Cases on the Popery Laws."]

[In a certificate of conformity under the Popery Act, 2 Anne, cap. 6, it is not necessary to pursue the precise words of the statute, the terms of the act

being fully satisfied if the fact be sufficiently certified. Thus, where a certificate was questioned on the ground that it did not state in these precise words,—that the party had conformed,—it was held that the certificate, though the word conformed was not in it, was sufficient, since it clearly enough certified the fact.]

Ejectment by Plaintiff Loveland against Defendant Lynch, in the Court of Exchequer in Ireland, T. T. 1792. The Defendant claimed to be entitled to the premises in dispute, (lands of Mackinish, etc. situate in the county of Clare,) under a [325] lease founded on the will (dated July 31, 1748) of Sir Thomas Blake, of Menlogh, Galway. The Plaintiff claimed on the ground of a lease (May 27, 1757) made to his lessor's ancestor by Sir Ulick Blake, son of Sir Thomas. The facts, as far as they are material to the point upon which the decision turned in the last resort, are these :

Sir Thomas Blake,—his father, Sir Walter Blake, being a papist—conformed in 1716, according to stat. 2 Anne, cap. 6, to make his father tenant for life, and to vest in himself the remainder in fee. Sir Ulick Blake, son of Sir Thomas, who had been educated in the popish religion, conceiving his father's conformity to be defective, also conformed in his father's life-time ; and, on the presumption that upon his father's death he held the premises in the ejectment in fee, he, in May, 1757, executed a lease, renewable for ever, under which the Plaintiff claimed. His father, Sir Thomas, had made a will, by which he devised his real estates to trustees, to the use of his son, Sir Ulick, for life ; remainder to his first and other sons in tail male ; remainder to testator's brother, Valentine Blake, for life ; remainder to his first and other sons in tail male ; remainder to Thomas Blake, of Brendrim, who, on the death of Sir Ulick, in 1766, entered into possession, Sir U. and Valentine Blake having died without issue male. This Thomas Blake, of Brendrim, in 1776, executed the lease under which the Defendant Lynch claimed ; his title to do so depending on the validity of the devise by Sir Thomas Blake, which depended on the sufficiency of the conformity in 1716.

[326] The only question was as to the sufficiency in point of form of the Archbishop's certificate, all the other steps having been indisputably regular. The alleged defect in Sir Thomas Blake's certificate was, that it did not pursue the words of the act, and state in express terms that he had conformed.

On trial at bar, in April, 1799, the jury found for Plaintiff in error, the Court of Exchequer being of opinion that Sir Thomas Blake's certificate of conformity was defective ; but on error brought in the Exchequer Chamber, this judgment was reversed, upon which last judgment error was brought in the House of Lords.

For Plaintiff in error it was insisted, that the act 2 Anne, cap. 6, must be strictly complied with ; that it was essential that the certificate should state—as Sir Ulick's did—that the party did conform to the church of Ireland (Cockburne v. Hussey, 1792. Ridg. P. C. 510.—Farrel v. Tomlinson, 5 Bro. P. C. 524.—Swann v. St. Stephen's Hospital, 5 Bro. P. C. 454.—Hobson v. Meade, 6 Bro. P. C. 197.—O'Grady v. Lord Kinsale, 6 Bro. P. C. 284.) That there was nothing on the face of Sir Thomas Blake's certificate that rebutted an occasional conformity ; and that such certificates might defeat the object of the law, which was to secure constant, and not occasional conformity. That a certificate of profession of the faith of the church of Ireland by the party was not sufficient, and did not preclude evidence of his still continuing a papist, (Moore v. Butler, before Lord Redesdale, 2 Sch. and Lef. 255–263 ;) that a case had been cited below from Howard's Popery Cases, Blake v. Blake, where it was stated, that it was essential to pursue the words of the statute.

For Defendant in error it was contended, that by the statute no particular form was made necessary, and that it was sufficient if the fact were certified. [327] That the case of Moore v. Butler did not apply, as that was a case of relapse after conformity. That Lord Kilwarden had said, that Howard's book was one of no authority ; and that the question had in fact been already decided, in a case which arose in this very family, and was here on appeal in 1719. (Blake v. Blake, 2 Bro. P. C. 350.—5 Bro. new ed. 384,) where the sufficiency of this certificate was assumed as the basis of the proceedings.

Adam and Romilly for Plaintiff in error ; Walton for Defendant in error.

Lord Redesdale. There were many points in the case, but if their Lordships

thought that the certificate could be supported, he apprehended that it would not be necessary to go into the other points. The certificate was as follows :—

"These are to certify, that Thomas Blake, Esq. of the diocese of Tuam, son of Sir Walter Blake, of the city of Dublin, having made profession of the faith and religion of the church of Ireland, by law established, and renounced the errors of the church of Rome, was this day received into the communion of the said church of Ireland, in the parish church of Headfort, in the said diocese, by me, Edward, Lord Archbishop of Tuam, and that the said Thomas Blake is a protestant. In witness whereof, I have hereunto put my hand and seal, this 23d day of December, Anno Domini 1716.
"EDWARD TUAM. (L. S.)"

[328] There were several other instruments following upon this—his father being a Roman Catholic—to enable him, according to the popery laws then existing, to take the vested remainder in fee in this estate. This certificate was given at no great length of time after the act had passed, and the question was, Whether it did in reality certify the conformity? Did the statute provide any particular form? for the only consideration was, whether the certificate was sufficient in point of form.

Sir Ulick Blake conformed, thinking the conformity of his father not sufficient, and his certificate was in these words :—

"Charles, by Divine Providence, Lord Archbishop of Dublin, Primate and Metropolitan of Ireland, to all whom these presents may concern, greeting: We do hereby certify, that Ulick Blake, of the city of Dublin, Esq. hath before us renounced the errors of the church of Rome, and was by our order received into the communion of the church of Ireland, on the 11th day of February, 1748, and that the said Ulick Blake is a protestant, and doth conform to the Church of Ireland, as by law established. In witness whereof, we have caused our manual seal to be affixed to these presents, this 11th day of February, in the year of our Lord 1748 aforesaid.
"C. DUBLIN. (L. S.)"

The difference consisted in this, that Sir Ulick Blake's certificate stated that he did conform to the church of Ireland, as by law established. The other [329] certificate certified the same thing, though not in the same words, and the statute had prescribed no particular form. It stated, that Thomas Blake, having "made profession of the faith and religion of the church of Ireland, by law established, and renounced the errors of the church of Rome, was received into the communion of the said church of Ireland," etc.

The act to be done was to be done at one time, and the question was, Whether this was not all that was necessary? Conforming, and continuing to conform, were two different things. (Moore v. Butler, 2 Sch. and Lef. 255.) Then the question was, Whether this certificate did not show that all had been done which was meant by the word conform in the act? Sir T. Blake agreed to the articles of the established church, and he (Redesdale) believed this was what was required from persons admitted to orders. They made profession of the faith of the church, and subscribed the 39 articles as evidence of it. The next words were corroborative of the preceding,—"he renounced the errors of the church of Rome;" and then the certificate stated, that he had been "received into the communion of the church of Ireland." The Archbishop conceived that he had done all that was necessary to show that he conformed.

On these grounds he thought the certificate sufficient, and then, if their Lordships were of that opinion, no question would arise as to the other points. The possession appeared to have been constantly held under the will of Sir Thomas Blake, and certainly it would be a strong act to hold, after possession for this length of time, that the certificate [330] was not sufficient. It might be recollected, that a case in this very family, had been cited as having come before their Lordships, where, though the conformity was not brought directly into question, the whole proceeding was founded upon his having conformed. A case had been cited from Howard's Popery Laws, (Blake v. Blake, 2 Bro. P. C.) where the word conform was stated to be necessary. But he was a man of no great eminence in his profession, and whether the account of the case was good or bad, they could not very well know.

It did not seem necessary then to enter into the other points, though they would

require consideration unless their Lordships agreed with him in this view of the case. His opinion was, that the judgment of the Exchequer Chamber ought to be affirmed.

Lord Eldon (Chancellor.) He agreed in the opinion, that the judgment ought to be affirmed. The question was, Whether this was a sufficient certificate of conformity. There was no case of authority to show that the certificate must say in express words that the party had conformed. If it certified the fact, that fully satisfied the terms of the act.

Judgment affirmed.

Agent for Plaintiff in error, WATKINS.

Agents for Defendant in error, MEGGISON and FAIRBANK.

[331] IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

CHADWICK,—*Appellant* ; BRADSHAW,—*Respondent* [June 1, 1814].

[Bill for specific performance against several Defendants, to one of whom the subject in dispute had been devised by Plaintiff's ancestor. This Defendant, however, by his answer, and on examination as a witness in the same cause, declares himself only a trustee for Plaintiff. Decree in Irish Exchequer, that the beneficial interest was in this Defendant. Held by the House of Lords on appeal, that the deposition of the Defendant as a witness ought not to have been received, and that the decree was wrong in declaring the beneficial interest to have been in a Defendant who admitted that he was only trustee for Plaintiff ; for if the beneficial interest had really been in the Defendant, Plaintiff had no right to file the bill, and the course would have been to have dismissed it. Decree varied accordingly.]

William Chadwick, (the Appellant's father,) being entitled to certain lands called Longstone, etc. in the county of Tipperary, under a lease for three lives, renewable for ever on payment of a year's rent on the renewal of each life, in December, 1753, entered into an agreement with Robert Bradshaw, Respondent's ancestor, to grant a lease of the lands to Robert Bradshaw, for three lives, at the rent of £1 per acre, the lease to contain a covenant for perpetual renewal at a pepper-corn fine on the fall of each life. This agreement was registered in proper form on 12th February, 1754. No lease, [332] however was executed in pursuance of this agreement. Robert Bradshaw died in 1779, leaving his brother, David Bradshaw, his heir at law, but having previously made a will, by which he devised and bequeathed all his real and personal property to one William Hiffernan, subject to the payment of his debts and legacies. Hiffernan declined to prove, or avail himself of the will. The agreement having come into Hiffernan's hands, was by him delivered to one Scott, an attorney, to be produced in some equity cause, by whom it was mislaid, or lost. Robert Bradshaw's creditors took possession of the lands in question. David Bradshaw died, having devised and bequeathed his real and personal property to Hugh and Edward Lloyd, as trustees for his son, Joseph Bradshaw, the Respondent. William Chadwick having died in 1803, his son, Richard Chadwick, the Appellant, in 1805, brought his ejectment in the Court of Exchequer to recover possession of the lands, to which—as no lease had been executed pursuant to the agreement—the Respondent could make no defence at law. But, in March, 1805, he filed his bill on the equity side of the Exchequer, against Richard Chadwick, Hiffernan, and Edward Lloyd, surviving trustee under David Bradshaw's will, praying a specific performance, by the execution of a lease to Joseph Bradshaw, or to Hiffernan, in trust for him and the creditors of Robert Bradshaw. Chadwick, in answer, denied that the alleged agreement had ever existed, or, if it ever had existed, he insisted that it had been

unduly obtained. Hiffernan admitted Bradshaw's title, and declared himself a trustee for him. [333] Lloyd also having answered, witnesses were examined, and among the rest Hiffernan, who gave the above account of the agreement, and a copy of it being produced, he did not take upon him to swear that it was a true copy. The existence of the agreement had however been admitted on oath in more than one cause in the Court of Chancery by the Appellant's father. Hiffernan also admitted that he was assisting the attorney for the Respondent with money to carry on the suit.

"The Court of Exchequer, on the 17th of June, 1809, decreed, "that the said Defendant, William Hiffernan, as devisee of the said Robert Bradshaw, deceased, "was entitled to the beneficial interest in the lands and premises in the pleadings "mentioned, subject to the debts, legacies, and other incumbrances mentioned in "the will of the said Robert Bradshaw, and the said Defendant, William Hiffernan, "was decreed entitled to a specific execution of the covenant for perpetual renewal, "said to be contained in the alleged article of 1753; and that the Appellant, the said "Richard Chadwick, should execute a lease to the said Defendant, William Hiffernan, "at the rent mentioned in the said articles of the 29th day of December, 1753, for "the lives in the Plaintiff's bill mentioned, and upon payment of all rent and arrears "of rent due out of the said lands and premises, and that it should be referred to the "officer to take an account of the said rent and arrears of rent, and also to take an "account of what the Appellant, the said Richard Chadwick, had made, or without "wilful default might have made, since the [334] execution of the *habere* in the "pleadings mentioned, and to set one off against the other, and strike a balance; "and that an injunction should issue to put the said William Hiffernan into possession "of the lands and premises in the pleadings mentioned, and to quiet and establish "him and them therein from time to time, as occasion should require."

From this decree Chadwick appealed, and Bradshaw having died—his son entered his cross appeal against the decree, in as far as it declared the beneficial interest to be in Hiffernan, and not in himself.

Romilly and Trollope for Appellant in original, and Respondent in cross appeal. Leach and Wingfield for Respondent in original, and Appellant in cross appeal.

Lord Redesdale. This case was founded on an agreement between the father of Chadwick and Robert Bradshaw for a lease of certain premises to the latter for lives renewable for ever at a fixed rent and the payment of a pepper-corn fine; and the rent and fines remaining therefore the same, there was no question about them. Chadwick permitted a long enjoyment by the Bradshaws, with whom the lands continued till the time of the ejectment, to which, as no lease had been executed pursuant to the agreement, no defence could be made at law.

Then the bill was filed, stating the agreement in 1753, and its registration in 1754, so that it was [335] binding, if there was no ground for avoiding it.—the registration there giving a priority to equitable contracts, which was not the case in this country; stating also the devise by R. Bradshaw to Hiffernan, who admitted himself to be only a trustee for David Bradshaw, and praying an injunction, and execution of a lease, pursuant to the agreement, to Joseph Bradshaw, (son of David Bradshaw,) or to Hiffernan, in trust for him. The objection was, that the agreement was not produced, and that there was no such agreement; and that if there had been any such, there was reason to presume, from the length of time that had elapsed without an attempt to carry it into execution, that it had been obtained by undue means. The bill was amended by making Lloyd, surviving trustee under David Bradshaw's will, a Defendant. Hiffernan by his answer admitted his being only a trustee. He was also examined as a witness, and proved that the article had existed, but did not swear that a paper produced and purporting to be a copy was a true copy; and he stated that he had assisted the Plaintiff's attorney with money to carry on the suit. It appeared to him that Hiffernan's deposition ought not to have been admitted in the cause, but however it was read, and then it was ordered and adjudged, (states the decree, *vide ante*.) This decree was appealed from, and Joseph Bradshaw and William Hiffernan and Lloyd having died, the appeal was duly revived; and David Bradshaw, the son of Joseph Bradshaw, entered his cross appeal against the decree, so far as it declared the beneficial interest to be in Hiffernan.

[336] The objection to the decree was, that there was no evidence of the agreement.

Hiffernan's evidence having been improperly admitted ; and that the decree had been made, not in favour of the Plaintiff, but in favour of Hiffernan, a Defendant.

As to the existence of the paper-writing or agreement, that had been clearly proved, as Chadwick's father had admitted it in an answer in Chancery, and had filed a bill upon the foundation of it, supported by an affidavit stating the agreement, so that there could be no doubt or question as to that.

The next objection was to the form of the decree, stating the beneficial interest to be in Hiffernan, subject to the debts, etc. If Hiffernan had the beneficial interest, the bill was improperly filed by Bradshaw, who had no interest ; and no decree could properly be made against one Defendant in favour of another on a bill filed by a person who had no interest ; and so far the decree was wrong. But Hiffernan having declared himself merely a trustee, the consequence was, that the beneficial interest was in those claiming under David Bradshaw, who had devised to Lloyd in trust for Joseph Bradshaw, the Plaintiff ; and consequently Joseph Bradshaw had a right to file the bill, as the interest was in him, subject to the debts and legacies of Robert and David Bradshaw. So that, though wrong in form, the decree was not so in substance, and the cross appeal had brought that point before their Lordships. Hiffernan was entitled as trustee for David Bradshaw and his representatives, subject as above,—the ultimate interest being in Joseph Bradshaw. Then it would be proper that the decree [337] should be varied in these particulars, by declaring, that the deposition of Hiffernan as a witness ought not to have been received in evidence at the hearing of the cause ; that the representatives of Robert Bradshaw were entitled to the benefit of the contract, such contract appearing to have been admitted by Richard Chadwick's father in an answer to a bill in Chancery, and Hiffernan also admitting that he was merely a trustee, etc. ; that the representative of Joseph Bradshaw was entitled to the ultimate interest, subject as above ; and that a lease should be executed in trust for these purposes.

Lord Eldon (Chancellor.) He had no doubt but the decree was perfectly wrong in form. The bill had been filed by the Plaintiff on the ground that the beneficial interest was in him. The decree was, that it was in a Defendant ; and if so, the course would have been to have dismissed the bill.

Two objections had been stated at the bar :—1st, That the agreement had never existed. 2d, That the evidence of Hiffernan ought not to have been admitted ; and it was singular, certainly, if they had made Hiffernan beneficially entitled on his own evidence. But it clearly appeared that the agreement had existed, though the evidence by which that fact was proved seemed to have come by surprise on the Counsel. The proof of its existence did not depend at all on the evidence of Hiffernan, which he agreed ought not to have been received.

But then it was said, that the Plaintiff had not the beneficial interest at the time of the bill filed ; and that Hiffernan having declared himself a trustee since was not sufficient. But the answer was, that [338] if Hiffernan, the devisee, did not choose to take the beneficial interest, it was proper that the heir at law should take it ; and therefore the decree was substantially right.

Decree altered accordingly, and affirmed.

Agents for Appellant, CANNON and GARGRAVE.

Agents for Respondent, FEW, ASHMORE, and HAMILTON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LORD SEAFORTH,—*Appellant* ; HUME,—*Respondent* [June 15, 1814].

[See *Fraser v. Chisholm*, 1814, 2 Dow, 561, *post*. p. 967.]

[The possession of shealings very strong evidence of the right, in questions of Highland boundaries. The circumstance that the burying of charcoal

is a common mode of [marking Highland boundaries questioned, on account of its apparent inaptitude in a country of that description.]

This was a conjoined process of declarator and suspension, instituted by the Respondent, to have the proper boundaries in the island of Lewis ascertained between himself and the Appellant. On Lord Seaforth's part, there was evidence of an agreement between his ancestor and Hume's predecessor, that the march should be settled in the line contended [339] for by him. On Hume's part, there was evidence of an understanding along the boundaries, that the line of march which he contended for was marked by buried charcoal, by the remains of a cairn, and by a stone with an inscription which had been removed. On both sides there was evidence of possession by shealings, but mutually disturbed; the Seaforth tenants having gone so far as sometimes to destroy the shealings of the other tenants. The Court of Session decided, that the parties had an equal right and interest in what was called Seaforth, or Mulag Island, but that the Respondent had an undoubted right to the other grounds in dispute. From this decision an appeal was lodged. The case is mentioned here merely for the purpose of introducing certain general observations made in the speeches in judgment on evidence as to Highland boundaries.

Lord Redesdale. In a country of this description, with which he was perhaps better acquainted than any noble Lord in the House, the possession of shealings was probably the strongest evidence of the right; and in the case of *Fraser v. Chisholm*, (*vide post*.) the judgment of the Court of Session was in a great measure founded on it: he himself knew that it must be a material circumstance.

One circumstance had been much relied upon, which appeared extraordinary to some of their Lordships at the hearing of the cause: viz. that charcoal had been found in a certain spot in the line contended for by the Respondent, and Dr. M'Leod, one of the witnesses, stated that this was a common way of marking boundaries in the Highlands. The [340] witness stated that he had so heard, without apparently having much knowledge of his own on the subject. But if the nature of the country were attended to, it must appear obviously improbable that the burying of charcoal should be a common mode of marking Highland boundaries. They were generally marked by natural objects, such as lakes, rivers, and ridges. But when they came to a spot where there were none such, they must take an imaginary line, marked by the eye thrown from one visible point to another, as without this it was impossible to know precisely whether there was a trespass. A man standing on one bounding point marked a straight line with his eye to another, and he had seen herds with their dogs marking out the line in this manner, the dog appearing to be almost as well acquainted with it as his master. Charcoal never could answer this purpose. The only purpose which it could serve in this way must be to mark where a stone might have been erected to point out the boundary.

There was great doubt to which of the parties the property belonged, and he could not assent to the proposition, that the Respondent had an undoubted right to all the lands in dispute (except the island of Mulag.) He was the Pursuer, and was bound clearly to make out his right. It had been found that the parties had an equal interest in the island of Mulag. That was founded on their intercommoning, and on possession by both; and if the Court below had said that they had an equal interest in the other grounds in dispute, he could not have said that the judgment was wrong. But when they [341] said that Hume had an exclusive right, that was against the evidence of possession, which was not satisfactorily rebutted by other evidence. He therefore thought it would be most proper to remit to the Court of Session to review the judgment, and to consider whether the parties had not an equal right to the lands in dispute,—not on the ground of such having been originally the case, but because, in consequence of their intercommoning, and the nature of the situation, each party had gained a sort of prescriptive title. An order would be framed adapted to these ideas.

Lord Eldon (Chancellor.) It was quite impossible adequately to represent the distress of mind which he suffered in endeavouring to form an accurate judgment upon such evidence as this. He was not acquainted with countries of this description, as his noble friend was, and when the question came to depend upon Scotch hills, and charcoal, and such matters, he was afraid that he might not sufficiently com-

prehend the proper import of the evidence. The inclination of his mind was, that Seaforth's was the better evidence. But at least, if this matter were to be tried by a jury, as it would have been here, he should think it reasonable in such a case to grant a new trial,—not because he was satisfied that the verdict ought to be different, but on account of the difficulty of collecting the true effect of the evidence; and the proposed mode of proceeding was as near this as any that could be adopted.

Lord Redesdale. On reconsidering this case, it seemed a question attended with so much difficulty, [342] that the best mode of proceeding appeared to be, to remit the interlocutors for review generally, rather than to remit with any particular declaration or direction.

Judgment of remit accordingly, to review generally.

Agent for Appellant, MUNDELL.

Agent for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HEPBURN,—*Appellant*; BROWN, and Others,—*Respondents* [June 6, 1814].

[A deed or contract between husband and wife, which is in substance a gratuitous settlement upon the wife, or a pure donation on the part of the husband, is revocable by him,—*secus*, if it be a mutual contract between husband and wife, for consideration or onerous cause; or if it be only a rational provision, under the circumstances, for the wife; and the Court will not weigh in nice scales what is, or is not, too much. Therefore, where a mutual contract was entered into between a farmer and his wife, by which the survivor (there being at the time no children) was to have the absolute disposal of the whole of their property, of every description, with the exception of the lease of a farm on the one hand, and a small reversionary interest on the other—the husband having, at the time of the marriage, only a share of the stock (the whole stock being worth about £1000) of a farm, of which, soon after the marriage, he got a lease, (excepted as above,) and some time after, [343] and before the contract, became entitled, in right of his wife, to a sum of £375 left her by her father, together with the reversionary interest excepted as above—it was held by the House of Lords, reversing the decision of the Court of Session, that, under these circumstances, her assignation and disposition to her husband of all (except as above) that she possessed, was, or might become, entitled to—her relinquishment of her rights at law—her binding herself to provide well for the children, if any there should be—formed a sufficient consideration on her part, and that the husband alone was not entitled to revoke the contract; the Lord Chancellor at the same time intimating an opinion, that, under the circumstances, the provision made for the wife by the contract could not be considered as excessive, though the parties afterwards accumulated property to the amount of about £5000.]

George Cunningham, the son of a farmer in the county of Haddington, intermarried with Agnes Hepburn, the daughter of a neighbouring farmer, in 1761,—no previous marriage contract having been made between them. At the period of the marriage, George Cunningham lived with his mother, and, in the absence of an elder brother, managed a farm belonging to the family; the father being then dead, having left no other provision for his widow and children than the lease and stock of the farm. The stock was worth about £1000, and the lease expired in 1763. What share of this fund belonged to George Cunningham did not appear: but in 1763 he got a new lease of the farm on his own account, and the stock was valued

over to him. In 1774 he became entitled to a sum of £375 in right of his wife, her father having died, leaving her that sum, together with the reversion of the share of an imbecile sister.

[344] In 1775—there having been no ante-nuptial contract—a deed was executed for the purpose of regulating the interests of the parties. By this deed it was stipulated between the husband and wife, that the longest liver of the two should have the absolute property and disposal of all that might belong to them at the dissolution of the marriage, with the exception of the husband's lease on the one hand, and the wife's eventual right to the patrimony of her sister on the other.

Cunningham and his wife had accumulated considerable property for persons in their line of life before 1783, the period when the lease expired. They then—having no children—removed to Haddington, where they lived till the death of G. Cunningham, in 1803.

In 1795 G. Cunningham executed a testamentary instrument, or trust deed, by which he assigned and disposed all his moveable and heritable property to his wife, in life-rent; then to trustees, for payment of debts and legacies, satisfaction of his wife's life-rent, and then for behoof of one George Milne, of Sydeserf, as residuary legatee; and he revoked the former settlement, which he stated as having been lost or mislaid, but which afterwards turned out to have been in the possession of his wife. In 1801 he purchased a house in Haddington, which he disposed to his wife in life-rent, and to G. Milne in fee. Cunningham died in January, 1803, and Milne in December, 1803, having executed a trust disposition in favour of the trustees under Cunningham's latter settlement.

Upon the death of George Cunningham, his wi-[345]-dow produced the deed of 1775, and brought an action of reduction to set aside the subsequent settlement. In the course of the proceedings Mrs. Cunningham died, and William Hepburn, (the Appellant,) executor of her will, sisted himself as a party. The Lord Ordinary pronounced this interlocutor:—

" Finds, that the post-nuptial contract betwixt the late George Cunningham and the Pursuer, Mrs. Agnes Hepburn, was in substance a gratuitous settlement by Mr. Cunningham upon his wife, which, *quoad excessum* of a rational provision, he was entitled to revoke: Finds, that said settlement was effectually revoked by him, by the deed of date 20th May, 1795, which also contains a rational provision in favour of the Pursuer; and therefore assolizies from the reduction at the Pursuer's instance, sustains the defences, and decerns."

To this interlocutor the Court adhered, and an appeal was lodged.

Something was said as to the deed of 1775 not having been properly delivered, and as to the wife having infringed it by applying to her own exclusive use acquisitions which, under the deed, ought to have been brought into the common fund. But these circumstances were not much relied upon in argument, and not at all in judgment.

Argued for Appellant. (Adam and Horner.)—The question was, Whether this was a gratuitous donation which the husband alone might revoke, or a mutual contract which he could not revoke with-[346]-out consent of the wife? The law made a contract for the wife, if she made none for herself. The conventional provision might be executed antecedent or subsequent to the marriage. If antecedent, it had as a consideration the marriage itself,—the highest consideration, though there might be an additional consideration. A post-nuptial marriage contract was a contract of which marriage was the consideration, and not a donation. If the Lord Ordinary was right in the first part of the interlocutor, he was wrong in the second. The interlocutor stated, that where, in case of a gratuitous donation, there was an excess beyond what was reasonable, it ought to be set aside so far. But if revocable at all, it must be entirely so, and the only effect would be, to restore the wife to her rights at law. But the judgment was wrong in applying the rule of law to the circumstances of this case. The deed could not be revoked entirely but by both parties, and the husband could not revoke it in part, as it was not unequal or irrational. In Scotland there might be a contract between husband and wife. The husband had the right of administration, but the contract was good; and in Kames's Dictionary there was a distinct title, under the head of Mutual Contracts between Husband and Wife.

It was quite clear that the wife had the power, by such a mutual remuneratory contract as this, to disappoint her next of kin; and this therefore raised a consideration. The point was clearly established in Crawford's case. The contract was besides a disposition of her heritage, in case she had acquired any.

[347] As to the question of excess, the contract was sufficiently reasonable. The wife, it ought to be kept in view, was entitled to half the goods in communion. It had been said, that she had no property at all in this fund till her husband's death. This was not true, though the husband, no doubt, had the absolute management. Cunningham's property at the time of the marriage was wholly of that description which belongs to married persons jointly, the half of which, on the death of the wife, passes to her representative, or next of kin, exclusive of the husband, if she had not renounced or disposed of the right. The renunciation was an important consideration; for otherwise, in case of her pre-deceasing him, the consequence might to him have been ruinous. It was in vain to say that he might have invested the common property in securities excepted by the law from the *communio bonorum*. To have done so purposely would have been fraudulent and injurious to the husband himself. The contract was not then in substance a gratuitous settlement on the wife. Besides, the wife was certainly not entitled to revoke what she had thereby granted or renounced; and if it was irrevocable by the wife, and good against her representative, it was difficult to contend that it was revocable by the husband. (*Palmer v. Bonnar*, Fac. Coll. Jan. 21, 1810.) There existed a great number of contracts resting on the security of the law as stated for the Appellant, and it would make wild work if that law were now subverted.

The following decisions, which have settled the law upon this subject, are to be found collected and abridged in the Dictionary of Decisions, (*voce* Hus-[348]-band and Wife,) vol. i. p. 410, as follows:—A post-nuptial contract of marriage is not reducible as a *donatio inter virum et uxorem*. (*Stair*, Nov. 2, 1664, *McGill v. Ruthven*.)—The like, though the contract was so far unequal, that it was found reducible by the wife upon minority and lesion. (*Forbes*, July 25, 1710, *Chalmers v. Husband's Creditors*.)—A mutual general disposition betwixt a wife and her husband during the marriage, no contract having preceded, is no *donatio*, even *quoad excessum*. (*Bruce*, M. S. July 31, 1716, *Sterling v. Crawford*.) In another case, a bargain betwixt husband and wife during the marriage, whereby a contract of marriage was first passed from, and the longest liver to brook (have right to) all, was found onerous, and not revocable as *donatio*. (July 13, 1733, *Shearer v. Somerville*, Dict. vol. i. p. 411.)—A case decided in the end of 1798, or beginning of 1799, but which has not been reported. *Kelly v. Executors or Relations of Smith*, was determined upon the same principles. (*Vide* also case of *Chisholm*, Jan. 26, 1669, Dict. 6137.—*Lauriston v. D*——e, 1635.—*Haliburton v. Porteus*, 1664.—*Macpherson v. Graham*, Kilk. (Dict. 6113.)—*Inglis v. Lorimer*, 1676.—*Stair*, b. 1. t. 4. s. 18.—*Bankton*, b. 1. t. 5. s. 96.—*Erskine*, b. 1. t. 6. s. 29, 30.)

Argued for Respondents. (*Romilly and Abercromby*.)—Every deed between married persons, whatever be its form, is revocable by the donor, if it be gratuitous, or imports a donation. (*Ersk.* b. 1. t. 6. s. 29, 30.) Mutual remuneratory grants are binding on both parties, but [349] where the onerous cause is simulated, and a donation appears to be intended, the grant is revocable as a pure donation. There was no foundation for the distinction suggested as to post-nuptial contracts of marriage. In the cases referred to by the Appellant, the question was, whether the deed imported a donation. (*Children of Woolmet*, *Stair*, Nov. 20, 1662.) This question was lately decided in the case of *Steven v. Dunlop* (Feb. 1, 1809.)

This previous deed was clearly gratuitous, as the husband received nothing except that to which he was entitled by virtue of the marriage. But a valuable consideration was farther attempted to be raised, by contending that a wife was entitled to her share of the goods in communion, and that by the deed in question Mrs. Cunningham relinquished such right.

A wife, however, has no actual or indefeasible right to the goods in communion. Her husband may lay out the whole of them in the purchase of land, or upon bonds bearing interest, by which the right of the wife is altogether excluded. But he cannot by will, or any deed which is not to take effect until his death, disappoint either her, or his children, of their respective rights: viz. her of her *jus relicte*, (which, on the

event of there being children, amounts to a third, and in the event of there being no children, to a half of the property, which is termed simply moveable,) and children of their legitimi, which is in the same proportion. But a wife has not, more than her children, any thing in virtue of this right which she can convey. She has a mere *spes successionis*, which may be destroyed by the husband during his life-time, but [350] cannot be defeated by any instrument which is not to take effect until his death. She herself cannot even divest herself of this right; for if the provision made for her by any post-nuptial contract of marriage, to which she was a party, should appear not to be equal to her legal claims, it is unquestionable that she may reject the provision, and betake herself to her legal claims. Nor can a wife divest herself during the marriage of any right to which she is entitled. (*Maclelland v. Executors of Hathorn*, Dec. 22, 1758.—*Watson v. the Executors of Gordon*, June 17, 1774.—*Scott v. Lady Cranstoun*, August 10, 1776.) Mrs. Cunningham's right therefore to the goods in communion raised no consideration by which the deed in question could be supported.

Lord Eldon (Chancellor.) The case stated was this:—In 1761 George Cunningham and Agnes Hepburn intermarried. At this time the fortune of the Cunningham family consisted of the stock and produce of a farm, worth altogether about £1000, to some part of which George Cunningham was entitled. In 1763 he got a lease of the farm on his own account, and his wife, on the death of her father, became entitled to £375 and a reversionary interest in the share of a sister. This was a fortune which was said, for their situation in life, to be considerable.

Prior to the marriage there had been no contract executed; but in 1775 they agreed to regulate the interests that might be affected by the death of either of them. Their Lordships knew, that by the law of Scotland, the wife, at the death of the [351] husband, was entitled to half the goods in communion, unless it had been otherwise settled; while, by the death of the wife, the husband was deprived of the half of these goods, which went to her next of kin. They therefore agreed, that the survivor of them should have the whole, except his lease on the one hand, and the patrimony of her sister on the other; and a deed was accordingly executed, and recorded in the Sheriff Court of Haddington.

By this deed, " it was contracted, agreed, and ended, between George Cunningham, " farmer in Whitekirk, on the one part, and Agnes Hepburn, his spouse, on the other " part, in manner and to the effect following; that is to say, The said parties, consider- " ing that they have been married several years without child or children now existing, " and without having hitherto entered into any contract or other settlement, whereby " the said Agnes Hepburn is not secured in a provision or share of her husband's means " and effects, as her merits, and his inclination and regard, entitle her to, and as has " been communed and agreed upon between the said parties since their said marriage: " in contemplation whereof, and the assignation to the tocher and others aftermen- " tioned, the said George Cunningham, by these presents, with and under the provision " after specified, assigns, transfers, and disposes from him, his heirs, executors, and " all others his assignees, to and in favour of himself and the said Agnes Hepburn, " his spouse, in conjunct life-rent during their joint lives, and to any child or children " to be procreated between them in fee: whom failing, to him, the said [352] George " Cunningham, and Agnes Hepburn, spouses, and longest liver of them two, his or " her nearest heirs, executors, or assignees, in fee, all and sundry goods, gear, and " effects, debts, and sums of money, etc. and every other moveable subject, heirship " moveables included, that shall happen to pertain and belong, or be addebted and " owing to him by any person or persons, by bonds, bills, etc. or any other manner " of way, at the time of the dissolution of the said marriage: and the said George " Cunningham hereby nominates and appoints the said Agnes Hepburn, his spouse, " in case she shall survive him, to be his sole executrix, hereby secluding and debarring " all others from that office: and in like manner the said George Cunningham binds " and obliges him and his foresaids to provide and secure all and whatever lands, " tenements, annual rents, wadsets, adjudications, apprisings, or other heritable sub- " jects or debts, that shall be conquest or acquired by, or shall fall to him during the " life-time of his said spouse, (his lease or leases of the said farm of Whitekirk excepted.) " to and in favour of himself and her in conjunct life-rent during their joint lives, " and to any child or children that shall happen to be procreated between them, in

" fee ; which failing, to him, the said George Cunningham, and Agnes Hepburn, spouses, and to the survivor and longest liver of them two, her or his nearest heirs, executors, or assignees, in fee, as said is ; and he binds and obliges him and hisforesaids to warrant the premises from all facts and deeds done or to be done by him or them [353] prejudicial thereto : provided always, as it is hereby specially provided and declared, that the said Agnes Hepburn shall be bound and obliged, in the event of her surviving the said George Cunningham, to pay all his just and lawful debts and funeral charges, and to aliment, educate, and sustain the child or children of the said marriage, if any be, as well as to put them to decent trades or employments, and at their majority or marriage to make payment to them of a share or proportion of the goods and gear in communion, equal to a half thereof, in such proportions as the parties shall agree, and failing thereof, to be divided equally among the said children, if any be ; which provisions above mentioned (under the declarations and stipulations aforesaid) the said Agnes Hepburn accepts in full of all terce and third of lands, third or half of moveables, that might or could fall to her by her said husband's death, or which her heirs, executors, or nearest of kin, can claim by her own decease, in case he survives her."

The obligation on the part of the husband, then, was to permit her to succeed to his whole property (except as far as concerned the lease) if she survived him. She accepted of this in lieu of her terce and half, and became bound, in case they should have any children, to aliment, educate, and put them out to trades, and to pay them a share of the goods in communion, equal to a half of the whole.

On her part she " assigns, transfers, and disposes,"—and on that last word some of the Judges had put a comment, as if she meant to bind her [354] real property,— " from her, her heirs, executors, and all others, her assignees, to and in favour of herself and the said George Cunningham, her husband, in conjunct life-rent during their jointlives, and to any child or children that shall happen to be procreated betwixt them, in fee ; which failing, to her, the said Agnes Hepburn, and George Cunningham, spouses, and to the survivor and longest liver of them two, his or her nearest heirs, executors, and assignees, in fee, all and sundry goods, gear, and effects, debts, and sums of money, and every other thing, of whatever kind or denomination, which presently do or may, during the standing of their said marriage, fall, accrue, pertain, and belong, or be addebted and owing to her, by any person or persons, by bonds, bills, conveyances, or otherwise, with all action, instance, and execution, competent thereon, and particularly without prejudice to the generality aforesaid, all and whole the sum of £375 sterling, (or such part thereof as is not already paid,) being her tocher, share, and proportion, of her said father's means and effects, and to which she has right on or through his decease, conform to his last will, settlement, and deposition, dated, etc. or other writs granted by her said deceased father for that effect ; together with the said bonds, bills, conveyances, or other writings, and all that has followed or may follow thereon, obliging her and her foresaids to warrant the premises from all facts and deeds done, or to be done, by her or them, prejudicial hereto, in any sort : it being the will and intention of both parties that the longest [355] liver of the two shall bruik and enjoy, and have the free and absolute property and disposal of all that shall belong to them, or either of them, at the dissolution of the marriage, by the death of either party."

Then followed an exception as to her wearing apparel, etc. and her eventual interest in the provision made for her sister.

They lived many years after, and the husband, without consent of his wife, in 1795, executed another deed, which was as follows :—

" Considering that upwards of thirty years ago I executed a settlement, which has since been lost or mislaid, whereby, to the best of my recollection, in the event of no children existing at the dissolution of the marriage between me and Agnes Hepburn, my present spouse, all our means and estate were conveyed and to be taken up and enjoyed by the longest liver of us, and the heirs and successors of the longest liver : and whereas, notwithstanding the said Agnes Hepburn has already considerable sums of money in her own right, provided to her exclusive of my *jus mariti*, the interest of which sums she has for several years applied to her use ; yet it is nevertheless incumbent on me to make a suitable and rational provision for her in the event before mentioned." On this narrative, the instrument purports to assign and

dispose to Mrs. Cunningham, in life-rent, and upon her decease, to George Robertson, Robert Brown, and Walter Lockhart, and the survivor and survivors of them, and their assigns, in trust, the [356] whole property and effects the testator should die possessed of ; and the purposes of the trust are, that his said wife, whom he appointed his sole executrix, should turn his property into money, and apply the same, 1st, in payment of his debts ; 2d, in payment of an annuity to his wife ; 3d, at her decease, in payment of certain pecuniary legacies ; and the residue for the use and benefit of George Miln, of Sydsarf : and this instrument also purported to recall and revoke the settlement formerly executed by him, as above mentioned, said to be lost or mislaid, and all other dispositions or settlements of the premises. This latter instrument remained unrevoked at his death.

The present cause had been instituted for the purpose of trying whether the first settlement was a contract binding on both husband and wife, and whether the second could by the law of Scotland operate as a revocation of the other.

It appeared that in the Court below a great deal of stress had been laid on a comparison of the value of the effects of the parties. But it did not appear to him that in this case any argument of weight could be drawn from a comparison of the value of the effects.

A question had arisen as to the delivery of the first instrument, but that did not seem to have been much pressed ; so that the case was finally reduced to this point,—whether the Court below was right in the conclusion, that the deed or contract was not binding on the husband, on the principle stated in the interlocutor, that it was “ in substance [357] a gratuitous settlement on the wife, which, *quoad excessum* of a “ rational provision, he was entitled to revoke.”

Then the proposition on which the judgment was founded was this,—that the settlement was gratuitous ; and that therefore, in as far as it was excessive, it might be revoked. It appeared then, that, if it was not gratuitous, or if it was not beyond a rational provision, it could not be revoked.

Their Lordships would recollect its being noticed at the bar, that suppose the husband could have made such a deed as the second, he could only propose to his wife to elect between the provision there made for her and her rights at law. That however was not the question which he meant to put forward, but only this,—Whether the deed was gratuitous, or whether it was excessive, or, in other words, more than a rational provision ?

Without stating at length the subsequent interlocutors, it was a circumstance of fact, that the Court had been so divided as to render this decision,—the judgments of the Court being always to be treated with the greatest respect,—of as little authority as it was possible for a decision of the Court of Session to be. Much difference of opinion had prevailed among Judges of high character ; but it was agreed on all hands, that if the first contract was on the part of the husband a pure donation, it could not bind him : but that if it was a mutual contract for consideration, it would bind him ; and that the representatives, or next of kin, of the wife were entitled to the benefit of it. In considering [358] whether the first deed was gratuitous, there had been some difference among the Judges below, whether the wife's real property would have been bound. But it did not appear necessary here to decide whether it would or not.

The husband then, at the time of the execution of the previous deed, had only the lease of the farm, (which was excepted,) and the stock on the farm, which appeared to have been the whole of his personal property. Their Lordships were aware, that by the law of Scotland, if she had pre-deceased her husband, her next of kin would have taken the half of the goods in communion ; that was, as he understood it, one half of the stock on the farm. Under such circumstances, what was there irrational or gratuitous in the contract, when she agreed not to claim her terce, to educate the children, put them out to decent trades or employments, and secure a provision for them equal to half the goods ? Nor was this the only view in which the question was to be considered. If she pre-deceased her husband, her next of kin would be barred ; and if she relinquished for them it was very difficult to say that this deed was gratuitous, or a pure donation. If not gratuitous, could it be justly said not to be a rational provision ? Or were they to weigh in nice scales what was, or was not too much ?

He proposed, therefore, that it should be declared that this deed was not gratuitous,

but that it was binding on both, and was not revocable by the husband alone; and to reverse the judgment [359] so far as it was inconsistent with this declaration, and to remit to the Court below to proceed accordingly.

Agent for Appellant, CHALMER.

Agent for Respondent, MUNDELL.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

WHEELER,—*Appellant*; D'ESTERRE,—*Respondent* [June 24, 1814].

[Parole agreement in 1782, for a lease for three lives not then named, nor any stipulation as to who should name them, at a rent of £1 15s. per acre. Tenant enters, and considerable improvements are made, and, in 1784, or 1785, the rent is reduced to £1 10s. per acre. Tenant names the lives in 1786 or 1787, one of them not in existence in 1782, and evidence that the landlord approved of them, but none of the improvements made subsequent to that declaration. Bill in 1796 for specific performance of agreement of 1782. Agreement denied; but decree by Lord Clare, in 1798, for execution of a lease for the lives named in 1786, at a rent of £1 10s. per acre. This decree reversed by Lord Redesdale as to the execution, but it being doubted whether the fact of substantial improvements by the tenant was so clearly established as to take the case out of 7 Will. 3, cap. 12, (Irish statute of frauds) farther inquiries ordered as to the improvements, and report that they had been made with the landlord's money. Exceptions to this report over-ruled, and decree, in 1806, by Lord Chancellor Ponsonby, dismissing the bill, and this decree affirmed on appeal, the Lord Chancellor being of opinion (Lord Redesdale concurring) that the bill ought to have been dismissed in the first instance, on the grounds [360] that no lives had been named in 1782, nor any stipulation then made as to who should name them; that one of the lives named in 1786 was not in existence in 1782,—an agreement for a lease for lives being to be understood as referring to lives in existence at the time; that though the landlord approved of the lives named in 1786, no antecedent improvements could give effect to such a declaration; and that, if they could, the agreement must be understood as one in 1786, different from that in 1782, on which latter alone the bill was founded.]

Bill by Wheeler, in the Irish Court of Chancery, October, 1796, for specific performance; alleging an agreement between him and D'Esterre, in 1782, for a lease to the former of 188 acres of the lands of Rosmanaher and Deer Park, in the county of Clare, for three lives, or 31 years; that the lives were nominated by Wheeler in 1786, being himself, his wife, and William Wheeler, his son; that leases were prepared accordingly by A. H. D'Esterre, Respondent's brother, an attorney; that Respondent agreed to execute the leases, but postponed the execution till relieved from a security in which he was engaged for Appellant; that Appellant, on the faith of the agreement, laid out considerable sums in improving the lands; and that, with the knowledge of Respondent, he had, upon the faith of the execution of this lease for lives, voted for a friend of Respondent's at the election for representative in Parliament for the county of Clare in 1783. And the bill prayed that the Respondent might be decreed to perfect the leases prepared as aforesaid, or such other lease as the Court might think the Appellant entitled to; and that an in-[361]-junction might issue to restrain proceedings upon a judgment in ejectment obtained by Respondent against Appellant. Respondent's answer denied any promise or agreement to let Appellant have the lands in any other manner than as tenant at will, with the hope of a lease held out in case Respondent approved of his conduct, but of what quantity of land, or for what term, was to depend entirely on Respondent; and it also denied that Appellant had

made any lasting or valuable improvements on the lands : and stated, that the voting at the election was no evidence of title, as others voted who were not even in possession, and that no declaration or oath was then required of the Appellant as to his having a freehold.

Witnesses were examined, and it appeared that the rent originally settled in 1782 was £1 15s. per acre, which in 1785 the Respondent agreed to reduce to £1 10s. per acre ; and that in the leases prepared by Respondent's brother, blanks were left for the quantity of land, and the term to be granted.

It also appeared, that in 1787 the Respondent gave 10 or 12 acres of the land which had been in Appellant's possession to one Dalton, who rented some adjoining grounds of Respondent's, without any objection made by Appellant. Some evidence, however, was given on the part of the Appellant, of the advertising of the lands in 1781 to be let for three lives, or 31 years, and of declarations by the Respondent, that he had agreed or promised to give a lease to the Appellant of the lands in question for three lives ; that the Appellant applied for a lease in 1786 or 1787, and that he [362] at the Respondent's request, then nominated the lives,—his own, his wife's, and his son's life ; that Respondent afterwards agreed to execute the lease when a map of the lands should be prepared, and that—the Appellant's first son being a bad life—the Respondent agreed to substitute the life of the second son ; that the Appellant voted at the election in 1783, as above stated, and in Respondent's presence ; and also that he made several improvements on the lands.

The cause being heard before Lord Clare, in March, 1798, his Lordship decreed a specific performance of the agreement, by the execution of a lease for the lives of the Appellant, his wife, and son, at the rent of £1 10s. per acre, on payment of the arrears of rent ; and a reference was made to the Master, to take the accounts between the parties ; and—the Respondent having before obtained possession under the ejectment—an injunction was awarded to put Appellant in possession. The Master having reported, an issue was directed to enquire what Respondent might have made of the lands during the time he was in possession between 1796 and 1798, and what sums he had laid out in repairs on the banks adjoining the river Shannon. It having been found and certified, that he might have made £600 of the lands, and had laid out £85 in repairs, the cause was again heard ; and, after a farther reference and report on the matters of account, an order was made in December, 1801, that the Master should settle the draft of a lease pursuant to the decree of 1798.

The cause was afterwards re-heard before Lord [363] Redesdale, who reversed the decrees of Lord Clare, and ordered a fresh reference to enquire what substantial improvements had been made on the lands by the Appellant between March, 1782, and March, 1785, and from 1785 to 1793, etc. The Master then reported, that no substantial and lasting improvements had been made by the Appellant at his expense during the periods mentioned, but that considerable sums had been expended by the Respondent in such improvements.—the Appellant acting in the capacity of his steward ; that the leases in the bill named were prepared at the instance of the Appellant, with blanks for the denomination and quantity of the lands, and the terms of years, etc. Exceptions by the Appellant to this report were over-ruled ; and, in 1806, it was decreed by Lord Chancellor Ponsonby, that the report should be confirmed, and the bill dismissed without costs ; and that a writ of restitution should issue to restore the possession to the Respondent. From these decrees of the 19th March, 1803, and 8th May, 1806, the Appellant lodged his appeal.

Hart and Barber for Appellant. (Romilly and ——— for Respondent—not heard.)

Lord Eldon (Chancellor.) Lord Clare, in 1798, decreed the execution of a lease for the lives of Wheeler, his wife, and son. I wish to know from you, (Hart,) whether, at the time of this agreement, in 1782, Wheeler had a wife or son ? Where did Lord Clare find these lives ? This was an alleged agreement for a lease for three lives, but they must [364] have been lives named and existing at the time. An agreement for a lease for three lives to be named and in existence five or six years after is a different thing.

Lord Redesdale. The decree of 1803 reversed the former decree as to the specific execution, but directed inquiries as to the expenditure. But suppose you could succeed on the exceptions to the last report, what is the agreement to be executed ?

Hart. He admitted that at the time no three lives were named; but there was evidence that the Respondent recognized the three lives afterwards named, — the Appellant, his wife, and eldest son; and that, when the eldest son's life was despaired of, he said he would admit the life of the second son.

Lord Eldon. Would any antecedent expenditure give effect to such a declaration? Suppose you and I were to agree for a lease for three lives, what is the rule by which the Court is to say that one of us shall name the lives, and not the other? I strongly think I should have dismissed the bill in the first instance.

Hart. If the parties thought it immaterial to name the lives at the time, and the tenant entered, and, in confidence of the execution of the agreement, expended considerable sums of money upon the lands, and then the tenant named the lives, and the other recognized them, —

Lord Eldon. Is there any allegation in the bill, that the agreement was for the lives mentioned in the decree, (1798,) or for any three lives that the Appellant should name?

Hart. No; — but their Lordships would deal [365] with the case according to the rules established in the Court below, and not according to what, under better directions, they might have been.

Lord Eldon. But if different principles are to be applied to English and Irish cases, we must know, and the world must know, what these principles are. How would you argue in the Court of Chancery, in the case of an agreement for three lives not specified, nor settled by whom to be specified? Would the Court name the lives?

Hart. No; — but if the names were afterwards pointed out and agreed upon by the parties —

Lord Eldon. Could the Court execute, unless it were alleged in the bill that they had agreed as to the names? My opinion at present is, that if three lives were to be named by the tenant, he must name three lives that were in existence at the time the agreement was made. But there was here even no allegation in the bill, that the defect had been supplied by naming these individuals.

Lord Redesdale. In looking at my notes, I find that the Plaintiff had, in 1782, been let into possession of considerably more than 188 acres, and a number of acres had been taken from him. It was farther objected, that the evidence relative to the election could not affect the question as to the lives. Plaintiff was not married at the time of the agreement, and his son of course could not then have been born.

Lord Eldon. He had not even a *filius naturalis*, (*vide* proceedings on the claim to the Borthwick Peerage.)

Lord Redesdale. One of the lives afterwards [366] named was not therefore in existence in 1782, and the only agreement which could be executed was one made subsequent to 1782. The bill then was for performance of an agreement made in 1782; the decree (1798) was for the performance of another agreement, made in 1786 or 1787. I was weighed down by the authority of Lord Clare, and therefore did not go farther. Whether I did right in that I very much doubt. Then was the agreement in 1782 such an one as could be executed?

Hart. Suppose it had been in writing, though no lives were named, yet if it appeared that the tenant entered into possession, and improved the lands in the confidence that the agreement would be performed, and a conversation afterwards took place between the parties, in which the landlord recognized certain lives named by the tenant as the names to be in the agreement, the Court might have connected this with the original contract, and decreed performance. (*Allen v. Bower*, C. C. 3 Bro. 149.)

Lord Eldon. The bill does not allege any expenditure by the tenant after 1786. My opinion is, that the bill ought to have been dismissed in the first instance.

Lord Redesdale concurred. He had been weighed down by the authority of Lord Clare; but on looking at his notes, he found the objections to be without end. In the agreement of 1782, the rent was £1 15s. per acre; but the decree of Lord Clare was for a lease at the rent of £1 10s. per acre, an abatement much beyond any improvements that had been made by the tenant; and as to the proof of these improvements — the Appellant having acted [367] as agent for the Respondent — the accounts were so mixed, that it was impossible to distinguish what improvements had been made with the money of the Respondent, and what with the money of the Appellant; and

that was the circumstance which induced him to send the matter to a farther inquiry : but he thought the bill ought to have been dismissed originally. The prayer of the bill, he saw, was, that the leases prepared by D Esterre, Respondent's brother, might be perfected ; and in these leases blanks had been left for the quantity of lands and the lives.

Decree of the Court below affirmed.

Agent for Appellant, J. PALMER.
Agent for Respondent, TYNEDALE.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HALL,—*Appellant* ; BROWN,—*Respondent* [July 4, 1814].

[Mews' Dig. xiii. 254, 1072.]

[The stipulations in a charter-party may be varied by subsequent instructions, which may amount to a new contract *pro tanto* ; and an insurance of the freight upon the new voyage, though different from that described in the charter-party, may be good. Thus, where a British vessel was chartered for a voyage from Odessa to Rotterdam,—war having in the mean time broken out between Great Britain and Holland,—the Master was instructed by the freighter's agents at Odessa, in case he could not get to Rotterdam, to proceed to Hamburg or Bremen ; but to enter at London [368] or Newcastle in the first instance, where he might receive different orders from the freighters,—the difference in the freight to be settled by arbitration. The vessel was captured among the Grecian Islands, and the Master made a declaration, attested on oath by three of the crew, of the capture, before the British consul at Patras in the Morea ; in which the ship was described as having been, when captured, on her voyage from Odessa to Rotterdam. An insurance had been effected on the freight for the particular voyage from Odessa to England ; and it was held by the Court of Session and the House of Lords, that the underwriters were bound to settle the loss, on the ground that the instructions formed a new contract, under which the vessel was, at the time of the capture, on her voyage to England, where, on her arrival, freight would have been earned.]

The ship *Duchess of Buccleugh*, Brown Master and part owner, was chartered at Leghorn in 1802, by the agents of Ebel and Co. of Riga, for a voyage to Odessa, on the Black Sea, to carry a cargo from thence to Rotterdam. The cargo was accordingly taken on board at Odessa, and the bills of lading made out for Rotterdam. In July 1803, the agents at Leghorn wrote to Brown, at Odessa, informing him that war had broken out between England and Holland—that it would be impossible for him to proceed to Rotterdam—and referring him for instructions to Messrs. Vander Schroeff, the agents of Ebel and Co. at Odessa ; stating, that they (Vander Schroeffs) would propose Hamburg or Bremen, but that they feared he would not be able to get into either of these places, owing to the French troops. The following instructions were afterwards prepared by Messrs. Vander Schroeff, and signed by Brown :—

[369] *Instructions pour le Capitaine John Brown, commandant le brigantin Anglois, La Duchesse de Buccleugh.*

“ La declaration de guerre survenue entre l'Angleterre et la France ayant obligé
“ *Messieurs Vander Schroeff et Fils, etablis à Julosyn en Ukraine, se trouvant actuelle-*
“ *ment ici, de donner UNE DESTINATION DIFFERENTE à la cargaison chargée par eux*
“ *à bord du brigantin susdit.* Nous sommes convenues avec le dit Capitaine John
“ Brown, que si les circonstances ne lui permettent d'entrer à Rotterdam conforme-
“ ment à sa chartepartie passée le 28 Avril de cette année, à Livourne, entre le dit

"Capitaine et Messieurs Grant, Sibbald, et Balfour, le Capitaine John Brown, en vertu des connoissemens signés aujourd'hui, s'oblige de se rendre à Bremen ou Hambourg.

"Pouvant entrer en Hollande, le susdit Capitaine Brown livrera la cargaison à Messieurs Cornelius Vander Hoeven et Fils, de Rotterdam ; mais en cas que les circonstances ne lui permettent d'y entrer, le dit Capitaine Brown fera voile pour Bremen ou Hambourg, et livrera sa cargaison à Bremen à Monsieur Johan Matthias Larneyer, et à Hambourg à M. Martin Johan Jenisth, et toujours bien entendu pour autant que les ports de la Republic de Batave seront bloqués, et que les circonstances ne permettront Capitaine Brown d'y entrer.

"*Le Capitaine Brown, pour sa propre sureté et celle de cargaison, tachera partout de se procurer des convoys et d'entrer en Angleterre à Londres ou à Newcastle, ou il trouvera peut-être des [370] ordres différents de la part de Messrs. Joachim Ebel et Co. de Riga.*

"Pour meillure intelligence du Capitaine Brown, il fera (à) son heureuse arrivée à Constantinople, traduire la present instruction en langue Angloise, dans la Chancellerie de l'Ambassade de sa Majestie Britannique.

"A. Odessa, le 3, 15, Août, 1803,

(Signé)

"JOHN BROWN.

"Le Capitaine Brown arrivant heureusement à Bremen ou Hambourg, la difference du fret sera réglée par des arbitres que le dit Capitaine Brown, et les maisons à qui il livrera sa cargaison, nommeront à cet effet. Il en sera de même si le Capitaine Brown entre à Londres ou Newcastle. A Odessa, le susdit.

(Signé)

"JOHN BROWN."

Ebel and Co. 9th September, 1803, wrote to their agents in London to insure the cargo from Odessa to London or Newcastle ; and from this, as well as a letter soon after written, addressed to Brown, and intended to have been received by him on his arrival in England, it appeared that Ebel and Co. understood that the vessel was to come to England in the first instance, though they seemed to have still intended Rotterdam as the ultimate destination of the cargo ; and, in the letter to Brown, spoke of freight not being due till the cargo was delivered at Rotterdam by a neutral ship or otherwise. This ultimate destination did not however appear to be a fixed purpose, and the agent here, in answer [371] to certain queries by the underwriters, stated that he would have sold the cargo in England. Letters were written by Brown from Odessa and Constantinople to this country, stating that he had been ordered to England, and directing insurance to a certain extent on the freight. These letters were received in evidence below. An order in these terms,—“ Insure £600 on freight, valued at £1500 per *Duchess of Buccleugh*, Brown Master, at and from Odessa to London or Newcastle, both or either, at 20 guineas per cent.,” etc.—was given to a broker in October, 1803, and a policy was prepared accordingly, which Hall underwrote for £100.

The vessel was captured by a French privateer among the Grecian Islands, and carried into Coran, in the Morea. Brown waited on the British Consul at Patras, who, on the 20th October, 1803, drew up a declaration of the capture, which was signed by Brown, and attested on oath by three of the crew. In this declaration, or protest, the statement was, that the Master had sailed with the vessel from Odessa for Rotterdam.

All the underwriters on the cargo settled the loss as on the voyage to England, and also all the underwriters on the freight, except Hall, against whom Brown brought his action before the Admiralty Court in Scotland. Decree was pronounced against Hall, and he having died, the Appellant, acting for his representatives, brought the matter by suspension before the Court of Session.

The grounds on which payment was resisted were,—1st, That the vessel at the time of the capture was engaged in a voyage to Rotterdam, whereas [372] the freight was insured on a voyage to England. 2d, That though the vessel had arrived at London or Newcastle, freight would not have been earned at either of those places ; and that Brown had not therefore an insurable interest. Another point, but not relied upon in the House of Lords, was, that the cargo was enemies' property, and

that this fact had not been communicated to the underwriters. The Court of Session at first found the letters orderly proceeded, but, on reclamation, altered that interlocutor, and sustained the reasons of suspension. They afterwards, however, returned to their first opinion, and to that judgment they adhered; upon which Hall appealed.

Marshall and Park (for Appellant) contended for the reversal of the judgment on the two grounds, that the voyage on which the ship was sailing at the time of the capture was different from the voyage insured; and that, suppose the vessel were sailing for England, no freight could be earned till the arrival at Rotterdam, and the assured could not recover, as the loss of the freight was not the immediate consequence of the capture; for suppose the vessel had come to England, she might still not have been able to get to Rotterdam. As to the point of the sailing of the vessel for Rotterdam, that was proved by the charter-party, and the protest on oath. Brown's own letters had been received in evidence to contradict his declaration at Patras. (Romilly. They were never objected to.) But their Lordships would object to them; for, though the English rules of evidence, more excel-[373]-lent than those of any other European country, were not binding in Scotland; yet rules of evidence contrary to the first principles of justice ought not to prevail in Scotland or any where else. As to the second point, the letter of Ebel and Co. intended for the Respondent on his arrival in England, stated that the freight was not to be earned till the delivery of the cargo at Rotterdam; and therefore the loss was not a loss under the policy, the freight insured not being the freight to be earned; and they referred to the *Nisi Prius* case of *Murdoch v. Potts*. (Marshall, 396.) This was afterwards considered and impugned in *Taylor v. Wilson* (15 East, 324); but it was submitted that the doctrine in *Murdoch v. Potts* was founded on the better reason. Part of a voyage might be insured, but freight was totally distinct from ship and cargo. It existed only in imagination—it was a mere expectation—it was not vested till earned. Nor could freight be due on the arrival in English ports, *pro rata itineris*. That was only due where part of the voyage was performed, and the completion, without any fault of the Master, had, by some intervening circumstance, become impossible. It would be dangerous to permit the Master to land the cargo where he thought proper, and then to claim freight *pro rata itineris*, unless there was an acceptance by the owner of the cargo. The case of *Hunter v. Princep* (10 East, 378) might be cited in their favour; and that of the *Copenhagen* (1 Rob. A. R. 289) was no authority against them. There was not a word in the policy of the alternatives mentioned in the instructions, which were signed only by Brown, who [374] therefore gave instructions to himself. All the voyages in contemplation ought to have been communicated.

Adam and Romilly for Respondent. The instructions and letters proved that this was a direct voyage to England, in the first instance, where the freight was to be settled by arbitration; and if so, there was an end of the question. The declaration appeared to have been prepared by the Consul from the charter-party, without advertg to the instructions, which formed a new contract; and as the ultimate destination might, by orders after arrival at England, have been Rotterdam, there was no inconsistency between the protest and the rest of the evidence. Brown's letters written without fraud, were, under the circumstances, the strongest evidence; and Hall was precluded from now objecting to them, by having adopted them below, and argued upon them. Their case was perfectly consistent with *Murdoch v. Potts*. Here there was an express agreement, that on the arrival of the vessel at England the owner should be entitled to freight *pro rata itineris*, supposing a farther destination of the cargo in view. Could there be a doubt as to this being an insurable interest? But suppose there had been no agreement, a circumstance (the war) had intervened, which rendered it impossible for the Master to complete the voyage to Rotterdam, and he would still, on coming to England, have been entitled to freight *pro rata itineris*. (*Copenhagen*, Menig, 1 Rob. Ad. R. 289.)

[375] Lord Eldon (Chancellor.) He observed in this case one judgment by which the underwriter was held not liable to pay. In each of the judgments there had been much difference of opinion, and during a great part of the argument at the bar, he himself had conceived that the Appellant was in the right, though he had since changed that opinion.

First, as to whether the Respondent had an insurable interest:—It had been argued that Brown could not recover, inasmuch as the vessel had been captured

upon a voyage to a place which, if she had reached, it did not follow that freight would have been earned, even *pro rata itineris*. But the answer was, that though it was admitted that the original intention was to proceed to Rotterdam, yet it had been found expedient to pay attention to the circumstance that she might not be able to enter that port. It was clear that the vessel was to proceed to England, either in the first instance, or in the event that she could not get into the other ports. By the instructions, which he considered as a new contract, it was agreed,—the freight as to Rotterdam having been already settled by the charter-party,—that on the arrival at Hamburgh, or Bremen, or in England, the difference should be settled by arbitration; and here indemnity was claimed for loss of freight insured as on the particular voyage.

The policy was on the freight to London or Newcastle, both or either; and if the real intention had been to sail to Rotterdam, it would be difficult under this policy, which said nothing as to Rotterdam, to support the claim. But on considering the instructions, it appeared clear that the intention [376] was to proceed in the first instance to London or Newcastle; and it was to be observed, that this voyage was covered as to the cargo by one insurance, and if the voyage was to be pursued farther, a distinct insurance, by a separate instrument, was to be effected.

Thus the claim appeared to be well founded, even without the letters of Brown, which here, indeed, would not have been admitted in evidence; but still, when they were made use of and relied upon on both sides, they must be received as evidence.

Taking it then, that the voyage to England was the first voyage, the freight was to be settled by arbitration, and there was clearly an insurable interest. It was evident that this was the voyage on which the vessel sailed.

The original destination having been Rotterdam, and that having been changed for England by subsequent agreement, the protest was perfectly consistent with the letters in this view. He thought, therefore, that the judgment was right; but in a case where there had been so much difference of opinion among the Judges below, he did not think it was fitting to give costs.

Judgment affirmed.

Agent for Appellant, MUNDELL.

Agent for Respondent, CAMPBELL.

[377] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WIGHT,—*Appellant*; RITCHIE (W. S.),—*Respondent* [June 15, 1814].

[See Debtors (Scotland) Act, 1880, s. 13 A (6).]

[In a process for a *cessio bonorum*, mere irregularity in the mode of keeping books is not of itself a ground for refusing the remedy. But a full disclosure must be made, and no fraud must appear; and therefore, where a person applied for a *cessio*, though a period of between five and six years had elapsed since his first incarceration, and though he had been, by his own statement, referring to certificates produced, in actual confinement for 11 months—(a few weeks, as stated by the opposing creditor)—the remedy was refused by the House of Lords, (affirming a judgment of the Court of Session,) on the grounds stated by Lord Redesdale, that a sufficient disclosure had not been made to enable the creditors, upon investigation, to say whether there was fraud or not; that certain books, and papers from which entries had been made, had been withheld; and that there had been a concealment at the time of an arrangement with the creditors, and a misapplication of funds after that arrangement.]

[The Lord Chancellor doubted whether it would not be better if there had been no appeal in cases of *cessio*; and Lord Redesdale expressed an opinion that it would have been better if in such cases the decisions below had been final.]

[The *onus* of proving fraud, in cases of *cessio*, rests on the person resisting the remedy (per Lord Redesdale.)]

This was an appeal from a judgment of the Court of Session, refusing the benefit of the *cessio bonorum*, stated to be the second appeal of the kind that had ever come before the House of Lords.

[378] It appeared that Wight, the Appellant, had been a starch-manufacturer at Ormiston, a farmer, and a dealer in corn and spirits. In 1807 he found it necessary to call a meeting of his creditors, and on the 17th and 22d April of that year meetings took place. Wight exhibited a state of his funds and debts, and proposed a composition of eight shillings in the pound, which was accepted by the creditors, with some exceptions. Ritchie, the Respondent, along with a relation of Wight, became surety for the payment of this composition,—the Appellant becoming bound to make over to the sureties the funds out of which the payments were to be made. In the mean time he himself was suffered to continue in the management and collection of these funds; but when the first instalment of the composition became due, no part of the funds were forthcoming, and the Respondent was compelled by the creditors to pay the whole. The Respondent had also become surety for the Appellant for a debt due to Price and Moss, of London, and was under the necessity of paying it, taking an assignation of their diligence, upon which he proceeded against Wight, and put him in prison. Some time after, with the concurrence of the other surety, he applied for and obtained a sequestration, and the son of that surety, an accountant, was appointed a trustee, who certified that the books and papers of the Appellant had been delivered to him, and that as far as he had investigated them they appeared to have been regularly kept.

The Appellant then raised a process of *cessio bonorum*, stating in the summons, “that his inability [379] to pay his debts was not occasioned by any fraud in him, “but was owing to losses and misfortunes in business.” The creditors to whom the Respondent was bound had no interest in opposing it; but objections were made by the excise collector at Edinburgh, in respect of arrears of starch duties. The Appellant however settled with the excise, and on 24th December, 1808, the Court (Second Division) found him entitled to the benefit of the *cessio*, and decerned in terms of the libel.

On the 2d or 3d of February, 1809, Ritchie presented a reclaiming petition, which was objected to as incompetent, on the ground that the interlocutor had become final; but on the 7th February, 1809, the Court ordered the petition to be answered.

The grounds on which the Respondent objected were, that the books exhibited by the Appellant contained false entries, and forced and fictitious balances; and cash-books were withheld by him which were necessary to explain his transactions, and to supply numberless omissions in the books exhibited. He was guilty of committing gross frauds upon the revenue. When he stopped payments in April, 1807, he prevailed upon the Respondent to become surety for the payment of his composition, by the false assurance that his debts amounted only to a certain sum, while he concealed from the Respondent’s knowledge, that other debts, to a considerable amount, were due by him. He fraudulently betrayed the confidence reposed in him, of collecting those funds which were intended to be applied in payment of the composition-bills, by embezzling [380] them to his own use, and leaving the Respondent to retire those bills out of his own funds.

After reference to Mr. Dundas, an accountant, who made three reports unfavourable to the Appellant, and subsequently to Mr. John Stewart, an accountant, who made two reports favourable to the Appellant, the Court having advised the whole proceedings, by the narrowest majority “altered the interlocutor reclaimed against, “and found that the Pursuer (Appellant) was not entitled to the benefit of the process “of *cessio bonorum*, *in hoc statu*, and decerned accordingly.” From this judgment Wight appealed.

It was contended for the Appellant, 1st, That the interlocutor of 24th Dec. 1808, was final, the six sederunt days having expired before the reclaiming petition was presented; and that all the subsequent proceedings ought to be reversed. 2d, That the alleged fraud against the excise was proved to be unfounded: and, though

it had been proved, it would not be such a fraud as would preclude the relief ; for in Maclean's case, 1803, the only one of this kind ever before appealed from, the House of Lords gave the benefit of the *cessio*, though books were fabricated, because it was not a fraud leading to or increasing the insolvency. 3d, That all the books had been produced, except certain loose papers and memorandums on which the Appellant when from home was accustomed to note down any occurrences in business, to be afterwards entered in his books, which papers were never intended to be permanently preserved. 4th, That though the [381] books had been inaccurately kept, there was nothing that evinced a dishonest intention. 5th, That the objections as to various sums of money and quantities of goods being unaccounted for in the books previous to the arrangement with the creditors had been sufficiently obviated ; that the statement made to his creditors at the time of the composition was correct ; and that the funds collected during his management after the arrangement had been properly disposed of for the expenses of his family, the payment of preferable debts, etc. 6th, That a creditor was not entitled to detain the debtor in prison till his complete and perfect innocence should appear, but that the extent of punishment would be considered, and the relief granted, though all the objections should not be answered, as had been decided in Thom's case (Feb. 11, 1809.) 7th, That the *onus* of proving fraud rested upon the objecting creditor ; and that the innocence of the debtor applying for the *cessio* was to be presumed till the contrary was proved ; and here the contrary had not been proved.

For the Respondent it was contended,—1st, That the interlocutor of the 24th Dec. 1808, had been got without proper notice to the objecting creditors, and was a surprise upon the Respondent ; and was not therefore within the principle of the act of sederunt. 2d, That the debtor must come into Court on the terms of the summons, and make out a clear *primi facie* case of honesty. (Ersk. b. 4. t. 3. s. 26.) 3d, That a person not engaged in trade becoming insolvent might appear to be innocent, though he had kept no books ; but in the case of a trader, books were necessary ; and the *cessio* had been refused in a case (Fraser, 4 Fac. Coll. 16) [382] where a trader had kept no books ; and books so inaccurate that it was impossible to discover from them whether there was fraud or not, were worse than no books at all. The debtor must show that his transactions were fair ; for it could not be enough for him to say that he was innocent. (Seal, July, 1812, and Ritchie v. his Creditors there cited.) 3d, The debtor had, by an unfair statement of his circumstances at the time of the arrangement with his creditors, induced the Respondent to become one of his sureties for the composition. 4th, He had misapplied the funds which ought to have gone in payment of that composition. 5th, He had kept back cash-books which ought to have been produced, and the presumption therefore was, that something was wrong. 6th, The refusal of the *cessio* by the Court below in Maclean's case was absolute ; here it was only refused *in hoc statu*.

Replied. A refusal *in hoc statu* was a refusal in this action, which it affirmed would be final. In Seal's case the debt was for aliment of a bastard child, and the delict was the ground of objection. In Fraser's case no books at all were produced. The judgment in Maclean's case was a decision in the Appellant's favour. The trustee under his sequestration was satisfied.

Horner for Appellant ; Adam, senior and junior, for Respondent.

Lord Eldon (Chancellor.) A case of this nature seldom came before their Lordships. By the bankrupt laws here, the decision of the Chancellor sitting [383] in bankruptcy was final ; and this policy had been sanctioned by the Insolvent Debtors' Act, by which the sentence of the first Judge was made final in this respect, whether the subjects in England should have the benefit of the *cessio bonorum* or not. It might be permitted to one who had had so much experience in these matters as himself to express a doubt whether it would not be better to say, that the opinion of the majority of the creditors should decide the question at once, than to say, that it should be examined in Court after Court ; for this was holding out to the just and honest creditor an alternative, whether he should decline to quarrel with the first decision, or ruin himself by farther process. But where the appeal was given, they ought not to interpose any obstacle in the way, or to do any thing except decide whether, under the circumstances, the debtor was entitled to the remedy.

The case of Maclean (Aug. 1, 1803,) had been stated at the bar, and it was to be

observed, that there the judgment of the Court below had been reversed; and it was their Lordships' habit on such occasions—he wished it always had been their habit when they dissented from the Courts below—to state the reasons of their judgment at length. It was always useful to state the reasons which influenced the mind of the Judge in giving judgment. If pronounced by a Judge from whose decision there lay an appeal, Counsel, and the advisers of parties, had an opportunity of weighing well the grounds of the decision: and when the matter came to the Court of last resort, where the principles were settled which must regulate the decisions of inferior tribunals, it was their duty to consider all the principles to which facts in all their varieties might afterwards be applied.

He recollected, that when the decision in the case of Maclean was pronounced, the Lord who sat on the woolsack had a degree of assistance which it seldom fell to the lot of a person in that situation to have. Lord Thurlow attended, so did Lord Roslyn; and, even when they gave no reasons in judgment, a great deal of private conference took place; and he might safely state, that he was perfectly sure that the grounds of the judgment in that case had been well considered.

He saw no reason, from any thing he had heard to-day, to depart from the principles recognized in Maclean's case. But it was often difficult to say how far the particular case came within the scope of certain principles, when applying these principles to the state of the facts. He could only say this, that he had read these papers with all the diligence in his power to enable him to understand the case, and, attending to the principles which governed Maclean's case, he did not find here any thing which enabled him to say that the judgment of the small majority of the Court of Session was wrong. He found nothing—ably as the case had been argued by the gentleman last at the bar (Horner)—which appeared to him a sufficient reason to reverse or alter the judgment. He did not think that the books afforded grounds sufficiently satisfactory to authorize him to do so. This case however depended so much on the facts,—as applied to the principles, about which there would be no dispute, —[385] that it was necessary to have these facts clearly understood; and therefore he wished that the noble Lord (Redesdale) who now sat on the opposite bench—who was particularly conversant with matters of this kind, and the author of an act which rendered the law on this subject nearly, though not entirely, the same here as that of the *cessio bonorum* in Scotland—to give his opinion. He wished to know from him, Whether he thought that the character of the transactions and the conduct of the party were such as to entitle him to this remedy? If any difference of opinion prevailed in this respect, then it would be necessary farther to examine the facts carefully and anxiously. But unless that were so, he could not say that this decision militated against the principles recognized in the case of Maclean.

Lord Redesdale. As far as he could understand the case of Maclean from what was stated at the bar and in these papers, it did not in any degree press upon his mind in the present case. The principle he understood to be this,—that the irregularity of the books was not of itself a ground for refusing the benefit of the *cessio bonorum*, provided a full disclosure were made; and that if nothing fraudulent appeared on that disclosure, the party was entitled to his discharge. The question with him then was, Whether a full disclosure had been made? and it appeared to him that it had not been made. It appeared to him that the books had been in a great measure made up after the debtor knew that he was insolvent, from memorandums or loose papers; and that they had been so made up [386] to a great amount. There was nothing in Stuart's report to explain this, as stated in Dundas's report. As to temper, he thought the character of temper belonged more to Stuart than to Dundas; and that Stuart had exceeded his duty as an accountant. Stuart indeed showed that Dundas's account was erroneous in some particulars, but did not contradict it in the most important part, as demonstrating that the books did not afford a full disclosure.

The manner in which books were kept back was very objectionable, as he had occasion to know from having had much experience in merchants' accounts. He had learned from merchants themselves, that the cash-book was the only book from which a true account could with any certainty be collected; and that the accounts in the other books might be easily fabricated. If Dundas was correct where he was not contradicted by Stuart, there was in this respect strong grounds to suspect fraud. It appeared too, that in many instances the dates were not merely days and months,

but years anterior to the entry in the books. They were then manufactured books. He knew, from conversation with Dutch merchants, and with a Dutch lawyer who was examined before this House on a committee, that, by the law of Holland, in the case of a person with such books, if they were made up after the insolvency, without the production of those papers from which the entries were taken, this of itself would be a ground for refusing the discharge.

In the country where he had presided for some time in bankruptcy, there was a provision in the bankrupt law which was a very good one. It rested [387] on two acts; one of which declared, that unless the books were regularly kept, the party should not be entitled to his discharge. The other qualified this, by saying, that the books, before the debtor could be entitled to his discharge, must have been kept in the way in which such books were usually kept,—alluding to the books of small shopkeepers. He had had reason to regret that a more precise qualification had not been introduced; for under these words, “usually kept,” much irregularity had prevailed. But he had examined a great many of such accounts, and generally found, that wherever entries were made subsequent to their dates, it was for the purpose of fraudulent concealment; and therefore, unless he had the papers from which the books were thus made up, he always considered that there was great room to suspect fraud.

Here there was not a full disclosure. It was only stated generally, that such books or papers had existed. But it was most material that they should have been preserved as to every article which was entered out of the proper date, and after the insolvency.

The matter however did not rest there; for, take it that the books were fully shown to be correct in other respects, they might still be fraudulent; for he did not find it denied that, as stated in Dundas’s reports, the numbers of several articles were given without the quantities; and as the articles were lump articles, unless the quantities also were stated, it must be impossible to detect fraud.

In another respect there had not been a full explanation; viz. in the statement made to the creditors at [388] the time of the composition. There, too, there appeared to have been a concealment,—he did not know to what extent,—for the purpose of giving a colour to the state of the insolvent’s affairs, and inducing the sureties to enter into those engagements which they had undertaken.

Another ground of objection was, the fraudulent misapplication of the effects which had come into his hands subsequent to the time of the composition. Some part had been applied to preferable debts, to which there was no objection; but other parts had been applied to purposes to which they ought not to have been applied: he did not quarrel with the expenditure on the farm, as the produce was brought into the general fund; but he had applied the effects to the payment of debts which were not in the composition, the effect of which was, that he saved himself from those creditors who were not in the composition, and left the sureties liable to those who were: any thing more fraudulent could not well be conceived. He had applied £400 and upwards to the expenses of himself and his family, which was liable to this objection, that he ought not to have spent a single shilling in that way. The account, it was said, had been made up by the trustee; but still it demonstrated the misapplication. It was clear then that Ritchie had been defrauded to a considerable amount.

Under these circumstances then, it appeared that a sufficient disclosure had not been made to enable the creditors upon investigation to say with certainty whether there was fraud or not; and that the books were of a description to leave as much room [389] for suspicion as if there had been no books at all; for such books were equivalent to no books: that a fraudulent representation to some extent had been made at the time of the composition; that sums which ought to have been applied to relieve the sureties had been applied to the payment of the insolvent’s own debts not within the composition; and that a large sum had been applied to the debtor’s personal expenses. He did not find therefore, that, under the circumstances of this case, the debtor ought to be discharged; but, on the contrary, that the charges of fraud appeared to be proved.

He admitted that the fraud must be proved by the parties resisting the remedy; and the proof here was, the withholding the books or papers, which raised the presumption of fraud; the concealment, to a certain extent, at the time of the composition;

and the misapplication of the effects afterwards, which was a gross fraud. On these grounds, he saw no reason to quarrel with the decision of the Court of Session.

He concurred in lamenting that questions of this nature should be exposed to so much litigation. He thought it would be infinitely better that the decision should be final in the first instance, as here in cases of bankruptcy, and under the late permanent Act for the Relief of Insolvent Debtors. It was really a question of discretion, requiring a great deal of investigation which could not well be given in a Court of Appeal; and it would be much better that the Court—which, when a doubt arose, might easily send the matter to a farther inquiry—should decide finally.

[390] It might properly be observed, that though, if the judgment should be affirmed, the remedy must be obtained by another process, if fitting to be granted at all, yet the debtor might avail himself of that farther process, if he could give the requisite explanations; which, however, appeared to him impossible, especially as to the last article. But as far as he could judge from the papers then before their Lordships, he thought the judgment of the Court of Session right, and could not therefore vote for its reversal.

Judgment accordingly affirmed.

Agent for Appellant, GRANT.

Agent for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MILNE,—*Appellant*; SMITH,—*Respondent* [July 6, 1814].

[If any artificer, or person employed to do any work in a highway, street, common staircase, etc. makes, or procures to be made, an opening for the convenience of his operations, and then goes away for a time, his work being unfinished, and he intending to return at a future period and complete it, and in the meantime the opening is used by other workmen or persons, it is the duty of these latter persons to secure the opening at night; and the person who so originally made the opening or procured it to be made, and [391] goes away as above stated, is not liable in damages for any accident that may happen from their negligence.]

[Thus, where a plasterer, employed about a new building, of which the floors were not laid, or where an opening was left for the staircase which was not then begun, for the convenience of his operations opened, or caused or advised to be opened, a passage or communication from the common staircase of an adjoining house, and afterwards went away for a time before his work was finished, with the intention of returning at a future period to complete it, and both while he was there, and during the time he was absent, other workmen employed about the premises—masons, carpenters, and others—made use of the passage or communication, and during the time he was so absent, the passage not having been secured at night, a man fell through, broke both his legs, and was in other respects severely wounded and bruised:—it was held by the House of Lords, (reversing a decision of the Court of Session,) that the plasterer was not the person liable in damages for this misfortune.]

[A common staircase is in the nature of a highway, so as to support an action for damages on account of any particular injury that may arise to the individual from not properly securing any dangerous opening, or nuisance, that may be there made or placed.]

Milne, the Appellant, having been employed in 1802 to plaster a new house, (belonging to one Scott, a brewer at Leith,) of which the staircase had not been made, suggested to Scott, that it would be convenient for the operations of the workmen

to open a passage to the first floor of the new house from the common staircase of an adjoining old house, also belonging to Scott. The opening was made accordingly ; and, on the night of the 21st of August, 1802, between 10 and 11 o'clock, Smith, the Respondent, a journeyman carpenter, when ascending the common staircase of the old house, [392] passed in the dark into this communication, and fell through the space which had been left open for the staircase of the new house, or between the joists,—the floor not having been laid,—broke both his legs, and was in other respects severely wounded and bruised, so as to be for nearly two years after unfit for labour. Smith brought an action before the Sheriff for £100 damages, etc. against Milne, and the Sheriff decided that Smith was entitled to damages ; but that in estimating them, a sum of £15, given to Smith by Scott, was to be taken into consideration ; and he afterwards pronounced for 10 guineas damages and expenses. The parties complained of the Sheriff's judgment by counter processes of advocacy ;—Smith being dissatisfied with the amount of damages—Milne conceiving that he was not at all responsible. In the *vivi voce* pleadings before the Lord Ordinary, something was said about Smith having come to the house at that late hour for dishonest purposes ; he brought a separate action of damages for the defamation. This action was conjoined with the other, and, after condescendances and answers, a proof was allowed.

It appeared that Milne had suggested to Scott, who himself superintended the building and finishing of the house, the expediency of opening this entry, and that it was afterwards opened,—by whom was not stated ; that it was used by Milne's workmen, as well as by other workmen employed on the premises ; that about two or three weeks before the accident happened, Milne and his workmen had left the place, either because they had other [393] jobs on hand, or because their operations could not proceed farther at that time, though the whole of the plastering work was not finished, nor Milne discharged ; and that, in point of fact, Milne was employed in another place, called Vauxhall, at the time of the accident, and that the tools and instruments of his trade had all been removed, except a hod and a plaster-beater ; that in the course of the day on the evening of which the misfortune happened, Milne, in passing, had complained to Scott, that water was spilled through the communication, by which the appearance of the plaster-work was injured ; and that Scott then desired Milne (or that Milne had advised Scott) to order the carpenter employed about the house to shut up the passage.

The Lord Ordinary (Meadowbank) having advised the proof and memorials, pronounced an interlocutor, finding " the Defender (Milne) guilty of gross negligence " in opening two passages from a common staircase into a house when building, " without constructing doors, or some security, to protect passengers ; that the proprietor's approbation was no defence in a question with one who suffered from this " negligence ; that the Pursuer became a victim to this negligence, and by a fall," etc. (facts as above :) " that the character and conduct of the Pursuer gave no just cause " for suspicion of an improper purpose ; therefore on the whole, found the Defender " liable for £100 *solatium* and damages, and for expenses of the conjoined processes ; " and reserved to the Defender his claim of relief," etc.

The Court, (Second Division,) however pro-[394]-nounced an interlocutor altering the above ; but afterwards returned to the Lord Ordinary's interlocutor, to which they adhered ; and thereupon Milne lodged his appeal.

It was contended for the Appellant, that there was no evidence that he or his workmen had in fact opened the passage ; and though they had, that Milne was not answerable for an accident that happened from not securing the passage, when he was absent ; that the plastering work not being then finished made no difference, as all was done that could be done, or that was intended to be done, at the time ; and that he had for the time entirely quitted the premises, where other workmen, under the superintendence of Scott, the proprietor, were, after Milne's quitting them, using this very passage for their operations ; and that Scott alone, or Scott along with others then employed on the premises, were answerable. It was also questioned whether a common staircase was so much in the nature of a highway or public street as to entitle Smith to reparation from any body ; and that, if entitled, he had accepted of £15 from Scott as a full reparation.

For the Respondent it was contended.—1st, That the Appellant being employed

to plaster Mr. Scott's new house, made, or caused to be made, and with culpable negligence allowed to remain unfenced, in the staircase of the adjoining house, the opening through which the Respondent fell; and that the Appellant had not finally left the work when the accident happened. 2d, That by the law of Scotland, the persons through whose fault he sustained the injury, whether as principals or accessories, are [395] each of them liable *in solidum*; and that he is entitled to sue any one of them for the whole damage sustained; so that, though Scott might be liable, Milne was also liable for the whole: and certain passages in Stair, (b. 1. t. 9. s. 4, 5,) Bankton, (b. 1. t. 10. s. 1,) and Erskine, (b. 3. t. 1. s. 15,) the maxim, *Culpa tenet suos auctores*,—and the case of *Innes v. Magistrates of Edinburgh*, (June 27, Dec. 12, 1797,) were referred to.

Romilly and J. P. Grant for Appellant; Horner for Respondent.

Lord Redesdale. Suppose a pavier is employed to open up part of a street, and then goes away, and afterwards persons are employed at the place for some time about the pipes, would the pavier be answerable for an accident happening from negligence in securing the place at a time when he was not actually employed there?

Horner. But the pavier's work, in the supposed case, is finished.

Lord Redesdale. No,—not till the place is closed up.

Lord Eldon. Suppose I make an opening in the street, and then I am absent for three weeks, while others are employed in digging there, whose duty it is, night after night, to secure the place, and they neglected,—should I be answerable for their neglect?

Horner. The person who made the opening, I submit, was bound to close it up.

Lord Eldon. Could he do so without Scott's permission?

[396] Horner. I can only deal with this case under its own peculiar circumstances. The damages for defamation were also included in the sum given, and these at all events were due.

Romilly. The question was, Whether Milne was answerable for an accident that happened at a time when it would have been a trespass in him to have entered the premises and shut up the opening without Scott's permission?

Lord Eldon (Chancellor.) The true question was, Whether, in point of law, Milne was liable in damages for the accident which happened on the night of the 21st of August, 1802? Though, when he first read this case, he had some doubts on the point, he now thought a common staircase might be considered as a highway, to the effect of supporting an action of this description.

It appeared that Scott had employed Milne to do some plasterer's work about a house which he was building. By Milne's advice,—or take it that it was done by Milne himself,—a hole was made from the staircase of the adjoining house for carrying plaster to the new house,—the joists of the new house being made to correspond with those of the old house. If, after this operation, Milne had left his work at night, without guarding against consequences, no doubt, unless the principles of the law of Scotland were very different in this particular from those of the law of England, Milne would have been liable. Take it that Scott was also liable, and that, if so, the person injured might have brought his action against either of them for [397] the whole damage, leaving the one to have recourse against the other. But if such was the law of Scotland, it was to be considered whether, in this case, Milne could have obtained any relief against Scott.

The Judges seemed to have differed a good deal. Lord Newton, a very eminent Judge, said that Milne had gone away six weeks before the accident happened. Lord Cullen said that he had left the house. Lord Glenlee said that his work had been stopped for a time; and another said that other workmen had availed themselves of this hole after he had gone away.

If he were summing up the evidence in this case to a jury in England, he should say, that there was not a single tittle of evidence of Milne's leaving this passage unguarded while he was there. He (Lord Eldon) distinguished between the cases where the work was finished, and where not finished; but if Milne was absent,—his business of plastering being of such a nature that one part of it must often be done some time before the rest could be finished,—it was to be considered whether he could be liable when not actually employed. Suppose his workmen had gone away to another job,—to this Vauxhall, for instance,—not that the work was finished, but because it was

in such a state that it could not then be finished,—the first thing to be proved was, that Milne left the passage unguarded while he was there; for it could not be law in Scotland, any more than in England, that, if he took care while his workmen were there, he should be answerable for what happened when they were not there. The first defect in the evidence then was this,—that [398] there was no proof of any *culpa*—to adopt a phrase from one of these cases—in Milne; for while he was there, he might have sufficiently guarded the passage. There was no harm in making the hole; and he could not be liable, unless he had left it in such a state as to expose others to injury of this kind.

However proper it might be, where work might be more conveniently done in one way than in another, to adopt the more convenient method, it was necessary certainly that the work should not be left in such a dangerous state as this had been; but though no man who lived in this town could be ignorant of the negligence in this respect of many of those who had received important privileges from the legislature,—water-companies and others,—and though he wished that a strong example should be made, yet they must not punish one man for the fault of another.

It was the duty of Scott, and the other workmen employed on the premises, to take care that nobody should be injured by their convenience;—and here came the question, How could Milne recover over against Scott? Scott might say to Milne,—‘You were not employed at the time:—if you have suffered, it must be because you did not make your defence. Those who were actually employed may have a right to recover over against me; but how can you who were not then employed, have any such right?’ So that, though no man would go farther—*i.e.* farther within the limits prescribed by law—to make a man answerable for the negligence of his workmen; yet it would be carrying the doctrine farther than it had ever before been [399] carried, if, under the circumstances of this case, they were to make Milne answerable for damage done at a time when neither he nor his workmen were employed on the premises, though it was not proved that he had neglected to secure the opening on any one night when his workmen were there.

Now what was the evidence? He very much mistook the effect of it, unless it proved this,—that Milne’s work was not finished, but that he had retired, owing to its being in a state which did not then admit of being finished; and not only this, but Scott’s evidence proved in terms, that the passage in question was suited to, and used for, the convenience of the masons and others employed about the same place. It was true that a hod was left there, and a plasterer’s beater; but surely that was not sufficient evidence to show that Milne was there. Then it was said, that Milne had desired Scott, or Scott had desired Milne, to order the carpenter to fill up or guard this hole; but whichever way that was taken, it did not prove that Milne was liable. It appeared to him, therefore, that the judgment must be reversed.

Lord Redesdale concurred. It was clear to him that Milne was not answerable. The only reason for conceiving him liable was, that he suggested the making the opening; but it was as much for the convenience of others as for that of his workmen. The injury did not arise from the opening of this passage, which was lawful; but from not properly closing it up, or guarding it, at night, when they left off working. It appeared that Milne had quitted [400] the premises, and left others working there; and it was their duty, and not Milne’s, to close it up. Scott, the owner, was certainly answerable, and without his consent the passage could not have been made nor closed up again. If an action, however, were brought against Scott, it might perhaps be doubted whether, after what he had given, it could be sustained. But suppose an action were brought against Scott, could he recover against Milne? He thought not, as Milne was not actually employed on the premises at the time, and therefore was not responsible for any injury that happened through the negligence of others. With respect to the damages, the Lord Ordinary’s interlocutor appeared to refer to the misfortune which had happened as the foundation for the whole.

It appeared to him, then, that the injury was to be referred—not to the opening of the passage—but to the negligence in guarding it; and that the negligence was not that of Milne, but of others who were using the passage at the time the accident happened. As to the conversation with Scott the day before, that clearly showed that it was not left unguarded through any negligence of Milne; for he complained that it was not shut up. Milne himself had not the means of shutting it up: it was the

business of the carpenter employed by Scott, and that was clearly the opinion of the parties. There was therefore no ground for imputing the negligence to Milne. It rested with Scott and others. He thought it right therefore that the judgment should be reversed.

[401] Judgment of the Court below accordingly reversed.

Agent for Appellant, GRANT.

Agent for Respondent, RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ANDREW,—*Appellant*; MURDOCH,—*Respondent* [June 29, 1814].

[See now the Criminal Procedure (Scotland) Act, 1887, s. 18, and the Bail (Scotland) Act, 1888.]

[In an action for wrongous imprisonment on the statute of 1701, cap. 6, the date marked on the petition praying to be admitted to bail is not to be taken as conclusive evidence as to the time when the petition was actually delivered; but evidence may be given to show the real and actual time of the delivery, though contrary to the date marked on the petition itself.]

[The act of 39 Geo. 3, cap. 49, made no alteration in the act of 1701, cap. 6, as to the time within which, in bailable offences, the bail must be cognosed; the only alteration being as to the amount of bail that may be demanded: and the statute of 1701, cap. 6, not being in any degree to be repealed by inference or implication.]

[Thus, where, in an action on the statute of 1701, cap. 6, for wrongous imprisonment, an undated petition for liberation on bail was alleged in the summons to have been delivered on July 2, and no deliverance given upon it till the 9th, which day was marked in the petition, and therefore, as had been contended, must be taken as the day on which it was delivered, the Pursuer offered to prove, by evidence written and parole, that the petition was presented on the 2d; and the House of Lords—in opposition to a judgment of the Court of Session—held, that evidence as to the true [402] time of delivery might be received, in contradiction to the date marked on the petition.—]

[Lord Eldon (Chancellor) also—in opposition to the opinion of a majority of the Court of Session—intimating a clear and decisive opinion, that the act of 39 Geo. 3, cap. 49, made no alteration in the statute of 1701, cap. 6, as to the time within which prisoners for bailable offences must be liberated on bail; and stating, that he could not conceive how it ever came to be imagined that the act of 39 Geo. 3 made any alteration in that particular, or to be thought that so important a part of so important a statute could be repealed by inference.]

[Several important points being involved in the cause, which the Court below had not under consideration, it was remitted for review generally, with a declaration as above respecting the admissibility of evidence to prove the true time of delivering the petition.]

This was an action for wrongous imprisonment, by Andrew, a shoemaker in the village of Maybole, in Ayrshire, against Murdoch, late Sheriff-substitute of that county.

The summons, after reciting the clauses respecting bail and the pains of wrongous imprisonment in the act of 1701, cap. 6, * stated, that in June, 1800, [403] a petition

* "That it shall be lawful for the prisoner, or person ordered to be imprisoned, to apply to the committer, or Commissioners of Justiciary, or other Judge com-

had been presented to the Sheriff-substitute, charging the Pursuer and one Ramsay, a cartwright in Maybole, with sedition and administering unlawful oaths, and praying for a warrant to apprehend them ; that on the 30th of June the Defender (Murdoch) accordingly granted a warrant for incarcerating the Pursuer in the tolbooth (gaol) of Ayr, and refused to admit him to bail, although bail was then offered.

It was stated, with apparently more accuracy, in [404] the printed case, that the first warrant on the 30th of June was for their apprehension in order to be examined ; that they were examined accordingly before Murdoch, and that three other persons, Quintin M'Adam and two others, were also examined ; that on closing the precognition, the Pursuer and Ramsay offered to find bail, which was refused by Murdoch, who on the same day (30th of June) granted the warrant of commitment, which was in these terms :—

“ *Maybole, 30th June, 1800.*

“ GENTLEMEN.

“ You will please receive and detain in your tolbooth the persons of John Andrew, shoemaker, and Robert Ramsay, cartwright, both in Maybole, accused of seditious practices, until they shall be liberated in due course of law ; for which this shall be your warrant. And you are requested to put these two persons into separate apartments in your jail, that they may have no communication with each other, or with any other person, without your liberty.

“ I am, Gentlemen,

“ Your most obedient servant.

(Signed) “ JOHN MURDOCH.

“ *To the Honourable the Magistrates of Ayr,
“ and Keeper of their Tolbooth.*”

The summons then stated, that the Pursuer was marched under a military guard from Maybole to Ayr, and committed to solitary confinement in the gaol, where the use of pen and ink was denied him, [405] and all communication with his friends interdicted ; that on the 2d of July, 1800, the Pursuer caused a written petition to be presented to the Sheriff-substitute, praying to be admitted to bail, and offering bail to any amount the Sheriff-substitute might please to fix ; that the Defender, in direct violation of the act, (1701, cap. 6.) refused to give any deliverance on the

“ petent for cognition of the crime, and offer to find caution, that he the said prisoner, or person ordered to be imprisoned, shall appear and answer to any libel that shall be offered against him for the crime or offence wherewith he is charged, at any time within the space of six months : and that under such a penalty as the said committer, or the Lords Justiciary, or other Judge competent, shall modify and appoint ; and that upon the said application, the said committer, or Lords of Justiciary, or other [403] Judge competent, shall first cognosce whether the crime be capital or not, in order to the finding bail allenarly ; and if found liable, that he or they shall be obliged to modify the sum for which the bail is to be found within 24 hours after the said petition is presented to him or them respectively ; the sum for which bail is to be found, not exceeding 6000 marks for a nobleman, 3000 for a landed gentleman, 1000 for any other gentleman and burgess, and 300 for any other inferior person, under the pain of wrongous imprisonment.”

That by another clause in the act, “ the pain of wrongous imprisonment shall be, £6000 Scots for a nobleman, £1000 for a landed gentleman, £2000 for any other gentleman and burgess, and £400 for any other persons ; and if any prisoner be detained after elapsing of the respective days, in manner before described, for obtaining his liberty, the Judges, Magistrates, or others, wrongously detaining him, shall be liable to the pains following ; viz.—the sum of £100 Scots for each day of a nobleman, £66 13s. 4d. for a landed gentleman and burgess, and £6 13s. 4d. for other persons ; and farther, shall lose their offices, and be incapable of public trust, by and attorn the pains above specified, and the penalty to belong to the party imprisoned, and process to be competent for the same before the Lords of His Majesty’s Privy Council, or before the Lords of Council and Session, to be discussed by them summarily, without abiding the course of the roll ; and it is declared, that the above penalties shall not be modified by any power whatsoever.”

petition within 24 hours from the time of presenting it ; and that the first deliverance was on the 9th July, which deliverance was in these words :—" In regard the petitioner is duly incarcerated until farther incarceration, and that the precognition taken against him is transmitted to the crown lawyers, he delays giving any deliverance on the petition : " that on the 12th July the Defender pronounced an interlocutor, stating, that " having now heard from the King's Counsel, etc. he found the offence bailable, and allowed the Pursuer to find caution, etc.;" which being done, the Pursuer was liberated the same evening. The summons concluded thus :—" By which illegal and unwarrantable conduct the said J. M., Defender, has not only subjected himself in damages to the Pursuer, but has also incurred the pains of wrongous imprisonment specified in the said statute ; and therefore, agreeably to the said act, and the laws and customs of Scotland, the Defender ought, etc. to make payment to the Pursuer in the sums of money following ; viz. £500 of *solatium*, and for damages incurred by his wanton conduct, together with £400 Scots, and £6 13s. 4d. Scots for each day the Pursuer was detained in prison after the lapse of 24 hours from the time of presenting [406] the foresaid petition for bail, being the pains of wrongous imprisonment inflicted by the foresaid act, etc. ; and farther, that the said Defender should be deprived of his office, and declared incapable of public trust," etc.

The defence was as follows :—" That this is a wanton prosecution against the Defender for discharging his duty. The Pursuer being committed only for examination in the course of a precognition respecting a high charge against him, he was not entitled to be summarily released on bail. And besides, as by his own statement the charge against him was for sedition and administering unlawful oaths, in which case by law (39 Geo. 3, cap. 49*) it is competent for the Court of Justiciary, on application of his Majesty's Advocate, to extend the bail to such amount as they may think necessary, the Defender would have been discharging his duty very ill indeed if he had admitted to bail a person [407] under so high a charge, before the public prosecutor could have had the opportunity of making an application to the Court of Justiciary for an extension of bail, had he judged that proper.—Under protestation," etc.

In support of the proposition that the commitment was for farther examination, the Defender referred to a certain writing, purporting to be a warrant for farther examination, annexed to the precognition, which he contended ought to be considered as the true warrant of commitment,—though the other was the warrant sent to the Magistrates. None of the Judges, however, appeared to rest much upon that allegation. But it was farther contended, that the words, " until liberated in due course of law," were not confined exclusively to warrants for custody in order to trial, but were words of a general signification, to be construed according to circumstances ; and that the circumstances showed this to be a warrant for farther examination, to which the statute did not apply. (Fife and M'Larin *v.* Ogilvy, Fac. Coll. July, 1762.) But though it had applied, the act of 39 Geo. 3, cap. 49, must be held to have virtually repealed the statute of 1701, as to the time when bail must be modified ; because otherwise the provision in question, in the act 39 Geo. 3, could not in many instances be carried into effect.

On the other hand, it was contended, that the mandate transmitted to the Magistrates of Ayr was clearly the warrant of commitment ; and that in practice the words " until liberated in due course of law " were never to be found in warrants for farther examination. But suppose the commitment had been for farther examination, the

* " That in all cases where any person shall be imprisoned on a charge of being guilty of the crime of sedition, it shall and may be lawful for the Judges of the Court of Justiciary, or any one of them, on an application for that purpose, in the name of his Majesty's Advocate, to extend the bail respectively herein directed, to be taken beyond the sums above specified, and to such amount as, under all the circumstances of the case, the Court, or any other Judge thereof, shall consider sufficient for insuring the attendance or the appearance of the person accused, on the day of his trial : provided always, that nothing herein contained shall extend to deprive such person of the other benefits of the acts above mentioned, and particularly of his forcing on the day of trial, as especially directed by the Act of Parliament of Scotland, first above recited."

act of 1701 applied, and the Pursuer ought to have been liberated on bail ; for otherwise the whole institution of bail was an absolute farce, since the Magistrate could defeat it at his discretion, by inserting the words "for farther examination" in the warrant of commitment. The clause in the act of 39 Geo. 3 related merely to the amount of bail, and made no alteration as to the time of liberation. After authorizing the extension of bail, it contained an express proviso against the supposition that it altered the act of 1701 in other respects. It was perfectly absurd to imagine that so important a part of so important a statute could be repealed by inference and implication.

[408] It also appeared that the petition praying to be admitted to bail was not dated, and there was a difference between the parties as to the time when it was presented ; the Defender alleging that it was not presented till the 9th July,—the Pursuer insisting that it was presented on the 2d, and offering to prove the fact by the books in the Sheriff-clerk's office, by the Defender's correspondence with the Crown agent, by parole testimony, etc. The Defender, however, contended, that as the petition was not dated, it must be held, *presumptione juris et de jure*, to have been presented on the day of the date of the first order or deliverance upon it,—viz. the 9th July. The Pursuer was not allowed by the Court to go into proof of the fact of presentation on the 2d.

After various proceedings, the Lord Ordinary, (Armadale,) by interlocutors of Jan. 24, Feb. 13, March 3, May 16, 1801 ; and Nov. 12, 1802 ; and the Court, by interlocutors, June 20, 1804, and June 21, 1806, sustained the defences and assolized the Defender, and found expenses due.

The grounds of the opinions of the Judges, very briefly stated, were as follows,—Newton, Armadale. (Ordinary, who had changed his original opinion,) and Meadowbank, being for Pursuer ; Hope, (Justice-Clerk,) Craig, Hermand, and Islay Campbell, (Lord President,) being for Defender,—

The Lord Justice-Clerk (Hope, now President) considered the warrant as a commitment for farther examination, and that such a commitment was not bailable ; but suppose it had been for custody in order to trial, the Sheriff-substitute was warranted in what he did by 39 Geo. 3, cap. 49.

Lord Newton. It was the duty of the Clerk to have marked the date of delivery on the petition ; and if he neglected, he did not know but the fact might be proved by parole evidence. The warrant did not bear to be a commitment for farther examination ; but even if it were, the act of 1701 clearly applied to commitments for farther examination.

Lord Armadale. The time of presenting the petition might be proved by the Sheriff-clerk's books. The act of 1701 did not apply to warrants for farther examination ; but this was a warrant of commitment for trial, to which the statute did apply ; and the act of 39 Geo. 3 made no difference as to the time for liberation.

[409] Lord Craig. The act of 1701 did not apply to commitments for farther examination. This was a warrant for custody in order to trial. It was very doubtful whether the act of 39 Geo. 3 made any alteration as to the time of liberation in the act of 1701 ; but where there was so much uncertainty he could not decern against the Magistrate.

Lord Meadowbank. No part of the act of 1701 can be repealed by inference, and no alteration as to the time for liberation was made by the act of 39 Geo. 3. A commitment for farther examination cannot be the ground of an application for bail. But this was clearly a commitment for trial, and the bail ought to have been cognosed within 24 hours.

Lord Hermand. The warrant was for farther examination, and the act of 1701 did not apply. He seemed to conceive that the act of 39 Geo. 3 at any rate warranted the proceeding of the Sheriff.

Lord President (Islay Campbell.) The statute of 1701 did not apply to commitments for farther examination. The warrant was peculiarly and anomalously expressed, and he did not recollect ever to have seen such a warrant before ; but the act of 39 Geo. 3 authorized the detention.

The Pursuer appealed from the decision of the Court of Session, prosecuting his appeal in *formâ pauperis* ; and in the interval between that decision and the hearing of the appeal the Defender died.

Romilly and W. G. Adam for Appellant : and Nolan for Respondent.

Lord Eldon (Chancellor.) In looking at the case of Andrew v. Murdoch, a case of so much importance, as it had been stated to be, to the liberty of the subject in Scotland, and of so much consequence in other respects, he found that many points arose out of it which had hardly been touched upon at the bar. This was an action brought by Andrew (a shoemaker) against the Sheriff-substitute of Ayrshire, for wrongous imprisonment ; and whatever might be the Appellant's situation in life, it was enough for them that he was one of His Majesty's subjects, and entitled as such to the protection of the law, and to the legal compensation, if there had been any breach of the law in his case. Sit-[410]-ting there as Judges, they had only to consider what the law was, and whether there had been any breach of it. Whatever might be their opinion of the law, their duty was to administer it. Where alterations might be requisite, they must be made by their Lordships in the discharge of very different functions.

His Lordship then stated the difficulties which, in the consideration of the case, had presented themselves ; the nature of which may be found in the five following questions, which were ordered to be argued by one Counsel on each side.

1. Whether, having regard to the allegations and conclusions of the summons, any and what judgment could, according to law, be pronounced against the Defender, if he was in life, in this case, considered as a proceeding under the Act of Parliament mentioned in the summons, unless it be proved or admitted that the Pursuer's petition was, according to his allegation, presented on the 2d day of July to the Defender ?

2. Whether any and what judgment could, according to law, be pronounced against the Defender, if he was now in life, for the Pursuer, considering the Pursuer as demanding a judgment in his favour, according to the laws and customs of Scotland, independently of the provisions of the aforesaid Act of Parliament, and having regard to the allegations and conclusions of the summons, and the facts of the case, and the principles upon which a proceeding demanding such a judgment is to be supported, according to such the laws and customs of Scotland ?

3. Whether, if the Defender was now in life, he could, according to law, in this proceeding, be deprived of his office, and be declared incapable of public trust ?

4. Whether the Pursuer was entitled by law, in one and the same proceeding, to demand damages, and likewise the sums mentioned in his summons, or other sums, as the pains of wrongous imprisonment inflicted by the said Act of Parliament ; and also, that the Defender should be deprived of his office, and be declared incapable ?

5. Whether, after the death of the Defender, any and what judgment can, according to law, be pronounced upon the summons, having all the conclusions for damages, and pains, and deprivation, and incapacitation ; regard being had to the fact, that in the Defender's life-time interlocutors were pronounced by the Court of Session upon the merits and expenses ?

[411] W. G. Adam. 1. Judgment might be given for the aggregate sum of £400 Scots, and also for the £6 13s. 4d. *per diem*, restricted as if the petition had been presented on the 9th ; but if that restriction was not competent, at all events the cause must be remitted, for proof of the fact that it was presented on the 2d. The difficulty as to the penalties of so much *per diem* was, that, unless the *terminus a quo* were given, they could not be rightly computed ; and that therefore the time was of the essence of the allegation of the offence. If this applied at all, it could only be to the penalties *de die in diem*. It could not apply to the aggregate sum of £400 Scots, which was one of the pains of wrongous imprisonment. On indictment, the offence might be laid to have been committed on one day, and it might be proved to have been committed on another, if the general allegation were made out. (Lord Eldon. Where time was of the essence of the charge, it must be alleged.) In an action for false imprisonment, it might be laid on at a certain day, or between day and day, but they were not tied down to prove the very day in the declaration. If that was the case with respect to the aggregate penalty, why not as to the penalty *de die in diem* ! as again in false imprisonment, the point of time was as important as under this act of Parliament ; and so in cases of demurrage at so much per day. But suppose this not to be English law, such an objection had never been taken in the law of Scotland. He could not find a single decision on the point ; and if there had been any authority, Blair, (afterwards President,) who argued the case below, would have found it.

2. In other words, Whether judgment might not be given for the damages at common law, independent of the statute? He submitted it might. That depended on the *malus animus*, which appeared from the circumstances to have existed here. By the act, the petition must be in writing; and the Appellant was confined so as not to be able to write at all. Bail to any amount was offered, and therefore the application to the King's Advocate was only a pretence.

3. Certainly, not without the concurrence of the public prosecutor. (*Sim v. Murray*, Jan. 19, 1810.)

4. The Pursuer was entitled to demand the penalties, and damages at common law under the same proceeding; and—the claim of deprivation of office being abandoned—they were so far [412] supported by the case of *H— v. Scott*, (Fac. Coll. Feb. 1793,) where the proceeding was for damages and penalties, to which there was no objection on the ground of incompetence, though it was restricted from want of evidence. Here, too, the summons might be restricted to the pecuniary penalties and damages, as a Defender in such a case could be in no worse situation.

5. Judgment might be given against the representative only for the penalties and damages. (*H— v. Scott*, Fac. Coll. Feb. 1793.) There were two heads of actions of which Erskine (b. 4. t. 1. s. 14) gave an account,—*Actiones rei Persecutoriæ*, and *Actiones Penales* (reads the section.) The chief difference between these two branches of actions was, that where the Pursuer insisted for indemnification of real loss, the action was transmitted against heirs; whereas, actions where a demand was made by way of penalty died with the transgressor. That was the general rule,—but there was an exception; and at the close of the title, Erskine (b. 4. t. 1. s. 69, 70) went on to explain the nature and effect of *litis contestatio*, which gave a new quality to the penal action, and rendered it transmissible.

In the case of *Morrison v. Cameron*, (May 25, 1809,) the Court was clearly of opinion that it did not transmit as a punishment, but that reparation in damages was a debt which transmitted like any other debt. So in *Mackenzie v. McKenzie*, and in *McNaughton v. Robertson*, and in the important case of *Montgomery v. Walker*. (Kilk. 401.) (Lord Eldon. But was it said in any of the cases that both damages and penalties transmitted?) There was no authority for both, and he put it only on the principle. Then as to the penalties:—When the offence was committed by the one, the penalty became a vested interest in the other, transmissible to his executors: and so it had been argued in *Sim v. Murray*, (Jan. 19, 1810,) and also in *Gray v. Pater-son*, (1773,) cited on account of the able argument of Islay Campbell, where it was admitted that the specific penalty given by law to a private party transmitted. This was no new doctrine, that the penalty given by a remedial statute vested in this manner,—the right to recover back a sum of money lost at play by a bankrupt before his bankruptcy having been held transmissible to the assignees. These cases were cited in the Bankrupt Law as authority. (*Brandon v. Pate*, 2 H. B. 308. *Brandon v. Sands*, 2 Ves. 514. 1 Cooke B. L. 320.) But he had another ground. Standing there, he was entitled to presume that the judgment of the Court below was wrong, and to argue as if it had been in his favour; and then it was clear he ought now to have judgment as [413] if the property had been vested in the life-time of the Defender. (Lord Eldon. In action for damages on tort, verdict for Plaintiff, and new trial; if the Defendant dies before execution, however it may be in a moral view, the whole is gone. The Courts, indeed, to remedy this, are in the habit of saying in such cases; that if a new trial be granted, security must be given for the damages, whether the Defendant die or not before execution.)

Lord Advocate. The preamble of the summons recited the statute only. The second part, or narrative, had nothing to do with the common law. No *animus injuriandi* was charged in the proper place. Not having been raised with concurrence of the King's Advocate, it was from the beginning good for nothing, and could not now be amended. The conclusion of malice and damages was thrown in at the end, without any apparent intention of resting on it. It was not rested on below. There was no condescendence upon it, and no proceedings but on the statute. In the case of *Sim v. Murray*, 1810. there were two conclusions,—one for £500,—another for deprivation; and the decision went thus far,—that the latter was not competent without the concurrence, etc. But there they were allowed to restrict. That was in the Court below: but here the summons could not be amended, either as to

addition or diminution. They could not open their mouths therefore, with respect to the damages only, or with respect to the penalties under the statute, without the concurrence of the Lord Advocate.

1. The charge was, that the petition was delivered on the 2d : but the date marked on it was the 9th.—the date of the first deliverance : and this was the only evidence. The law of Scotland was jealous of parole testimony, and none could be admitted against the date on the petition. (Lord Eldon. Suppose it had been delivered on the 2d, and the Clerk by mistake had put the 1st, was it the law of Scotland that the Magistrate was bound by this mistake ? Or if he could show the true day by parole evidence on his defence against an action of this sort, why should not others have the same advantage ?) That was a strong case ; but he apprehended, that though the Clerk might be punished, the Magistrate would be bound. (Lord Eldon. Then the Lord have mercy upon Scotch Magistrates.) As to this first question, then, [414] he said, that no judgment could be given upon the summons, without concurrence of the Crown officer ; and even if that had been given, still no judgment could follow : the allegation being as to the 2d—the proof as to the 9th, and no amendment being now competent. With deference, he denied it to be consistent with law or practice in Scotland, that a crime could be charged on one day and proved on another, either on an ordinary summons, or on a proceeding more strictly criminal. He was informed, that the same principle was acted on here in cases where time was of the essence of the offence.

2. The summons was not one libelling on the common law, and therefore, though there had been a *malus animus*, no judgment could be pronounced upon it against the Defender.

3. There was no concurrence, and the whole proceeding, coming here without amendment, was vitiated.

4. A summons might include damages at common law, and the statutory penalties ; but the summons here was bad, for the reasons already stated.

5. There were two principles as to penal actions. So far as they were for reparation in damages, it had been repeatedly held that they were transmissible,—*secus*, if for punishment of the supposed offender. (Gray v. Paterson, 1773.—Morrison v. Cameron.) Here the summons was not for reparation in damages to the injured party, but a summons on the statute, merely for penalties, as a punishment on the Magistrate ; and therefore there could be no transmission.

W. G. Adam (Reply.) They were not too late here in passing by part of their demand, as the case was not finally decided, and the objection had never been taken below. The observation, that the law was jealous of parole testimony, did not apply here, as they had offered to prove the delivery of the petition on the 2d, not merely by parole evidence, but by the Clerk's books, etc. The Lord Advocate had denied that an offence could be charged on one day and proved on another. But let him look at Erskine, in his chapter on Crimes. (b. 4. t. 4. s. 89.) As to the argument respecting the concurrence, etc. that was putting the liberty of the subject on that concurrence. The case of Gray v. Paterson (1773) was cited against him, but, as he conceived, without effect ; as the Pursuer there gave up his claim before decision, and it became merely a proceeding [415] *in vindictam publicam*. The pecuniary penalties here were intended as compensation, which evidently appeared from their being proportioned to the degrees of the parties.

Lord Eldon (Chancellor.) The Appellant in this case having come before their Lordships in *formâ pauperis*, it was desirable that the cause should not be sent back again, if that could be prevented. The case had been very ably argued on both sides, and it might be proper to take a short time to consider it before they came to a conclusion. They could not blame themselves for having it re-argued, as many important points were now opened, which had not been adverted to below.

The original proceeding, to which he knew nothing analogous in the law of England, was by a summons concluding both for damages at common law and pecuniary penalties, with deprivation of office, and disqualification during life, under a statute ; and the consequences therefore would have been very serious indeed to the Defender, if the decision had gone against him. It certainly had occurred to him as singular, if the law of Scotland really did allow such a proceeding. But, after what he had heard, he could not take upon him to say, that, with the concurrence of the King's

Advocate, a proceeding of that description might not be competent. It was contended, however, and with considerable effect, that the summons could not here be restricted to damages at common law merely; also, that the conclusion for deprivation and disqualification could not be supported, unless the King's Advocate had been called in; and that, unless the King's Advocate had been called in, even the pecuniary penalties of the slump sum, and so much for each day, could not be recovered. But the question as to the concurrence of the Lord Advocate was very different when considered with a view to the loss of office and disqualification during life, from what it was when considered with regard to the pecuniary penalties given by the statute to the party imprisoned.

Their Lordships had heard much as to the time when the petition had been presented; and he would recommend it to such of them as had particularly attended to the cause, to give a good deal of consideration to that point. True, the Appellant had offered to prove that the petition was delivered on the 2d, and had stated the *media* of proof; but it was argued, that such proof [416] could not be admitted against the date marked on the petition. He had before felt a difficulty as to that, which was still far from being removed. Suppose the party had put a wrong date on the petition, would that bind the Judge? Suppose the Clerk had marked the date, and had put the 1st instead of the 2d, would that be so powerful that the fact of the mistake could not be proved, and that the Judge must be shut out from that proof against an action for damages at common law,—against an action for the pecuniary penalties under the statute,—and against a prosecution for deprivation and incapacitation? If that was so clear, that running they might read it, they could not help it; or they must help it in another way. But he had hitherto heard of no authority to show that such was the law. It must then be considered, whether the fact, that the petition was delivered on the 2d, could be got at without remitting the cause.

Reference had been made here to the not passing from the alleged incompetent part of the summons in the Court below, and a question had arisen, whether their Lordships could now pass from it; and whether they had not the power to do so, since the objection as to the competency of the summons had not been taken below, and therefore the amendment not made there; and also as to what effect the death of the original Defender must have upon the suit.

These were points for consideration; but he could not help expressing his regret, that a matter so plain as this appeared to be, both as to fact and law, should have been the subject of such a long and complicated litigation. The fact was, that the Appellant had been arrested for a bailable offence. If the petition praying for liberation on bail was presented on the 2d, a deliverance ought to have been made upon it within 24 hours from that time; and, with all due deference to the opinion of the Court below, he could not but say, with more confidence than he usually felt on such occasions, that he could not possibly imagine how it came to be thought that the act of 1799 (39 Geo. 3, cap. 49) made any alteration as to this point. The alteration related merely to the amount of bail, but the party was not to be kept in prison longer than before; and the act of 1799 could not have the effect of authorizing a longer confinement, unless that had been the subject of special enactment. If the statute for the prevention of wrongous imprisonment was attended with incon-[417]-venience in its operation,—(he did not feel that it was.)—that inconvenience was not to be removed by inference. What was to be done with this case must be the subject of farther consideration; but, after having already thought much upon it, he should have been sorry to part with it, without even now stating, that he thought the Appellant had very considerable reason to complain.

Lord Eldon (Chancellor.) This was an action on the statute of wrongous imprisonment, (1701, cap. 6.) which was considered to be as valuable for the protection of the liberty of the subject in Scotland, as the *Habeas Corpus* act was in England. A proceeding therefore founded on an alleged violation of this statute was entitled to their Lordships' particular attention. (After stating the facts and previous proceedings at length, his Lordship continued.) Their Lordships could not be much surprised after this statement if they still found themselves under a very great difficulty in getting at the real justice of this case. It had been contended at the bar, that the summons was one which proceeded entirely on the statute, and that it con-

tained no allegation libelling, as they called it, upon the common law; yet the conclusions were for penalties under the statute, and for damages at common law. The way in which the Lord Advocate put it was this:—The summons not being one which libelled upon the common law, no judgment for damages at common law could be given upon it; and as to the penalties under the statute, he (Lord Advocate) insisted that the subject could not have the benefit of that statute without the concurrence of the Crown officer,—a proposition which would require a great deal more consideration than to be satisfied with the mere assertion. But their Lordships would find it farther contended, that this Court (House of Lords) could not alter a summons, but must take it as it stood. It had been stated at the bar, that in the Court below they might pass by part of a summons; but it had been farther argued, that if a cause came here by appeal upon a summons joining competent with incompetent conclusions, the summons could not be in part passed by in this Court of Appeal; but the judgment to be given upon it must be only such a judgment as the Court of Session could have given, if no part of the summons had been passed from. Though an anxiety, and a proper anxiety, prevailed among their Lordships, to come to a final conclusion on this subject, it was however very difficult for them to do so, where they stood in circumstances in which they were called upon to decide important points in the criminal law of Scotland which had not been considered and decided upon in the Court below.

But there were two or three points arising out of this case which deserved their Lordships' particular attention. If they rightly understood the proceedings in the Court below, (and they ought to be able to understand them, considering the assistance they had had at the bar,) the interlocutors involved this proposition,—that where a person imprisoned for custody in order to trial applied under the directions of the act of 1701 to be liberated on bail within 24 hours of the date of presenting the petition to that [419] effect, if it happened that a date, not accurately stating the time at which the petition was delivered was marked upon it by the Magistrate or the Clerk, it was of necessity that they were bound down by the positive rule of law to take the date so put as denoting the true day upon which the petition was delivered; and that no evidence could be admitted in behalf of his Majesty's subjects to show that the date so marked was not the true date of the delivery of the petition. He had found it very difficult to convince himself that such was the case; for if it were so, their Lordships would consider what must be the condition of the Magistrate himself. It might be usual for the Clerk to put the date of delivery upon the petition; but it had not been averred to them, that it was his duty to do so:—but suppose it had been his duty,—for God's sake, if an action were brought against the Magistrate upon the statute of wrongous imprisonment, under which he was liable in the payment of a large pecuniary penalty for each day of confinement beyond 24 hours from the time of presenting the petition, and exposed besides to the loss of office, and perpetual disqualification, —could it be contended, that in such a case the Magistrate would be bound down by a mistake of the Clerk? But justice must be administered with equal scales. If the subject could not have the benefit of the blunder as against the Magistrate, the Magistrate could not have the benefit of it as against the subject. This proposition therefore it appeared to him quite impossible to sustain, upon any principle that he could understand.

[420] But it had been said, that this was not a warrant of commitment for custody in order to trial, but a warrant of commitment for farther examination; and a great deal of argument had been used to induce their Lordships to believe, that a warrant which bore to be for custody "until liberated in due course of law" might be understood as a warrant of commitment for farther examination. Even in the law of England he had found more authority for correcting the conclusion of a warrant by the subject matter of it than he had at first been aware of. Their Lordships, however, would look at the fact in the present case. This might turn out not to be a warrant of commitment for farther examination, and it might not be a warrant of commitment for trial. But if it could not be considered as a warrant of commitment for farther examination, he doubted whether the Magistrate could be heard to say, that it was not a commitment for custody in order to trial.

The Magistrate had fallen into the mistake—he should be sorry to speak harshly of supposing that the late act (39 Geo. 3, cap. 49) authorized him to confine persons

charged with this species of offence till a correspondence could take place with the King's Advocate from all parts of Scotland. He did not say whether this would be a reasonable enactment; but it was difficult for him to conceive it to be so reasonable as to induce him to believe that such was the meaning of the act, unless he found that meaning clearly there expressed. There was a mode of construing the act, which appeared [421] to him to be rational, without resorting to any such meaning; and therefore he should say, that it contained no such enactment. Where the exigency of the statute occurred, the Lord Advocate, with the aid of the Court, or of a Judge of Justiciary, might say, 'Under the authority of this act, I direct bail to a greater amount to be taken.' But it never could be contended, that because a power was given under this statute which might be rationally exercised as above stated, the consequence should be a repeal of the whole benefit of the act of wrongous imprisonment, in every case where the necessity existed for a distant correspondence.

Then it appeared to him, that the proper mode of dealing with this case, considering the important points of Scotch law involved in it which had not been under consideration in the Court below, would be to remit to the Court of Session to review the interlocutors generally, but with a declaration as to the point of the date of the delivery of the petition; for till that was fixed they could come to no conclusion upon two other points, one of which was essential, the other extremely material. Whether there was any undue delay in giving a deliverance on the petition was essential; and it was a very material point, whether the laying the time was not here of the essence of the allegation of the offence.

These were most important considerations, with reference to the condition of the Magistrate himself; but it ought never to be forgotten, that in the case of every individual, the act for preventing wrongous imprisonment must be so construed as to give to [422] that individual, be he high or low, rich or poor, the benefit which under that statute belonged to all.

Lord Holland. Partly from accident, and partly from the interesting nature of the subject, I have attended this cause throughout, and listened patiently and anxiously to all the proceedings before the House. I do not, however, rise for the purpose of giving any opinion on the decision which your Lordships must adopt. Had I disagreed with the noble and learned Lord on the woolsack, I should, from consideration of his great legal knowledge, and the professional habits of his life, have hesitated long ere I felt myself warranted in giving the party in whose favour I so differed the benefit of my opinion and vote;—but I am relieved from all such difficulty. After the maturest reflection, I concur in the noble and learned Lord's conclusion; and I concur in it nearly, though not entirely, upon the same grounds as those stated by his Lordship. The House will not suspect me of the presumption of hoping to enforce arguments which he has urged with such eloquence this day. Nothing after his luminous statement and powerful speech can be uttered to give additional reason or authority to your Lordships' decision,—nor am I vain enough to attempt it; but there have been other circumstances brought before our view, on which I wish to say a few words, addressing myself to your Lordships in your capacity of legislators and guardians of the law, rather than in that of Judges. It has already been remarked, that this is a cause of importance, both as it affects the Magistracy and the people of [423] Scotland. It is so especially, inasmuch as the construction and efficacy of the most anxious statute in the book of Scotch law depend upon some of the questions which have been raised in the course of it. I call the act of 1701, at the risk of a barbarism in language, an anxious statute; because every line of it betrays the anxiety of the Scotch legislature of that day to guard against unnecessary and oppressive or, as it is termed in the law itself, wrongous imprisonment of the subject. In the face of such a statute, in defiance of that anxiety, it is painful, indeed, to be compelled to send back the Appellant without any redress or compensation; but owing to the mixed and incongruous manner in which the charges are drawn, to that conclusion I fear we must come. The forms and proceedings of justice require it, whatever we may think would have been our judgment had the facts and the law have been brought before us in a more regular shape. The forms of justice are not, and cannot safely be, dispensed with. Though but the rind of the tree, they are necessary to convey its nourishment and sustain its growth, and to protect its substance from injury and decay. Nor is it form only, but substantial justice requires us, sitting here as

a Court of appeal, not to determine points on which the Courts in Scotland have pronounced no decision. But while you must act as Judges, your Lordships must feel as legislators, or as men ; and you cannot shut your eyes to the facts of a case, or fail to lament that in this instance an act of glaring oppression has occurred, and at the end of 14 years the party ag-[424]-grieved must be sent back to the Court of Session for that redress which, while the events were recent, and the means of proof at hand, he was not permitted to obtain. That a man has been wrongously imprisoned is clear ; that the common law of Scotland grants damages for wrongous imprisonment seems admitted ; that the statute of 1701 inflicts severer penalties is still more incontrovertible ; and yet this unfortunate Appellant, having sued for redress in various Courts, and appearing at your bar in *formis pauperis*, must now be sent back to recommence his suit, when lapse of time, which has removed by death the person against whom his action was brought, may possibly have extinguished his witnesses too, and thus have deprived him of the means of obtaining at last that redress to which, from the facts of the case, it is manifest he was legally entitled. How has this happened ! From negligent administration of justice, or from some defect in the law itself ! If from the former, Parliament should punish those who have neglected their duty ; if from the latter, inquiry should be made into the nature of the laws themselves, for the purpose of revising and correcting their defects.

The act of 1701 inflicted several penalties on those who imprisoned any of the subjects of Scotland wrongously. The nature of these penalties have been frequently explained,—1st, a certain sum *de die in diem* ; 2d, what was called the slump, or aggregate sum ; and, 3d, loss of office, and disqualification from holding any situation of public trust whatever ;—a severe punishment,—one of the se-[425]-verest that can be inflicted ; for nothing can be more cruel, as I have often contended on other occasions, (which being of a political nature I shall not now dilate upon,) than to disqualify a man from the service of his Sovereign and his country. It has been argued, that these penalties, though inflicted by statute, cannot be recovered without the concurrence, that is, the concurrence and intervention of the Crown officers in Scotland. This is an important question indeed, and the House is not prepared on the sudden to declare what is the law of Scotland upon it ;—and here I must regret, that a regulation, once suggested, I believe, by a committee, has never been adopted :—I mean the attendance of two Scotch Judges, by rotation, during each session of Parliament. Their assistance would promote the ends of justice in all questions of Scotch law, and the House would not, as now, be compelled to take so much time for the purpose of referring to other authorities, or collecting the law exclusively from the statements and arguments of Counsel at the bar. We might learn the maxims and practice of Scotch law from them ; and from our conduct, even in the anxiety shown to ascertain that law, may I be permitted to add, that they might learn something from us. This House, as a Court of Judicature, does not consider what might or ought to be the rule of law, but regulates its decisions by what is actually so. We know of no "right reason which is paramount to Acts of Parliament ;" but hold it our duty to be guided exclusively by the common and statute law of the land. The Scotch Judges [426] might profit by such an example ; and, unless they are belied by a publication which I shall notice presently, they stand in great need of the lesson. One of them is represented, I hope untruly, as boasting, that he did not judge by law, but by what he is pleased to term "right reason," which, he adds, is "paramount to "all Acts of Parliament." If such be their language, while by their attendance here they might enable us to ascertain the law of Scotland on many points, our example might teach them not to set up the authority of their own "right reason" against the law which they have sworn to administer. In all judicial cases, whatever we may think of the law, by it, and by it only, must we decide. Circumstances, however, may come before us as Judges, which may suggest many useful considerations to us in the character of legislators for the correction of abuses, and general improvement in the administration of justice. I think some have arisen in this cause. I know not whether all or none of the penalties under the act of 1701 can be recovered without the concurrence of the Lord Advocate. In either case, it appears to me the law requires revision and explanation. On the one hand, it is perhaps unreasonable to expose a Magistrate to so severe a penalty as privation and disqualification from all office of trust at the suit of an individual ; and though in flagrant cases such punishment

might be inflicted, it ought perhaps to be at the suit of the Crown alone such consequences so highly penal should attach. On the other hand, the whole of that excellent statute, by which the [427] Scotch legislature meant to secure the liberty of the subject by provisions yet stronger than those of our *Habeas Corpus*, would be rendered nugatory, if none of the penalties under the act could be recovered but by the intervention of those persons in authority who, in all likelihood, especially in charges of sedition, would be the chief instigators of the wrong, and therefore the last persons whose concurrence should be thought necessary in seeking to redress it. If the law grants the pecuniary penalties, and not the disqualifying punishment, at the suit of the individual, that law ought to be ascertained and promulgated by a declaratory act, if necessary. If that be not law, a statute should pass to make it so; and the recovery of the sum *de die in diem*, and still more that of the aggregate sum, called *solatium*, and partaking of the nature of damages, should be rendered easy, and in no way dependant on the will of any Magistrate or lawyer in office or authority.

The decided opinion of the noble and learned Lord on the construction attempted to be put on the 39 Geo. 3, cap. 49, has given me great satisfaction. It is such as I should have expected from *his* accurate mind, and renders all farther comment unnecessary. The argument, that such an act can, by inference and a side wind, defeat the intentions and repeal the provisions of the act of 1701, (though some stress was laid upon it in the Court of Session,) is, I am happy to hear from the noble and learned Lord, not to be maintained for a moment. It would be idle to waste one word to expose its futility. The act of 1799 has left the provisions of 1701 [428] where it found them; with this exception only, that at the instance of the Lord Advocate, the Court may exact a larger amount as bail in cases of sedition, than under the old act it could have done. And here I wish to say a word on that act, not as it affects this cause, but as it affects generally the liberty of the subject, and the consistency of our legislation. "Justice," said the learned Lord, "must be administered with 'equal scales;' and laws, I venture to add, should be made on equitable principles also. Yet I find this act of 1799, (framed, by the by, at a time when the learned Lord had many cases of sedition, or, at least, that were so called, on his hands; a time which I look back upon as a most unhappy period in legislation)—I find, I say, this act giving a power to exact a greater amount of bail from persons accused, but not extending the sum to be inflicted as penalty on the Magistrate in case of wrongous imprisonment. Yet in the preamble I find the motive, or at least one of the motives, for this change, was the "difference of times." That, I presume, means the difference of the value of money. But is there more difference in the value of money given as bail than the value of money paid as penalty? If that difference is a good reason for a change in one case, it is in the other; and the act as it now stands is a partial law, an unequal, a lopsided measure, where the argument is granted in favour of the Magistrate, and denied in favour of the subject. A moment like the present is favourable to the revision of laws, especially such as have been passed in periods of a different [429] character, in a period like 1799, of passion, prejudice, and injustice. This act, in my opinion, had better be repealed altogether; but if it remains on the statute-book, regard to the principles of justice, and even to the appearance of consistency, requires an increase of penalty for wrongous imprisonment proportionable to the increase of bail which may by that new law be exacted.

I now come to a topic which it is painful to me to touch upon, but which, with my view of it, it would be criminal in me entirely to overlook. In the course of this cause, there have been handed up from the bar, not indeed as evidence, but for the information of the House, two books, one rather voluminous, and the other not small, purporting to be Reports of cases determined in the Courts of Scotland, and containing particularly the report of what passed in the Court of Session on the cause which is now before us. It is not necessary to observe, that in this country many learned and ingenious men have supplied the public with Reports of law cases, which, as precedents, have become the rules by which our Courts of Justice decide upon points of the greatest importance. One cannot look across this table* without having the value of this sort of publication brought to our mind. Our law, the result as it is of the experience of ages, does not disdain such assistance, and often leans on the

* Mr. Cowper, the Clerk of the House of Lords, published Reports.

authority of such books. But, if I am not misinformed, the volumes handed up to us are invested [430] with a yet stronger character of authenticity. They are not the mere voluntary reports of attentive individuals. The gentlemen who publish them are actually appointed by the Faculty of Advocates, that is, the bar of Scotland, to attend the Courts, and to publish the proceedings. How can we then doubt their authenticity? And yet, when I see the spirit in which the opinions of the Judges of Scotland are there represented to be delivered, I cannot help hoping that there may be some inaccuracy, some exaggeration, or mistake. Unlike the bias which is generally enjoined by law, and has at the close of his speech been this day so well enforced by the noble and learned Lord, of construing every thing in the manner most favourable to the liberty of the subject, a spirit of directly a contrary tendency, with one or two honourable exceptions, (Buch. Rep. 28-42. Probably Lords Newton and Meadowbank.) pervades the whole of what is there reported to have been delivered from the bench. A disposition is manifested to dwell on every argument, to catch at every twig, by which the Court can be spared the dreadful mortification of granting a helpless and injured individual the redress to which he is entitled against the arm of power exercised with oppression. One Judge (Buch. Rep. 51. Lord Hermand) is represented as saying, (and if the report is false, a grosser libel was never propagated against the character of a Judge than this authenticated book of Reports,) that the act of 1701 had been compared to the English *Habeas Corpus*, had been called the *Magna Charta* of Scotland, the palla-[431]-dium of civil liberty; but that he, ever since he sat on the bench, and long before, had considered it as a galimatias of nonsense! as an act framed with an intention of being so; that he did not care what the Act of Parliament said, but always decided according to right reason, which was paramount to all Acts of Parliament. I do not, my Lords, pretend to quote the exact words in the book, for it has been mislaid; but such I am sure was nearly the substance of what is put into the mouth of a Scotch Judge. I cannot say that they were actually pronounced by him. I have stated to the House on what evidence they rest. I will not even say, that in the shape in which we have received them they call for any Parliamentary proceeding; but I do say broadly, (and I again wish some Judges of that part of the United Kingdom were here to hear me,) that if such words, or such sentiments, had been expressed from the bench of *this* country, if, even in the common, unauthenticated, and careless newspaper reports, such a defiance of the authority of Parliament, such an open contempt of their oath and their duty, had been attributed to our Judges, and it had occurred during a sitting of Parliament, twenty-four hours would not have elapsed before some step was taken to ascertain the truth of the report, and if true, to institute inquiries into the manner in which the Judges of the land were themselves treating that law which they are appointed and have sworn to administer.

I could not therefore allow this circumstance, so brought before me, to pass without animadversion. [432] If the impression made on my mind be too strong, I shall, I am sure, be corrected; but I cannot but believe that every one of your Lordships who have read or heard of this report must have felt concern and indignation at such a violation of duty and decency. If such is the language held on the bench, it is high time to appoint a committee of inquiry, and to ascertain how justice is administered in Scotland; and I only hope that your Lordships, and the learned Lord on the woolsack in particular, will not think that I have exceeded my duty in thus animadverting strongly on the strange language which has been brought before our notice. I know nothing of the learned Judge whose words I have commented upon; the duty I have discharged is a painful one; but upon my honour and conscience, I think I should have deserved reproach if, feeling as I do upon the subject, I had neglected it. On the cause I believe there is no difference of opinion; and I trust, when the learned Judge shall have framed his motion, or judgment, I shall find his opinion—that the decision of the Court of Session, on the subject of the date of the delivery of the petition, cannot be sustained—strongly expressed.

“It is declared by the Lords spiritual and temporal in Parliament assembled, that “it is competent to the Court of Session in Scotland, in a due proceeding on account “of wrongful imprisonment, to receive evidence tendered to prove the actual and “true date of the delivery of the petition of the [433] party alleging himself to be “aggrieved by such imprisonment; and that the date of delivery written upon such

"a petition ought not to be taken to be conclusive evidence of the actual and true date of such delivery. And it is farther ordered, that with this declaration the cause be remitted back to the Court of Session in Scotland, to review generally the several interlocutors complained of; having in such review special regard to the nature of the summons in this proceeding by the Appellant alone, and its allegations and conclusions: and thereafter to do in the said cause what to the said Court shall appear meet and fit to be done."

Agent for Appellant, CAMPBELL.

Agent for Respondent, LONGLANDS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ANDERSON, of Inchry,—*Appellant*; THOMAS, Minister of Abdie,—*Respondent*
[July 6, 1814].

[See Bell's *Principles*, ss. 1173, 1175.]

[Designation of certain lands for a Minister's grass glebe objected to on the grounds that there had been a payment in lieu of such grass glebe for about a century of £20 Scots. (but no decree of Presbytery for it appeared on record;) that the ground was arable, and under cultivation at the time of the application for the designation; and that the lands designated were not those nearest the church. Pleaded on the other hand, that—there being no recorded [434] decree of Presbytery—the presumption was, that the payment arose from a private agreement between the heritors and Minister for the time being, not binding on the successors; that the lands in question were best adapted for pasture, and the nearest to the church that were convenient for the purpose.—Judgment for the Minister below—affirmed above, with £80 costs.]

In 1805 the Presbytery of Cupar, in Fife, on the application of Mr. Thomas, Minister of Abdie, designated certain lands, chiefly out of the Appellant's property, to the Respondent, Mr. Thomas, to make up a deficiency in the usual half acre allowed for the site of the manse, offices, and garden, and also for a grass glebe, in terms of the act of 1663, cap. 21. The Appellant, Mr. Anderson, conceiving himself aggrieved, brought the matter by suspension before the Court of Session. The Lord Ordinary found, that though it might be usual to allow a full half acre for manse, offices, and garden, on a new designation, it was not legally necessary that the precise quantity should be made up by an after designation; and that, under the circumstances of this case, the demand was not founded in law." This was acquiesced in; and the only question was as to the grass glebe. The Lord Ordinary decided for the Minister; and the Court—suspending the letters as to an acre given beyond what was sufficient—adhered *quoad ultra*, and the Appellant appealed.

To the designation of the grass glebe there were three grounds of objection:—1st, That for about a [435] century before, £20 Scots had been paid by the heritors to the Ministers of Abdie in lieu of the grass glebe for a horse and two cows; and that it was to be presumed that this payment originated in a decree of Presbytery, (though none such was to be found on its records,) both from the length of time for which the payment had existed, and according to the legal presumption, "*Quod omne rite et solemniter actum fuerit.*" (Case of the Minister of Dollar, Fac. Coll. July, 1807.) 2d, That the act of 1663 provided, that in case there were no church lands near the church, or in case such church lands were arable, the heritors should pay the £20 Scots in lieu of the grass glebe; that the proper criterion for deciding whether the lands were arable was the fact of their being or not being under cultivation at the time of the application to the Presbytery; (Minister of Panbride v. Maule, Fac. Coll. 1809;) and that at such time, in the present instance, half of Mr. Anderson's lands

designated were under cultivation. 3d. That there was abundance of pasture lands nearer to the church than the lands in question : and that all the statutes respecting the designation of glebes directed them to be taken out of lands nearest the church. (Case of the Minister of Jedburgh, 1807. 1593, cap. 165 : 1594, cap. 202 : 1606, cap. 7 : 1663, cap. 21.)

On the other hand it was contended.—1st. That there being no record of a decree of Presbytery, the presumption was, that the payment of £20 Scots had originated from some agreement between the Minister for the time and the heritors, which could not bind the successors, and had been continued through the negligence of the incumbents. (Case of Dollar, 1807.—*Holket v. Lawrie*, 1784.—Minister of Panbride v. Maule.) 2d. That the argument that the grass glebe must be allocated out of lands nearest the church, attending to the [436] most trifling distance, and totally disregarding convenience and every other circumstance, had no foundation in the words or spirit of the statute of 1663, cap. 21, or any other statute. 3d. That the only proper criterion as to whether lands were or were not arable within the meaning of the statute was that adopted by the Presbytery and the Court below : viz. whether the lands were most fit for tillage or for pasture : and in the present instance they were in their nature best adapted for pasture. (*Dalrymple v. —*, *Kilk.* 1748.—*Hodges v. —*, 1756.—*Grierson v. —*, 1778.)

Romilly and W. G. Adam for Appellant : Horner for Respondent.
Affirmed without observation, with £80 costs.

Agents for Appellant, SPOTTISWOODE and ROBERTSON.

Agent for Respondent, CHALMER.

[437] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

JACKSON,—Appellant : SAUNDERS,—Respondent [July 26, 1814].

[Mews' Dig. xiv. 59. See *Mountnorris v. White*, 1814, 2 Dow, 459.]

[Demand for fines made under the Tenantry Act on 6th October, 1800, (after all the lives had dropped,—one in 1789, another in 1791, and the last in August, 1800 : and repeated applications since 1798 for payment,) and no tender till March, 1801, after ejectment brought by the landlord. Held, that the tenant had forfeited his right to renewal ;—the offer to pay and renew being considered, under the circumstances, as delayed for an unreasonable time.]

[*Sentiente* Lord Eldon, that the delay after the demand was unreasonable, though there had been no prior neglect, and (*concurrente* Lord Redesdale) that no particular formality in the demand was necessary : that it need not be of a specific sum ; that it need not be in writing ; that no special power was necessary to authorize an agent to make the demand and receive the fines ; that a subsequent demand was no waiver of a prior demand, unless the terms of the subsequent demand were complied with : and that, in considering what was a reasonable time after demand, prior applications and circumstances were to be taken into account.]

[*Dubitante* Lord Eldon, whether—where a tenant was taken bound, on the dropping of any of the lives, to pay a fine and nominate another life : or, in case of neglect, to pay interest on the fine—the meaning could be, that the tenant should have the option to postpone renewal till the last life was about to expire. *Sentiente*, if such was the meaning, that it was not a covenant which equity would specifically execute.]

This case arose upon a bill, in the nature of a bill for specific performance, filed in Chancery, to com-[438]-pel renewal under a lease for lives renewable for ever.

The lease was made in 1699 of the lands of Cumber, King's County, by a Mr. Weaver, the then proprietor, to two persons of the name of Lamb, for three lives, with covenant for perpetual renewal. In 1724 the estate and inheritance became vested in Robert Saunders, the Respondent's ancestor, to whom the joint lease was surrendered by the Lambs; and he granted two separate leases, one to each of them, for three lives, with covenant for perpetual renewal. The covenants in the lease of the north-west part of Cumber (those in the lease for the south-east part being the same) were in these words:—

"And the said Robert Saunders doth for himself, his heirs, and assigns, covenant to and with the said Richard Lamb, his heirs, and assigns, that as often as it should please God to take away by death any of the before-named Edward Lamb, Richard Lamb, and Thomas Mitchell, (the lives in the said indentures named,) he the said Robert Saunders, his heirs, and assigns, shall put in another life of such person as shall be named by the said Richard Lamb, his heirs, or assigns, still to keep up three lives in the present demise."

"And the said Richard Lamb doth for himself, his heirs, and assigns, covenant to and with the said Robert Saunders, his heirs, and assigns, that within four months after the death of any of the before-named Edward Lamb, Richard Lamb, and Thomas Mitchell, he will nominate one other person whose life shall be added to this lease, to [439] the life or lives that then should be in being; and also then to pay to the said Robert Saunders, his heirs, and assigns, one full half year's rent. And if the said Richard Lamb, his heirs, or assigns, neglect or refuse so to do, then the said Robert Saunders, his heirs, and assigns, shall be allowed interest for the said fine from the death of the person or persons so dying."

It was also covenanted, that the tenant should once in every six months, if required, procure and deliver to the landlord a credible certificate of the persons being alive whose names were in the lease, or might be in any farther lease by renewal thereof; and that a life being beyond seas and not heard of for three years should be taken as dead, and renewal accordingly, etc.

In 1755 the interest in both leases became vested in Robert Jackson, Appellant's ancestor, who at that time obtained a renewal of the lease of the north-west part of Cumber, now particularly in question. One of the lives dropped in 1788, or 1789: another in 1791. No steps were taken for several years for renewal, because the tenant, as he afterwards alleged in his bill, was then very much embarrassed in his circumstances.

The applications on the part of the landlord to the tenant to renew, of which there was any distinct evidence, began in 1798; and both in 1799 and 1800 several applications were made:—one in 1799 by the Respondent himself; another by Thomas Saunders, Respondent's solicitor, in March, 1799. Applications to the same effect were made to the Appellant's solicitor, Peter Jackson. T. Saunders [440] at length wrote to the Appellant himself, on the 9th July, 1800; stating, that unless the fines were paid immediately, Respondent would not renew, being so advised by Counsel. The Appellant wrote in answer, (17th July, 1800,) that he would give directions to his solicitor about it; but the solicitor, (Jackson,) on being applied to some time after, stated that he had got no such instructions. The last life in the lease dropped in August, 1800. Another application was made in August or September; and at length, on the 6th October, 1800, T. Saunders having obtained a warrant of attorney to receive the fines, went to Appellant's house, and demanded the fines from him in person, but without effect. An ejectment was then brought in Jan. 1801; and in March, 1801, the Appellant tendered the fines, and presented deeds of renewal to Respondent for execution; but the Respondent then refused to renew. There was some question about a draft for renewal having been presented to Appellant's solicitor by Respondent's solicitor so late as Nov. 1800. The evidence with respect to this was that of P. Jackson, who said he found the draft among his papers on Nov. 1, 1800, and marked that date on it; and that of T. Saunders, who stated that it was prepared by him, and delivered in March, 1799, or 1800. It appeared, however, to have been delivered before, or in, August, 1800; it being a draft for two lives; whereas the third life, as before stated, dropped in August, 1800.

The bill for performance was then filed; and, after answer, etc. the Lord Chancellor, (Redesdale,) [441] by decree, Nov. 30, 1802, dismissed the bill with costs; and,

on re-hearing, Dec. 1804, varied it so far as to dismiss it without costs ; and the tenant appealed.

Romilly and Leach for Appellant ; Hart and Bell for Respondent.

Lord Redesdale. This case depended on the construction of an act of the Irish Parliament, commonly called the Tenantry Act, which was founded on the practice prevalent in that country of granting leases for lives, with covenant for perpetual renewal. This act was supposed to have originated from certain decisions of this House at that period, before the Union, when the appellate jurisdiction was exercised by the House of Lords in England. (*Kane v. Hamilton*, 1 Ridg. P. C. 180. — *Bateman v. Murray*, 1 Ridg. P. C. 187.) The case was simply this (states it as above.) It seemed to have been the idea of Saunders and his advisers, that a formal demand, with notice that it was intended to insist on the forfeiture in case of refusal, was necessary. It appeared to him, however, that there was nothing in the act to show that the demand must be of that description. The words were, that Courts should relieve against lapse of time, " unless it be proved to the satisfaction of such Courts, " that the landlords, or lessors, or persons entitled to receive such fines, had demanded " such fines from such tenants, or their assigns ; and that the same had been refused " or neglected to be paid within a reasonable time after such demand " (*Irish Tenantry Act*, 19, 20, Geo. 3, cap. 30). The true construction of this act, as it struck him was, that Courts of Equity should re-[442]-lieve in cases of mere neglect ; that where both parties had been equally negligent, the tenant should not lose his right of renewal. But if the landlord was active, and called on the tenant to renew and pay the fines, and if the tenant neglected to do so within a reasonable time, the landlord was not bound to renew at all ; and it was not necessary for him to say that he insisted upon the forfeiture in terms of the act, as the act itself gave him the benefit after demand and refusal or neglect to pay in a reasonable time. Then the case here amounted to this :—" I have often demanded my fines, and you have not paid them ; " then I make a formal demand, and if you do not renew, I insist on the benefit of " the act." This last proceeding was certainly candid, and might be considered as a sort of waiver of the prior demand, if the fines had then been paid without further delay. The question therefore now was, Whether, after the demand in October, 1800, Jackson took the proper steps to renew ?

The evidence depended, first on the depositions of Mr. Thomas Saunders, the agent of Saunders the Respondent, who made the demand in October, 1800, and spoke to several prior applications to the Appellant to renew. The first of which he gave an account was in the Hall of the Four Courts, in 1799 ; where he said he was present when the Respondent applied to the Appellant and required him to pay the renewal fines then due. He then stated, that after making several applications personally and by letter on behalf of the Respondent, he wrote to the Appellant on the 9th July, 1800, calling upon [443] him to renew and pay the fines ; and stating, that unless they were immediately paid, the Respondent would not renew. That would have been a sufficient demand under the act ; and the agent then did, in point of fact, give notice that the Respondent had been so advised by Counsel. The deponent then stated the answer of the 17th July,—that the Appellant, Robert Jackson, would write to his agent, Peter Jackson, and give directions to have the matter concluded ; that he afterwards waited on the agent, who informed him that he had no instructions ; that in August following he wrote to P. Jackson, stating, that as so much time had been lost relative to the renewals, he could not, without doing Respondent injustice, avoid proceeding to prevent the Appellant obtaining any renewal of the lease as the act prescribed, and entreating a speedy answer ; that this produced no effect, and Saunders, the Respondent, being pressed for money, in consequence of a decree against him in a suit with the Earl of Anglesea, the deponent went, on or about the 6th October, 1800, to the house of the Appellant, and personally demanded payment of the renewal fines from the Appellant, having previously taken a warrant of attorney from Respondent authorizing him to make the demand ; but neither payment nor any effect was produced by this step.

Nothing effectual was done in October, November, or December, 1800 ; and, in January, 1801, the Respondent brought an ejectment to recover possession, the lives having dropped. The ejectment proceeded, and an application was made by the Appellant to stay it upon terms which were not [444] acceded to ; and judgment

was obtained, and possession taken. The bill, which was filed in April, 1801, for the purpose of having the lease renewed, prayed that the Respondent might be obliged to execute a renewal of the lease of the north-west part of Cumber, for the lives mentioned in a deed of renewal which had been prepared, but which Saunders had refused to execute.

When this cause came on to be heard in Ireland, he had the honour to be Chancellor there: and it appeared to him that the object of the act was simply this,—that no person should suffer through neglect merely; but that if a demand were made and not complied with in a reasonable time, it converted this into something more than mere neglect, and entitled the lessor to insist in equity that the interest of the lessee was gone: and the question was, What was a reasonable time? In this case it was clear, that though a formal demand was made on the 6th October, 1800, no effectual step was taken by the Appellant to renew till after the ejectment had been brought. If no transactions had passed before between the parties, it might have been a different question. The proper construction of the act, as it appeared to him, was, that after demand the tenant should lose no time in taking the necessary steps to renew. But here he had, for two or three years, been told that it was incumbent on him to renew, and he had all that time to prepare; and therefore the demand in October could have been no surprise on him, and he ought to have renewed immediately.

Some difficulty had arisen on this ground. In [445] a conversation which took place according to the Agent Saunders's deposition in March 1799, Jackson the Appellant, or his Agent Peter Jackson, on being asked when the Appellant would be ready to pay the renewal fines, desired Thomas Saunders to prepare a renewal; and Thomas Saunders accordingly prepared a draft of a renewal, for two lives, and before the end of the same month, (March, 1799,) as he believed, delivered it at the office of Peter Jackson, St. Andrew-street, Dublin, for his approbation. It was doubtful when this draft was sent to Peter Jackson, who gave rather an extraordinary account of it. His account of it was, that he first found it at his house, or office, in Nov. 1800; and then wrote upon it the words "Received Nov. 1, 1800," and he would have it inferred that it had not been left till then. It was singular that he did not inquire when it was left. This, it appeared, he had not done, but having seen it, as stated, he endorsed upon it the day on which he so found it. He (Lord Redesdale) did not however think it a matter of much consequence, even if it had not been left till that time—for he might have the next day filled up the blanks, and then the delay would have rested on Saunders. But instead of that, he, on finding it, merely noted the time, and took no steps upon it—and it struck him that it was wholly out of the question. An attempt was made upon this circumstance to impeach the testimony of Thomas Saunders, and this was said to be a new discovery: but upon looking at his notes he found that it had been much discussed below, and that Mr. Blackburne had strongly insisted upon it as a very important feature in the [446] evidence; and the answer given to it was this, that Thomas Saunders might possibly have been incorrect as to the year 1799; but that it was clear the draft must have been prepared before the third life dropped, (July or August, 1800,) the draft being for two lives only.

Reference had been made to cases decided before the act; but he did not know that these were very material in a question respecting the construction of that act, because the object of the act was to obviate a supposed contradiction between the cases decided in Ireland, and the decisions in this House. The earliest case on the subject was said to be that of *Anderson v. Sweet* (1722, 2 Bro. P. C. 430). That was a case of mere negligence in both parties. There were other cases, in some of which the renewals had been granted, in others refused. The case which first excited alarm was that of *Kane v. Hamilton* (1774, 1 Ridg. P. C. 180). That depended on very particular circumstances, which put neglect quite out of the question. Another case of this class, *Bateman v. Murray*, (1777, 1 Ridg. P. C. 187.) came to this House soon after, which appeared to him to have been clearly a case of fraud, and not of mere neglect; and nothing that was said by Lord Thurlow, on that occasion, could go to the extent of justifying the notion, that the Court here had overlooked all the cases that had been decided in Ireland before. The manner in which Lord Thurlow stated it was, "that equity would relieve the lessee if he lost his right by fraud in the lessor,

"or by accident on his own part, but would never assist him where he lost his right by "his own gross laches, or neglect." Whether these cases ought to have any influence in the construction of the act, he left it [447] to their Lordships to consider. The object was to prevent all future difficulty on this subject; and the act said, that in cases of simple neglect the tenant ought to be relieved. When after demand made, and not complied with in a reasonable time, the matter ceased to be mere neglect; and the act left it to the Judge to say what was a reasonable time. It had been said that there ought to be some fixed rule as to the time: but a fixed rule as to the time would be mischievous in such cases. What might be a reasonable time in one case, might not be so in another. In the present case, after repeated applications for two or three years, a formal demand was made on the 6th of October, 1800, and no real steps were taken to renew and pay the fines till March, 1801.—Under these circumstances it had not appeared to him, that the tenant was entitled to a renewal. A demand had been made, and the tenant had neglected to comply within a reasonable time, and therefore was not entitled to relief under the act. It was material on the dropping of a life, not only that the fine should be paid, but that another life should be nominated, otherwise the landlord might only have one fine, where if the tenant had complied with his covenant, he might have received several fines; and it was material also with a view to the keeping up of the tenure, and enabling the landlord to proceed for the recovery of the rent. It would have been unjust therefore to have enabled the tenant, who, after demand made, had not proceeded immediately to name the life, and pay the fine, to compel a renewal. It would not be fitting for him to say more on the question here; but these were the rea-[448]-sons which influenced his mind in the Court below, in deciding, that, according to what seemed to him to be the sound construction of the act, the tenant, under all the circumstances, was not entitled to the relief which he claimed. This was a case of great consequence, as it affected so much of the landed property in Ireland; and it was very important that their Lordships should draw the line between those who were to pay, and those who were to receive, and point out precisely what, under the law as it stood, were the respective duties of landlord and tenant in such cases.

Lord Eldon (Chancellor.) In this case there had been two decrees, one of Nov. 30, 1802, dismissing the bill with costs, the other of Dec. 22, 1804, varying the former decree only by dismissing the bill without costs; and their Lordships had heard stated to them the grounds upon which these decrees proceeded. The difference between the Appellant and the Respondent arose upon this state of facts (states the lease 1724, and reads the words of the covenants; states also the renewal in 1755, and the dropping of two of the lives, one in 1789, the other in 1791, etc.) The Appellant then represented, "that at the time when these lives dropped he was, and ever since has been, very much embarrassed in his circumstances, in consequence of "debts and incumbrances incurred by his father, which affected his said property: "and by means of an expensive suit in which he was involved in the Court of Chancery "in Ireland; his endeavours to extricate himself from which engaged all his attention." He solicited their Lordships' attention to that passage, because he could not conceive that [449] any equity could be founded on these embarrassments, unless the lessor had taken them into consideration, and created a new equity between the parties. The Appellant then stated, "that in the month of November, 1800, the Respondent, "or his agent, furnished Appellant's solicitor with a draft of a renewal of two lives; "but that when Appellant was preparing to have them engrossed, and to pay the fines, "he was informed that the third life had dropped in the preceding August, and com- "municated this to the Respondent's solicitor, that the renewal might be made out "for three lives." He then stated the steps that were taken to turn him out of possession, the tender made by him of fines and arrears on March 29, 1801; and at length he filed his bill, in the nature of a bill, for a specific performance of this covenant, (*vide ante*), to which he again called their Lordships' attention (reads the covenant.) On the terms of this covenant the Appellant insisted—1st. That he was entitled to this renewal strictly speaking, and that the real meaning of the covenant was, that if the tenant chose to renew on the dropping of the first or second life he might do so; but that, if he so chose, he might postpone it, and at any period, during the existence of the third life, call upon the landlord to renew for one or two lives, just before the expiration of the third life, and then at last pay the fines and nominate the lives.

If the words of the covenant had that force, their Lordships must so give it effect : but the tenant was bound to show that such was the meaning. He did not know how it might be in Ireland, but it [450] would be difficult here to show that this could be the meaning, where the consequence of such a construction must be, that it would be in the option of the tenant, instead of nominating immediately on the dropping of any of the lives, and paying a fine, suppose at the end of every 10 years, to defer the nomination till the third life was about to expire, till the end, suppose, of 20, 30, or 40 years, and deprive the landlord of the additional fines which, according to the casualties of human life, he might expect to have received in the course of so many years, if always on the dropping of one life another had been immediately nominated.

Then it was said that the Appellant was entitled to a renewal even if the Tenantry Act had never passed, upon the equity of relieving against lapse of time, on full indemnity being made to the landlord. That was done in equity here in many cases ; (in Ireland they had gone farther :) and they were now bound to proceed on the notion, that men were not, in all cases, to be held to their contracts, but that equity would relieve where the matter lay in compensation. Where the condition was for payment of money at a certain time, the time was not of the essence of the contract ; and this, it was said, was a matter which lay in compensation, and if interest should be allowed from the period when payment ought to have been made, this was considered as compensation, and equity would relieve notwithstanding the want of punctuality. Without entering at length into that subject, this must strike every one, that where the money, instead of being paid on a certain appointed day, was not paid till 12 months after, the [451] consequence, in many cases, might be little short of absolute ruin to the disappointed party. In these cases of leases renewable for ever Lord Thurlow had, at one time, persuaded himself that he never would compel a renewal. Where a man let his lands at what was a fair rent at the time, and covenanted to renew every seven years for ever, at exactly the same rent, Lord Thurlow thought that such a want of understanding of the nature and effect of the contract might be presumed, as to make it unfit for a Court of Equity to interpose. It was like the horse and shoe nails contract mentioned in the books. But he found himself too much bound down by precedent to refuse ; and it was true that equity here would compel the renewal, (though there was a great difference in this respect between this country and Ireland,) provided the lessee did his duty, and showed that he had done all that was obligatory on him.

In certain cases which had been referred to, great astonishment had been expressed at the length to which the Courts in Ireland had gone, and the decisions followed which produced the Irish Tenantry Act. (*Kane v. Hamilton*, 1 Ridg. P. C. 180.—*Bateman v. Murray*, 1 Ridg. P. C. 187.)

This led him to another point. The Appellant contended that in case he were not entitled to a renewal under the terms of the covenant itself, or upon the common rules of equity, he had still a right to a specific performance under the effect of the Tenantry Act, which said, that mere neglect should not deprive the tenant of his right to renewal, but that if he paid his fines within a reasonable time after demand made, he should still have a [452] renewal notwithstanding such previous neglect ; but here he should leave off for the present.

Lord Eldon (Chancellor.) He had before stated to their Lordships the three principal points contended for by the Appellant :—1st, That till August 1800, the time when the third life dropped, he was entitled to a renewal according to the strict terms of the covenant. 2d, That he had a right to a renewal upon principles of equity, independent of the statute. 3d, That he was entitled to a renewal under the Tenantry Act, having tendered the renewal of fines within a reasonable time after demand made, supposing that demand to have been sufficiently formal and peremptory. He believed he had gone sufficiently far into the consideration of the reasonableness of a covenant with such a meaning to enable him to say, that a covenant would not be specifically executed by a Court of Equity, if attended with the consequences which followed upon the construction contended for by the Appellant. That construction as already stated was, that the tenant was not called upon to renew and pay a fine immediately on the dropping of any of the lives, but had the option to renew at any time during the existence of the third life, to postpone the renewal for 50 years, paying interest on the fines ; whereas if on the dropping of any of the lives another were always imme-

diately nominated, five, six, seven, eight, or ten lives might fall, and as many nominations take place in the course of these 50 years, and so many fines become payable to the landlord. That could not be the meaning of [453] the covenant; or it it was, such a covenant was not one for specific execution in equity.

As to the second point, that had been but faintly urged; and it appeared to him impossible to sustain it.

And that reduced the question to this, Whether, under the Tenantry Act, relief ought to be given. The first life dropped in 1788 or 1789, the second in April, 1791, and the third in August, 1800, and then there was a proposition to renew, which was not very seriously acted on till 1801. Here he should notice some general observations which had been made with a view to take the demand in this case out of the Tenantry Act. The first was that the demand ought to be for a specific sum. There was nothing in the act which said so. It must occur that the tenant would be most likely to know the time of the death of the life, and it was his business to come forward and make the proper tender; and if, at the time of a demand made, the tenant himself did not happen to know what was the specific sum, the question then would be, what was a reasonable time for settling it.

Another point contended was, that according to the act their Lordships ought to say what, in every case, would be a reasonable time; as in foreclosure cases the Court of Chancery uniformly allowed six months for the mortgagor to redeem. That however was a very different subject: but even there, though now it was the practice on account of its antiquity, rather than the reason of the thing, to allow six months, the Court was in the habit, according to circumstances, the value of the subject, [454] the probability of sale at a better price, etc. of enlarging the time; so that strictly speaking, even in these cases, it was not fixed what was to be held in all cases a reasonable time. Those who passed this act, (19, 20, Geo. 3, cap. 30,) the object of which was to teach the English Courts what was the proper notion of Irish equity, must have known what was the practice of Courts of Equity there; and consequently, if any fixed time had been intended, they would not have legislated in general terms, but have expressly provided for a limited and regular time.

Another consideration of great weight was this: He had before alluded to the surprise felt in this country at the extent to which the Courts of Equity in Ireland had carried the practice of giving relief in these cases of leases for lives with covenant for perpetual renewal (Mountnorris (Earl of) v. White, 2 Dow, 459); and it was certainly very extraordinary, that where a lessee covenanted to pay a fine in two, three, or four months, from the death of any of the lives, and where there was an express proviso, that if he did not then it should rest entirely in the option of the lessor, whether to renew or not, equity should relieve in a case of strong neglect in the tenant, and where the damage to the landlord was eventual and uncertain, and therefore not a proper subject of compensation. But to say that the act should be construed so as to apply to cases of this kind the same sort of rule as to time (six months) as had been applied to redemption in cases of mortgage, though the parties themselves had said that unless the lessee renewed in two, three, or four months, it should be at the option of [455] the lessor to renew or not, appeared not only not the proper construction of the statute, but it was manifest that they who passed it had no such idea, and that six months was a time which the parties themselves thought unreasonable.

Then they came to the terms of the statute: "Whereas great part of the lands in this kingdom are held under leases for lives with covenants for perpetual renewal upon payment of certain fines, etc.; and whereas from various accidents and causes tenants, and those deriving under them, have frequently neglected to pay or render such fines within the times prescribed by such covenants after the fall of such lives respectively; and whereas many such leases are settled to make provision for families etc.; and whereas it has for a long time been a received opinion in this kingdom, to which some decisions in Courts of Equity, and declarations of Judges, have given countenance, that Courts of Equity would relieve in such cases against lapse of time, upon giving adequate compensation to the persons to whom such fines were payable, or their representatives, to the end that such interests may not be defeated by mere neglect, etc. Be it enacted, etc. that Courts of Equity, upon an adequate compensation being made, shall relieve such tenants, and their assigns, against such lapse of time." He need not repeat what he had said respecting the extraordinary

notion of equity as to what was compensation, but he should be very unwilling to apply in these cases the sort of rule which was adopted in cases of mortgage, when he considered that in six [456] months the mortgagee might, for want of his money, be in the same gaol where otherwise his debtor would be. As to leases for lives renewable for ever, they, in England at least, found it very difficult to say what was adequate compensation; for, in cases of leases for lives with a fine payable, and a new life to be nominated on the dropping of each life, and where on the dropping of a life another had not been nominated, it was impossible to know what was the value of the life that might have been nominated, and therefore impossible to ascertain the proper compensation. But if this doctrine had been acted upon in Ireland by a common error of law and equity, he did not say but it deserved great attention in cases of mere neglect. But in cases of fraud, such as the concealment of the time when a life was gone, or where the tenant was under a particular obligation with respect to the landlord by being employed as his agent, the question would be different. He did not call this a case of fraud, but he did not go the length of saying that long neglect and supineness might not amount to a fraud: he gave no opinion on that point.

Then the act went on: "If no circumstance of fraud be proved against such tenants, unless it be proved to the satisfaction of such Courts that the landlords, or lessors, or persons entitled to receive such fines, had demanded such fines from such tenants or their assigns, and that the same had been refused or neglected to be paid within a reasonable time after such demand." In this case there was no difficulty as to whether the per-[457]-son who made the demand was authorised to receive the fines; but, even if the question had arisen, he should think, that though a person had no express power for that particular purpose, but was employed to collect the landlord's revenue generally, and therefore to collect his fines, he had still sufficient authority. And as to the alleged necessity that the demand should be in writing, there was no such thing in the act, and that would not have been left out of the act if any such thing had been intended. Here there was certainly authority enough to make the demand, and a parole demand was sufficient. It was impossible to read this act, without seeing the necessity of holding the balance with an even hand, between the landlord and tenant. A life drops, and a fine is due; but the tenant holds for two other lives, and as long as either of these lasted, though the tenant rested without paying the fines, the landlord could not get possession,—and till the tenant filed a bill for the specific performance of the covenant to renew, the landlord could not show the demand, and might not be able to get the benefit of the act, unless he filed a bill to perpetuate testimony, to meet the tenant when he came for a specific performance.

It had been said that some time must be fixed, as that which should be considered as a reasonable time. But what was or was not a reasonable time must depend on the circumstances of each separate case. It had also been pressed, that a subsequent demand was a waiver of a previous demand. He could not however so readily accede to that doctrine. It might or it might not be a waiver, and [458] whether it ought to be so considered or not must depend on the nature of the demand. But it was impossible, as he thought, to contest this, that after applications without effect from year to year, when they came to look at what was a reasonable time, the same time which would be reasonable after a demand made in the first year, might not be reasonable upon a demand made at the close of two or three years' neglect, and ineffectual applications. If in this case the tenant, after having so often been applied to without effect, had at the time of the demand in October urged his embarrassed circumstances, the landlord might say, "I have nothing to do with your circumstances: I tell you, that if you now pay your fines, and nominate a life, or lives, (which was material,) I shall still renew, but then there must be no farther delay." Could it be said that the landlord therefore waved the previous demands? He waved them indeed if there were no farther delay, but that there should be no farther delay was the very term and condition of the waiver.

Then in the fair and reasonable construction of this act, looking at all the evidence and all the circumstances, had or had not the tenant been put in mind that he had neglected to pay fines that were due? had not a demand been made? and had there not been a refusal or neglect, for a longer period than could be properly called a reasonable time? Had there been more than a reasonable time? That was a question of

fact. He (Lord Chancellor) said, that applications had been repeatedly made, and not complied with in reasonable [459] time; that the right to insist upon the previous demands had been waved in October, provided there was no farther delay; that there was farther delay, and a delay for a time which in itself was unreasonable, even if there had been no neglect before. A reasonable construction must be put on the act, for the benefit of the tenant; but not such a construction as would leave the landlord without any adequate remedy, and enable the tenant to make of his covenant just what he pleased.—(*Vide* 1 Sch. Lef. 443.)

Decree accordingly affirmed.

Agent for Appellant, LANE.

Agent for Respondent, FLADGATE.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MOUNTNORRIS (EARL OF),—*Appellant*; WHITE,—*Respondent* [July 27, 1814].

[See *Jackson v. Saunders*, 1814, 2 Dow, 437; *Hussey v. Domville*, (1900) 1 I. R. 417.]

[Where, on the dropping of one of the lives, in a lease for three lives with covenant for perpetual renewal, repeated applications were made to the tenant to renew according to his covenant, particularly in 1788 and 1796, and he made no offer to renew till 1804 or 1805, when some conversations took place respecting a renewal upon the tenant's relinquishing a suit in equity, which he was carrying on against his landlord, but which conversations ended without anything being done, and the landlord re-[460]-fused to renew; the House of Lords, reversing a decision of the Irish Court of Exchequer, held that the tenant's right to a renewal was forfeited, and that the case was not one, where relief could be granted under the Tenantry Act, 19, 20, Geo. 3, cap. 30.]

[*Sentientibus* Lords Eldon and Redesdale, that relief under the act is to be confined to cases of simple innocent neglect; that a simple demand, (without any menace of forfeiture, etc.) followed by neglect for an unreasonable time, is sufficient to conclude the tenant, and bar his relief; that, where there have been several demands, if the terms of the last demand are not complied with, the original demand remains the foundation of the right; that inability to pay is no excuse; that the character of a general agent is sufficient to authorize one to demand and receive the fines; and that if there had been a consent to wave the forfeiture connected with the relinquishing the suit, the transaction would have been a new agreement within the statute of frauds.]

[*Dubitante* Lord Eldon, whether, if there had been a waiver of the right connected with another transaction, it was competent to take one part of the bargain, and act upon it as if the other part had been out of the question—also, whether, when the landlord acquired a right to the forfeiture, the agent could pass from it without a special authority.]

[*Semble* that, in these cases, equity in Ireland relieves against the strongest negative clauses in the contract.]

This cause arose upon a bill, in the nature of a bill for specific performance of a covenant for renewal in two leases for three lives, each renewable for ever.

The leases were granted in 1747, of certain lands (Killish and others) in the County of Wexford, by the Earl of Anglesea, (represented by the Appellant,) to one Fielding, son in law of James White, (represented by Respondent,) who was the Earl of Anglesea's agent, manager, and receiver, to whom [461] Fielding, being only a trustee for White, soon after assigned his interest. In this lease it was covenanted, that "if it should happen on the failure of any life therein nominated, or to be nominated, that the tenant should not pay to the Earl of Anglesea, for every life so failing, the sums

“ of £8 for one part of the lands, and £12 for the other part, by way of fines, and “ nominate another life within 12 calendar months; after the death of such life, “ it should be lawful for the Earl of Anglesea, his heirs and assigns, to refuse to “ renew at his or their option.” The interest in one of these leases was acquired from Hawtry White, son of James White, by the Respondent, Hawtry’s nephew, in 1788, and the interest in the other lease in 1804.

One of the lives dropped in 1784; and various applications were made to Hawtry White, and to the Respondent, after his interest in the lands was known, to renew. The times and nature of these applications were set forth in the evidence of Sir Frederick Flood, the Appellant’s friend and agent; and Mr. Morton, Respondent’s solicitor. Sir F. Flood stated, that in 1788, Hawtry White came to Camolin Park, the seat of Lord Mountnorris, to pay some arrears of rent, and on that occasion Deponent and Appellant applied for the fines; and that the answer by Hawtry White was, “ that “ he thought he had done a great deal, in bringing in so large a sum for rents, which “ he was obliged to borrow, and that he could do no more at that time.” In or about 1796 he made another application to Hawtry White, in the Grand Jury room [462] at Wexford, saying, that he did not wish that any advantage should be taken of his laches, if he renewed without delay. He afterwards applied to Respondent, to renew for the premises held by him, and desired him to speak to his Uncle to do the same; that before and since he had sent repeated messages to Hawtry, to the same effect, being induced to it the more, from Appellant’s pressing occasion for money at that time, and particularly that he sent a message in 1803 or 1804, by a confidential servant of Hawtry White’s, which the servant delivered, but without effect. In 1796, relying on the Respondent’s promises to renew, he caused a calculation of the fines, etc. to be made, having been assured by the Respondent that the life dropped in 1786, whereas it had in fact dropped at a much earlier period. Sir F. Flood then gave an account of an application to him by Respondent, for a renewal, early in 1805; and that an offer was made to relinquish a law-suit, carried on against Appellant by one Dubois and by Respondent, in consideration of renewal; but that Sir F. Flood referred him to Lord Mountnorris himself, who was soon expected from England; that upon his Lordship’s arrival some conversation took place on the subject of renewal, all connected with the settling of Dubois’s suit, but that at length intimation was given in April, 1805, that the Appellant would not renew after such gross lapses and neglects.

The effect of Morton’s evidence was that upon these applications by the Respondent for renewal, (the first of them, as he stated, at the close of 1804,) both Sir F. Flood and Appellant had at first [463] agreed to renew, but afterwards refused. Nothing was said about Dubois’s suit in his presence, but he was not present at the whole of the conversations.

In January, 1806, the Appellant filed a bill, to perpetuate the testimony of his witnesses.—On Feb. 11, 1806, the Respondent filed his bill for renewal; and in Feb. 1808, the Court decreed a specific performance of the covenant for renewal, on payment of rent, renewal fines, septennial fines, and interest.

From this decree Lord Mountnorris appealed.

Romilly and — for Appellant; Hart and Bell for Respondent.

Lord Redesdale. This was an appeal from a decision of the Court of Exchequer, in Ireland, under the following circumstances, (states them, and particularly the covenant, by which, upon failure of renewal within a limited time, it was to be optional with the landlord whether to renew or not.) This latter clause distinguished the present case from that which had the other day been under consideration by their Lordships. It was a very strong clause, and if there had not been determined cases in favour of renewal, notwithstanding such negative clauses, it would be extremely difficult to get over it; for it allowed 12 months to the tenant to provide and pay the fines; and there was an express provision that, in case the tenant did not pay, the landlord should not be compelled to renew. But in looking at the cases determined in Ireland, it would be found that the Courts there had given [464] relief in cases where there were such express negative clauses.—This case must therefore depend on the construction of the Irish Tenantry Act.

The circumstances of the case were singular, and there appeared to have been neglect, to a very considerable extent. It appeared from the evidence of Sir Frederick

Flood, who was the person entrusted with the management of the Appellant's affairs in Ireland, in the Appellant's absence, that "in 1788 he was present when Hawtry "White came to Canolin Park to pay certain arrears of rent, and was asked for his "fines, to which he answered, that he thought he had done a great deal, etc. and could "do no more at that time;" and it had been represented that the Appellant submitted to that excuse. The next transaction was in the Grand Jury room at Wexford, in 1796; where Sir F. Flood asked why H. White did not pay his fines, adding, that he did not wish any advantage to be taken, in case there were no farther delay. Here then was an express intimation, that there had been delay from 1788 to 1796; of which Sir F. Flood conceived the Appellant had a right to take advantage, but thought it might be waved provided there were no farther delay. The evidence on this point was clear and uncontroverted. The impression on Sir F. Flood's mind then was, that the demand of 1788 was sufficient. (His Lordship then adverted to the rest of Sir F. Flood's evidence, the general effect of which has been before set forth.) It was material to attend to the deposition of Sir F. Flood, as he considered every thing as connected with Dubois's suit, and that if there was any chance of [465] an agreement to renew at all, the settling of that suit must be part of the transaction. On the part of the Respondent, it had been contended that these conversations amounted to a waiver of the right to insist on the previous demands; and the question was, whether they did so or not. One thing was material, which had not been dwelt upon at the bar, though the Counsel's attention had been called to it by him. If what Sir F. Flood said was true, that the transaction was connected with Dubois's suit, it was a new agreement within the statute of frauds. He did not think it necessary however to consider that question; as Morton in no degree fairly contradicted Sir F. Flood's account of the conversation with the Respondent White, in 1804, or 1805—though they differed a little as to the time, and Sir F. Flood might be mistaken in that, as Morton spoke from his books. Sir F. Flood connected this with Dubois's suit. Morton was silent as to the suit, but he did not say that he stated all that passed, so that they might be reconciled.—(His Lordship proceeded farther to comment on the evidence: the result on the whole being, that all the subsequent conversations about renewal were connected with the settlement of Dubois's suit; and that Lord Mountnorris, having refused to come to any agreement even on these terms without good advice, at length determined not to renew at all, and filed a bill to perpetuate the testimony of his witnesses.)

Then it appeared, that in 1788 there was a demand sufficient to put him on his guard, and to apprise him that it was incumbent on him to pro-[466]-ceed to renew, (for he ought to have known the time of the death of the *cestui que vie*, his father;) and that there was a dereliction of renewal till 1796; and that Sir F. Flood then understood that he was not entitled to a renewal:—and yet all this was to be set aside by the evidence of Morton, intended to show that there was a waiver, and consent to renew! It did then appear to him infinitely too much to say here that the demand was waved.

They were told, that in the Court below it was considered that the demand must be expressed to be for the purpose of concluding the tenant under the act, in case he neglected or refused to renew. There was no such thing in the statute; and it was not an opinion which he was inclined to hold. But here it was clear that Flood conceived the demand of 1788 to be such as he could take advantage of. It did appear to him, then, that this did not come within the equity of the Tenantry Act; which he considered as clearly applicable only to cases of simple innocent neglect, and not to cases where a demand was made, and not complied with in a reasonable time. Here there was a demand in 1788; and it could not be argued with effect, that because the Appellant demanded for the tenth time what was his right, that he thereby forfeited the benefit of the nine first demands; for that was the amount of it. If a person, after several previous demands, made another, and the last demand was instantly complied with, that would raise a different question. But it was impossible by a subsequent, to destroy the effect of an original demand. Unless the subsequent demand was immediately complied with, [467] the original demand was that upon which the right was founded.

Lord Eldon (Chancellor.) He concurred in the last observation. It appeared to him that the Court below had conceived, that if a new demand were made, it was

a waiver of former demands. It was impossible to say that such must necessarily be the effect of the new demand. That must depend upon its nature. Suppose a landlord were to say, 'I made a demand a long time ago, and more than a reasonable time has elapsed without compliance on your part: I now again demand payment; and if you pay immediately, I shall not take advantage of your refusal or neglect.' Suppose, then, the tenant did not pay immediately, was he to be allowed to turn round and say, 'Your new demand is to be considered as a waiver of your previous demands, though the terms of it have not been complied with, and though you protested against its being so considered.' It was impossible to sustain any such doctrine. He had before been of opinion that it was impossible to sustain it; but in these Irish cases, it was a great happiness to him, and must add much to the weight of their Lordships' decisions, to have the benefit of the assistance of his noble friend (Lord Redesdale.)

How it ever happened that equity came to interpose in cases of this kind, he could not conceive; but now it was said, that if a life dropped and a fine was to be paid, and another life to be nominated within 12 months after, and it had been so agreed between the parties, equity would relieve the tenant, though no fine was paid nor life nominated [468] till the end—suppose—of three years; because, they said, that the time for renewal was not of the essence of the contract, and compensation might be made to the landlord. But he maintained, that it baffled all calculation to say exactly what was compensation, when the tenant neither paid, nor nominated a life, till the end of three years, when he ought to have paid at the end of one year, and then nominated a life; and when, if he had so done according to his contract, he might, at the end of three years, be compellable to pay another fine, and nominate another life. The Courts, however, had gone the length of throwing all the error of the calculation on the landlord, and relieving the lessee. But here the landlord had said, that he would not trust to the ordinary doctrines and rules of equity. 'I do not choose,' he said, 'that any Court on earth should decide for me; and I expressly declare, that unless my tenant performs his covenant, he shall have no renewal, unless it be my will and pleasure to renew.' Why, to interfere in such a case, what was it but saying, that persons could not be bound by a contract out of the rules of the Courts? He had been very much disinclined to think that this could have been supported by authority; but he saw there was authority; and therefore he agreed, that the election reserved by the landlord was of no more avail than if there had been no such clause in the leases.

They had in Ireland stretched their equity in favour of these tenants to an extent of which there was here no example. The hardships of some decisions by the House of Lords in this country had [469] been complained of, and so this act was passed. He wished it had been better considered; but there it was, and they must deal with it as they best could. The act said, "Whereas, from various causes and accidents, tenants neglected to pay," etc. Why, look at Sir Frederick Flood's evidence: he said, that when White came to pay his rent, and was asked for his fines, the answer was, "that he thought he had done a great deal in bringing so much money for rents, which he had been obliged to borrow; and that he could do no more at that time." Why, did the legislature mean that this representation of inability to pay was one of the accidents and causes to be relieved against? Then the act went on,—“That Courts of Equity, on an adequate compensation being made,” (it was impossible to calculate the compensation,) “shall relieve such tenants and their assigns against such lapse of time, if no circumstance of fraud be proved against such tenants; unless it be proved to the satisfaction of such Courts, that the landlords, or lessors, or person entitled to receive such fines, had demanded” (in writing would have been said, if it had been so meant) “such fines from such tenants, or their assigns, and that the same had been refused or neglected to be paid within a reasonable time after such demand.” In the first place, when they came to consider the various accidents and causes of neglect, could inability to pay be an accident, or a cause of neglect, against which it was intended to relieve? Certainly some such idea had been entertained in Ireland. A man stated his circumstances as an excuse for non-pay-[470]-ment. But if, after demand, there was neglect,—meaning there a want of due diligence, or refusal to pay, did the act say that the cause signified one farthing?

Now here it appeared, that a life had dropped in 1784, which White had repre-

sented as having dropped in 1786 ; and it was difficult to believe that he should be so little attentive to the time of his father's death, as not to know whether he died in 1784 or 1786. But though it might be a fraud to conceal in this manner the death of a life, his opinion did not at all turn on that point. This, however, was clear, that he must have known, that when a life dropped, it was his duty, within 12 months after, to pay a fine, and nominate another life. But that was not done ; and when, in 1788, three or four years after the life dropped,—and whether three years or twenty-three was as to this purpose the same,—he was asked for his fines, he answered, " that he thought he had done a great deal, etc. and could do no more at that time." But the Counsel had said, there must not only be a demand, but the demand must be made in a minacious manner. " You must not only demand your fines, but you must threaten, that unless they are paid in a reasonable time, you will refuse to renew." But when the statute said, " unless it be proved that the landlord, lessor, or person entitled to receive them, had demanded such fines," etc., the demand must, *primi facie*, be taken to be for the purpose of asserting the right ; and it was on others to show that, in order to be by law effectual, it must be made in a particular manner, and under [471] particular circumstances. Then Sir F. Flood stated, that his next application, (and his character of general agent was sufficient authority,) " after that of 1788, was in the Grand Jury room at Wexford, some years ago,—thinks about 12 or 14 years ago, when he asked White why he did not pay the fines." Now here was a notable law on their construction—this was merely to awaken the tenant—" Don't forget you owe me a fine"—that was all, according to this doctrine—and a reasonable time after was 14 years !—" But that though the said Hawtry had been hostile in his conduct and acts against the Appellant ; yet, for deponent's part, he wished that no legal advantage should be taken, if he, White, would use no farther delay." Now if it was not necessary that the demand should be in writing, he would ask, whether this was not sufficiently minacious—" that no legal advantage shall be taken, if he, White, used no farther delay ?" Why, did not that, in common sense and common parlance, mean, " If you do use farther delay, legal advantage shall be taken ?" and was the plea of the want of money to be admitted against this !—though, of all the various accidents and causes of neglect, want of money in England, Ireland, and Scotland, was the chief. Another passage which escaped the Counsel's attention was material :—" That he had before and since sent repeated messages, etc. to Hawtry to pay his fines, and informed him of the Appellant's great want of money." This added great weight to the demands which were proved. If Lord Mountnorris then acquired the right of refusal [472] to renew, he doubted whether it was competent to Sir F. Flood to pass from it : but here it was unnecessary to consider that question, as it appeared that Sir F. Flood took care to disavow all consent to renew without the personal concurrence of Lord Mountnorris, to whom he referred the Respondent.

Then it was said, that there was a waiver of the right. He had often had reason to lament how easily the provisions of that wise statute, the statute of frauds, might be evaded. But he admitted (a new agreement was a different thing) that Lord Mountnorris might say, ' The various causes and accidents are all reduced to your want of money. I am in great want of money also ; and if you pay immediately, I shall renew.' He had a right to do so : but admitting that to be the law, he must have clear fact upon which to administer that law, and the matter must not be left *in dubio* by conflicting evidence. It appeared quite enough that there was a demand before Lord Mountnorris returned to Ireland ; that a reasonable time, and more than a reasonable time, from the period of that demand had elapsed before any thing was done. When he did [473] return, the treaty of arrangement included other matters ; and nothing was said which could be considered as amounting to waiver, unless the whole of the arrangements had taken place. He was happy to find that his noble friend, (Lord Redesdale,) who was so well acquainted with Irish customs

and Irish proceedings, concurred with him in the opinion, that this claim for renewal could not be supported under this Tenantry Act. But he protested, that unless they could decide so as not to relieve tenants from all control in these cases,—so as not to give to gross neglect and refusal the character of mere neglect,—it would be hardly possible to say with certainty what was the law as between landlord and tenant in that country; and the landed property there would be put into such a state, that no one could know how long he might be landlord, or what might be his duty as a tenant.

Lord Redesdale. In 1717 a case of renewal had been determined in Ireland, which came here some time after. (*Anderson v. Sweet*, 2 Bro. P. C. 430.) That was a case of mere neglect, and the decision was affirmed. There was another the same year, *Philpott v. Rowley*, which was dismissed for laches. In several cases which followed, the prejudice began to run in favour of renewal, and the Tenantry Act was passed. Then came the case of *Magrath v. Muskerri*, (1 Ridg. P. C. 469. T. 1787,) where the bill was dismissed for gross neglect on the part of the tenant. Therefore, neither among the cases which had been determined here while the appellate jurisdiction was exercised by this House, nor among those determined in Ireland after the appellate jurisdiction returned to the House of Lords there, [474] was there any case in which relief was given where there appeared gross, wilful, and obstinate neglect.

Decree reversed.

Agents for Appellant, WILLIAMS and BROOKS.

Agent for Respondent, FLADGATE.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SMITH, and Others (Underwriters),—*Appellants*; ROBERTSON, and Others (Merchants),—*Respondents* [July 27, 1814].

[*Mews*' Dig. xiii. 1283, 1290. See *Ship 'Blairmore' Limited v. Macredie*, 1897, 24 Rettie, 893; *Provincial Insurance Co. of Canada v. Leduc*, 1874, L. R. 6 P. C. 224, 241.]

[Insurance on ship *Ruby*, at and from Halifax to Plymouth, captured on the voyage—intelligence of the capture and immediate abandonment, and some steps taken by the underwriters to settle the loss—intelligence then of her being re-captured, and refusal by the underwriters to settle, except for a partial loss. Held by the Scotch Admiralty Court and Court of Session, that upon notice of abandonment, given on intelligence of the capture, the transaction was closed, and not subject to be disturbed by any event appearing on subsequent intelligence, and the judgment affirmed in the House of Lords on the ground of the acceptance of the abandonment by the underwriters; by this means keeping clear of the principle on which the Court of King's Bench had decided the cases of *Bainbridge v. Neilson*, and *Faulkner v. Ritchie*: *sed quere*, Whether it does not appear that Lord Eldon (Chancellor) was far from being satisfied with these decisions.]

[*Dubitante* Lord Eldon, whether there might not be found to be as much uncertainty in the law of marine insurance as in any other branch of the law.]

The ship *Ruby*, belonging to Respondents, merchants at Greenock, was insured at Glasgow, "at and [475] from Halifax to the discharging port in Britain, with leave to call at Quebec." The *Ruby* sailed Aug. 24, 1805, from Quebec for Plymouth. She was captured on the voyage, Sept. 16, 1805, by the *Vangador*, Spanish privateer. On Oct. 18, 1805, the owners received intelligence of the capture, and on the same day wrote to their brokers at Glasgow, stating the circumstances, and adding, "In the

"mean time we abandon our interest in the ship to the underwriters, and you will be pleased to communicate the same to them." On the following day, the brokers wrote in answer, that they had notified the abandonment accordingly. The master's protest was sent to Glasgow on the 19th October, and was, on 21st October, referred by the underwriters to two of their number, who returned it to the brokers on the 24th, with a notification that they were satisfied.

On the afternoon of the 24th, advice was received of the re-capture of the vessel by a Guernsey privateer. Certain underwriters upon her at Greenock (who afterwards, pursuant to award of two referees at Lloyd's, settled as for a total loss) took charge of the vessel without prejudice, and brought her from Guernsey to Plymouth, where she discharged her cargo and earned her freight. The Glasgow underwriters refused to settle except for a partial loss, and proceedings against them were instituted by the owners in the Scotch Admiralty Court, and upon judgment there in favour of the owners, the underwriters carried the matter by suspension before the Court of Session. An attempt was made there to show, that there had been an over-valuation, and [476] that there had been no complete abandonment, but without effect. The points chiefly relied upon were two:—1st. That the moment when the assured received advice of the capture, the right to abandon vested: and that the owners having exercised that right *bona fide* upon the state of the fact as it had come to their knowledge, the transaction was finally closed as between the parties, and not to be opened up or disturbed by any subsequent event, or event of which the intelligence subsequently arrived. 2d. That the underwriters, in this case, had acquiesced in or accepted the abandonment, and therefore were concluded independent of the general principle. The Court of Session (First Division) gave judgment in favour of the owners upon the principle. (*Vide* Buch. Rep. 73, 76.) From this judgment the underwriters appealed.

The case was argued at length in the House of Lords on the principle: though it seems unnecessary to follow that argument, as the decision ultimately turned upon the acceptance. Marshall, Serjeant, (for Respondent,) said, that whoever read the judgment of the Court of Session must be convinced that it could not easily be shaken: and the speech of Lord President Blair would have done honour to any Judge that ever sat in that Court or in Westminster Hall. The foreign books, especially Pothier, (No. 138,) the reasonableness of the principle itself, and the language of Lord Mansfield in *Goss v. Withers*, (2 Bur. 695,) were relied upon for the assured. To these, on the part of the underwriters, were opposed chiefly the decisions of the Court of King's Bench in *Bainbridge v. Neilson*, (10 East, 329,) and, in a subsequent case, [477] *Faulkner v. Ritchie*. The Lord Chancellor, in the course of the argument, took occasion to notice, that the House of Lords had determined that the ship and voyage were different things; but the Court of King's Bench had afterwards said that they were the same, and had taken upon themselves to reverse a judgment of the House of Lords and the Exchequer Chamber. (*Fitzgerald v. Pole*, Willes, 641.) His Lordship also put a case:—Suppose a vessel proceeding to the East Indies, captured two days' sail from the coast, re-captured two days after, and the re-capture not known till she reached her port—action in the mean time and judgment—could the underwriters recover back their money in another action? If the decisions in *Bainbridge v. Neilson*, and *Faulkner v. Ritchie*, were right, the question was, whether the argument for the underwriters must not go to that extent. The judgment of the Court of Session, he said, was a very able one.

Adam and Romilly for Appellants: Marshall and Horner for Respondents.

Lord Eldon (Chancellor.) If he had thought it sufficient, in this case, merely to have come to a conclusion satisfactory to himself, he should have been ready to proceed to judgment immediately. But from the circumstances of the case, and certain decisions which had taken place in the Courts below in this country, it appeared to him, for reasons which he should now very shortly state, to be proper that the case should be argued again by one [478] Counsel on each side, and in the presence of the Judges.

The question arose in an action on a policy of insurance commenced in the Court of Admiralty in Scotland, and subsequently brought under review of the Court of Session, which took cognizance of these matters. The insurance was against the usual perils, and capture among the rest. The vessel was captured, and the insured

abandoned; that was, they gave up the property to the underwriters, and claimed as for a total loss, as they were entitled to do in case of capture. The underwriters (the Counsel on one side insisted) agreed to accept this abandonment; while on the other hand it was insisted, that the matter went no farther than a treaty to have it ascertained whether the loss had taken place.

After this had been concluded, information was received of the re-capture. Then the loss was not total, but only the amount of the salvage, etc. It was contended, on the part of those who brought the action, that the loss was total at the time of the capture, and that they did not know of the re-capture when they offered to abandon; and that, as the contract of insurance was, in most cases, construed according to what was supposed to be the situation of things at the time of entering into it, the right to abandon vested when the intelligence of the capture was received; and that having so vested, nothing could deprive them of that right, they having chosen to exercise it; and they cited text writers and cases in support of that principle. [479] An election might, it was contended, be made in these cases to abandon, or to take the chance of re-capture, and claim for a partial loss. But here, they said, they had made their election, and that this was founded on their right to do so; and that at the time they claimed they had the right, because a present demand could not properly be made without a present right; and that if there was a present right, there was a corresponding obligation to accede to it *de presenti*.

Then their Lordships had heard cases cited where the re-capture was known at the time of the offer to abandon; and cases with respect to what would be the law, if the re-capture were known between the offer to abandon and the action brought; if known between the institution of the action and the judgment, or between the judgment and execution or payment: and it was curious, that while those who had been most concerned in settling what was the law on this subject had taken great credit to themselves for its certainty; and that the text writers had boasted of how little uncertainty there was in this branch of law; it might perhaps be found, when the matter came to be examined with the proper degree of impartiality, that there was full as much uncertainty on this subject as in any other branch of the law, as it appeared to him.

If it were fitting to decide this case merely on the question, whether there had or had not been an acceptance; perhaps the circumstances of this case might afford a ground of decision upon the particular fact, which would prejudice no other past decision, and which would furnish no precedent for [480] any future decision, unless in a case where the circumstances might be precisely the same. But it must be recollected, that the Court of Session put it on quite different principles. On a subject of this importance it was impossible to leave the law in such a state, that what was a good decision in the one country should be bad in the other, where the decisions on this question of mercantile law ought in both countries to be the same; and it was difficult to say that the same principle might not comprehend and determine the whole of the cases in which there existed these minute shades of difference. In deciding this case, their Lordships might affect the decisions of their own Courts; and it was therefore proper that the case should be argued in the presence of the Judges; and then a question might be put, which would settle the principle that would decide all the cases that might occur with the variety of facts to which he had alluded.

Lord Eldon (Chancellor.) It would be in the recollection of their Lordships, that he had at one time intimated that it would be proper to have this case re-heard, and that the twelve Judges should attend and give their advice. He had been induced to propose the adoption of this course, principally from having regard to a case (*Bainbridge v. Neilson*, 10 East. 329,) decided in the Court of King's Bench, and another case mentioned at the bar, (*Faulkner v. Ritchie*.) by which the doctrine in the case of *Bainbridge v. Neilson*, as to the effect of the abandonment, was confirmed.

Their Lordships were aware, and it was due to [481] the Court of Session to mark the fact, that these cases were all heard there in such a course, that there was no obstacle in point of form to prevent their coming before their Lordships. By the old mode of proceeding in Westminster Hall, 40 years before he had ever set foot in it, the practice was, to have special verdicts found, and then the case might come upon error to the House of Lords. But this practice had been altered by Lord Mansfield,

upon the whole with considerable utility ; and now, for the sake of expedition, instead of entering the matter at length upon the record in a special verdict, special cases were made for the opinion of the Court ; and nothing appearing on the record but the general verdict, the subject might have no door by which to come into that House. But in the Court of Session, as he understood their practice, the cases were heard in such a form, that the subject could not be prevented from coming to their Lordships ; and therefore it was no discredit to the Court of Session that so many of their decisions in these insurance cases were brought under the review of their Lordships.

Since the time when this case was last mentioned to their Lordships, he had had an opportunity of considering it with great attention, of consulting with his noble friend near him, (Lord Redesdale,) and of discussing the question with different persons whose judgment was entitled to the greatest respect ; and the conclusion to which he had come was this,—that without intimating in the least what, if the cases of *Bainbridge v. Neilson*, and *Faulkner v. Ritchie*, had come before their Lordships, would [482] be the judgment of the House of Lords, and protesting against being considered as giving any opinion agreeing or not agreeing with these decisions, it was clear that the present case was out of the principle of these cases. Here it was not made out that the underwriters had any right whatever to refuse to settle as for a total loss : they could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss. It was therefore on the effect of the transactions in this particular case, without reference to others that he thought the decision of the Court of Session right.

Lord Redesdale. I concur.

Judgment affirmed.

Agents for Appellants, SPOTTISWOODE and ROBERTSON.

Agent for Respondents, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CUNNINGHAMS,—*Appellants* ; CUNNINGHAMS,—*Respondents* [July 20, 1814].

[Considered in *Campbell v. Campbell*, 1867, L. R. 1 Sc. & Div. 182.]

[A man and woman, after a known illicit connexion, cohabit together in such a way as to create a reputé, though a divided one, of their being married persons ; and the man, in order to get lodgings in the houses of persons of respectability, and to save the woman from rude treatment by one [483] of his companions when drunk, acknowledges that the woman is his wife. Held by the House of Lords, reversing a decision of the Court of Session, that the facts and circumstances were not sufficient to infer a marriage.]

[Certificate of celebration not sufficient to prove the marriage ; one of the witnesses who signed the certificate having sworn, that the woman was not present when the marriage was stated in the certificate to have been celebrated.]

[*Sentiente* Lord Eldon, that in cases of cohabitation, presumption is in favour of its legality—*secus*, if the connexion is known to have been in its origin illicit.]

[*Sentiente* Lord Redesdale, that reputé, to raise presumption of marriage must be founded on general, not singular opinion ; and that a divided reputé is, on such a subject, no evidence at all.]

The facts of this case, as far as it appears necessary here to notice them, were these :—

While John Cunningham, eldest son of John Cunningham, of Balbougie, was Provost of the borough of Inverkeithing, in the year 1758, he hired Agnes Hutcheson as a servant. In 1759 she bore him a child, and they were both rebuked—she publicly, and he privately—by order of the Kirk Session. This judicatory required of her to produce a testimonial of her being absolved from fornication, which she had been

guilty of in Edinburgh ;] and she was at length compelled to quit Cunningham's service. Cunningham at this time would not confess that the child was his ; stating " that he had some doubts about that." The connexion in its commencement was therefore clearly illicit.

In 1760, Cunningham's affairs having become embarrassed, he went to live within the precincts of the Abbey, where he was joined by Agnes Hutcheson. Some time after, with a view to take the [484] benefit of the *cessio honorum*, he went into gaol, where he was attended by Agnes Hutcheson ; and then the parties lived together—at one period in the Canongate, and during another period in the Cowgate—till 1768, when Cunningham's father died ; and then they went to Balbougie, where they lived till 1770 ; when Agnes Hutcheson, being in ill health, either for medical advice, or to be near her relations, or for both purposes, was sent to Edinburgh, where she died, and was buried in the Canongate churchyard, as an unmarried woman, with very little ceremony ; Cunningham having sent his bailiff, or cowfeeder, to take charge of the funeral. The Respondents were the children of Cunningham by this Agnes Hutcheson ; after whose death, Cunningham took another woman to live with him, under the name of his housekeeper,—a Mrs. Gibson,—whom he afterwards married.

The estate of Balbougie had been entailed by Cunningham's father upon his sons and their issue male, in the usual order ; and failing issue male, then on their issue female, in the usual order. The issue male having failed, Cunningham, being desirous that his own daughters should succeed in preference to his brother's daughters, resolved to attempt to prove a marriage between himself and Agnes Hutcheson ; and the Respondents, under his direction, in 1790, raised an action of legitimation before the Commissaries of Edinburgh. After some previous procedure, (*vide* the Lord Chancellor's speech in judgment, *post.*) a proof of the marriage was allowed.

The marriage was attempted to be made out in [485] three ways—by actual celebration—by cohabitation as husband and wife—and by acknowledgments parole and written. To prove the celebration, a witness was produced, who stated that Cunningham came to his house some time in 1770, with an episcopal clergyman of the name of Murray, who made out a certificate of the marriage, which witness signed ; but Agnes Hutcheson was not present. The certificate was then called for, but was not produced till about ten years after, when the witnesses were dead, and then it was impeached as a forgery. In a supplementary action against Cunningham himself by the daughters, raised in 1798, his declaration was taken ; and he stated a celebration in the Abbey ; but this was not relied upon. A great number of witnesses were examined respecting the alleged marriage by cohabitation and acknowledgment during the residence of the parties in the Abbey, the Canongate, Cowgate, and at Balbougie. The evidence of reputation, or habit and repute, as to the character in which the parties cohabited, was contradictory. Several acknowledgments by Cunningham were proved ; but the question was, whether they were mutual, and whether not made for a particular purpose. (*Moir v. M'Innes*, Dom. Proc. 1782.)

With respect to the law on the subject, both parties appeared to be agreed, that marriage was constituted only by mutual consent ; and that regular celebration was conclusive evidence of that consent. But as to irregular marriages, the Defenders maintained, that the evidence in support of them might be rebutted by other evidence ; and that the conduct of the parties, and the opinion of the world as [486] to the character in which they cohabited during the whole period in which they lived together, was to be taken into consideration. For the Pursuers it was contended, that when once cohabitation as husband and wife, or distinct acknowledgment, was proved, they were entitled to stop and say that the marriage was completely established ; and that no subsequent declarations, or even the oaths of the parties themselves, or of other persons, could avail against it, any more than against a regular celebration.

The Commissaries, and afterwards the Court of Session, (Second Division,) by the casting vote of the then Lord Justice Clerk, (Hope,) found facts and circumstances proven sufficient to infer marriage ; and from this judgment the appeal was brought. It appeared that some doubt had been expressed below as to the authority of the decision of the Lords in *Moir v. M'Innes*, (Dom. Proc. 1780,) as to the effect of an acknowledgment.

In support of the proposition, that the most express parole or written acknowledg-

ments were not conclusive evidence of consent, the Appellants cited *Moir v. M'Innes*, Taylor v. Kello, (Fac. Coll. 1786,) and *McGregor v. Campbell* (Fac. Coll. 1801). As to the effect of cohabitation and declaration, or acknowledgment, the cases of *Ingles v. Robertson*, 1786—*Edmonston v. Cochrane*, 1804—*Callender v. Boyd*, 1801—*Case of Arrot*, Ersk. 95. Mor. Ed. *Pennyueick v. Grinton*, 1752—*M'Adam v. M'Adam* (*vide ante*, 1 Dow, ¶148)—*Fergusson v. Mackie*, 1781—*Richardson v. Irving*, 1785—*Ritchie v. Wallace*, 1792—*Atkinson v. Brown*, 1787—were referred to on the part of the Respondents.—In support of the proposition, that [487] marriage was complete and indissoluble when the consent was once proved, whether by regular celebration or otherwise, besides a variety of writers on the canon and civil law, the cases of *Bunting*, 4 Coke, 29—*Jesson v. Collins*, Salk. 437—*Dalrymple v. Dalrymple*, 1811, were cited.—The cases of *Swinton v. Kailes*, 2 Stair, 400—*Somerville v. Halgro*, Durie, 210—*Cameron v. Malcolm*, 1756—*Young v. Allen*, 1774—*Johnston v. Smith*, 1766—*McCulloch v. McCulloch*, 1759—*Whyte v. Hepburn*, 1785, and *MacLachlan v. Dobson*, 1796, (*vide ante*, 1 Dow, 171,) were also mentioned.

Romilly and Horner for Appellants; Clerk and Moncrief for Respondents.

Lord Eldon (Chancellor.) It would be recollected that this cause originated by a summons of legitimation, raised in 1790 before the Commissaries of Edinburgh; in which it was alleged "by Misses Elizabeth and Alison Cunningham, daughters of "John Cunningham, Esq. Advocate, who is eldest lawful son of the deceased John "Cunningham, Esq. of Balbougie, Writer to the Signet; that whereas the complainers (viz. the said E. and A. Cunningham) are lawful children of the said J. "Cunningham, procreated betwixt him and the now deceased Agnes Hutcheson, his "spouse, who were lawfully married together; yet, notwithstanding thereof, Misses "Katherine, Alison, Mary, and Jean Cunningham, children of Colonel James Cunningham, of Balbougie, and Mrs. Esther Cunningham, otherwise Cauvin, only surviving [488] child of the deceased Dr. Harry Cunningham, third lawful son of the "said deceased John Cunningham, and spouse of Mr. Joseph Cauvin, Clerk to the "Signet, and the said Colonel James Cunningham, as administrator in law to his "daughters Mary and Jean, who are under age, and the said Joseph Cauvin, for his "interest, with a malicious intention of depriving the said complainers of succeeding "to their said father or grandfather, or any of their other relations, have taken upon "them to propagate and tell to sundry persons, that the complainers are bastards, "although, as above mentioned, they were begot in lawful marriage, and brought "forth lawful children."

To this first part of the summons he called their Lordships' particular attention, as it was of great weight in the cause. This summons was the commencement of the suit in 1790, alleging that the complainers were the lawful children of John Cunningham, Advocate. Their father was then alive: he lived for a long time after, and had an opportunity, if they were his lawful children, to consult their interest, to gratify their anxiety to establish their legitimacy, and also his own anxiety which appeared in the course of the cause, by stating the nature of his connexion with the woman, who was certainly their mother. If he and the mother were married at an early period of their acquaintance, he could state the time, the place, and the witnesses. If the marriage took place at a later period, (by celebration,) he might also point out the time, place, and all the circumstances. If any of the witnesses [489] were living, he could point them out, and mention their names. He was himself the best witness in the world in such a case, from the knowledge which he must have of all the circumstances. When the complainers therefore had an opportunity of stating in this process all the circumstances from which a marriage was to be proved and inferred, they alleged that they were begot in lawful marriage, and brought forth lawful children; the meaning of which was, that they were begot and brought forth after the marriage of their father and mother. By the law of Scotland, their Lordships knew, though the complainers had been born before marriage, they would have become legitimate by a subsequent marriage of their father and mother. But this allegation was, that they were lawful children? by a marriage between their parents before their birth.

When they must have been instructed then by their father as to what was the fact, and were not driven to the necessity of saying one thing and then alleging another thing inconsistent with the former, they went on to state in their summons—"at least,

" if the complainers, or either of them, were procreated or brought forth before the said John Cunningham, their father, and the said Agnes Hutcheson, their mother, were actually married, the complainers were afterwards legitimated by a marriage which took place betwixt their said father and mother ; and they have been always held and reputed to be lawful children."

The case then was open to the observation which he had stated,—that it had been clearly instituted by the advice, and conducted under the superin-[490]-tendence, and at the expense, of Cunningham the father ; and on this ground he was rejected as a witness, though he had been afterwards judicially examined, and made a declaration which would by and by be noticed. The allegation which he permitted them to make was, that there had been a formal marriage before their birth ; by which he supposed was meant the marriage by Don, or Dun ; that he was married to their mother either before their birth, or after their birth, by which they became legitimate. The allegation too was on the fact of an actual marriage ; and yet he should be unwilling to hold that the summons excluded cohabitation with habit and repute, and acknowledgment. He took it as if it meant to include every thing by which a marriage could be inferred ; though it was difficult to believe that this would have been the mode of expression if all these had been intended.

Appearance having been made for the Defender, K. A. Cunningham, it was said in her defences, that the libel was too general ; that there had been no celebration, no marriage ; and that the Pursuers were illegitimate.

Answers were given in for the Pursuers ; and, instructed as they must have been by their father, as before stated, they said, " that like the children of many very respectable families in this country, they were not born in lawful wedlock ; but they have this comfort, that from their infancy they and their mother lived with their father, and sat at his table ; and when they came the length of going about, they were taken notice of by all the [491] respectable people in the neighbourhood ; and for several years past, since they came to greater length, they were visited and received visits at their father's house from all these people, and never heard the smallest surmise of their not being the legitimate children of their father, till they had information to the contrary from the Defender. The Pursuers do not know why, in the deed executed by their grandfather," (this deed, which was in the hand-writing of Cunningham the father, he would notice by and by,) " leaving a legacy to the Pursuer, E. Cunningham, she was designed a natural child. They never saw that deed, nor do they know the date of it ; but it would seem that it had been written previous to the marriage ; or, if after that period, that their father had not wished to mention to their grandfather that he was married : but this is of no importance in the present question ; for even supposing their father were to give a solemn declaration that they were at this moment natural children, it would have no effect whatever in contradiction to a positive proof of a marriage betwixt their father and mother. The Defender is wrong in asserting so violently that the Pursuers have never been considered as lawful children ; because that they not only are so, but have long, if not always, been reputed to be so, can be proven in the most satisfactory manner."

After this, the Commissaries " ordained the Pursuers to give in a pointed condescendence of the facts which they offered to prove in support of their libel, and in particular of the facts and cir-[492]-cumstances from which they inferred a marriage between their parents : " by which, as he understood it, they were to have an opportunity of proving,—1st. The fact of marriage by actual celebration ; or, 2d. In any other way by inference. A condescendence was then given in ;—and here he might be allowed to observe, that up to this moment there had not been a word said as to the marriage at Holyrood House ; nor he believed of an actual marriage in 1770, except in this condescendence : and not a word about the certificate in the hands of the father. The Pursuers then offered to prove,—1st. That their father and mother were formally married in the year 1770. 2d. That they and their mother always sat and were entertained at their father's table ; and that their mother, if not always, was often called by their father's name. 3d. That they had been educated and brought up as their father's lawful children ; and that they had always been considered and treated as such by their relations, neighbours, and acquaintances ; and there cannot be a stronger instance given of the idea which their opponent and her family had of their legitimacy, than to mention, etc. that she, her mother,

and two sisters, a few years ago, paid their father and them a visit at Balbougie, "where they staid eight or ten days, during which the greatest friendship subsisted among them; and they and the Pursuers afterwards corresponded by letters "always upon the footing of cousins."

Here then they first offered to prove a marriage actually celebrated in 1770, which turned out to [493] be the marriage supposed to have been celebrated by Murray, at the house of Paterson. But those who prepared this condescendence (he trusted this was an observation which he was warranted judicially to make) felt a difficulty as to the actual marriage; and, under the second and third heads, had betaken themselves to cohabitation with habit and repute.

After answers for the Defenders, the Commissaries "ordained the Pursuers to "condescend more particularly on the circumstances attending the marriage of their "father and mother, and to specify the time of the year, the place, the celebrator, "and the witnesses." This was not requiring too much, considering that the father was then alive, who could not be ignorant of time, place, or circumstances attending an actual celebration of marriage.

Though immediately after the hearing of this cause he had desired further time for consideration, he had then no doubt, that if this had been one of those cases in England, where neither the place of the marriage nor registration could be found, but where the question was, whether *rebus ipsis et factis*, by cohabitation as man and wife, and what they called reputation, marriage might not be presumed; an English Jury could not have presumed a marriage upon such facts and evidence as appeared in this cause. But though that was his opinion then, he had desired time to consider what might be the peculiarities of the law of Scotland, with regard to such facts and evidence.

In this condescendence, here properly called for, [494] though the particulars could only be supplied by the father,—no notice was taken of the marriage at Holyrood-House; but they stated, "that the marriage of their father and mother took place "on the 5th of July, 1770; the celebrator being Mr. Thomas Murray; the witnesses, "David Shiells and William Paterson; place, the house of William Paterson, who "resided in the Canongate."

Here nothing was said as to the certificate, nor was it necessary to say any thing. It was however called for, and the answer was, that it had been mislaid; and in point of fact, it was not produced till about ten years, or some long time, afterwards. But it was at length produced. There was an offer to examine Cunningham himself; but, if Cunningham was carrying on the suit, supplying the expenses, etc.—by the law of Scotland, as he understood it, Cunningham could not be a witness. Upon a supplementary summons however, by the Pursuers, against Cunningham the father, he was judicially examined as a party; and he declared, "That it was some years "before the year 1760, when he became acquainted with Agnes Hutcheson; that "he had several children by her, and that she was the mother of the present Pursuers; "that he lived for four years in the Abbey, at Holyrood House, from 1760 till 1764, "as he thinks; and Agnes Hutcheson, during that period, lived constantly with him; "that, during that time, he was privately married to the said Agnes Hutcheson; "that the marriage ceremony was performed by a Dr. Don, or Dun, an English Clergyman, who had come from England to reside in the [495] Abbey for some time, on "account of debt."—This was what Cunningham said in 1803, 13 years after the suit had been instituted.—And then he went on:—"The declarant recollects that "there were present at the marriage, Captain Robert Campbell, of Monzie; Cowan, "a watch-maker, and, as he thinks, either Judge Philp or Mr. D. Dalrymple, afterwards "Lord Westhall; and he is certain that one or other of them was present, but which "he does not recollect; that he is not sure if there were any other persons present; "that Dr. Dun gave him a certificate of the marriage; and he now recollects that "the woman of the house in which they staid was present at the marriage; that her "husband's name was Spark, who was one of the King's trumpeters; that the above "certificate the declarant gave to Agnes Hutcheson, after he left the Abbey, when "he came to reside at Balbougie, after getting his affairs settled; that his father "was very much against the marriage, and the declarant did every thing in his power "to conceal it from his father, who had declared that if he married that woman, he "would not give him a sixpence."

Their Lordships would permit him here to observe, that the suit had not been instituted till long after the death of Cunningham the grandfather—till after the son had gone to Balbougie—till after the death of Agnes Hutcheson : and the reason alleged by Cunningham for not having brought forward this marriage before was, that if his father knew it “ he would not give him sixpence.”

Then they had from 1764 to 1770, in which to [496] look at the circumstances from which marriage might be inferred, with the recollection of the fact of its having been alleged, that between 1760 and 1764 there had been an actual celebration of marriage. Why then, how happened it that the evidence of facts and circumstances was so ambiguous ? It might be answered — “ Ah, but secrecy was necessary.” That, however, was nothing to the fact of actual celebration ; and if it applied to the habit and repute during the grandfather's life, how came the evidence to be so inconsistent, so incoherent, when the grandfather died, and the cause of secrecy ceased ; when the woman must have been anxious to have all possibility of doubt on the subject removed ; and when he, who, from apprehension of his father, had compelled her for a time to live in so suspicious a situation, must have been anxious to proclaim her openly and unequivocally a married woman ?

Cunningham then proceeded to declare, “ that in order to obtain the benefit of a *cessio bonorum*, he was some time a prisoner in the Canongate tolbooth ; which was “ some time after he had been in the Abbey ; that while the declarant was in the “ Canongate tolbooth, A. Hutcheson lived and slept with him ; that the gaoler made “ some objection to A. Hutcheson staying with him, saying, that no woman was “ admitted unless she was married ; upon which declarant told him that he was “ married, and referred him to some people of whom he might inquire ; that he re- “ collects staying in the house of a man of the name of Winter, as he rather thinks, “ after having been in Canon-[497]-gate gaol ; that A. Hutcheson lived with declarant “ in Winter's house, and she was treated by declarant, and the people of the house, “ as he thinks, as his wife, etc. ; declares that he always allowed A. Hutcheson to “ manage his house as his wife.”—Interrogated, by what name did she go ? Declares “ that she sometimes went by her own name, and sometimes by that of declarant ; “ and that he sometimes desired people to call her by her own name, by way of keeping “ the matter private : ”—(their Lordships could not forget the evidence, of a message coming to her as his wife, at Edinburgh, from Balbougie ; a fact as inconsistent as any fact could be, with the idea of secrecy on account of the father :)—“ that the “ declarant thinks he lived in another house in Edinburgh, for some short time, after “ leaving Winter's, etc. ; and that he lived with her there in the same manner as in “ Winter's, and did so in every house where he lived with her ; that A. Hutcheson “ came to live with him at Balbougie, after his father's death ; that A. Hutcheson “ was always in bad health, from the time when she came to reside at Balbougie, and “ she continued so till her death, which happened at Edinburgh ; that, a consider- “ able time before she died, she mentioned to declarant that she had either lost or “ burnt Dr. Dun's certificate of the marriage ; that declarant told the real story “ to William Paterson, porter in Canongate, and who kept a public-house, and who “ and his wife knew all the affairs of A. Hutcheson, and her connexion with declarant ; “ and upon telling the said W. Paterson the matter, he said [498] that he would get “ a Mr. Murray, an English Clergyman, who would marry them, and who often did “ those things ; and that he Paterson was often present as a witness, at marriages “ performed by that man ; and accordingly William Paterson brought Mr. Murray “ to his own house, to the declarant ; ”—(their Lordships would please to observe the fact, that Paterson brought Murray :)—“ and there Mr. Murray performed the “ ceremony in the same manner as had been done before, in order to confirm the “ marriage ; and Mr. Murray did thereafter grant a certificate of the marriage.”

On occasion of the alleged marriage by Dun, Cunningham meant, no doubt, to represent that both parties were present ; and here he said that the ceremony was performed in the same manner as before, and a certificate granted. That certificate, which had at last been produced, was in these words,—

Edinburgh, July 5, 1770.

“ These are to certify all whom it may concern, that the parties following, viz. Mr. John Cunningham, Advocate, and Agnes Hutcheson, were this day duly married

"BY MUTUAL CONSENT, having first declared, (that is both declared,) that they were both FREE AND UNMARRIED PERSONS of equal stations, without the forbidden degrees of kindred, knowing no unreasonable objections against their being joined in the bands of marriage.—These presents being attested by me—

(Signed) "THO. MURRAY, Minister."

[499] This certificate was signed by Cunningham, and then there was an attempt to write Agnes Hutcheson, to which he requested their Lordships' particular attention. It was also signed by two persons as witnesses, David Shiells and William Paterson; and Shiells signed first, or at least it was not likely that he signed after Paterson, as his signature was above the other. For some reason or other, Shiells was not examined at all, but they examined Paterson and his wife; and Paterson said, "that above 20 years ago Mr. Cunningham told deponent, that he was to be married to Ann (Agnes) Hutcheson—that immediately thereafter he brought to deponent's house one Murray, who he knows to have been in the use of performing irregular marriages;"—(it would be recollected that Cunningham said, that Paterson had brought Murray:—) that this person, in presence of deponent, wrote marriage lines betwixt Mr. Cunningham and Agnes Hutcheson, to which deponent signed witness—that upon this occasion Ann (Agnes) Hutcheson was not present." The deposition having proceeded thus far, the Dean of Faculty, as Counsel for the Defenders, required the agent for the Pursuers to produce the certificate on which their libel proceeds; whereupon the agent for the Pursuers informed the Court, that an express had been sent to Mr. Cunningham, in the country, for this certificate, and that the answer returned was, "that it was mislaid and could not be found."

The object then in calling Paterson was to establish the fact, that a marriage had been celebrated between the parties in 1770; but though the certificate was said by Cunningham to be lost, he did not produce Murray, if he was in the world, nor Shiells, who unquestionably then was in it, to examine either of them as to this point. Paterson being required to state whether he was present when any actual marriage took place betwixt Mr. Cunningham and A. Hutcheson, deponed, that "he knew nothing more than what he has deponed to as above." Paterson's wife said, "that about 20 years ago, she saw Cunningham and one Murray at her own house; that she knows Murray was brought there for the purpose of performing a marriage between Mr. Cunningham and Ann (Agnes) Hutcheson; that A. Hutcheson was not present;"—(she confirmed her husband in that:—) "that she understood from what she heard from Mr. Cunningham, that A. Hutcheson was to have come to the house to be married, but was prevented by sickness;"—(now really one would think, that if the wife could not come to the husband, the husband might have gone to the wife:—) "that she understood, that Murray had made out marriage lines between Mr. Cunningham and A. Hutcheson, which had been subscribed by her husband, but deponent neither read the lines nor heard them read, but concluded they were marriage lines from Murray having been brought to the house; that she knows this Murray died several years ago: and being interrogated whether she ever heard Mr. Cunningham and A. Hutcheson acknowledge one another as man and wife, depones, she can say nothing about that, but that they lived together as such, which she infers from [501] their eating together and sleeping together; that she knew they ate and slept together before the marriage lines were made out, but did not know whether they did so after; that David Shiells was present at the meeting between Mr. Cunningham and Murray, above deponed to; and it was said among them, that D. Shiells had subscribed the marriage lines, but she did not see him subscribe them; that she did not know where A. Hutcheson lived at that time, nor where she then was."

This declaration having been made as to an actual marriage before 1764, and this evidence given as to an actual marriage in 1770, the Pursuers examined besides a great variety of witnesses. The original connexion between Cunningham and A. Hutcheson, was of this nature.—She went to Cunningham's house, at Inverkeithing, as a servant, and Mr. Clerk and Mr. Moncrief represented her as then an innocent and uncorrupted young woman. By the time she had been nine days in Cunningham's house, this sturdy virtue gave way, and she bore her master a child. This

gave great offence to the ecclesiastical judicatory, by which she was compelled to do penance, and she was publicly rebuked by Mr. Richardson the Clergyman. Another circumstance relative to her chastity was, that they ordered her to bring a testimonial from Edinburgh of her being absolved from the scandal of fornication she had been guilty of there. Such evidence was material in a case like the present, because in judging from circumstances of the nature of the connexion, whether illicit or not, the question [502] must be, in some degree, affected by the mode in which it originated. The presumption was in favour of the legality of the connexion; but where it clearly appeared that it was at first illicit, that the man had expressed doubts whether the child was his own, such a connexion was likely to continue illicit, and therefore it was important to consider how it began. The difficulty was this—which, as far as he had heard or read, neither learned nor unlearned had grappled with—Was it during the residence in the Canongate, or Cowgate, or at Balbougie, or at what time did this become a lawful connexion between man and wife? This was material; since, if their Lordships were called upon not to admit subsequent declarations against the status of wife and of children, if there was a previous marriage, it must be shown first that they had acquired that status, she of a wife, and they of lawful children; for otherwise how could it be known whether such declarations were made before or after the status had been acquired?

If we cannot establish a marriage by celebration, they said, we can establish one by acknowledgment, by cohabitation—as man and wife must be meant; for there might be a cohabitation as man and woman without its being a cohabitation as husband and wife. None of the Judges appeared to have thought that there was a marriage by cohabitation with habit and repute, etc. before the residence at Balbougie; and even from this very case it was clear that cohabitation as man and woman was not considered as forming cohabitation as man and wife. Then whatever affection Mr. Cunningham had for [503] this woman when alive, he showed very little regard to her memory when she died. In her last sickness she had been sent to Edinburgh, where this ceremony was said to have been performed, and there Mr. Cunningham left her; and when he heard of her death he sent his cow-feeder or bailiff, or some such person, to see her buried. She was buried as Agnes Hutcheson, as an unmarried person, and with hardly the decencies of the most ordinary funeral, and laid in the grave, not in the character of wife but of mistress.

The Commissaries were of opinion, that there was no actual celebration of marriage, but found facts, circumstances, and qualifications proven, relevant to infer marriage. The cause was then carried before the Second Division of the Court of Session; and the judgment of the Commissaries was ultimately sustained by the casting vote of the then presiding Judge.

He had read the whole of this evidence with all the attention in his power, with all the care which the demands of justice required, and with a just inclination to support the legitimacy of the Pursuers. He wished he could say, that he concurred with those Judges of the Court of Session, who thought that it might be supported. But it was impossible for him so to concur; though he admitted that the case was important, and attended with considerable difficulties. This was a case where the connexion was clearly illicit in its commencement. The parties were not married till she had borne him a child, till she had been publicly, and he privately rebuked, till after he had expressed a doubt whe-[504]-ther the child was his, and till she had been directed to procure a testimonial from Edinburgh of her being absolved from the fornication she had been guilty of there, whether committed with him or others did not appear, except from the doubt which he expressed as to the child being his. He afterwards went to the Abbey, where he found her again, and lived with her. He did not enter at all into the question of habit and repute, and acknowledgment, and so forth, while they lived there, as he found that there was no difference of opinion as to that part of the case. If there was a single word of truth in this man's (Cunningham's) testimony, (he called it so, though not strictly such,) a marriage had there been actually celebrated. Cunningham might wish to conceal it, but he must say, that there should have been, on that account, the greater care to preserve the evidence of it against the effect of that concealment. Every act of concealment laid both the parties under the stronger obligation to preserve the evidence of the marriage. But when they were told, that this was the purpose, and were at the same time called

upon to decide whether a marriage must not be presumed from habit and repute, the case appeared the most difficult that well could be.

He was perfectly aware of the distinction taken betwixt cohabitation with habit and repute, and acknowledgment, but he apprehended that the fact of mutual consent must be made out. He had examined this case (*Moir v. M'Innes*, Dom. Proc. 1782) : with reference to all that was said on the subject in the books, and in the cases cited ; and in the fair meaning of what was con-[505]-tained in these books and cases, it did not appear to him that there was sufficient, in this case, to entitle him to infer that there had been such a consent as made a marriage. This case must be looked at as one originating in an illicit connexion, said to have become lawful at some period —no one knew when ; and if the marriage depended on the evidence as to the cohabitation with habit and repute among the circles in which they lived, he desired to know at what precise period was the nature of the connexion changed, and when did they thereafter begin to live together as husband and wife ? If their Lordships believed Cunningham, there was an actually celebrated marriage before 1764 ; but if so he would ask, whether all question about it would not have been removed long before the death of Agnes Hutcheson ! If they had been acting before with a view to concealment, he would ask whether, after they went to Balbougie, after they found themselves in the seat of the man at whose displeasure Cunningham trembled, if they had the feelings, he of a lawful father, and she of a lawful mother, for their children, they could then have left any doubt as to whether they were man and wife ? If the design before had been secrecy, why not then have clearly and unambiguously relieved her from the taint of the situation, in which that purpose of secrecy had so long held her, the moment they got into that house ? And that too in a country where the children might have been legitimated so easily ; their situation, in that respect, being different from what it would have been in England, where a man might rather choose to rest [506] on a doubtful marriage prior to the birth of his children. But there, where they had no more to do than to call two or three witnesses, as in the case of M'Adam, (*vide ante*, 1 Dow, 148,) and in their presence say, " We were married, but we were afraid of Balbougie ; we now acknowledge our marriage, " and we are married, etc."—she had nothing to do but to reiterate the words and clearly intimate her consent, and then they would have given to their connexion a character, and to their children a state quite unequivocal. Instead of showing that any thing of that kind had been done, they went on examining witness after witness, till one could not well tell what was the nature of the treatment which she received ; some saying that she was treated as a servant, others, that she was treated as a wife.

There was one circumstance very strongly pressed, and properly so—he meant the conduct of the Clergyman. But in looking particularly at the evidence as to the conduct of the Minister, he could come to no such conclusion from it as that for which the Pursuers contended. His acts did not go the length of supporting the inference drawn from them by the Pursuers ; and Brown's evidence showed, that the opinion of that gentleman was not favourable to the idea of a marriage. It was said, that in the circles of their friends and servants they were considered as man and wife ; but he would ask, In what circle had there been an acknowledgment of that fact ? at what time, in any circle, had such an acknowledgment been made ?

When the cohabitation of man and woman was not known to have been in its origin illicit, the [507] presumption was that it was lawful. But where it was at first notoriously illicit, and where a change in the character of the connexion must be operated, and when they found the means employed for that purpose to be such as left half the world in doubt, the servants, the relations, one half thinking one way, the other half the other ; at what time, in what circle, could it be said that there was such a habit and repute as raised the presumption that the parties had mutually consented to be husband and wife ? He could not admit that mere cohabitation as man and woman was a cohabitation as husband and wife. Give him that, and let the law be what it might, what it was contended to be on one side or the other, he said that the weight of evidence was against the legitimacy, independent of actually celebrated marriage ; and if there had been an actual celebration, the facts and circumstances must have all tallied with that fact of actual celebration ; and instead of being against the fact, all the evidence must have been on one side. He found in the notes, and here he must observe that if what was stated in notes, which occasionally

came before their Lordships as containing the observations of the Judges below, was not what was said by them, they were not to be implicated; and he wished it to be distinctly and particularly noticed, that in commenting upon what appeared in such notes, when he had no other means of knowing what was said by the Judges below, no offence to them was ever intended; but he found in the notes of their observations, that great weight was laid on the evidence of Mudie, who said, "that at the first visit [508] the deponent made at Balbougie, which was after the death of the Pursuer's mother, etc. the Provost did not inform him that he had married her; that about 18 months after deponent's marriage, Provost Cunningham came to visit him at Leith, when he informed the deponent that he had been married to the mother of the Pursuers before witnesses;"—(this was certainly a strong passage, but it must be taken altogether;)—"before witnesses; and that Mr. and Mrs. Taylor, of Fodd, could attest the fact." How could they attest it?

Though sorry to shake the alleged marriage, he wished to have it pointed out where he could fix upon as the period of a marriage ceremony, or of private consent proved by facts and circumstances. He desired no stress to be laid on subsequent declarations, whether in writing or not; but still he could not forget the fact, that Mr. Cunningham had written to his brother, Dr. Henry Cunningham, in 1769, that he had "two fine little daughters of natural children, etc.—if Jammy (another brother) has no sons, little George (Dr. Henry Cunningham's son) will in all probability heir the estate, for I scarce think I shall now marry;" he could not forget his signing a note the same year, in which Agnes Hutcheson was described as his housekeeper, with all the variety of papers, about 15 or 16 in number, noticed as evidence in writing, where he called A. Hutcheson his housekeeper, and one of the Pursuers a natural child. Much had been said as to the conduct of the Minister, and it was asked, "Would he have examined A. Hutcheson unless he had conceived that she [509] was Cunningham's wife?" He did not find that the Clergyman did examine her, though she was on the list;—and then as to politics and decorum, as to the Swintons visiting at Balbougie, they did appear to have objected to Mrs. Gibson, either before or after her marriage. The inference therefore from this circumstance went a great deal too far.

He should have been disposed to give more weight to the parole evidence, if there had been no such certificate as that of 1770. He had already adverted to the circumstances of contradiction between the evidence of Paterson, and the declaration of Cunningham; so that both could not have been true. Paterson stated that the woman was not in the house at the time. It had been argued that they might have been married before. But the effect of Cunningham's declaration and of the certificate was, that Murray was brought there to marry them, and that they were married there. And it appeared to him that the certificate was a piece of false and fabricated evidence. It was inconsistent with the interests of mankind—inconsistent with human security, to give any credit to such an instrument. Was it consistent with an alleged previous marriage, to have a marriage celebrated in 1770, the parties professing themselves to be then, "free and unmarried persons?" When the children were called "bastards" at school, and when instead of putting an end to all such imputations, by an open and unequivocal avowal of marriage, which might have been done in a minute, the parents contented themselves with sending messages to school-masters and school-mistresses, desiring them not to permit [510] their children to be called "bastards"—was it consistent with the conduct of the parties to suppose, that such a celebration of marriage took place in 1770? Or, if it had taken place, was it to be imagined that he should immediately have turned his back on her, and left her to be buried, not merely like one in the humblest situation in society, (for the poorest might be buried with the honours of fair character,) but to be tumbled into the grave as an unmarried woman, and one who had lived with him as his prostitute?

With respect to the case of *Moir v. McInnes*, (Dom. Proc. 1782,) it was unnecessary for their Lordships to enter into it; but he must say in very respectful language, to those who entertained doubts as to the soundness and authority of the ultimate Judgment in that case, that he was sure, from his knowledge of Lord Thurlow, that it never could have been decided till after infinite examination. Without saying whether the decision must be an authority in all cases that might come before that

House, he knew that it must have been the fruit of most anxious and elaborate consideration. In the present case he did not think the facts and circumstances in proof relevant to infer marriage, and was therefore of opinion that the Judgment ought to be reversed.

Lord Redesdale. In every country marriage was a contract, and every contract was a fact, to be proved by positive evidence of the fact, or by other evidence from which the fact might be presumed. By the law of Scotland, cohabitation with habit and repute was presumptive evidence of marriage, [511] as it was, more or less, in all countries; and so it had been declared in statute 1503, cap. 77; which at the same time proved that the presumption might be refuted by contrary evidence. There must be such a cohabitation, as to induce persons to form the opinion that the parties were married. The cohabitation by itself was nothing at all here, as it was known to have been in its origin illicit. Where that was not known, the presumption was in favour of marriage, as it was not to be presumed that the parties would live in such a way unless they had formed that contract; but the evidence as to that presumption must rest on repute.

In this case they alleged an actual celebration of marriage in two different instances: one in or before 1764, another in 1770. The noble and learned Lord who had just addressed their Lordships had clearly shown, that there was nothing to prove that the contract was formed on either of these occasions.

The question then rested on the repute, and the parties must be reputed and holden to be married:—it must not be an opinion of A., in contradiction to an opinion of B., and of C. in opposition to D.: it must be founded not on singular, but on general opinion. That species of repute which consisted in A. B. and C. thinking one way, D. E. F. another way, was no evidence on such a subject.

It was true, the evidence here was extremely contradictory; but in such cases he had always understood, that they ought to look at what were the collateral circumstances in which there could be no error; and which were not liable to that impression, [512] one way or the other, to which witnesses were often subject. What then were the collateral circumstances here? There was first the legacy left by the grandfather, in a settlement in the hand-writing of Cunningham the father, to one of the Pursuers, there described as a natural daughter. It had been said, that Cunningham, the father, was compelled so to write it, from apprehension of the grandfather's resentment. But after the grandfather's death, Cunningham, in a letter of Oct. 7, 1768, to Mr. S. Mitchelson, the factor for the trustees on the Balbougie estate, called her again his natural daughter, when it was impossible that a dread of the grandfather's resentment could be the reason. In April, 1769, in writing to his brother, Dr. H. Cunningham, he called the Pursuers his natural daughters. What could be the object in holding out to his brother that they were not legitimate, if they had really been so? All this was in the life-time of A. Hutcheson, and the words in the letter to Dr. Cunningham, "I scarce think I shall ever marry," were very material, as they demonstrated that he did not then consider himself as married. In the same year he took a note payable to A. Hutcheson, and signed by her with her initials, in which she was called his house-keeper; so that both declared that there was nothing like a marriage, on which repute could be founded. After A. Hutcheson's death, in a letter to Mitchelson in 1771, and in writings dated 1773 and 1775, and signed by him, A. Hutcheson was still described as his house-keeper. These were instruments with respect to which there could be no error, and which [513] were not liable to that sort of affection of the mind which might lead witnesses into mistakes. In the surgeon's and shoemaker's bills, she was called Mrs. Hutcheson, which showed that they considered her merely as a house-keeper. These were the more valuable as evidence, from their not being framed with any idea of ever being brought into a Court of Justice. Such collateral circumstances operated in a great degree to decide on the character of the parole testimony, and, where they existed, were always the best means of ascertaining the truth on any subject whatever.

One thing decisively showed that there was a great deal of management in this business; he alluded particularly to the marriage lines (certificate) of 1770: Cunningham must have had these before him, and have known their contents, but he said he had mislaid them—and when were they produced? After the death of Shiells who had not been examined; Paterson the other witness having been examined,

and having contradicted them. He could not account for Shiells not having been examined in any other way, except from a conviction that his evidence would have been in conformity to Paterson's.

Under these circumstances, judging from what had, and what had not been produced, etc.; he was of opinion, that there was not here such evidence of repute, as was necessary to establish the fact of a marriage by presumption.

Much stress had been laid on Cunningham's declaration to Mudie. But that was after the death of A. Hutcheson, and could form no contract; and [514] besides, considering what he had declared respecting his marriage in 1770, in which he was so materially contradicted by Paterson, a declaration of his was not much to be relied on. Then the matter rested on the cohabitation and repute at Balbougie; and it appeared that some thought they were married, and some thought they were not. But the repute of marriage, as he had already stated, must be general; the conduct of the parties must be such as to make almost every one infer that they were married. Here the connexion had been long illicit, and it did not appear when it became lawful. There was not repute sufficient to form presumptive evidence of a marriage.

"That the facts and circumstances, etc. proven were not relevant to infer marriage —and remit."

Agents for Appellants, SPOTTISWOODE and ROBERTSON.

Agent for Respondents, CAMPBELL.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MEREDITHS, *-Appellants*; SAUNDERS,—*Respondent* [July 27, 1814].

[Mews' Dig. vii. 180; xiii. 1846.]

[Meredith, being in embarrassed circumstances, in consideration of a loan of £900, makes a lease to Dennahy, with covenant for perpetual renewal, of lands of the yearly value of from £400 to £500, at a rent of £150 subject to a private [515] parole agreement, that Meredith might redeem within two years, on payment of £1300. Saunders, knowing the circumstances, with the consent of Meredith, purchases the interest of Dennahy, to whom Saunders pays the £1300. Saunders afterwards purchases the whole interest of Meredith, in these and other lands, for the additional sum of £3706—the clear profit rent at which the lands were let in the year following being £600 a-year besides other advantages. Meredith having consented to the purchase from Dennahy—having had opportunities of being perfectly acquainted with the value of the lands—having acted deliberately—and no fraud appearing—held by the House of Lords, affirming a decree of the Irish Exchequer, that there was no ground for setting aside the transaction.]

[*Dicente* Lord Eldon, that though the decision in *Mortlock v. Buller* (10 Ves. 292) had been questioned, if he were to decide the case again, he should decide exactly in the same way as before.]

The Merediths, who held the lands of Armaghmore and Dysart, county of Kerry, under a lease for lives renewable for ever, granted in 1738 by Richard Meredith, the then proprietor, to his second son, William Meredith, being in 1796 much distressed for money, obtained a loan of £600 from one Dennahy, upon covenant to grant to Dennahy a lease for three lives, or 41 years, of the lands of Armaghmore, at the yearly rent of £150 to commence from March 25, 1798; or on that day to pay Dennahy £750 with interest from the date of the agreement. The annual value of the lands was much more than £150, and it was contended that the transaction was usurious. At a subsequent period in the same year, Dennahy advanced to the Merediths a farther

sum of £300 ; and in consideration of the whole sum of £900 he obtained a [516] lease of these lands for three lives, with covenant for perpetual renewal, at the rent of £113 15s. for the first two years, and £150 for ever after, subject to a private parole agreement, that the Merediths should be entitled to redeem on payment of £1300 to Dennahy on March 25, 1798.

The Respondent, Saunders, —who was uncle to William Meredith, the Appellant chiefly interested in the lands, and who appeared to have been apprized of the situation of the Meredith family, and the nature of the transaction with Dennahy, at which it was in evidence that he expressed great indignation,—with the full knowledge and concurrence of the Merediths, purchased the interest of Dennahy, and paid the £1300. He afterwards purchased the whole of the interest in the lands of Armaghmore and Dysart, under the lease of 1738, for an additional sum of £3706 ; though, in the following year, the lands were let, (as was stated on oath,) so as to yield a clear profit to the Respondent of £600 a-year, with other advantages. William Meredith had however consulted Mr. Justice Day (then a practising barrister) and the Rt. Hon. Maurice Fitzgerald on the subject of this sale ; but from their evidence, it appeared that they knew nothing about the value of the lands, and hardly remembered any thing about the transaction.

The Appellant, W. Meredith, alleged that he had been induced to act as he did from the opinion entertained by himself and others, that the Respondent — being supposed to be a man not likely to marry—would make him his heir ; and there was evidence that the Respondent himself had made [517] such a declaration. But though the Respondent some time after the transaction did marry, the Appellant, W. Meredith, made no attempt whatever at that time to impeach the fairness of the transaction, and never then stated that he was dissatisfied with it. The lands at that time became the subject of a marriage settlement.

The Appellants afterwards refused to renew ; and the Respondent filed his bill in the Exchequer, in the nature of a bill for specific performance. The Appellants answered, stating the above circumstances ; and witnesses being examined, and the cause being heard, the Court decreed performance pursuant to the prayer of the bill ; and from this decree the Appellants lodged their Appeal.

Several grounds were mentioned for impeaching the transaction ; but the only grounds on which any great stress was laid in the House of Lords were,—1st. That the whole transaction was founded on the usurious contract with Dennahy, and was therefore void, whether the Respondent had, or had not, notice of that contract ; and, 2d, (which was chiefly relied on.) The consideration was grossly inadequate. To the first point it was answered, that there was no pretence for saying that the transaction, in any view of it, was usurious at law ; and as to the equity of the question, Saunders did not substitute himself in the place of Dennahy, paying only the £900 and interest ; but purchased for £1300 with the knowledge and consent of the Appellants. (*King v. Drew*, 3 Wils. C. P. 390.) To the second objection it was replied, that the Appellants were perfectly acquainted with the value of the lands ; that there was no confidential relation [518] between the parties ; that the consideration, under the circumstances, was not inadequate ; and at any rate, that mere inadequacy of consideration was no ground for rescinding an agreement, no fraud appearing :—and this defence was like a bill to set aside a contract.

In the course of the argument, the case of *Mortlock v. Buller* (10 Ves. 292) having been mentioned, Lord Eldon (Chancellor) said.—“ I perceive the judgment in the case “ of *Mortlock v. Buller* has been questioned in a decision of the present Lord Chancellor “ of Ireland. I have since looked back into all the circumstances of that case ; and, “ with all due respect for that opinion, if I were to decide the case again, I should “ decide it exactly in the same way as before.”

Romilly and Leach for Appellants ; Hart and Bell for Respondent.

Lord Eldon (Chancellor.) This was a case depending on a great variety of circumstances. After having considered all these circumstances, and admitting that the case was one of some difficulty, he was of opinion, on the whole, that the decree ought to be affirmed.

Decree affirmed.

Agent for Appellants, BLANDFORD.

Agents for Respondent, NEELD and FLAGGAIL.

[519] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHAND, *Appellant*; HENDERSON, Clerk and Manager for the Aberdeen Canal Company, in behalf of the said Company,—*Respondent* [July 28, 1814].

[Mews' Dig. xiv. 1916. See *Goldie v. Oswald*, 2 Dow, 534.]

[Where a particular jurisdiction is appointed under a canal act to determine all questions that may arise respecting things to be done in pursuance or in execution of the act, if the canal proprietors do any thing in a way not exactly according to the terms of the act, and not strictly within the powers thereby given, the individual conceiving himself aggrieved, in applying for redress, is not limited to the particular jurisdiction; but the complaint is to be entertained by the ordinary jurisdictions, and the wrong to be redressed in the same way as other wrongs; upon the principle, that any thing done not in exact conformity with the provisions of the act, is not a thing done in pursuance and execution of the act, and therefore not confined to the particular jurisdiction.]

[*Sentiente* Lord Eldon, that though where a party stood looking on while an act not strictly legal was done, having the means, but without taking the proper steps, to prevent it, the remedy by injunction, which he would otherwise have, was gone—yet the Company were trespassers, and would be liable in damages; and that even if they entered on an individual's lands without authority, they were trespassers, and liable at least in nominal damages, because the act was unlawful.]

This was an action of declarator and damages by the Appellant, Shand, Advocate in Aberdeen, against the Respondent, Henderson, as representing the Aberdeen Canal Navigation Company. The sum-[520]-mons stated, "that in 1798 the Company had, without any legal authority, seized upon, and appropriated to the use of " the canal, part of his lands of Tanfield, severing and dividing the same in a very " irregular and awkward manner;" and concluded to have that fact declared, and for damages. The illegality, as it was afterwards alleged, consisted in the Company having unwarrantably deviated from the line prescribed in the act under which they were constituted; and in their not having in the earlier proceedings, in occupying the Appellant's grounds, and settling the amount of his claims, strictly adhered to the previous steps required by the act. After answers on the merits, the Respondent stated, that a particular jurisdiction had been appointed by the act to settle all differences that might arise between the Company and the individual proprietors, in the execution of the act. After condescendence, the Lord Ordinary allowed a proof; but his interlocutor was altered by the Court, which sustained the defences, and assolized the Defender; "reserving to the Pursuer, if he shall be so advised, to " prosecute his claims in terms of the Act of Parliament." From this judgment the Appellant appealed; contending, that he was entitled to be allowed a proof that the Company had deviated, and taken his grounds without authority; in which case, he contended, the Court of Session, and not the particular jurisdiction, must decide as to the consequential damage.

Romilly and Nolan for Appellant; Adam and Horner for Respondent.

[521] Lord Eldon, (Chancellor,) after stating the case. Their Lordships would permit him here to mention, that the action was not brought against the Company, but against the Clerk, or Manager; and he did not find any clause authorizing them to sue, or making them liable to be sued, by their Clerk. But if the Court of Session had a practice of its own on this point, he did not say that it ought to be disturbed; but it was quite unknown to them in England.

By these canal acts, large powers were given, and private property largely sacrificed, on the ground of public utility; but when one considered the extent of these powers, in England as well as in Scotland, the necessity of restraining them within

the precise limits to which the acts confined them must be obvious. The Court where he sat, if they did exceed them, would restrain them by injunction. If that was not promptly applied for, and the thing not strictly authorized by the act had been actually done, the party could not have that remedy, because the application was too late for that: but he apprehended the Company were trespassers, and liable in damages; and even if they entered on the land when not authorized by the act, the individual was entitled to call on them for nominal damages at least, because the entry was unlawful.

This act, like others of that description, enabled them "to enter into and upon the lands belonging to any person or persons, to survey and take levels of the same, and to set out and ascertain such part or parts thereof as the said Company shall think necessary and proper for the making, com-[522]-pleting, maintaining, improving, and using the said canal: " and to do a variety of other strong acts.

But their Lordships knew, that previous to passing these acts, there must be a survey, and a map, or plan, for Parliament to look at, to show the practicability of the object, and the exact line to be followed; and that this was kept in deposit, that it might be seen whether the terms of the act had been complied with. The act therefore provided, that the Company should not deviate from the course "delineated on the said map, or plan, etc. without the approbation and consent in writing, signed by the person or persons to whom any lands, etc. do or shall respectively belong, through or over which any deviation is decreed to be made," etc.

The act contained the usual clauses about tolls, etc. and then authority was given to Commissioners in these words:—"Whereas differences may arise between the said Company, etc. and the owners of, or persons interested in, the lands, grounds, etc. which shall or may be taken, etc.; be it therefore enacted, that the Commissioners for the land-tax for the time being for the county of Aberdeen, etc. the Representatives in Parliament for the said county and royal burghs of Aberdeen, etc. the Sheriff Depute for the said county, etc. are hereby appointed Commissioners for settling, determining, or adjusting, all questions, matters, and differences, which shall or may arise between the said Company and the several proprietors of, and persons interested in, any lands, [523] grounds, etc. that shall or may be taken, used, affected, damaged, or prejudiced, in pursuance or in the execution of any of the powers hereby granted, and for the other purposes in this act mentioned." The authority of the Commissioners then extended only to such matters and differences as might arise from what should be done in pursuance or in execution of the powers thereby granted. But the act having required that a particular line should be followed, if that line had not been followed, and the Company had cut through an individual's grounds without his consent, he apprehended that it was impossible to say that they were proceeding in pursuance and in execution of the powers thereby granted. They were only doing so when they proceeded according to the exact terms and provisions of the act. Put it in another view: if the parties could not agree as to the value of the grounds that might be required, and if the Company proceeded without taking the previous steps incumbent upon them to take under the act, he was of opinion that they became trespassers. They must proceed according to the terms of the act, if they meant to say that the jurisdiction constituted by the act was the only jurisdiction which ought to deal with the matter.

One was anxious therefore to point out, that their principle in England was this,—that the Company should not be interfered with if they acted within their powers: but that, for the very reason that such large powers were given, the Court would keep them strictly within the limits of those powers.

Without stating at length all that happened, it [524] appeared difficult to say that a regular and strictly legal mode of proceeding had been here adopted. The remedy by injunction was quite out of the question. If a man stood by, and knowingly suffered the operations to be carried on, without taking the proper steps, though he had the means, to prevent them, he ought not to have an injunction. But though he had neglected to apply for that, it did not follow that he should be deprived of his right of action, and his remedy by damages. But, as a general observation, he might say, that the amount of the damages ought to be calculated with a view to the conduct of the individual: and where he stood by, without taking any steps to interfere, a jury would perhaps not give damages worth seeking for. But if the Company did

any thing which the law did not authorize them to do, though the damages might be nominal, he did not mean to say that the suit ought not to be entertained.

The conclusion then was this.—the Court did not say but that something might have been done which might be a fair ground of complaint somewhere, and it "reserved" to the Pursuer to prosecute his claims in terms of the Act of Parliament;—"meaning, he supposed, that he ought to go to the Commissioners, and that the Court could not deal with the question. That, however, depended on this consideration:—If the acts done were within the powers given, the probability was, that the legislature intended to give a local summary jurisdiction, and not to leave the Company, in every question that might arise, to be dragged before the Court of Session. But if the acts done were not [525] within the powers, then redress was to be sought for the wrong in the same manner as for other wrongs. It appeared to him, looking at all the circumstances, (he did not say what might be his opinion as to the litigiousness of such a proceeding as this, if the case were his own; he had only to look at the legal rights of the parties, in dealing with the cases of others.)—that if these acts were not such as the act of Parliament authorized, their Lordships had no right to send the Appellant to the Commissioners; and of course the Court of Session had no right to do so. In order to settle the principle, therefore, he proposed that they should declare, that the Commissioners were not authorized by the act to settle, determine, or adjust, any questions, etc. that might arise by reason of any proceeding not conformable to its provisions—such proceeding not being in pursuance, or in the execution, of the powers granted by the act; and that with this declaration the cause should be remitted, for the Court below to give judgment accordingly. (*Vide Agar v. Regent's Canal Company.*)

Remitted, with the above declaration.

Agent for Appellant, _____.

Agent for Respondent, CHALMER.

[526] IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BAKER, and Others,—*Appellants*; MORGANS,—*Respondents* [July 27, 1814].

[Where a landlord, or lessor, in 1781, by an ejectment for non-payment of rent, entered upon the possession of a widow, tenant for life of a lease for lives renewable for ever, remainder to her children, infants; and the children, in 1806, long after they came of age, and after the lessor had been in undisputed possession for upwards of 25 years, filed their bill for relief;—held by the House of Lords, reversing a decree of the Irish Court of Exchequer, that there was no ground whatever in this case for interference in equity.]

[*Sentientibus* Lords Eldon and Redesdale, that the proper proceeding, if any were adopted, would be a proceeding at law; that as to any irregularity in the proceedings in the ejectment under which the lessor was put in possession, that was a question for the consideration of the Court of King's Bench; and that the construction attempted to be put on the statute giving the remedy by ejectment to the landlord for non-payment of rent; viz. that rights of infants in remainder were saved, would vary the rights of the landlord, and was inconsistent with the effect of the entry for non-payment of rent, which was to revest the property in the landlord, in the same manner as before the lease had been granted.]

In 1750 Lord Santry granted a lease for three lives, with covenant for perpetual renewal, to Thomas Taylor, of the lands of Kilmore, in the county of Dublin. Taylor demised part of these lands to Edward Clinton, for the same lives, and with covenant for perpetual renewal. Clinton demised the [527] same part of the lands to Brunton

Morgan, for the same lives, with a similar covenant, reserving a profit rent; and afterwards assigned his remaining interest in the lands to Thomas Baker, the Appellant. Brunton Morgan died in 1779, having by will given his widow the benefit of the lease for her life; afterwards to go to his four children, share and share alike. In 1781, a considerable arrear of rent having accrued, Baker brought an ejectment; and having obtained judgment by default, an *habere* issued, and he was put in possession. Baker after having expended considerable sums on the lands, in 1795, demised part of them to J. C. Beresford, for three lives, with covenant for perpetual renewal, at £110 15s. 7d. yearly rent.

In 1801 he several times publicly advertised the remaining part to be let to the highest bidder; and, in March, 1802, he demised that part to James Coghlan, for three lives, with covenant for perpetual renewal, in consideration of a fine of £1300, and £241 yearly rent.

In 1806 the three surviving children of Morgan (no step to redeem having been taken, nor any intimation of defect of title in Baker given, nor any claim made during a period of 25 years) filed their bill in the Exchequer: stating, that the ejectment was irregular, and that Baker had not been put in possession under it; the possession having been voluntarily given up by their mother, by agreement with Baker, during their minority; and praying that Baker might account as their guardian, and that they might be put in possession pursuant to their father's will. Baker answered, stating as [528] above; and Beresford and Coghlan answered, stating that they were purchasers for valuable consideration without notice. Witnesses having been examined, some evidence was given, tending to show that Baker had been in possession by agreement with the mother at the time the *habere* was supposed to have been executed; that there had been no service of the declaration in ejectment; and that the proceeding had been in other respects irregular. On the other hand, the proceedings, as certified from the Court of King's Bench, appeared to have been perfectly regular.

At the time of filing the bill, the mother had been dead 16 years; the eldest of the Plaintiffs was 35 or 36, and the youngest 29, years of age. On June 9, 1809, the Court decreed the lease of 1770, or a copy thereof, to be handed to the Plaintiffs; "an injunction to issue to put the Plaintiffs in possession; and Baker to account "for the profits of the lands from time of filing the bill." From this decree the Defendants appealed.

For the Appellants it was contended, —1st, That supposing the Respondents had any right at all, it was a matter for proceeding at law, and not cognizable in equity; no special cause, such as suppression of deeds by the adverse party; no legal estate outstanding in another, etc. appearing, so as to prevent their availing themselves of the ordinary jurisdiction. 2d, That the alleged informality in the proceedings in the ejectment was a matter solely for the consideration of the Court of law. 3d, That the Appellants had no title in law or equity to the premises; the saving in the statute (11 Ann. cap. 2. sect. 8) of the rights of [529] infants, in cases of ejectment for non-payment of rent, extending only to rights in possession; and the infants here having at the time of such ejectment no estate in possession, but only a remainder after their mother's death. 4th, That Beresford and Coghlan being purchasers for valuable consideration without notice, their title could not be defeated. (O'Connors v. Lord Bandon, 2 Sch. Lef. 679. — Co. Lit. 202. A. Kenney v. Browne, 3 Ridge, P. C. 462, 512.)

For Respondents it was contended that the proceedings in the ejectment appeared by the evidence to have been irregular, and that the ejectment was therefore a nullity; that at any rate the rights of infants in remainder and reversion, as well as in possession, were saved by the statute (11 Ann. cap. 2. sect. 8); that Beresford and Coghlan ought to have inquired more strictly into Baker's title; and that at any rate they would have their remedy against Baker.

In the course of the argument Lord Redesdale said, that equity might try whether a judgment was obtained by fraud, but he never heard of equity trying the proceedings at law for irregularity.

Lord Eldon. It was clear that where judgment was got, and the *habere* issued, if the tenant then gave up that which at any rate she would be forced to give up, equity would not consider that as merely voluntary. If the bill stated a judgment

by fraud, that was one thing; but he never heard before of a judgment impeached in equity for irregularity, without any attempt to set it aside at law.

Romilly and Leach for Appellants; Piggot and Dowdeswell for Respondents.

[530] Lord Eldon, (Chancellor,) after stating the circumstances and previous proceedings. The Court of Exchequer must have thought that Baker was to be considered as having acted in the capacity of guardian to the Respondents, and on some such principle they directed an account. On their part they insisted that their mother was not ejected in due form of law, but had voluntarily given up the possession, and that this did not bar the children as if there had been a recovery in due form and course of law. In the next place they insisted, that if the proceedings had been regular, still they being then infants were not bound, the statutes of ejectment for non-payment of rent in arrear saving the rights of infants. As to the purchasers they denied notice, and there was a dispute in point of fact whether they had or not. In his view of the case it was not necessary to decide that question, his opinion being, that independent of that circumstance the Plaintiffs were not entitled to a decree.

So long ago as 1781, Baker obtained possession under the ejectment. The bill was filed in 1806, long after all the parties were of age. That there had been a proceeding in ejectment was certain: it might be difficult to say whether it was regular, and some matter of fact was brought forward connected with the question, whether the possession was voluntarily given up, or forcibly taken from the widow. But he could not imagine how, upon a bill filed in 1806, equity ought to trust itself to examine, as the ground of decree, whether a judgment in 1781 was regularly obtained. It would [531] be a dangerous thing where a judgment was obtained in 1781, and the party submitted to it for 25 years, if equity were then to examine, not into the merits, but into slips in point of form, and upon that ground to give relief.

As to the fact whether the Sheriff did really put the writ in execution, or whether the party to save trouble gave up the possession, it was a serious thing when the writ issued, and was returned executed, to say that this was to be a good ground of objection, because the party, who would otherwise be compelled to give up the possession, might choose to save expense and trouble by giving it up voluntarily.

Another very serious point was, that if the rights of the infants were saved, under circumstances of this description, the rights of the landlord were varied, and he might be prevented for ages from having his remedy by ejectment. But at any rate it was difficult to say how equity could interfere at all. If their right accrued on the death of their mother, and if there was no bar, how was it that they had no right of ejectment at law?

Lord Redesdale. The chief question as to the interference of equity, in such cases, had come before him in the case of the *O'Connors v. Lord Bandon*, (2 Sch. Lef. 679,) and he was clearly of opinion that equity had nothing to do with the matter. In this case he apprehended, that even upon a simple entry by Baker the landlord for non-payment of rent, if he entered peaceably he could not be deprived of the possession, or even if forcibly, not after three years quiet possession, without a proceeding at law. The entry here [532] was on the possession of the widow, and it was said that the entry was lawful as to the widow, who was tenant for life, but not as to the children. That however was inconsistent with the entry of the landlord for non-payment of rent, which revested the property in him in the same manner as before the lease, and so the entry on the widow reinstated the landlord as if no lease had ever been granted; and equity could not, as he conceived, divest his possession. It was only a question at law. It was alleged that the statute protected the interests of infants in remainder and reversion as well as possession. This however would make the statute a trap for the landlord, whereas it was intended for his benefit.

It had been objected that there had been irregularity in the proceedings in the ejectment; but that was not for equity, but for the Court of King's Bench to consider. It was said that the possession had not been actually delivered by the Sheriff. That might be immaterial, but at any rate the Sheriff's return said that it had. A very curious question would arise on their construction of the statutes. One would come of age before the other, and was the ejectment to be avoided as to each of them when he attained the age of 21 years, or was it to be avoided as against them

altogether? The length of time during which one of them had been of age, before proceeding commenced, would be a strong objection even at law.

He could not dismiss the subject without adverting to the situation in which Beresford and Coghlan were placed by this decree. It was important to keep in view that they were both purchasers for valuable consideration. Both had taken possession, and expended money on the premises; and this was the first time where equity had turned a purchaser for valuable consideration out of possession, when the legal title was in him. The effect of turning them out of possession was to vest a right of action in them against Baker, who would thus be involved in difficulties beyond description. Was a purchaser for valuable consideration bound to see that the whole of a proceeding at law, under which the vendor or lessor was in possession, was perfectly regular? There never was a time when equity so dealt with purchasers for valuable consideration. Even if this ground then were tenable as against Baker, it was not tenable as against them.

But there was nothing here to warrant the Plaintiffs to proceed in equity in any way. The proceeding, if any were competent, must be at law. They did not state that they wanted any necessary instrument; there was no affidavit to the bill of any such being lost; and it even appeared by their own showing, that they had evidence to proceed by ejectment if they had so chosen. Equity therefore could not interfere.

Decree reversed.

Agent for Appellants, ROBINSON.

Agent for Respondents, WINDUS.

[534] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GOLDIE,—*Appellant*; OSWALD, and Others,—*Respondents* [June 1, 1814].

[Action against the trustees, under a road act, for having, in the occupation of the Pursuer's grounds, deviated from the line prescribed by the act, and entered upon his lands without taking the proper previous steps, in terms of the act, to give him notice, and settle the compensation. The House of Lords held that the line taken was authorized by the act, but remitted to the Court below to review its judgment with reference to the question, whether the proper previous steps had been taken in terms of the act; and, if not, to consider what damages had been sustained in consequence.]

[*Dicente* Lord Eldon, that the trustees, under these road and canal acts, ought to be kept strictly within their powers, that they ought not to deviate in the smallest degree from the line prescribed by the act: that though an injunction would not be granted where there was *laches* in applying for it, the trustees, if they deviated, would be liable in damages; and that if they entered on a person's lands without taking the previous steps incumbent on them under the act, they would be liable, upon trespass, in damages and costs. (*Vide* Shand v. Henderson, *ante* [2 Dow, 519]; also Agar v. Regent's Canal Company.)]

This cause commenced by an action of declarator, molestation, and damages, brought by the Appellant against the Ayrshire road trustees, under an act passed in 1805, for having illegally entered upon his lands, and made a road over it in a line not authorized by the act. A bill of suspension [535] had been previously presented and refused, and therefore an action of reduction of the interlocutors and certificate of refusal was brought, lest these proceedings in the Bill Chamber should be founded upon as a *res judicata*, which, it was contended, they could not be, because such a plea can only be established by a decree *in foro*, which could not be pronounced in the Bill Chamber. That plea did not appear to have been seriously insisted upon;

but some objection was made to the competency of these actions, (which had been conjoined,) on the ground that the act had appointed a particular jurisdiction for the decisions of all questions arising in the execution of it. To this it was answered, that the conduct complained of was not in execution of the act; that the trustees had exceeded their powers; and that in case of the smallest excess of power, the ordinary jurisdiction was the proper one. (*Countess of Loudon v. Ayrshire Road Trustees*, Fac. Coll. May, 1793.)

The particular grounds of complaint were—1st, That the trustees had deviated from the line of road prescribed in the act. 2d, That they had entered on the ground, and commenced their operations, without previous notice to the proprietor, and without ascertaining and settling the damages according to the terms and provisions of the act.

The Lord Ordinary pronounced an interlocutor, finding among other things, "that the line of road adopted by the trustees, where it passed through the Pursuer's lands, and which appeared from the plan to be a very small deviation from the line marked Old Road, was throughout warranted and authorized by the description in the act, [536] sustains the defences, etc. and finds the Pursuer liable in expenses." To this interlocutor the Court, after some farther procedure, adhered; and thereupon the Pursuer appealed.

Lord Eldon (Chancellor.) The interlocutor said, that this was a very small deviation from the line marked Old Road. If the Old Road was the line settled by the act, then, whether the deviation was great or small, they had been in the habit, in this country, of saying, "No, you have no right to deviate at all;" and it would be dangerous to leave it to the discretion of Courts to say what was a large or what a small deviation with respect to these roads and canal acts. (*Shand v. Henderson, ante*; *Agar v. Regent's Canal Company*.) Then as to the notice and tender—suppose the fact were clear that none such had been made or given—if a man stood by for some time without interposing, it was too much to say, applying to the equitable jurisdiction at least, that an injunction should issue after the operations had proceeded; but still the liability for damages would not be affected, though the *quantum* might. It appeared impossible here to say that the trustees had no right to carry the road over Goldie's land. One however could not help entering into Goldie's feelings, the value of whose property would be very much depreciated; but still their Lordships had nothing to do with that, and could not prevent the trustees from doing what, under the act, they were authorized to do.

Goldie had delayed longer than they would have liked in England in case of an application for an [537] injunction. But there was another point to be considered which the Court below did not appear to have attended to. The trustees ought not to have begun their operations upon this ground till the terms upon which they were to have it had been settled with the proprietor; and if the parties could not agree, a jury ought to have been called in to settle them. Without these previous steps the trustees were not authorized to enter upon the land. He had always considered it of great consequence with respect to these turnpike and canal acts, that if his Majesty's subjects were to be exposed to their operation, the parties obtaining them should take care to take the steps incumbent on them. Here, if they entered without authority, an action of trespass might be brought, and some damages must be given, and the whole of the costs. Goldie then had been in some respects wrong, and in some respects right, and yet he was saddled with the whole of these expenses.

What he should then propose would be to declare that the line of the road was warranted by the act, and with this declaration to remit to the Court below to review the judgment, having regard to the provisions of the act as to the entry on the ground, and to consider whether these provisions had, in this respect, been observed, and, if not, what damage had been sustained by the Appellant in consequence of their not having been attended to.

He hoped, however, the parties would have the good sense to come to some arrangement which would render farther proceedings unnecessary. But [538] as matters stood, he did not see any other way of getting at the dry justice of the case.

Cause remitted with a declaration as above.

Agent for Appellant, RICHARDSON.

Agent for Respondents, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SMITH, and Others,—*Appellants* ; MACNEIL, and Others,—*Respondents*
[July 28, 1814].

[Mews' Dig. xiii. 1255.]

[Insurance on some hogsheads of tobacco, from Greenock to Bremen :—vessel deviates from stress of weather, and puts into Korshaven, on the coast of Norway, Nov. 30, 1798 ; where she remains till April 24, 1799 ; then sails, and in three days arrives at Bremen, and delivers the tobacco, which was not examined till the 25th of May ; when it was found that 40 hogsheads were damaged, and seven sound. The 40 hogsheads sold at $10\frac{1}{4}$ grots per lb. ; the sound hogsheads (though instructions to sell had been sent) retained unsold in expectation of a better price ; but valued by a broker at $17\frac{3}{4}$ grots per lb. The only evidence of the deviation being occasioned by stress of weather consisted of letters from the Consignees, stating that the master had written to a house at Bremen, that such was the fact ; and a copy of a judicial examination of the master at Bremen ; but no protest produced—no letter from the master. Held by the House of Lords, affirming a decision of the Court of Session, that the underwriters were liable for the partial loss, though on evidence which would not be admitted in England.]

[*Sentiente* Lord Eldon, that though the sale of both the sound [539] and damaged hogsheads might be the most certain way of ascertaining the difference, and calculating the amount of the loss ; the valuing of the sound hogsheads by a regular broker, the parties acting *bonâ fide*, was sufficient.]

This was an insurance upon a cargo of tobacco, valued at £43 per hogshead, to be shipped on board a vessel called the *Fleece*, bound from Greenock, to Bremen.

The vessel sailed with a fair wind from Leith Roads, on Nov. 24, 1798. Having lost her convoy on the 27th, she abandoned her course for Bremen, and put into Korshaven, on the Norway Coast, where she arrived on the 30th. On the 24th of April following, she sailed under convoy from Korshaven, and in three days arrived at Bremen. On the 22d of January 1799, Tiel and Sons, Consignees of the cargo at Bremen, wrote the insured, (Respondents,) stating that the master had written a letter, Dec. 22, 1798, to Messrs. Rotberg of that place ; informing them, that on the separation of the fleet on the 27th of November, he had been obliged by a heavy gale to bear up for Norway, and put into Korshaven, with the loss of sails, etc. ; but expressing his hope that the cargo had not suffered. Messrs. Tiel and Sons also stated, that the Weser was then almost covered with ice, and that no vessels could get in without great danger. The insured wrote to Tiel and Sons, on the 23d of March, expressing their hope that the *Fleece* had arrived, and their wish that the tobacco should be sold immediately. Tiel and Sons answered in April, [540] stating that the *Fleece* had not arrived ; " and as it was probable that part of the tobacco might " have got damaged, they requested to be informed whether the Respondents were " insured, and in what manner ; and whether they were to sell the damaged tobacco " on account of the underwriters." In answer to this, the Respondents wrote in these terms—

" Our tobacco per *Fleece* is insured. We are, however, considerably interested " individually as underwriters. As there is no clause in our policy for average on " separate packages, we cannot recover any loss unless it amount to five per cent. " upon the whole, valued in policy at £43 per hogshead. We hope the tobacco may " have escaped damage altogether ; but should not that be the case, and it amounts " to five per cent., you will of course have it sold for behoof of the underwriters, and " send us the documents."

On the 27th of April the *Fleece* having arrived at Bremen, on the 30th Messrs. Tiel and Sons wrote the Respondents the following letter :

" After referring to ours of the 12th instant, on which expect your answer. This serves to bring you the pleasant news of Captain Pinchon's safe arrival ; lighters are engaged for discharging the *Fleece*, and we hope to have your tobacco soon in town. We wish it may be without damage ; but, as the Captain made so long a voyage, and had dreadful weather at sea, it is rather probable that [541] a part of the cargo may have got some damage, and therefore are desirous to hear if you are insured, and if we must sell the damaged tobacco for account of the underwriters. It is a pity, indeed, this tobacco was such a long while coming, the best period for sale being passed, and prices about five grots less than our best sales in November, without any appearances of an advance. On the contrary, the large supplies that are expected still make a farther decline not at all improbable."

On the 16th of May, (19 days after arrival of the *Fleece* at Bremen,) the master of the vessel, with certain of his crew, appeared in the Court Leet at Bremen, and gave an account of his proceedings, a copy of which was produced. It bore in general, that he had been obliged to put into Korshaven, by stress of weather, and the loss of convoy ; where he had made a solemn sworn protest, of the existence of which, however, there was no other evidence. " After that they were detained in the said harbour through the strong frost and heavy gales, and through French privateers, till the 24th of the month of April, 1779 ; on which day they sailed, according to the order of the English consul, to Korshaven, from there, and joined his British Majesty's armed ship the *Espeagle*, as the convoy for the river Weser, for the destined port of Bremen. Then nothing material happened, and they arrived under the said convoy for the river Weser ; and after that, with the aid from a Pilot here, at Brache, at her dis[542]-charging place, on the 27th instant, where they have delivered in the following days the whole cargo, in lighters, to transport for Bremen. Then the appearants had adjointed, upon their oath, that by the discharging from the above mentioned cargo, as tobacco out her vessel, a part of them on the ground tiers a little wet.

" At the rest, they had pumped the ship out every time when it was necessary ; farther, the Captain Samuel Pinchon, and his ship's crew mentioned here before declared by a solemn oath that they have acted honestly and sincerely with the said cargo, nothing thereof sold, bartered, pilfered, expended, embezzled, or let embezzle by any of the above crew : but on the contrary, that they have delivered the cargo in such a manner as they receive them. If now any part of the cargo should happen to be want, or any of it damaged, it was not owing to the ship's company but to the bad weather, or to other causes which they knew not."

It appeared, that though the vessel had been unloaded immediately on her arrival, April 27th, the cargo had not been examined till the 25th of May. It was then found that 40 hogsheads were damaged, and seven sound ; the brokers declaring that it was an old damage, but that it happened in the last voyage. The 40 damaged hogsheads were sold at $10\frac{1}{4}$ grots per lb. ; and the examining brokers valued the sound hogsheads at $17\frac{3}{4}$ grots per lb. The sound tobacco was however afterwards sold, probably owing to the fall of the market at $10\frac{1}{2}$ grots.

The underwriters having refused to settle for the [543] difference, between $17\frac{3}{4}$ and $10\frac{1}{4}$ grots, the insured brought an action in the Admiralty Court, where judgment was given in their favour. This judgment was affirmed on suspension by the Court of Session ; and the underwriters appealed.

It was contended for the underwriters,—1st, That there was no legal evidence that the deviation was occasioned by stress of weather ; and if there had been such evidence, still the voyage of necessity had not been pursued in the shortest and most expeditious manner, the delay at Korshaven not being justified by any necessity. (Lavabre v. Walker, Doug. 271.) 2d, That there was no sufficient evidence to show that the damage had been occasioned by any of the perils insured against. 3d, That the principle on which the damage had been calculated was unjust ; as the sound tobacco ought to have been sold pursuant to the instructions, which was the only certain and proper way of ascertaining the amount of the damage ; as the mode of putting an imaginary value on the sound tobacco, and then claiming for the difference, might be made a cover for great injustice.

Park and Nolan for Appellants.—No Counsel appeared for the Respondents.

Lord Eldon (Chancellor). This was a question respecting a partial loss, on a small cargo of tobacco. The action was brought in 1802 or 1803; and in the Admiralty Court, in the Court of Session, and House of Lords, the cause had been depending till 1814. Mr. Park, who was so well conversant with subjects of this nature, had natu-[544]-rally dwelt on the insufficiency of the evidence; but in Scotland these letters, etc. might be evidence, though here they would not be admitted as such. The Respondent did not appear; and it turned out that he was insolvent, and could not afford the expense, and trusted his case to the care of their Lordships. When the cause came on for hearing, it appeared that one half of the papers had not been given in. They had however since been produced, and he had read them that morning.

The questions were chiefly questions of fact:—1st, Whether the deviation was justified by necessity. 2d, What was the cause of the damage. 3d, Whether the loss had been properly calculated. And here he could not help saying, that this was one of those cases which compelled one extremely to lament the want of inclination which prevailed in Scotland to adopt the trial by Jury in civil proceedings. It might be introduced gradually—first, for instance, in questions relating to boundaries in great wastes. He would be a bold man who would say that this House was as competent to decide such questions as a Jury would be, who might be acquainted with all the *indicia* of these boundaries. It had often occurred to him in reading these cases, as it sometimes occurred to him in Westminster Hall, that if, instead of being confined to the deposition in his hand, he had a witness before him, he would ask him a hundred questions, in order to get at the whole of the case; and equity here in such cases might direct an issue, in order to get at the better mode of examination. If the action had been brought here, it would have been decided [545] in the course of a few weeks by a Jury of merchants, perfectly competent to judge whether there was a necessity for the deviation, and whether the damage was occasioned by any of the perils insured against; whereas the cause, from the want of that advantage, had been depending for 12 years.

He had said so much, on account of the defects which sometimes existed in these causes, from want of the means of accurate information as to the facts on which their Lordships could safely rely. With regard to this particular case, upon reading it with reference to the Scotch rules of evidence, it did not appear to him that there was sufficient ground to reverse the decision. He thought there was evidence as to the causes of the deviation and damage, sufficient to support the judgment. As to the calculation, the only difference between the parties was, whether the sale of both the damaged and sound hogsheads would not have been the most accurate way of ascertaining the amount of the loss. But where persons under such circumstances, acting *bona fide*, retained the sound hogsheads unsold, in expectation of a better price at a future period, and took the most proper steps to have the sound portion fairly and accurately valued, he was not prepared to say that this was a valid objection.

Judgment affirmed.

Agent for Appellants, MUNDELL.

Agent for Respondent, BERRY.

[546] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HONE, — *Appellant*; DAVIS, and Others, — *Respondents* [June 1, 1814].

[Lessee of a church-lease, made about 150 years ago, sub-leases, with covenant for renewal as long as he could renew the original lease; the sub-lessees covenanting to pay double the rent that might be demanded by the Dean and Chapter, and to pay £300 of the fine; the immediate lessee covenanting "to make all proper applications, and use all proper endeavours, for the renewal of the leases." Renewals at the old rent, and increasing fines, till

1796; when the sub-lessees agreed to pay a greater proportion of the fine, on having an addition to their term, and clause introduced into the contract, that they should have the option to reject the renewal, in case the rent should be too much advanced. Immediate lessee endeavours to procure a renewal at a small fine and increase of rent; but the Court below, on bill by the sub-lessees, decreed performance of the covenant, by renewal for a large fine at the old rent.—the Dean and Chapter being willing to renew in that way,—on the ground, apparently, that such was the true intent and meaning of the parties:—it being conceived, that the option reserved to the sub-lessees, to reject the renewal, was intended to guard against the effect of an increase of rent, if insisted upon by the Dean and Chapter, without its being left to the immediate lessee to endeavour to procure a renewal at an increase of rent and small fine, if he could.—The decision affirmed on appeal.]

Some time in or about the year 1650, John Usher, of Mount Usher, county of Wicklow, obtained a lease from the Dean and Chapter of Christ's Church, Dublin, of the lands of Ballymolchins, etc. [547] in the county of Dublin, for 21 years, at a rent of £107 12s. 6d.; and soon after demised the same premises, for 16 years, to Jeffery Davis, (under whom the Respondents derived,) at the yearly rent of £215 5s. being double the original rent; with a covenant for renewal as long as he could renew the original lease. It was the usage of the Dean and Chapter to renew every seven years, at the same rent, on payment of a fine. The covenant for renewal was in these terms:—

"That he the said John Usher, his executors, administrators, and assigns, shall and will, at some time before the expiration of the first seven years of his present lease from the said Dean and Chapter, and likewise at or some time before the expiration of the first seven years of every future lease that shall be obtained by him or them of the said lands, or at some time sooner, make all proper application, and use all proper endeavours with the Dean and Chapter, or their successors, for the renewal of the several leases which shall be obtained from the said Dean and Chapter; and upon obtaining of every such renewal by the said John Usher, his executors, administrators, or assigns, he or they shall and will, from time to time, and at any time within six months after his or their giving notice of such renewal unto the said Jeffery Davis, his executors, administrators, and assigns, renew and make a lease to the said Jeffery Davis, his executors, administrators, and assigns, for the farther term of seven years, to be added to the term and continuance of the present lease, and of every future lease; he the said [548] Jeffery Davis, his executors, administrators, or assigns, accepting of every such renewal within six months after such notice, and paying unto the said John Usher, his executors, administrators, and assigns, the sum of £300 as a fine for every such renewal; and also paying double the yearly rent, and no more, as shall be reserved and made payable to the said Dean and Chapter, and their successors, by the said John Usher, etc. out of the hereby demised premises. And the said Jeffery Davis, in like manner, for himself, his executors, administrators, and assigns, does covenant to and with the said John Usher, his executors, administrators, and assigns, that he the said Jeffery Davis, his executors, administrators, and assigns, on every subsequent and after renewal and renewals, will pay to the said John Usher, his executors, administrators, and assigns, the said sum of £300 sterling, as a fine for such renewal or renewals for their said lease, and accepting of the said lease, within six calendar months after such renewals made with the Dean and Chapter, on their having notice thereof; and also pay to the said John Usher, etc. double the yearly rent as shall be made payable to the said Dean and Chapter, and their successor, by the said John Usher, out of the hereby demised premises."

On a subsequent renewal, the following stipulation was added to the covenant:—

"And it is hereby declared to be the true intent and meaning of the said parties to these presents, that in case the said, etc. (sub-lessees,) their ex-[549]-ecutors, administrators, or assigns, shall, upon any future renewal to be made by the Dean and Chapter, or their successors, of the said lands, to the said John Usher, etc. apprehend that the reserved rent is too much advanced, it shall be at the election of the

"said, etc. (sub-lessees,) whether they will accept of a renewal, or refuse the same, and be content with and possess the residue and remainder of the term of years in their said lease then in being and unexpired."

In 1796 Usher, descendant of the original immediate lessee, (the Dean and Chapter having increased their fines,) called upon the sub-lessees to assist him with a sum in addition to the £300 in procuring a renewal, which they did, on the terms of having two years and a half added to their term; and renewals were thereupon executed, at the old rent, with covenants as in the original sub-lease, and the additional stipulation above stated. In 1801 Usher sold his interest in the lease to Hone, the Appellant, for £950. Hone soon after applied to the agent of the Dean and Chapter, (Arthur Maguire,) to know on what terms they would renew; and being informed that a fine of £1035 8s. 9d. would be required, he caused a notice, dated July 20, 1802, to be served on the Respondents, the sub-lessees, demanding, that they should pay the whole of the fine, and requiring a specific answer before the 1st of the following September: promising, in case of compliance with the proposition, to renew with them; otherwise, that he should consider himself at liberty to make the best terms he could with the Dean and Chapter, by renewing at [550] an increased fine or rent, or suffering the term to expire. No answer having been given within the time, Hone represented to the agent, that the under-tenants were refractory, and proposed to give £500 fine, and £80 additional rent, for renewal. The Dean, on being informed of this proposal, desired the agent to communicate it to the under-tenants, that they might consider how their interest would be affected. They then, on Dec. 2, 1802, gave notice to the Appellant, that they were ready to advance the whole of the fine of £1035 in the mean time, to prevent the increasing of the rent; leaving it to be afterwards settled by arbitration what proportion should be paid by Hone. This not being attended to, they stated in a memorial to the Dean and Chapter, their liability to pay to the Appellant double the rent which he paid, or might pay, to the Dean and Chapter. On the 30th, the Respondents caused another notice to be served on the Appellant, stating, "that the Dean and Chapter were ready to renew at the old rent, on payment of £1035 fine; that Respondents were willing to pay the whole, and to pay all future fines that might be demanded, leaving to the Appellant his profit rent clear; that if he did not renew with the Dean and Chapter, and grant renewals to the Respondents, on these terms, they would apply to a Court of Equity for liberty to renew in his name." No satisfactory answer having been given, the Respondents filed their bill in Chancery against Hone, and Maguire, the agent, (the object in making the latter a party being for the discovery of evidence;) stating as above, and praying that Hone [551] might be compelled to renew, or that the Plaintiffs might be authorized to renew in his name, under such terms as the Court might think fit to direct. Hone having answered, and Maguire's name being struck out of the bill by leave, without putting him to the trouble of an answer, he having declared that he was ready to answer upon interrogatories, and several witnesses having been examined, the cause came on to be heard before Lord Redesdale, (Chancellor,) who recommended an accommodation, but without effect. The cause came on again to be heard, when the Court decreed, "that the Respondents should be at liberty to renew at their own expense; and that the Appellant should do all necessary acts for that purpose; and that the renewal should be in Hone's name, if he consented in a month; otherwise, in the name of a trustee, to be named by Plaintiffs, and approved by the Master; Plaintiffs consenting to pay the whole fine and fees, and consenting, in case the renewal should be in the name of the Defendant, to accept of covenants for renewal from him, with these variations, etc.; and reserving farther considerations."

The Master reported, "that the Defendant had not consented that the lease should be renewed in his name; and that a trustee had been proposed and approved. The Dean of Christ Church having died in the mean time, his successor demanded a fine of £4295 4s. 8d. which Plaintiffs paid, and a lease was executed to the trustee. Upon farther directions, it was ordered and decreed, "that [552] the trustee should execute new leases to Plaintiffs, pursuant to the covenant in the former leases"; and the Master was directed "to inquire what portion of the fine ought to be considered as demanded in respect of the increased value of the lands produced by improvements beyond the ordinary expenditure of a tenant; and how much in respect

"of the lands exclusive of such improvements": the sum of £300 to be deducted out of the latter part, and the Plaintiffs to stand as creditors on Defendant's interest in the lease for the remainder; and the renewed lease to remain vested in the trustee, to secure the same, unless the Defendant paid in six months; the Plaintiffs to pay the rents as they became due to the Defendant, according to covenant; and to be at liberty from time to time to apply to the Court for leave to renew the leases, and for that purpose to surrender to the trustee, etc.

The Master reported the payment of the fine by the Plaintiffs; that the whole of it had been demanded in respect of the ordinary value of the lands; and that all rents were paid up to Defendant. Upon petition by the Defendant, the cause was reheard; when the Lord Chancellor (Ponsonby) decreed, that as the Plaintiffs had offered to pay the sum required by the late Dean of Christ Church, amounting to £1035 8s. 9d., the decree of July 6, 1805, should be varied, so far as that the Defendants' interest in the lease should stand as a security to the Plaintiffs only for £3259 15s. 11d., being the difference between £1035 8s. 9d. and £4295 4s. 8d.; [553] and that in other respects the former decrees should be affirmed. From these decrees the Defendant appealed.

Romilly and Hart (for Appellant). The lessor was bound to renew and to under-lease; but he was left at liberty under the covenant as to the terms, whether by fine or increased rent. He was bound to pay all the fines above £300; and as ecclesiastical bodies were in the habit of taking fines on improvements, the perpetual renewal on such terms would be ruin to him, unless he had reserved the discretionary power to renew upon fines or increased rent. Without this option, equity must have said, that the nature and effect of the covenant never could have been understood by the parties, and would have set it aside, as in *Willan v. Willan* (2 Dow, 274). The renewing at increased rents might be ruinous to the sub-lessees, had not an option been reserved to them to give up their interest when the rents should be too much advanced. The argument on the other side was, that the Court was not to look at the terms of the instrument and covenant; but that the lessor (immediate lessee) must always renew on payment of fines, because that had been done hitherto. The Court, however, must look at the covenant, and could not make a new agreement for the parties. The decrees below proceeded on a mistake as to the facts; for, as Appellant understood plaintiffs, they had only offered to pay the fines in the mean time. But at any rate Appellant was not bound to accept the offer, as it rested with him to renew at an advanced rent, or on fines. The ques-[554]-tion was not, what was just, but what was agreed upon between the parties; and the Court could not make a new agreement for them. The subject involved three points:—1st, What was the construction of the covenant. The rule of equity was to consider what was the legal construction of the covenant, and then specifically to perform it. 2d, Whether this decree executed it according to the legal construction. 3d, Upon whom the loss which happened pending the suit ought to fall.—As to the construction, the sub-lessee knew that the Dean would naturally prefer the fines, and not allow the rent to be increased too much; and therefore he was contented to subject himself to the payment of the double rent, contributing only £300 to the fine, leaving the immediate lessee to deal as he could. It could not be the original intent that the immediate lessee should have only the stipulated profit-rent, and forego all the advantages of improvements. The sub-lessee, by the contract of 1796, guarded against the too great increase of the rent, by stipulating that he should be at liberty to reject the renewal and exhaust the term. This construction was also corroborated by another part of that contract; for the sub-lessee, looking to the possibility of too great an increase of rent, had added two years and a half to his term. It was clear, then, that there was nothing to restrict a reasonable increase of rent. 2d. The decree did not execute the contract of the parties, but put a construction upon it which the terms and understanding of the parties did not warrant: or, in other words, made a new contract for them, which the Court then executed. This [555] might lead to dangerous consequences. In *Willan v. Willan*, the Court held that it could not modify the contract of the parties. It must stand entirely, if it stood at all. 3d, As to how the act of God ought to affect the parties, the Appellant was throughout right. He would have renewed according to his covenant, but was prevented by the Respondents, and they ought to bear the consequences.

Richards and Nolan (for Respondents). The Court did not make a new contract, but only executed the existing contract according to justice and the real intent and meaning of the parties. The leases having been septennially renewed upon fines for 150 years at the old rent, there was no difficulty in the construction of the covenant. In 1796 the parties erected a Court of Equity for themselves. The sub-lessees, on account of the advance of the fines, agreed to pay more than the £300, which was in fartherance of the equitable intent of the old covenant. The price at which Hone purchased clearly showed the impression upon the minds of the parties as to the true construction of the covenant. The intention of Hone was to put it in his power to destroy the interest of the sub-lessees, which it was the duty of the Court to prevent, if the meaning of the covenant was, that both interests should be preserved. The meaning of the option reserved to the sub-lessees, to refuse to renew, was to guard against too great an advance of rent by the Dean and Chapter. The Appellant refused to renew accord-[556]-ing to the true meaning of the covenant, and the consequences ought to fall upon him.

Decrees of the Court below affirmed.

Agent for Appellant, BEDFORD.

Agent for Respondents, LANE.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LAWRIE, and Others,—*Appellants*; LAWRIE,—*Respondent* [July 27, 1814].

[Judicial sale of part of an entailed estate, for redemption of the land-tax, made by decree of the Court of Session, under authority of the Acts of Parliament, afterwards reduced; the terms of the act not having been complied with, etc. and the heir of entail in possession having been himself the purchaser, by the intervention of a trustee. This judgment affirmed in the House of Lords, on the ground of the particular relation in which the purchaser stood with respect to the estates.]

[Lord Eldon, (Chancellor,) observing, that the question would have been a very serious one, if it had been the case of a stranger purchaser; and Lord Redesdale saying, that it would have been very difficult to reduce such a sale, in the case of a stranger purchaser.]

This appeal arose out of an action brought before the Court of Session, for reduction of a sale of part [557] of an entailed estate, made by decree of the Court of Session, under the authority of the Land-tax Redemption Acts. (38 Geo. 3, cap. 60.—39 Geo. 3, cap. 40.)

Mr. Sloane Lawrie, who held the estates of Redcastle and Bargattan under two separate entails, in which the substitute heirs were different, applied to the Court of Session to have the farm of Edgarton, on the estate of Bargattan, sold, for the redemption of the land-tax of both estates. It appeared that Mr. S. Lawrie, if aware of the fact, had concealed that the estates were held under distinct entails. The Court (July 11, 1799) pronounced for the sale; and the farm was purchased by Mr. S. Lawrie's factor and agent, as trustee for Mr. Lawrie himself; who, on Mr. S. Lawrie's death, conveyed the farm to his sisters, the Appellants, his representatives.

The grounds of the action of reduction brought by the Respondent, the next heir of entail, as stated in the condensation given in on his behalf, were these:—

1st, That Mr. S. Lawrie, when he made his application to the Court, knew perfectly well, as indeed it was impossible he should be ignorant, that one part of the entailed estate was held under one entail, and the other under another, each of them destined to a different series of heirs; and that, with a view to injure the Pursuer, the heir, under both destinations, as well as for the purpose of obtaining an undue and great advantage to himself, he chose as a subject for a sale the farm of Edgarton,—which,

by the destination of the entail in which it is contained, he knew would become a fee-simple in the Pursuer's person, in the event of his having no [558] heirs male of his body,—and applied part of the price to redeem the land-tax of the whole lands under both entails; whereas, he was bound by the Act of Parliament to have made two separate applications,—one for each of the entailed estates,—in order that a part of the lands under each entail should be sold, and the price obtained for each of the parcels applied to redeem the land-tax payable out of the lands contained in each of the entails respectively. This proposition neither requires nor admits of any other proof than the terms of the two entails, and the proceedings in the Court; from which last it appears that this circumstance was entirely kept out of the view of the Court.

2d. That the land-tax of the whole lands in both entails amounted only to £17 18s. 3½d.; viz. £8 1s. 11½d. out of the lands in the first entail, which does not terminate in the Pursuer's person, and £9 6s. 4d. out of the lands in the other entail, which includes the lands of Edgarton, and terminates in the Pursuer's person: that, to have afforded a sufficient price for purchasing the whole land-tax, there were other smaller farms, etc.

3d. The Pursuer offered to prove that Mr. S. Lawrie purposely kept back from the Court all the above circumstances, which it was his bounden duty to have laid before them. That he did so, stands established by the records of the proceedings. That he did so purposely, being a matter of intention, can only be proved, or rather inferred, from what followed.

4th. That at the sale of the lands, no proof of the value was laid before the Court, and which the [559] Pursuer has undertaken to prove to have been £8000, were set up at 21 years' purchase of the old rent, by Mr. Hunter, Mr. S. Lawrie's own agent and trustee for the sale, at £1680. That to give the appearance of a competition, the reality of which had been precluded by its having been made known that Mr. S. Lawrie was desirous of acquiring the lands, a confidential friend was brought forward, who bade the upset price, and, upon Mr. Hannay, Mr. S. Lawrie's factor, offering £10 more, gave up the contest, and allowed the lands to fall into Mr. Lawrie's hands at £1690.

The Lord Ordinary, thinking there was sufficient evidence without resorting to parole proof, took the cause to report to the Court on informations; and the Court by interlocutors, May 22, 1805, and Feb. 11, 1806, reduced the sale; "reserving "to the Defenders all claims of relief competent to them." From this judgment the Defenders appealed.

Lord Eldon (Chancellor). This case arose out of a transaction very singular in its nature, and one which required little now to be said about it, except to take care that the effect of their Lordships' judgment should not be misunderstood. If the question were, whether a stranger, purchasing under the Acts for the Redemption of the Land-tax, and the authority of the Court of Session in the administration of these acts, could be disturbed, it would then be a question of very great interest; and he was anxious to have it understood, that he gave no opinion whatever on the point so put. But he was of opinion, that considering the relation in which Mr. [560] Sloane Lawrie stood with regard to the estates, an implied duty to the Court, and to all who had an interest, rested on him in such a manner, that whatever might be the case with respect to a stranger purchaser, the Court had authority in his case to interfere, and that the judgment which it had given was well founded. The relation in which S. Lawrie stood with respect to the estates gave the Court jurisdiction to do as they had done.

On the best attention which he could give to the circumstances, it did not appear to him necessary to alter the interlocutors, if he understood them. There was a reservation of relief, which saved the equities that arose out of the transaction and judgment. But, lest any difficulty should occur as to that point, there might be a declaration, that all whose interests were affected should be entitled to relief. An additional declaration had been taken, founded on the nature of the service; but their Lordships could give no opinion on that point, as it had not been under consideration by the Court below. The interlocutors might therefore be affirmed, subject to such alterations as might appear proper in case of an application to review the judgments upon the ground of the nature of the service, which had not been before under the consideration of the Court.

Lord Redesdale. He thought it important to say, in the case of a stranger purchaser, it would have been difficult to reduce the sale. He considered this judgment as resting simply upon the relation in which Mr. S. Lawrie stood with respect to the estates.

[561] Judgment affirmed—subject to alteration as above.

Agent for Appellants, SPOTTISWOODE and ROBERTSON.

Agent for Respondent, CHALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

FRASER, *Appellant*; CHISHOLM, — *Respondent* [July 27, 1814].

[Where a claim to a right of common on the high grounds, in the Highlands, depends on usage and possession, it must be a very strong and clear case of usage that can support the claim, as trespasses may be so very easily committed.]

This was another question (*vide ante*, *Seaforth v. Hume*, 2 Dow, 338) as to high-land boundaries, arising upon an action in the Court of Session, to have the Appellant's (Fraser, of Lovat) exclusive right, in virtue of his title to the barony of Beanly, declared to certain lands upon which, as he contended, the Respondents, to whom or their predecessors certain parts of that barony had been feued at different times, had improperly encroached, on the ground that the lands in dispute were common property. After much difference of opinion, and contradictory interlocutors, the Court below decided in favour of the Respondents, and Fraser appealed.

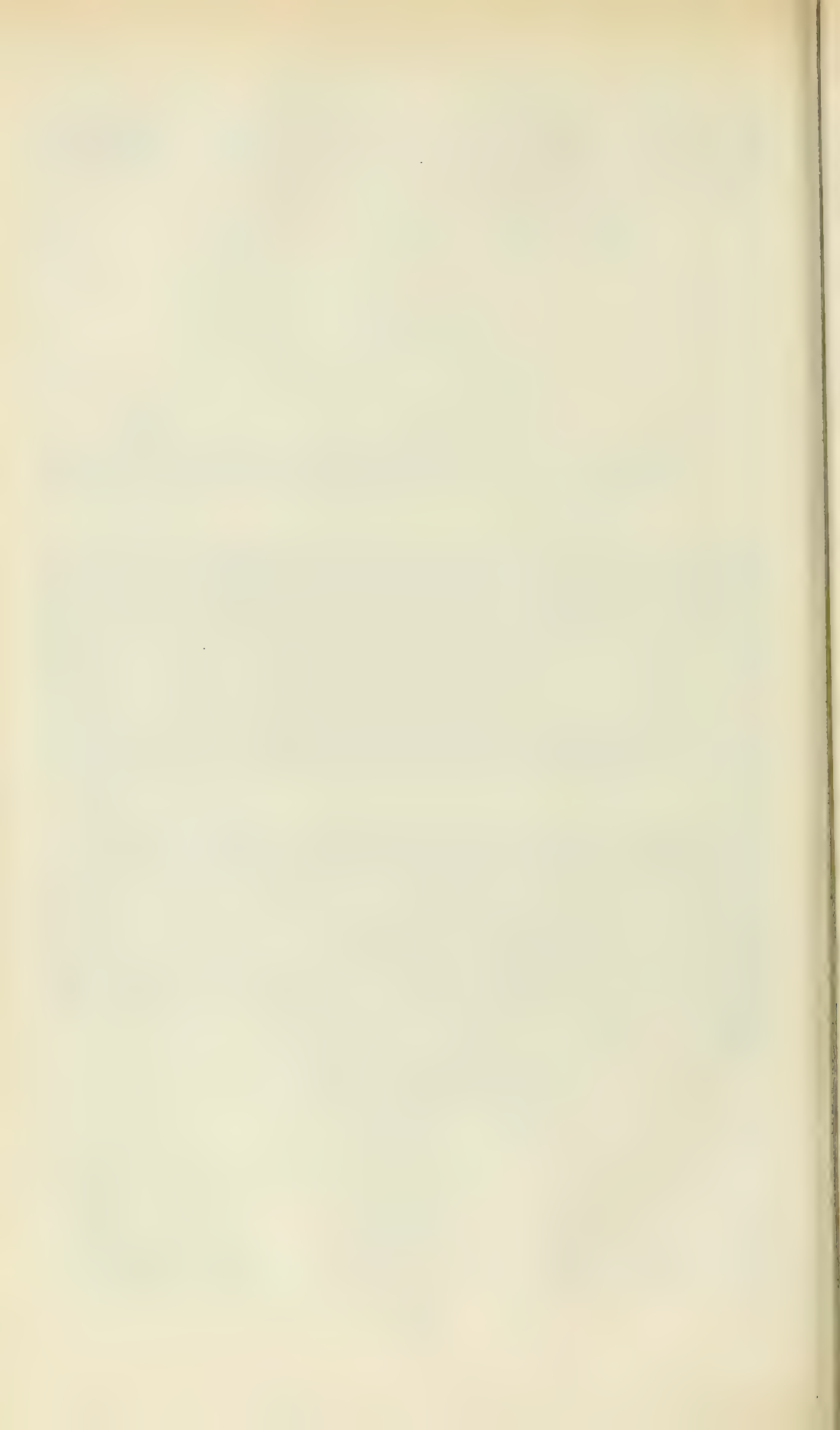
The ground on which the Respondents alleged [562] that these lands were common property was that of prescriptive usage and enjoyment. It appeared in evidence however that this usage had been much interrupted, and that the Lovat family had long kept a grass-keeper on the lands to maintain the exclusive possession, though leave had been given by them to others at times to put their cattle on the places in dispute.

Lord Redesdale. In these vast wilds trespasses were very easily committed, and with great difficulty restrained. The boundary marks were tops of mountains, cairns, huge stones, etc. It must therefore be a strong case of usage which could give a right where there was no written evidence to warrant the claim. Their Lordships, in judging as to the usage and possession, had to consider whether it was an assertion of the right or a mere trespass. In looking through the evidence the Appellant's usage was of a description clearly asserting an exclusive right. The evidence for the Respondents was simply that of having used the lands for their cattle, that usage having been interrupted, and therefore not the foundation of a prescriptive right. The possession by bothies, and on the whole the weight of the evidence, was with Fraser.

Lord Eldon (Chancellor). He concurred in that opinion.
Judgment of the Court below (in effect) reversed.

Agents for Appellant, CAMPBELL.

Agent for Respondent, ———.



VOLUME III.

ENGLAND.

ERROR, FROM K. B.

JOHNES,—*Plaintiff* (in Error); JOHNES,—*Defendant* (in Error) [Nov. 21, 1814].

[*Mews' Dig.* v. 500; xiii. 1918. As to practice under 8 & 9 Will. III. c. 11. s. 8, see R. S. C. 1883, App. A. iii. 4; Ord. 22, r. i; Ord. 13, r. 14; *Tuther v. Caralampi*, 1889, 21 Q. B. D. 414. Chitty's Forms, 12th ed. p. 639. See also *Noble v. Ahier*, 1886, 11 P. D. 158, 166.]

[In action of debt on bond, with penalty for performance of covenants, breaches under stat. 8. 9 Gul. 3. s. 8. may be assigned in the replication.]

[And, on demurrer, interlocutory judgment may be given to the extent that it appears to the court that the replication is sufficient, and that Plt. ought to recover his debt and damages for detention, and final judgment may be stayed till after award and execution of the writ of inquiry.]

[And where the interlocutory judgment was in E. T., and then, as the inquiry could not, according to the usual mode of holding the assizes, be taken before the justices of assize pursuant to stat. till after T. T., a day was given to the parties in M. T., passing over T. T. altogether, without continuance—held that, as in the due execution of the object of the stat. the giving a day in T. T. would have [2] been nugatory, the reason for the continuance failed, and the omission was no error.]

Error upon a judgment in K. B. in an action of debt on bond. The declaration was in the common form of debt on bond, and Deft. on Oyer set out the condition of the bond, (which was for quiet enjoyment of certain premises purchased by Plt. John Johnes, from Deft. Thomas Johnes, particularly against the claims of Mrs. Eliz. Johnes, Deft.'s mother,) and pleaded that Plt. had quietly enjoyed. Plt. in the replication stated that E. Johnes had filed her bill in Chancery against him setting forth her title under her marriage settlement as tenant for life, to part of the premises which had been sold by her son Thomas Johnes, to John Johnes, who had, without her knowledge or consent, been let into possession; and also alleging that an agreement had been entered into between her and John Johnes, for a lease to the latter, at a given rent, of that part of the premises claimed by her; and praying an account, an injunction to stay waste, and a specific performance of the agreement: that the Master of the Rolls had decreed the account, etc. and ordered a reference to the Master to inquire whether E. J. had a title to grant a lease; and, if she had, then he decreed a spec. per. but reserved the consideration of the costs of the inquiry as to the title and spec. per. till after the Master should have made his report, and from the subsequent proceedings it remained doubtful whether any costs were given on this last [3] ground. The replication then stated as the result of the suit in Chancery, and an action by E. Johnes in K. B. for damages for use and occupation, etc. that he was damnified to the amount of £6000. To this replication Deft. demurred, and after joinder in demurrer, (no counsel appearing to argue it for Deft.) the Court in E. T. 1813, gave judgment so far as that it appeared to the Court that the replication

was sufficient, and that Plt. ought to recover his said debt and damages for the detention : but final judgment was stayed till the truth of the breaches could be inquired of, and the damages assessed by a jury, and a writ of inquiry was for that purpose awarded, pursuant to statute, returnable in M. T., when a day was given to the parties (passing over T. T. altogether,) and then final judgment was given for Plt. (*vide* the form as read by Lord Eldon, C.) Deft. brought error in the Exchequer Chamber, where no counsel appearing for Deft. the judgment was affirmed, and then he brought error returnable before the Lords.

Parke (for Plt. in error).

1st Objection. The judgment was erroneously entered. The first judgment or act of the Court (" *videtur, Curia, etc.*") could not be considered as amounting to a final judgment, the *ideo consideratum est* being there wanting ; and the second judgment was erroneous, as there was a discontinuance, or miscontinuance, which was error at common law, and not cured by statute. (Comyns' Dig. T. *Pleader*. W. 1.—1 Roll. Abr. 485. pl. 20.—Gilb. Hist. C. P. cap. 9.) It has been laid down that if there [4] was an interruption for a whole term, or even short of that, it was error. (1 Roll. Abr. 484. 486.—Johnson v. Norton, 2 Roll. Rep. 442.) There were cases in which it had been held that a delay till next term, without satisfactory reason assigned, was error. (Yelv. 97.—Noy. 120.) So it was clear that mis- or discontinuance was error at common law ; and here there was one or both. Stat. 8. 9 Gul. 3. cap. 11. directed the writ of inquiry to be issued after the judgment, and it was not necessary that the inquiry should be executed before ; so there was no satisfactory reason for the delay over a whole term. The judgment was clearly a com. law judgment. The object of the stat. Gul. 3. was not to limit the judgment, but the execution ; so there was no reason for a delay of the judgment, since it could not affect the damages, and at any rate there was no excuse for the delay over one whole term. It might be said that the inquiry could not be executed till after Trinity Term, but there was no law against its being executed before. The defect was not cured by any statute. An appearance only aided a discontinuance of process ; but there was no case where a discontinuance by the act of the Court itself was cured by appearance. (Bradley v. Banks, Cro. Jac. 283.—Yelv. 204.—Phyler v. Boson, 1 Sho. 319. Peplow v. Rowley, Cro. Jac. 357. where there was an appearance, and yet a discontinuance.) In a book of practice of some authority, (*Quere* Tidd !) it was said that a dis. was cured by appearance, and Humble v. Bland, 6 T. R. [5] 255. was cited ; but there was no case where a discontinuance by the Court was cured by appearance. Then in stats. Jeof. no remedy was applied to judgments on demurrer. Stats. 27 El. c. 5.—4 Anne, c. 16. (the rest applying only to cases after verdict) only cured such defects as might have been assigned as cause of special demurrer : but here the discontinuance arose long after joinder in demurrer, and when the Court had made up their minds. Here then was a defect at com. law, not cured by stats. Jeof., and the judgment could not be supported.

2d Objection. The replication had not distinctly averred a lawful title in the person interrupting, and therefore no sufficient breach had been assigned. (Wootton v. Hele, 2 Saund. 178. n. by Serjt. Williams.—Southgate v. Chaplain, Comyns' R. 230.)

3d Objection. The damages had been improperly assessed. The bill in equity alleged an agreement between El. Johnes, and Deft. in error, for a lease to the latter etc., and prayed a spec. per. As Plt. in error had not been privy to this he was not liable for the costs, and yet no distinction had been made in the assessment : so that it was not clear but the damages were partly such as Plt. in error was not liable to pay, and he could not know how much to tender.

Eldon (C.). As to title and damages, decree in equity was stated, and that was a judgment that the person interrupting claimed by title, since otherwise there could have been no decree : but the matter did not rest on reasoning, for M. R. had directed an inquiry as to the title, which [6] was afterwards reported good, and saved the question of costs as to that part of the suit : and on farther directions it did not appear that any costs at all, as to that part, had been given ; so that a claim by title was shown, and though the jury might have included the costs of the spec. per. in the damages, it did not conclusively appear on the state of this record that they had so done.

Abbott (for Deft. in error). It appeared on the record that the parties had the claims of Mrs. E. Johnes in view, and that one of the conditions was to indemnify against them. It not only appeared that she claimed by some title antecedent etc., which would have been sufficient, but that she claimed by a title founded on certain deeds of settlement. But they said, "You don't aver the title"; perhaps not distinctly, but it was averred substantially. It was a defect in form, and could not avail on general demurrer. One of their Lordships had answered the objections as to the assessment of the damages. As to the other point, this judgment was warranted by stat. 8, 9 Gul. 3. c. 11. s. 8. which was made in case of Defendants, and it had been decided that it must receive a liberal construction, and that Plt. not only might have the real damages assessed by a jury, but was bound to do so, instead of leaving Deft. to his relief in equity as before. (*Roles v. Rosewell*, 5 T. R. 538, *et ib. cit.*—*Hardy v. Bern*, 540.) (Eldon, C. The only question seems to be whether these breaches ought to be assigned over again.) Yes, which would have been absurd. Stat. did not say at what time the breaches should be assigned; it gave a special [7] writ, which must be executed by the Justices of assize; and this could be only at the time of the assizes, and if a writ was awarded in E. T. it could not be executed till after T. T. (Eldon, C. It might be, but probably never would be.) He did not know of any assizes having ever been held between E. T. and T. T. Something, it was said, must be done in each term, or a reason stated for giving farther time. That mode of argument showed there was no occasion for a continuance. The Court could do nothing till the return of the writ in M. T., and to have entered any thing in T. T. would have been nugatory and absurd; so that there was neither discontinuance nor mis-continuance, as the reason failed. But at any rate if there was a defect, it was cured by 4 Anne, c. 16. which ought to receive a large construction. (Eldon, C. Suppose I had advised P. R. to send no judges of assize after T. T., and he followed that advice, how then?) Parke. Then final judgment should be entered up at com. law. Abbott. The judges must reserve final judgment till after return of writ, as no judgment could be given for the costs of the inquisition till then, and this form was suggested by Mr. Serjt. Williams, in a note in Saunders, 58. Gainsford v. Griffith, and the form was approved by Lord Alvanley in *Hankin v. Broomhead*, 3 Bos. Pul. 607. 611.

Taunton (for Deft. in error). The only objection now was as to the judgment, and that resolved itself into two parts: that there was no judgment before the return of the writ, and that there was no continuance. Now in *Hankin v. Broomhead* there was a judgment before return of writ, and [8] then a supplemental judgment which was held to be erroneous, and this judgment was framed so as to avoid that error. His L. F., when he said that final judgment could not be postponed till return of the writ, had overlooked the case of *Ethersay v. Jackson*, 8 T. R. 255, where it had been solemnly decided that final judgment might be suspended till after return of writ, and this had suggested to Mr. Serjt. Williams the form in his notes to *Gainsford v. Griffith*, Saund. 58. The only other point was the omission of the continuance. In what words could it be entered up? If a day was given on the record it must be for some purpose, and there was no purpose for which a day could be given in T. T. Object of stat. was to confine the legal to the real right. Plt. had judgment at com. law for the whole penalty, and in strictness the execution ought to follow the judgment; but here was an anomaly, that though there was a com. law judgment there was a statutable execution; and so far there was an apparent inconsistency, which he mentioned merely to show that, if there was an incongruity, it was owing to the provisions of the stat. It was of necessity that there should be no continuance. Unless the assizes could have been expected to be held in E. Vac., it was necessary to pass over T. T. in the record, and to make the writ returnable in M. T. and then a day was given. No day could be given in T. T. without absurdity, and there was no error therefore in the omission to enter up a continuance; but if there had been a defect, it would have been cured by 4 Anne, c. 16. s. 2. True, discontinuance at com. law was error. [9] but it was cured by several stats. in cases of judgment on verdict, and by stat. Anne the remedy was extended to judgments on confession, *nisi dicat*, or *non sum informatus*, and "no such judgment shall be reversed, nor any judgment on any writ of inquiry of damages executed thereon, be staid or reversed for, or by reason of any imperfection, etc." The words must be understood as applying

also to judgments on demurrer, as the legislature could never have meant to exempt judgments on demurrer, and leave them as before, when they too needed the remedy, and the words of the stat. were large enough to include such judgments. (Eldon, C. What do you make of the words "executed thereon"? Executed on such judgment, and might it not be meant that no judgment of such a nature should be reversed, etc.?) If so, this judgment was within the meaning, and this construction was supported by a passage in Com. Dig. Amendment, I. from which it appeared that Comyns construed the stat. as extending to all judgments entered up after writ of inquiry executed, and it was not likely he should have done so without weighing the words of stat. Stats. Jeof. were always liberally and largely expounded, of which there was a strong instance in *Mallory v. Jennings*, 2 Str. 878, where the want of a writ of inquiry was held to be aided.

Parke (in reply). If the objection as to the costs were not now to be considered as out of the question, he should still say that the costs of the answer to the bill, as far as it was for spec. per. for which [10] Deft. below was not liable, must have been included in the damages assessed. However the other two still pressed. The objection that no lawful title was stated in *Mrs. Johnes* was substantial and good on general demurrer, and also after judgment. The fact of a lawful title should have been distinctly averred, but it had only been stated that it had been found to be lawful. As to the discontinuance, the mode of entering up the judgment was easy. Final judgment might have been entered up immediately after disposing of the demurrer, and the writ of inquiry awarded after judgment, as it did not influence the judgment, but the execution; and so it had been pressed in *Hankin v. Broomhead*, where it had been decided that the second judgment was erroneous, and that case was in substance a decision that the first judgment should have been final. (Eldon, C. That case proves that a judgment before the writ would not be erroneous, but that one before, and another after, was erroneous.) The difficulty as to the costs had been answered by Lord Alvanley, in *Hankin v. Broomhead*. There was no reason therefore for a delay of the judgment, and Mr. Serjt. Williams' note in 1 Saund. 58, had been corrected by himself, in a note in 2 Saund. 187 (*Roberts v. Marriet*). If the judgment were to be delayed, it would be difficult to point out how the continuance should be entered; but there was no necessity, nor any good reason, for the delay. Stat. Anne, it was true, must be liberally construed, but still it did not cure this defect. *Ethersay v. Jackson* did not prove that the judgment might be suspended. [11] It only proved that breaches might be assigned after *non est factum* pleaded, issue joined, and notice of trial given. There was no delay there, and it fell within stat. Will. But there was no authority for the delay in entering up judgment.

Lord Eldon (C.). In attending to this case one or two circumstances presented themselves, which rendered it proper to postpone proceeding to judgment upon it for a few days. In looking at *Hankin v. Broomhead*, it appeared that Lord Alvanley (in justice to whose memory he must say that he never in his life knew a more attentive and diligent judicial character) lamented that the Court had never been moved to settle the proper mode of entering up judgment on the statute, in cases of this nature. The present judgment had not, except in form, received the authority of a Court of Justice, and he must say that this House had not been properly treated, when, instead of having the case argued below, all the Courts had been passed over, except as to form, and the record brought there in a manner which made it be considered as having been brought merely for delay; without any suggestion which could lead their Lordships to call for the usual assistance, in a case which it was most fitting to have discussed in the presence of all the judges. This mode of proceeding left them without the benefit of that assistance in the regular way, which however, in the exercise of a cautious and diligent inquiry with respect to a question which had not before received a judicial decision, they ought to procure in some way, and [12] he charged himself with that duty. In the mean time he begged he might be understood as giving no opinion; and indeed on a point which had so much distressed the profession, he could not trust himself so far as to rest satisfied with any opinion which he himself might have formed. He stated this much the rather because the question had not been argued below, and the writ of error had been considered as having been brought merely for delay, and the cause had therefore been taken out of its course. If its nature had been understood, he might have thought it right that farther time should

be allowed for preparation before argument, though that would have been unnecessary, as the case had been very ably argued on both sides.

The stat. 8, 9 Gul. 3, c. 11, s. 8 had been passed for this reason. Before that stat. where there was a bond for performance of covenants with a penalty, for instance of £50,000 in case of a breach, and action brought, the Plt. had judgment for the whole sum, though the actual damage might be a mere trifle, or at least far short of the whole penalty, and Deft. was obliged to go for relief to a Court of Equity, which, by directing an issue, etc., ascertained the real damage; and in this expensive and circuitous mode justice was done. The object of the legislature was to relieve Deft. from the necessity of resorting to this course by empowering the court of law to confine the legal to the real right; and it was remarkable, after the passing of all these statutes, how far the words had fallen short of the construction which the Courts had put upon them. The remedy then devised by the stat. was [13] this, "that in all actions which etc., shall be commenced or prosecuted in any of H. M. Courts of Record, upon any bond or bonds, or on any penal sum for non performance of any covenants, or agreements in any indenture, deed, or writing, contained, the Plt. or Plts. may assign as many breaches," (meaning in the declaration) "as he or they shall think fit; and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned," (meaning in the declaration) "as the Plt. upon trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict, as heretofore hath been usually done in such like actions." So far the stat. related strictly to cases where breaches were to be assigned in the declaration. It then went on to cases where judgment was given without breaches previously assigned. "And if judgment shall be given for Plt. on a demurrer, or by confession, or *nihil dicit*, the Plt. upon the roll may suggest as many breaches of the covenants, etc., as he shall think fit, upon which shall issue a writ to the Sheriff of that county, where the action shall be brought, to summon a jury to appear before the Justices or Justice of assize or *Nisi Prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the Plt. shall have sustained thereby, etc. etc." In the obvious construction the remedy was by suggesting on the roll, [14] these breaches, and the subsequent part was so modified, that the judgment for the whole sum stood as a security for the damages, costs, and charges; together with such farther damages as might be sustained by future breaches, Plt. suggesting such breaches, again going to a Jury, and so from time to time satisfying himself. But the Courts had construed this statute so as to extend the remedy to cases not strictly within the words, and the case of *Ethersay v. Jackson* (8 T. R. 255) went a great way to that purpose. That was an action of debt on bond for performance of covenants; plea, *non est factum*, and issue thereupon, and notice of trial given. Plt. then entered a suggestion on the roll, and assigned breaches under the stat., and had a verdict—motion to set aside for irregularity, because the suggestion on the roll in this case was not warranted by the stat.; for it gave liberty to suggest only after judgment, and even that only in three cases, in judgments on demurrer, confession, or *nihil dicit*. The Court said there was no foundation for this objection, that stat. required a liberal and beneficial construction, it being made in advancement of Justice and ease of Defts., that it was manifest the legislature contemplated cases where Plt. had not originally assigned breaches in the declaration, which stat. enabled him to supply by suggestion on the record even after judgment, and *a fortiori* before. He was bound to suppose that this was just, and yet where a stat. gave power to assign breaches in the declaration, and to suggest them on the roll after judgment, an ordinary man would say that it was not hastily to be inferred [15] that it sanctioned a third mode. But it had been properly said that this was a remedial stat., and that, in advancement of the remedy, all was to be done that could be done in a way consistent with any construction of it. This showed how anxious the Courts were to extend the remedy to cases where it was wanted. When that case occurred where it was thought that the mode of entering up two judgments was wrong, (*Hankin v. Broomhead*, 3 Bos. Pull. 697) Lord Alvanley adverted to a form, of which this was nearly a transcript, which had been suggested by Mr. Serj. Williams, (1 Saund. 58. n. 1.) to which he (Lord A.) said he saw no objection. So far there was

authority that this judgment was good, attending to what had been said by Serj. Williams in his note (2) in 2 Saund. 187, and though one who had held no judicial situation could not regularly be mentioned as an authority, yet he might say that to any one in a judicial situation it would be sufficiently flattering to have it said of him that he was as good a common lawyer as Mr. Serjt. Williams, for no man ever lived, to whom the character of a great common lawyer more properly applied. There was however no judicial decision on the point. Lord Alvanley had expressed his wish that the Courts had been moved to settle the proper mode of entering up judgment in such cases; and he should be sorry to part with the present case without having it settled, not only as a correct judgment for the present, but as a precedent for the future; and he should therefore use the means in his power, to ascertain whether that opinion was [16] sound, which he himself had formed, but which he would not now state.

With respect to the other points, he was of opinion that there was nothing on this record which compelled them to take it as if the costs of the spec. per. had been included in the damages assessed; and that prior to the demurrer there was enough to show that Mrs. E. Johnes claimed by title. As to the allowance of interest, nothing could be more proper than to discourage the practice of bringing writs of error for delay, and the converting their Lordships' House into a Court of original jurisdiction. Costs including interest might be given within the sum (£400) in the recognizance, if that should appear proper upon a sober and judicious consideration of the whole circumstances of the case.

Lord Eldon (C.). This was an action of debt on bond, with penalty conditioned for the quiet enjoyment of certain purchased premises, and breaches were assigned, in the replication to which Deft. below demurred, and after joinder in demurrer, no Counsel appearing to argue the case for Deft., Plt. had judgment which was in the following form:—

“ But because the Court of the said Lord the King now here is not yet advised
 “ what Judgment to give of and upon the premises, a further day is therefore given
 “ to the parties aforesaid, to come before our said Lord the King, at Westminster,
 “ on Saturday next after eight days of Saint Hilary to hear judgment thereon, for that
 “ the Court of our said [17] Lord the King now here is not yet advised thereof: at
 “ which day before our said Lord the King at Westminster, come the parties aforesaid,
 “ by their Attornies aforesaid; but, because the Court of the said Lord the King
 “ now here is not yet advised what judgment to give of and upon the premises, a
 “ further day is therefore given to the parties aforesaid, to come before our said Lord
 “ the King at Westminster, on Wednesday next after fifteen days of Easter, to hear Judgment
 “ thereon, for that the Court of our said Lord the King now here is not yet advised
 “ thereof: at which day before our said Lord the King at Westminster, come
 “ the parties aforesaid, by their attornies aforesaid: Whereupon all and singular
 “ the premises, being and by the Court of our said Lord the King now here fully understood,
 “ and mature deliberation being thereupon had, it appears to the said Court
 “ here that the said replication of the said John Johnes, to the said plea of him the said
 “ Thomas, and the matters therein contained in manner and form as the same are
 “ above pleaded and set forth, are sufficient in law for him the said John Johnes to
 “ have and maintain his aforesaid action thereof, against the said Thomas; wherefore
 “ the said John Johnes ought to recover against the said Thomas his said debt, together
 “ with his damages by him sustained on occasion of the detention thereof,
 “ etc. But, because it is convenient and necessary that judgment should not be given
 “ hereupon, until the truth of the aforesaid breaches of the said condition of the said
 “ writing obligatory above assigned shall have been inquired into, and the damages
 “ which the said John Johnes has sustained thereby shall have been assessed by a Jury
 “ of the country in that behalf, according to the form of the statute in such case made
 “ and provided; therefore, let judgment hereupon be stayed in the mean time: And
 “ the said John Johnes having prayed the writ of our said Lord the King to be directed
 “ to the Sheriff of Herefordshire, and to his Majesty's Justices assigned to take the
 “ assize in the said county, to inquire of the truth of the aforesaid breaches of the said
 “ condition of the said writing obligatory above [18] assigned, and to assess the damages
 “ which the said John Johnes hath sustained thereby: Therefore according to the
 “ form of the statute, in such case made and provided, the said Sheriff is commanded,

" that he summon twelve good and lawful men of his bailiwick, to appear before his
 " said Majesty's Justices of assize, on Monday the sixteenth day of August next, at
 " Hereford, in the said county of Hereford, to inquire diligently, on their oath, of
 " the truth of the premises, and to assess the damages which the said John Johnes
 " hath sustained by reason of the aforesaid breaches : and that he have on that day
 " before his said Majesty's said Justices of assize, the writ of our said Lord the King
 " to them thereupon directed : It is likewise commanded to his said Majesty's said
 " Justices of assize, that they certify the inquisition before them taken to our said
 " Lord the King, at Westminster, on Friday next after the morrow of All Souls, to-
 " gether with the names of those by whose oath such inquisition shall be taken : and
 " that they also have there then that writ : and the same day is given to the parties
 " aforesaid, at the same place : at which day before our said Lord the King, at West-
 " minster, come the parties aforesaid, by their attornies aforesaid ; and the said
 " Justices of Assize now here return a certain inquisition indented, taken before them
 " by virtue of the said writ, on Monday, the said sixteenth day of August next after
 " the issuing of the said writ, at Hereford aforesaid, in the county aforesaid, upon the
 " oath of twelve good and lawful men of the said county ; by which it is found that
 " the several breaches of the said condition of the said writing obligatory above as-
 " signed, are and each and every of them is true, and that the said John Johnes
 " hath sustained damages on occasion of the aforesaid breaches, to the sum of £4685
 " 11s. 11d., besides his costs and charges by him about his suit in this behalf ex-
 " pended : Therefore it is considered that the said John Johnes do recover against the
 " said Thomas Johnes his said debt, and also as well one shilling for his damages
 " which he hath sustained on occasion of detaining the said debt, as £198 8s. 1d. for his
 " costs [19] and charges by him about his suit in this behalf expended, by the Court of
 " our said Lord the King now here adjudged to the said John Johnes, and with his
 " assent."

It would be observed that there was here a regular continuance from Hilary to Easter. There was no continuance from Easter to Trinity, but a day was given in M. T. so that the continuance might be said to be from Easter to Michaelmas Term. Then error was brought in the Exchequer Chamber ; but there was no argument, nor any suggestion as to what was the error in the judgment. The matter then came to that House, where it was the clear right of the subject to bring a case in this way and, if there was error, to call upon their Lordships so to declare. But when the case came to be considered with reference to the conduct of the parties, and a view to costs, it became material to know why the question had not been argued below, and, if the circumstances called for it, to set Defendant in error right in respect of costs and interest.

A few words as to the chief point to which he had before adverted. The simplicity of the com. law restricted parties to one judgment in the same cause ; but this simplicity had been made to give way by several acts of Parliament, such as enclosure acts, etc. ; and under these acts there might, in the same cause, be a variety of judgments. Their Lordships were aware that, where there were covenants with a bond and penalty for performance, if any one of them was broken the whole penalty was gone, though the real damage in consequence [20] of the breach might be but small in comparison. The subject was therefore obliged to go to a Court of Equity, which, by directing an issue of *quantum damnificatus*, etc. ascertained the real amount of the damage ; and on payment of the damages and costs of the proceedings, the party was relieved, the penalty standing as a security for damages that might accrue by any future breaches, and leave being given to apply to the Court *de tempore in tempus* for similar issues. In the time of King William it was thought proper to relieve Defendant by giving the Courts of Law an equitable jurisdiction ; and Plaintiff, upon action on bond and judgment for the whole penalty, might suggest different breaches on the roll, and then pray that the real amount of the damage suffered might be inquired of by a Jury, and the Court was to find means to award execution ; and in case of future breaches Plaintiff might apply for interlocutory judgments, and future inquiries, *de tempore in tempus*. And the Court, in furtherance of the object of the act, construed *may* as compulsory on the Plaintiff to proceed in this way. The form then by this mode was, after judgment apparently final, to suggest breaches on the roll as they occurred, and so to have judgment after judgment from time to

time. This was felt to be attended with difficulties ; and the late Mr. Serjt. Williams, an eminent pleader, not merely from his acquaintance with the forms, but because there was no man whose mind was more richly stored with the principles of pleading, suggested a form of which this was nearly a transcript. But errors having been suggested here for the first time [21] after passing the Courts below, there was one point with respect to which, as it had not been found to have been decided before, and as this would be a precedent for the future, he had thought it right, though he had formed an opinion, privately to consult those whose assistance was most material under these circumstances. The objection was of this nature, that the law required the parties to be constantly in Court, that when it was stated on the record that the Court was not prepared to give judgment on any particular term, the parties should be ordered to attend on a given day in the next term, and so on from term to term. In this way the cause had been continued from H. T. to E. T., and then an interlocutory judgment was given to the extent, that it appeared to the Court that Plt. below ought to recover his debt. But then the record went on, "because it is convenient and necessary that judgment should not be given hereupon, until the truth of the afore-said breaches etc. shall have been inquired into, etc." giving a day to the parties not in T. T. but in M. T., directing an inquiry in the mean time before the Judges of assize, which from the ordinary mode of holding the assizes could only be executed subsequent to T. T. It was said however that the reason for the ordinary continuance ceasing, there was no occasion for it in this instance, and that the question was, not what was necessary by the common law, but whether the record was sufficient to satisfy the enactments of the statutes. And it had been said on the other hand, that there might by possibility be no assizes before Michaelmas: [22] true ; but a day was given in that term, and there might be a farther continuance. Attending then to the reason of the common law and the object of the statutes, it was clear that this record was sufficient and right, as providing in every respect for the due execution of the statute ; and the point for their Lordships' consideration was, whether there was error with reference to the due execution of the statute. The common law said there must be only one judgment, but in the due execution of certain statutes there must be several judgments ; and if this record satisfied the statute, it appeared to him to be sufficient. A Ca. Sa. need not be made returnable the term after it issued, the object being to give time for payment of the debt, etc. and the reason therefore ceasing. (Salk. 700.—2 Raym. 775.) It was otherwise, he believed, on *mesne process* ; but this showed that the reason of the thing was to be considered, and they would apply the common law reason as far as it enabled them to go in due execution of the statute. That was his view of the case, and having waited to see whether others, whose minds were more enlightened on the subject than his own, concurred with him, he was now prepared to recommend to their Lordships to decide that there was no error on this record.

With respect to costs, he could not help saying that, when a party travelled through the Courts below without argument, it did afford a strong ground to show that the other party was entitled to his costs and interest. He had now been there for twelve years, attending to writs of error, and had found that not more than one in fifty was [23] argued, so that forty-nine out of fifty were brought for delay. Delay was one of the greatest mischiefs in the administration of justice ; and as far as that could be checked by giving exemplary costs, their Lordships would be disposed so to check it. But let it not be thought that, in a case where there were merits, he wished to prevent its being considered and reconsidered again and again, that they might be sure they were right ; what he meant to say was this, that that House must not be employed as an instrument in doing what was gross injustice.

Dec. 1, 1814. Judgment affirmed with (including interest) £350 costs.

Agent for Plt. in error, ———

Agent for Deft. in error, GREY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2D DIV.).

PARKER, and Others. — *Appellants*; POTTS, and Others. — *Respondents*

[Feb. 15, 1815].

[Mews' Dig. xiii. 1160.]

[When a ship, soon after her sailing on a voyage insured, is found to be unfit for sea, the question whether or not she was sea-worthy at the commencement of the risk, or the voyage, (when not otherwise ascertained,) must be decided by rational inference from the circumstances.]

[A ship is *prima facie* to be deemed sea-worthy. But if it is found soon after her sailing that she is not so sound, without adequate cause by stress of weather, or otherwise, to [24] account for it, the rational inference is that, notwithstanding appearances, she was not sea-worthy.]

[If a ship is sea-worthy at the time of her sailing, however soon after she may become otherwise, the warranty is complied with. (*Watson v. Clark*, 344, *ante*.)]

Insurance, valued policy, on freight of ship *La Gloire*, French-built, sharp and deep between decks, standing A. 1. in Lloyd's Book, "beginning the adventure at Honduras, until the said ship with her goods and merchandises should be arrived in London." The vessel had sailed in ballast from Bristol to Honduras, where she remained about five months, taking in a cargo of mahogany and logwood, during which period she two or three times grounded, but was got off without any material apparent damage. She sailed from Honduras on 19th October 1804, and the next day was found to be leaky, the leak increasing till on the 27th she was making $3\frac{1}{2}$ feet water per hour. On the 30th some of the crew remonstrated, and on the 31st the master bore away in distress for Montego Bay, Jamaica. From thence, on the 7th November, he wrote to the owners, stating, "The night after we left the quay, we fell in with a gale from the north-west, which strained the ship so much that she made $10\frac{1}{2}$ inches water in the hour, but which I considered to be occasioned by the ship plunging in a head sea, and was in hopes that, as the gale subsided, the leak would take up, but was unfortunately deceived. However I still persevered in keeping the sea, but another [25] gale coming on, on the 27th the vessel strained to that degree that I was dubious of being able to keep her afloat." On the 3d of December, he again wrote, stating that he had discharged his cargo, and was preparing for a survey. "In closely examining the ship I find her in a very bad state: several of her beams are gone in two or three places: her fore and aft ceilings are mostly sprung; and the beams in general sunk four or five inches. She continues to make 18 inches of water an hour from a leak not yet discovered, and her copper has suffered considerably from the ship's working. I shall not attempt to anticipate the opinion of the gentlemen that may form the survey, but shall take special care that they are of the greatest respectability that can be procured." The ship was accordingly surveyed, and the surveyors reported, "we find her to be copper-sheathed and iron fastened; that those fastenings are decayed: that three of her beams are broken, the main beam in three places: that she is making at the rate of 18 inches of water per hour, which we consider does not proceed from a single leak, but from the loose state of the ship throughout; she has evidently spread; and that she has not to support her lower deck any knees, either fore or aft or otherwise; and we are of opinion that her upper works have alone kept her together. We are therefore unanimously of opinion that the said ship is unfit for sea." The ship-master and agent, without any farther proceeding, then sold the vessel for £642 as a wreck; and the purchaser, having repaired her, upon another survey [26] procured a more favourable report, "that the ship was perfectly tight and secure, and capable of carrying a cargo of West India produce to any port of Europe." A cargo of sugar was accordingly put on board, and the vessel having put to sea it was found, on the same

day on which she sailed, that there were three feet water in the hold, and the next day the leak increasing to four feet, the crew made for St. Lucia, the nearest harbour, where the vessel was hove down, and surveyed two or three times, and finally condemned as unfit for sea. In the report on the last survey it was said, "we are of opinion" that the defective and injured condition of the ship has been occasioned by a great "strain of heaving down, and not in any degree of decay or rottenness of her materials." An action was raised in the Admiralty Court against the underwriters, who refused payment, and defended on the plea that the ship was not sea-worthy when she sailed from Honduras. The Judge Admiral repelled the defences on the ground of the decisions of the Court of Session in the cases of the *Midsummer Blossom* and *Flora*; and upon suspension the Lord Ordinary and C. of S. also gave judgment against the underwriters, who thereupon appealed to the House of Lords. The cases of *Munro v. Vandam*, *Horncastle v. Stuart*, 7 East. 400, and *Concordia of Greenock*, Dom. Proc. 1809, were cited below.

Park and Romilly (for Appellants). The first report having stated that the fastenings were of iron and that these were decayed, the beams [27] broken, no knees to support the lower deck, (on which, from the construction of the ship, great part of the heavy cargo of mahogany and logwood was stowed,) the general loose condition of the ship, etc., one would have thought that the case was there closed. The question seemed to be whether the doctrine of sea-worthiness was any longer to stand. In the case of the *Mills frigate* the decay of the iron fastenings, and consequent loose state of the timbers, were held sufficient to establish the non-sea-worthiness of the ship at the time of sailing, though not discovered till long after; and in a late case, *Watt v. Morris*, 1 Dow, 32, where the only point was the want of knees, this House had decided that the vessel was not sea-worthy. The groundings at Honduras had not been mentioned in the master's letter to the owners, and the attributing the state of the vessel to this cause was an after-thought. It had long been established that, though the insurance was at and from, the vessel must be sea-worthy at the time of her sailing, which was supported by reasons of public policy, as this produced a greater attention to the state of the ship and the safety of the seamen. But it seemed to be admitted that the ship was not sea-worthy at the time of her sailing; and the decision in the Court below (Fac. Coll. 5th June 1810), appeared to turn upon this, that if the vessel was sea-worthy while at Honduras it mattered not though she were otherwise when she sailed from etc. provided the want of sea-worthiness was unknown to the master.

Marshall and Harrison (for Respondents). This [28] was a valued policy on the freight, and the whole risk commenced the moment any part of the cargo was put on board. It appeared that soon after she sailed she encountered a heavy sea and tempestuous weather, and that circumstance might be considered as the cause of her inability to perform the voyage. There was nothing in the objection stated in Appellant's case, that the ship had been sold without an order from the Vice-Admiralty Court. In that particular the parties were left to do as they could. (Mr. Serjt. Marshall. His book, 2d Ed. vol. i. p. 162, had stood in the way of the Appellants below, as he had there stated that the ultimate decision in the case of the *Mills frigate* had been against the underwriters; but upon subsequent inquiry he found he had been misled as to the judgment in the Exchequer Chamber, so that the case as now reported was the true case. Lord Eldon (C.). Sometimes the Court of K. B. misunderstood the Exchequer Chamber, as appeared from Willes' reports.) (*Fitzgerald v. Pole*, Willes, 641.) As to the want of knees, French vessels were held together by a different construction from ours, and many of them were good ships without any knees at all; and so this vessel had been considered, as appeared from the marks A. 1. in Lloyd's Book, A. denoting the hull, and 1. the rigging, to be of the best description.

Park (in reply). A decision of this House was better than a lecture on French naval architecture. The Lloyd's surveyor could only examine a vessel on the outside, and so the ship was put down in the Book, as he had occasion to know from an [29] examination of the surveyor a few weeks ago at Guildhall. They had no right to open up a ship so as to know her condition with certainty. In the case of the *Midsummer Blossom* (*Watson v. Clark*, 1 Dow, 348), one of their Lordships (Redesdale) now in the House, had said that "he had always understood it to be a clear and distinct" rule of law that if a vessel in a short time after leaving the port where the voyage

"commenced was obliged to return, the presumption was that she had not been sea-worthy when the voyage began, and that the *onus probandi* was thrown on the assured," and another of their Lordships (Eldon, C.) had said, "though he did not pretend to much skill in nautical matters, he had been in a situation where he had an opportunity of hearing more of the conversation of seamen than perhaps any Judge on the Bench, and if he were on board a collier he should not be much afraid though he heard the seamen talking of fresh gales and squally weather": exactly the case here. That too was a policy at and from Honduras, and the judgment for the underwriters rested on the ground that the vessel was not sea-worthy at the time of her sailing. Lord Kenyon also, in the case of *Forbes v. Wilson* (Park), and his successor, in *Hibbert v. Martin*, (Camp. 538.) had held it to be the rule that the ship must be sea-worthy with reference to the commencement of the voyage insured.

Marshall prayed in aid the doctrine in the case of the *Midsummer Blossom*, (1 Dow, 344.) where one of their Lordships (Eldon, C.) "held it to be clear [30] that if a ship was sea-worthy at the commencement of the voyage, though she became otherwise only one hour after, the warranty was complied with." The doctrine was sound and good, and strictly applicable to the present case.

Lord Eldon (C.). This was one of those cases which were always very distressing to the mind of the Judge here, as, in his view of it, it was merely a question of fact, was the ship sea-worthy or not? He repeated the doctrine supposed to have been laid down in the case of the *Midsummer Blossom*, that if a ship was sea-worthy at the time of her sailing, it mattered not how soon after she became otherwise. With respect to the French naval architecture, he could not admit that as an answer to the English doctrine of sea-worthiness. The ship sailed from Bristol, he believed in ballast, and it did not appear in what condition she was afterwards till her arrival at Honduras. While she lay at Honduras the Appellants subscribed a policy of insurance upon her freight, to the amount of £1000, "beginning the adventure at Honduras, until the said ship with her goods and merchandises should be arrived in London," which was represented as an insurance at and from Honduras, until her arrival at London. It appeared that there had been some difference below, as to when the risk commenced in an insurance on the freight; but he only noticed that for the purpose of saying that he did not enter into it at all. Supposing, for the sake of the argument, that the risk commenced the moment any part of the cargo was put on board, [31] without admitting that or denying it, was the ship sea-worthy upon the state of the case so put? Whether she was or was not must in this case be deduced by rational inference from the circumstances. As to the condition of the ship while at Honduras they only knew that she wanted knees and that from her construction it was necessary to stow a considerable part of the cargo between decks, and that she began to make water at the rate of $2\frac{1}{2}$ inches in the hour. He admitted the doctrine, in the case of the *Midsummer Blossom*, that *primi facie* a ship was to be deemed sea-worthy, but if without adequate cause by stress of weather, or otherwise intervening it was found that she was not so sound, then the rational inference was that, notwithstanding the appearance, she had not been sea-worthy. Then while at Honduras she made no more than $2\frac{1}{2}$ inches water in the hour, which might proceed from causes not sufficient to frighten a landsman if they were explained to him. But having sailed on the 19th, she on the 21st began to make nearly eleven inches water in the hour, and at an early period $3\frac{1}{2}$ feet. The master then made for Montego Bay in distress, and very honestly represented the condition of the vessel, stating that he was preparing for a survey, and that he would take care that the surveyors should be persons of the first respectability that could be procured, and a survey so made he considered as evidence preferable to that of the subsequent surveys. Now what was the report upon that survey? "that the vessel was iron-fastened, and that these fastenings were decayed," to the full as respectable evidence with respect to the fastenings [32] as that of the subsequent surveys, "that three of the beams were broken, the main beam in three places; that she was making at the rate of eighteen inches of water per hour, which they considered as not proceeding from a single leak, but from the loose state of the ship throughout; that she had evidently spread; that she had not to support her lower deck any knees, either fore or aft, or otherwise; and they were of opinion that her upper works had alone kept her together." Now as to the question whether knees were necessary, it was at any rate

proper to consider whether the cargo was of a description which peculiarly required knees. But they need not puzzle themselves about that, as they had only to consider whether they could account for the loose state of the ship without connecting with it the want of knees, as one of the causes, and whether after she left Honduras any thing happened which could account for the state in which she was afterwards found to be, if she had been in sense of law sea-worthy even when at Honduras Bay. Without going farther into the evidence unless any noble Lord differed from him, the conclusion he came to was that she was not sea-worthy. The first report was an answer to the question whether the vessel was sea-worthy when at Honduras. The only question is whether this ship was sea-worthy, and I think not.

Judgment of the Court below reversed.

Agent for Appellants, CAMPBELL.

Agents for Respondents, WADESON, BARLOW, and GROSVENOR.

[33] IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

HAMILTON, and Others.—*Appellants* ; GRANT, and Others,—*Respondents*
[March 17, 1815].

[Mews' Dig. vii. 270 ; xiii. 1851.]

[Specific performance of an agreement refused on the ground of the want of specific mutuality, of laches misapprehensions in the party or parties of its nature and effect, inequality, improvidence, and other circumstances appearing in the case.]

John Lord Bellew was in 1751, under a private Irish act of parliament, seized for life of certain estates in the counties of Louth, Meath, and Kildare, with remainder, in case he died without male issue, to his sister Dorothea and the heirs of her body. Lord Bellew appeared to have a power of jointuring a wife in all, or any part, of the estates. Dorothea was in 1751 married to a Mr. David Dickson, afterwards Sir David Dickson. She had been previously married to Gustavus Hamilton, afterwards Lord Boyne, and had issue by him Frederick Hamilton, afterwards Lord Viscount Boyne, who would be entitled to the estates under the above limitation, as heir of the body of Dorothea, in case no act were done to disappoint his succession. Lord Boyne the son, and Dickson his father-in-law, by deed dated September 27, 1751, entered into the following agreement, reciting that "the reversion and inheritance of several estates in the several [34] counties of Kildare, Meath, and Louth, then in the seisin and possession of the said John Lord Baron Bellew, would, on the death of the said Lord Bellew and the Honourable Dorothea Dickson, mother of the said Lord Viscount Boyne, descend and come to the said Lord Viscount Boyne, in case the said David Dickson did not and would not join the said Dorothea his wife, and the said John Lord Bellew, in levying fines and suffering recoveries of the several lands and premises of which the said John Lord Bellew was so seized and possessed ; and that the said Lord Viscount Boyne had proposed, that, in consideration of the said David Dickson's not joining with the said Dorothea his wife, and the said Lord Bellew, in levying any fine or fines, or suffering any recovery or recoveries of all, or any part, of the lands, tenements, or hereditaments, in the said several counties, whereof the said Lord John Bellew was then seized and possessed, he the said Lord Viscount Boyne, his heirs and assigns, should and would immediately after he or they should become seized and possessed of all, or any part, of the said several lands and premises, by good and sufficient deeds and conveyances in the law, grant and convey unto the said David Dickson, his heirs and assigns for ever, the fee-simple and inheritance of such part and parcels of the said lands and premises, whereof the said Lord Viscount Boyne should be so seized and possessed, as the said David Dickson,

" his heirs or assigns, should choose, to the clear yearly value and amount of £200 sterling; and also one an-[35]-nuity or yearly rent-charge of £200 sterling, to be yearly issuing and payable to the said David Dickson and his assigns, during his natural life, out of all and singular the said estates, lands, and premises, whereof the said Lord Viscount Boyne should become seized and possessed as aforesaid; and further reciting, that the said David Dickson had agreed to the said proposal; and in pursuance of such agreement the said David Dickson did enter into and perfect, unto the said Lord Viscount Boyne, one bond or obligation, bearing equal date therewith, of the penalty of £10,000 sterling, conditioned that he, the said David Dickson, would not join with any person or persons in levying or suffering any fine or fines, recovery or recoveries, of the said premises, or any part thereof, without the consent of the said Lord Viscount Boyne first had and obtained in writing. It was by the said indenture witnessed, that, in pursuance of the aforesaid proposal and agreement, and in consideration of the said David Dickson's not joining with any person or persons in levying or suffering any fine or fines, recovery or recoveries, of the said estates and premises, or any part thereof, and of the said David Dickson's having entered into the said recited bond for that purpose, and also in consideration of five shillings, he, the said Lord Viscount Boyne, did thereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to, and with the said David Dickson, his heirs and assigns, that he, the said Lord Viscount Boyne, his heirs or assigns, should and would, [36] immediately after he or they should become seized or possessed of the said estates, lands, tenements, hereditaments, and premises, whereof the said John Lord Bellew was then seized, in the several counties of Kildare, Meath, and Louth, or in either or any of them, by good and sufficient deed or deeds, conveyance or conveyances, or any reasonable assurance whatsoever, such as the counsel learned in the law of the said Sir David Dickson, his heirs and assigns, should advise and require, grant, convey, release and confirm unto the said David Dickson, his heirs and assigns, for ever, the fee simple and inheritance of such part of the said lands, tenements, and hereditaments, situate in the said counties of Kildare, Meath, and Louth, or either or any of them, as the said David Dickson, his heirs or assigns, should think proper to choose, of the clear yearly value and amount of £200 sterling; and also one annuity or yearly rent-charge of £200 sterling, to be issuing and payable to the said David Dickson and his assigns for and during the term of his natural life, to be yearly issuing and payable out of all and singular the said lands and premises whereof the said Lord Viscount Boyne should become seized and possessed by virtue of the said settlement, act, or acts of parliament, or either of them; and in the said deed there is contained a covenant on the part of the said Lord Boyne for further assurance; and also a covenant on the part of the said Dickson, whereby he the said David Dickson, for the considerations aforesaid, did thereby covenant, promise, and agree [37] to and with the said Lord Viscount Boyne, his heirs and assigns, that he the said David Dickson would not join with any person or persons whatsoever in levying or suffering any fine or fines, recovery or recoveries, of all or any part of the said lands, tenements, hereditaments, and premises, situate in the said several counties of Kildare, Meath, and Louth, or either or any of them, or do, commit, or suffer any act, matter, or thing to prejudice, defeat, or bar the said Lord Viscount Boyne's title or interest of, in, or to, the said lands and premises, or any part thereof, without the consent and approbation of the said Frederick Lord Viscount Boyne first had and obtained in writing; and for the true performance of the said deed, the said parties did thereby bind themselves, their several and respective heirs, executors, and administrators, each to the other of them, his executors and administrators, in the penal sum of " £10,000 sterling."

Dorothea Dickson died in 1759, Sir D. Dickson in 1765 without issue, leaving his elder brother's three daughters his co-heiresses at law. Lord Bellew died in 1770, and Lord Boyne came into possession of the estates, of which he, by means of fines and recoveries, acquired the fee simple. In the deed leading the uses of these fines and recoveries, it was declared that such fines or recoveries should not be construed so as to confirm any agreement made by him antecedent to the death of Lord Bellew. Lord Boyne died in 1772, without legitimate issue, having previously made a will by which he devised the estates to trustees, in trust for pay-[38]-ment of his debts etc.,

and subject thereto, to the use of his three natural sons, Frederick, Gustavus, and Joseph (Joseph died without issue) Hamilton, for life, remainder to their issue in tail male, in distinct parts, the Louth and Kildare estates to one, the Meath estates to the others, with cross remainders among themselves.

The Misses Dickson in 1780 filed a bill in the Court of Exchequer, for spec. per. against F. and G. Hamilton and others, to which answers were put in, and the cause was allowed to sleep for several years. One of the sisters having died, the other two in 1794 assigned their interest in the agreement to their relation Captain Allan Grant, and another of the sisters having afterwards died, a bill, in the nature of an amended bill, and bill of revivor, was filed in 1796 in the name of Helen Dickson, supposed to be then living, without saying any thing as to the assignment. But it was discovered that she too was dead at the time of filing the bill; and Allan Grant in 1800 filed a bill, in the nature of an amended bill and bill of revivor, in his own name, stating the assignment, and that the bill of 1796 was filed in ignorance of the fact of Helen Dickson's death, and that he was heir at law of the Misses Dickson, as well as their relation by blood, and assignee, and disclaiming the bill of 1796, and praying that the original suit might be revived, etc. The fact of his being heir at law was put in issue, but no evidence of it was produced. The Appellant Frederick Hamilton, son of Frederick Hamilton the elder, in 1801 answered this bill by his father and guardian. In 1804 the [39] father died, but his personal representative was not brought before the Court. Allan Grant also died, and the suit was revived by Charles Grant, his heir at law, and his executors, the Respondents. There was some evidence in this cause that Lord Boyne was a weak and dissipated man, but owing to the length of time that had elapsed, this evidence did not go so far back as 1751 when the agreement was entered into; though in a former cause, *Hamilton v. Page*, Dom. Proc. 1809, the fact of his being so in 1751 was proved. In 1808 the Court decreed "that the Respondent Charles Grant was entitled to a specific execution of the covenant contained in the deed of September 27, 1751, by a conveyance "of so much of the said estates, comprised or mentioned in the said deed, as were then, "viz. on February 23, 1808, of the clear yearly value of £200, over and above all outgoing and reprisals; and that a commission of perambulation should issue to "certain commissioners, to be appointed for that purpose, to set out so much of the "said lands and premises, at the election of the said Charles Grant, as were then of "the clear yearly value of £200 sterling; and the Respondents, Thomas Cockburn, "Alexander Cockburn, and George Mowbray, were decreed entitled to an account "of what was due on the foot of said £200 a year from the 26th day of October, 1796, "the time of filing the amended bill by the said Allan Grant, down to the time of his "death; and the Respondent Charles Grant was decreed entitled to an account of "the said £200 a year, from the death of the [40] said Allan Grant, to the time of "signing the officer's report." From this decree F. and G. Hamilton appealed.

Romilly and Phillimore (for Appellants). There could be no spec. per. of such a thing as one might choose. Dickson could not be called upon for a specific performance, but only for damages, and therefore spec. per. ought not to be decreed in favour of the other party, there being in this particular a want of mutuality. *Collins v. Plummer*, 1 P. Wms. 104. 107. 2 Vern. 635. *Lawrenson v. Butler*, 1 Sch. Lef. 13. *et ib. cit. Bromley v. Jeffries*, 2 Vern. 415. *Armiger v. Clarke*, Bun. 111. The agreement was without consideration, there was no evidence that Boyne derived any benefit from it. The length of time too before attempting to enforce the contract was a reason against spec. performance. *Underwood v. Courtown*, 2 Sch. Lef. 56. The assignment was within the stat. 32 H. 8. against maintenance. (Eldon, C. There is no proof that Grant was the heir at law of these ladies, and it is denied in the pleadings. Redesdale. If the wife had survived Dickson, suffered a recovery, limited the estates to Lord Boyne for life, and he had survived her, he would have had to answer a fee simple of £200 a year out of a life estate. Eldon, C. To have limited to him for life would perhaps have been the most rational course that could be adopted. Redesdale. The same bill is made an amended bill and bill of revivor, but they must be taken according to the nature of each. He could only revive in the character of heir at law, [41] and that ought to be proved. Eldon, C. It was insisted in the pleadings that no such bond as that stated in the agreement was ever executed by Dickson. The account given by this decree was from the time of a bill filed in the

name of a dead person.) The suit in 1796 was disclaimed by the bill, but the decree adopted it.

Piggot and Hart (for Respondents). In the fair transmission of a contract made for val. con. the assignee stood in the place of the assignor, and the statutes of maintenance, Champerty, etc. had no application whatever. It was a purchase by Dickson of £200 a year, and that was assigned. The only objections below were that this was not in its nature a contract which equity would specifically execute, or, if it was, that the length of time which had elapsed was a good ground for refusing spec. per. And as to the first point, the circumstances showed a consideration, and there was a clear mutuality in Dixon's abstaining from doing the act which he had covenanted not to do. As to the other point, this was a *lis pendens* since 1780, and from that time the objection on account of delay was equally strong against the Defendants, as they might have dismissed the bill, *Hart v. Gifford*, 2 Sch. Lef. 386.—*Cane v. Lord Allen*, 2 Dow, 289. (Redesdale. These decrees in the Exchequer don't state what was read at the hearing. This is very wrong.)

(March 20.) Lord Redesdale. The question was whether equity ought to enforce a specific performance of this agreement of 1751; and the Court of Ex-[42]chequer in Ireland had decided that it ought. To that decree various objections had been made, and particularly that this was a covenant which, whatever might be the nature of the transactions in 1751 in other respects, ought not to be specifically performed, as the consideration on the part of Dickson was of a description not capable of specific performance, and the agreement not being in that respect mutual, and that if Dickson had any right the Plaintiff ought to be left to his damages, and not to have a specific performance. And from the case of *Collins v. Plummer* from P. Williams, it did appear that the covenant could not be specifically performed as against Dickson, if there had been a breach on his part. The property, so far as Dickson was interested in it, depended upon the right of the wife; and if he joined with her she might levy a fine and suffer a recovery, and the Court could not control her deed. She might limit the estate to her own separate use, and could not be made liable to his contracts, and Dickson could be responsible only in respect of his personal property; and there was no evidence that he, the younger brother of Sir R. Dickson a Scotch baronet, had sufficient personal property to answer in damages for non-performance of the covenant. The agreement then was not mutual. On one side a specific performance could not be enforced; and when that was the case, equity would leave the parties to law, generally speaking, unless there were circumstances which did not occur in this case.

But there were other objections. Dickson was Lord Boyne's father-in-law. Lord Boyne's mother [43] was Dickson's wife, and Dickson was the only one on whom it depended what she might do. She might have no wish to dispose of the estate from her son, and yet this was the only supposition on which Lord Boyne purchased any security. There was no evidence that there existed any such disposition in the mind of Mrs. Dickson; and unless such a disposition did exist to be controlled by Dickson, it appeared to him that there was no proof of consideration. With respect to Dickson standing in the relation of a husband, the law was jealous of the influence of the husband over the wife, in parting with the wife's property. The covenant was objectionable on this ground, as it might operate on the mind of Mrs. Dickson, and he might say, If you leave the estate to descend, I have such a claim upon it, and so he might deal with the wife on the ground of this contract, and induce her to do an act which otherwise she might not choose to do. The contract was therefore to the prejudice of the son, supposing the mother had no intention to bar him, because it enabled Dickson to deal with her as otherwise he might not be able to do. The benefit was his, without a corresponding advantage to the son. If she had a disposition to leave the estate to descend, he (the son) only suffered a loss, and it was clear that Dickson would thus have a power over the mind of his wife, which otherwise he would not have.

There was a great inequality too in the contingencies. If Lord Bellew died, and Lord Boyne came into possession, Dickson gained a great deal. If Lord Boyne died before Lord Bellew, he (Lord B.) gained [44] nothing. If Lord Boyne survived Lord Bellew he gained nothing, unless he also outlived his mother, and Dickson was not even tenant by the courtesy in this case. If Dickson died before his wife, and she

suffered the estate to descend, Lord Boyne was still injured, as he was liable to make good the contract with Dickson in specie, while Dickson was bound not specifically to perform, but in damages; and if he had any property, it was bound in damages for non-performance. It appeared to him that there was such an inequality that, considering the agreement as one between son-in-law and father-in-law, the influence which the father might have over the son, the apprehensions he might raise in the son's mind as to Mrs. Dickson's intentions, and the manner in which these circumstances and others might operate on the mind of Lord Boyne, the Court ought to look with great jealousy at the transaction. The agreement in itself contained strong grounds of suspicion. It was entered into in 1751, and more than 60 years had now elapsed; and here arose another objection, length of time, which was generally a very good reason for refusing to interfere in the case of a transaction of which, if the matter had been prosecuted at an earlier period, a different view might be given. The statutes of limitations were not a bar in equity, but Courts of Equity looked to them as guides. This transaction might at an earlier period have been objected to, on grounds that could not now be investigated; for instance, that Lord Boyne was a man of infirm mind. Their Lordships might know this from [45] evidence *aliunde*: in another appeal the fact had been proved. But when this case came to issue, there were none perhaps who could prove the weakness of Lord Boyne's mind at the time when the agreement was entered into. He died in 1772, or 1773, and this cause was not prosecuted till above 22 years after his death: and what the circumstances of the transaction were could not then probably be well ascertained. Another thing was that it did not appear that any bond was executed. The expression was in consideration of a bond; and if no such bond existed, the consideration so far failed. The length of time too, that elapsed after 1780 without prosecuting the claim, was a strong reason against the consequence which was given to the suit in the Court of Exchequer. In truth there was no proper proceeding till 1800. The original bill was filed in 1780, about ten years after the death of Lord Bellew; and when the effective proceeding was commenced in 1800, thirty years after the death of Lord Bellew, all the collateral evidence was lost. There was one striking circumstance which had not been much attended to on either side, but to which he had called the attention of the counsel, viz. that Lord Bellew had power under the settlement to limit all, or any part, of the estates to a wife for life. In looking at the agreement of 1751 it appeared that this fact was not in the view of the parties at the time, and that Lord Boyne had no distinct conception of the real state of the title. Lord Bellew might have made a settlement on a wife which would have exhausted [46] the whole estate, or the whole except £200 a year; and thus Lord Boyne would be left without sixpence, besides being liable for the annuity of £200. This was a clear misapprehension of the parties, appearing on the face of the instrument itself. Under these circumstances he thought it too much to say that a specific performance ought to have been decreed. It was not in itself an agreement which could be specifically performed, as against one of the parties, and that party had no right to a specific performance against the other party. It also ought not to have been decreed as there did not appear any evidence of a real consideration, for to make it such, there must have existed an intention in Lord Bellew and the mother to prevent the descent of the property, and such an intention was stated to have existed in the mind of Lord Bellew, but there was no evidence of it. It also ought not to have been decreed, as the contingencies were so unequal that it was evident the mind of Lord Boyne could not have weighed them properly; and when that was coupled with the fact that Lord Bellew might have defeated the object, there was evidently such a want of equality, that equity ought not to assist in this way; and that too coupled with the fact that this was a transaction between a son and a father-in-law, that the whole was to be executed by the control of the husband over the wife, and that as against Dickson it could not have been specifically performed, coupling with that the length of time suffered to elapse before the commencement and effective prosecution of the [47] suit; all this did appear to afford sufficient ground for refusing a specific performance of this contract.

There were other circumstances in the case which, though of less consequence, were entitled to some weight. The agreement was unreasonable in another view, as it enabled Dickson, his heirs and assigns, to select such part of the estates as he

or they might think proper; and the selection might be made so as to distress Lord Boyne beyond the value of £200 a year. All the ground round the mansion-house might be taken, and thus a much greater consideration than £200 a year extorted. It was also inconvenient with a view to the disposition which Lord Boyne made of the property, as it enabled the person claiming the performance to have it executed out of any of the estates in the several counties, so that, if the lands were to be mortgaged, or sold, the covenant, running over the whole, rendered the property unalienable and affected the mortgagee, lessee, and others, all of whom might be injured by this option. The proceeding too was defective in point of parties. At the conclusion of the agreement each became bound to the other in £10,000 for performance. That could be recovered only by the personal representative of Dickson, and this proceeding was not by the personal representative, but by one claiming an inheritable interest in this specific land, so that he thought there were not proper parties. The decree was singular likewise, in as much as it took the value as it stood at the time of the decree. On the principle that he claimed as heir, he was entitled to [48] have as much land as was of the value of £200 per annum, at the death of Lord Bellew, and whatever might be said as to the by-gone rents, still the time of taking the value of the lands was the time of the death of Lord Bellew. But even as to the rents and profits, it was very extraordinary that they appeared to be considered by the Court as a charge on the estate. No, but on the persons in possession; and they had not adverted to the fact that Frederick Hamilton was alive in 1780, and in 1800, and that though he died in 1804, his personal representative was not before the Court; and he it was who ought to answer the rents and profits. But these objections were of less importance. The contract was in its nature one which a Court of Equity would not enforce, and the impression on his mind was that the decree ought to be reversed, and the bill dismissed.

Lord Eldon (C.). It seemed necessary to state the circumstances shortly with a view to a clear understanding of the case. Lord Bellew was seized for life of certain estates in the counties of Louth, Meath, and Kildare, in Ireland, remainder, in case he had no issue male, to his sister Dorothea, wife of D. Dickson, and the heirs of her body. She had been previously married to Gustavus Hamilton and had issue by him, a son, Frederick Hamilton, afterwards Lord Boyne, who, in case no act were done by her to bar the descent, and he also survived Lord Bellew, would be entitled to succeed. It had been represented that Lord Boyne was of a weak and dissipated character, and em-[49]-barrassed in his circumstances, and not very capable of clearly understanding the nature of his contracts. In the present cause there was some, though not very particular, evidence of this; but he did not like to trust himself with looking at what might have appeared in other causes, and in his view of the matter it was not necessary as a fact in the case. In 1751 a deed was made between Dickson and his son-in-law, which was to the following effect. It recited (*vid.* the agreement as set out *ante*). Now the first objection to this was, that taking what was said by the noble Lord (Redesdale) to be accurate, that Lord Bellew might have limited the whole of the estates to a wife for life, the recital was false. But independent of that question it was false in law; true, if Dorothea and Lord Bellew did no act while living to bar the descent, the estates would so descend to Lord Boyne, but if Dickson died in the life-time either of Lord Bellew or of his wife, it would be competent to the wife, tenant in tail, to disappoint the views of the son. If she had such an intention she might suffer only a part to come to the son, not more than would yield £200 a year; and then the whole of what came to him would go to the heirs of the husband. Then it recited "that Lord Boyne had proposed that in consideration of Dickson not joining with his wife, or Lord Bellew, in levying any fine or recovery of all or any part of the estates, Lord Boyne, his heirs and assigns, would immediately after he became seized and possessed of all or any part of the lands, etc., grant and convey to Dickson, his [50] heirs and assigns for ever, the fee simple and inheritance of such part and parcels of the said lands, etc., as Dickson, his heirs or assigns, should choose, to the clear yearly amount and value of £200, and also an annuity of £200 to Dickson during his life, to be issuing and payable out of all and singular the said estates," etc. In this passage there were two or three circumstances worthy of notice:—1st, that Lord Boyne made the proposition, of which however there was no evidence, 2d, the proposition was that, in consideration of Dickson's not joining with Lord

Bellew, or his (Dickson's) wife, or, as it was expressed in another part of the deed, with any person or persons, in levying any fine, or suffering any recovery, etc., Lord Boyne would, immediately on his coming into possession of all or any part, etc., grant and convey to Dickson such part or parcels of the estates as he, his heirs, etc., should choose, to the clear yearly value and amount or £200 besides an annuity for life to Dickson, charged on the whole of the estates. From the mode of expression here it seemed as if Lord Boyne thought that if Dickson did not join, etc., the whole of the estates must come to him, whereas no part of them might so come. 3d, the agreement was to be executed immediately upon Lord Boyne coming into possession. That was material; for as the option was given to Dickson to choose such part as he thought proper, and that part then became his absolute property, the estates might be unalienable till the choice was made; and the agreement was, that it should be immediately done. [51] And it ought to be noticed too that, though all the property was bound, the agreement was that, if all or any part should come into possession of Lord Boyne, he must perform to Dickson, so that, if not so much as the value of the yearly sum of £200 were suffered to descend, the other real and personal assets of Lord Boyne, if he had any, would be bound to make good the agreement. Another circumstance was that Dickson was not only to have such part of the lands as he chose to the yearly amount of £200, but also a life annuity of £200 which affected all the estates. The wife died in 1759, Dickson died in 1765, and Lord Bellew in 1770; and then the agreement, if to be performed at all, ought to have been carried into execution. But the first bill for specific performance was filed twenty-nine years from the date of the agreement, and, what was more material, ten or eleven years after the death of Lord Bellew, when, if the agreement was to be specifically executed at all, it was for the benefit of Lord Boyne himself, as well as the other parties, that the act should be done immediately. This bill was filed in 1780; answers were put in, and it was contended that the agreement ought not to be specifically executed, regard being had to all the circumstances. The matter then slept for a long time. Two of these ladies, the other being then dead, were represented as having, in 1794, made an assignment of this claim to Allan Grant, Respondent's father. It was unnecessary to consider the validity of this assignment under his view of the subject, but it purported to be an assignment not for valuable consideration, [52] but for the causes there stated. In 1796 a bill was filed in the name of Helen Dickson; and this bill was of a singular nature, even giving credit to the reasons alleged for it, she being dead some time before, and the proceeding being instituted by a person claiming by grant from her and her sister in 1794. After this the matter lay dormant till 1800, and then Allan Grant the assignee filed a bill in his own name, stating reasons for the delay, and the assignment; and the bill represented him as heir at law of the Dicksons as well as assignee, and that was put in issue in the answer, and it was to be recollected that the counsel had been called upon to show the evidence of his being heir, and they had not referred their Lordships to any. Here some difficulties arose on the form of the pleadings. If he sued as assignee, the bill ought to have been of a different nature, and if as heir at law he could not in that character sustain the decree. That decree was, that Charles Grant was entitled to a specific execution of the covenant by a conveyance of so much of the estates as were of the yearly value of £200 at the time of making the decree, etc., and that Allan Grant's executors were entitled to an account of what was due on the footing of £200 a year from the filing of the bill in 1796, that was, from the time of filing the bill in the name of a person who was dead at the time, which proceeding was repudiated by that of 1800. That however might be considered only as an inaccuracy. One of the difficulties was to conceive upon what principle the Court thought that there ought to be a specific performance when they confined it to the [53] time of making this decree; for if the Plaintiff had a title to a specific performance it was derived from the agreement of 1797, and he had a right to land of the value of £200 a year, at the time the contract was to be executed.

Different objections had been taken to this proceeding:—1st, that to support such a title would be to encourage maintenance; and the difficulty there was founded on this, that he claimed under the assignment and not as heir at law. But supposing the facts as to the assignment to be as represented, he was of opinion that the fair acquisition of such a title was not within the statutes of maintenance, etc. Still, under all the circumstances, this did not appear to be a case where a Court of Equity

ought to give the extraordinary remedy of a specific performance. Then it was said that the agreement was voluntary, and that it was not the principle of a Court of Equity to execute a voluntary agreement. He was not disposed to say that there was no consideration, if the view given of the facts was correct; but supposing it to be a case of valuable consideration, still he thought this agreement ought not to be executed specifically. Though Equity might not execute a voluntary agreement, he denied that where there was some consideration it therefore would execute: for there might be cases in which some consideration might appear, but which, notwithstanding that circumstance, ought not to be specifically executed. Then the first thing one had to do, in order to see whether this should be executed, was to look at the four corners of the agreement, to ascertain whether it was one which a Court [54] of Equity ought to deal with. He had seen the name of one or two cases which had been mentioned in Ireland, but he could not apply the principle to the present case. This was a case where Lord Bellew was tenant for life; he had no issue male, but he had daughters who did not stand in the limitations of these settlements. On the death of Lord Bellew without issue male, the lands were then destined to his sister and to her issue; that sister, Lord Boyne's mother, was Dickson's wife, and Dickson was Lord Boyne's step-father. Then what was the bargain by Lord Boyne, who was her sole issue inheritable? This was an agreement where Lord Boyne was bargaining for £200 a year out of the lands, and an annuity of £200 that Dickson should not join in doing an act, which it might possibly be extremely rational to do. There was no evidence that she meant to do the unnatural act of giving away the estates to a stranger; but it was apparently entered into by Lord Boyne, under the notion that Dickson's forbearance would insure the property coming to him on the death of Lord Bellew and his mother: whereas if Dickson were out of the way she might do any act she pleased, and disappoint Lord Boyne. That was not all; the agreement was improvident in another view: Lord Boyne might not be able to do any act respecting the estates, as Dickson would be the owner of such part as he might choose, and the annuity affected the whole; so that the difficulty to manage the title was clear. Then even if this demand had been made in 1770, when Lord Bellew died, a Court of Equity would have looked at the [55] transaction with jealousy, to be satisfied whether it was understood by the parties, having regard to the circumstance that Dickson was Lord Boyne's father-in-law, and had a control over the property of the wife, and the interests of the son. And when the demand was made in 1780, it became a Court of Equity to look at the whole with the most anxious jealousy, and on that he founded a remark which affected some of the observations made in the Court of Exchequer. It had been said in answer to the charge of laches, Why not dismiss the bill? and this might be said with great effect in many cases. But here there was laches in not attempting to enforce the demand from 1770 till 1780, because if any thing was due, it was due on the death of Lord Bellew in 1770; and it was not only in one sense for the benefit of the party claiming the performance of the agreement, that it should be immediately executed, but in one sense also for the benefit of Lord Boyne. For what was his situation? till the demand was made he could not tell of what acre in Louth, Meath, or Kildare, he was the owner, or might continue to be the owner; and this option was another reason why a Court of Equity should look with jealousy at the transaction, as Dickson, if he survived Lord Bellew, might say "Don't tell me about taking what I ought to take, here and there; I shall have your park or your garden." Why then, under these circumstances, was there ever a case where it was more necessary that the demand should have been made without delay? Suppose it had been made in 1770, Lord Boyne might then have said, "The proposition did not come from me, or if it did, then let us see [56] whether I understood the nature and effect of this agreement, whether my mother was acting against, or protecting my interest", and unless she had intimated an inclination to bar the interest of her son, it was very easy to see that no Court of Equity would deal with it at all. Why then, though the demand ought to have been immediately made, and the parts to be taken pointed out, none such was made, but the estates were left to be devised by will, and the parties had been allowed to deal with the property as their own, to improve the estates, to enjoy them and act with regard to them as their own for ten years together. Suppose that only a part of the property, worth the yearly sum of £200, had come to Lord Boyne, it was a very different thing to

demand the land after suffering him to deal with it as his own, and to improve it as his own, from what it would be to demand it immediately when due. These were main points, in considering whether or not there ought to be a specific performance. The consequence of all this was not that the agreement was void in law; let them go to law and make what they could of it: but the not making the demand in proper time, and the laches connected with it, the loss of evidence, and all the other circumstances, appeared to constitute a case in which the matter ought to be left to law, without the interference of equity in the way of specific performance.

There was one circumstance which ought to be noticed, that the appeal was not presented for four years after the making of the decree in the Exchequer, and it might have happened that something had been done in the mean time, consequent on the [57] directions in that decree, such as, the issuing the commission of perambulation, etc., and if so the Respondents ought to be protected against the expense which an earlier appeal would have prevented.

Decree of the Court of Exchequer accordingly REVERSED.—Appellants to pay Respondents their costs subsequent to the decree, and the bills dismissed without costs.

Agent for Appellants, GIBBS.
Agent for Respondents, PALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2D DIV.).

WILKIE, and Others,—*Appellants*; GEDDES,—*Respondent* [Feb. 27, 1815].

[Mews' Dig. xiii. 1159. See *Dudgeon v. Pembroke*, 1875, 1 Q. B. D. 110.]

[Under the implied warranty of the assured, as to sea-worthiness, it is necessary not only that the hull of the vessel be tight, staunch, and strong, but that the ship be furnished with ground tackling sufficient to encounter the ordinary perils of the sea; and therefore, where it appeared that the best bower anchor, and the cable of the small bower anchor, were defective, the vessel was held not to be sea-worthy.]

The Appellants underwrote a policy of insurance on the ship *Mary*, of Stromness, for a voyage [58] from Grangemouth, in the Frith of Forth, to Gottenburgh, and thence back to her port of discharge in the Forth, with liberty to join convoy in Leith Roads. While the vessel, after sailing from Grangemouth on her outward voyage, was at anchor in Leith Roads, a strong breeze sprang up, and the ship began to drive. She was then riding with her best bower anchor only, but soon after let go her small bower anchor, the cable of which appeared to have parted almost as soon as the anchor was dropped, and hung loose from the side of the ship. The master, under pretence of running into Leith Harbour, which it was impossible to do, as it was then not more than two hours after low water, cut both cables. The vessel took the ground near the beacon rock, at the entrance of Leith Harbour, and sustained considerable damage. A claim of £978 having been made for repairing her, the underwriters resisted, on the grounds that she was not sea-worthy when she sailed on the voyage insured:—1st, Because the cable of the small bower anchor was at that time so worn and decayed as to be unfit for service;—2d, Because the best bower anchor was not of a proper construction, nor of sufficient weight. The Respondent brought his action in the Admiralty Court, and the Judge-admiral allowed a proof. The result of the evidence appeared to be that the small bower anchor cable had been much rubbed and injured, and that pieces of it had been on different occasions cut off on that account, previous to the commencement of the voyage insured; and that the best bower anchor was too light and short in the shank for a vessel of [59] the *Mary's* tonnage. The Judge-admiral and the Court of Session however, having seen it in a different view, decided in favour of the assured, and the underwriters appealed.

(March 22, 1815.) (Lord Eldon (C.). This was an action on a policy of insurance, for the amount of repairs done to a ship, in consequence of damage sustained by her driving from her anchorage, and taking the ground after the commencement of the risk. And the defence was, that the ship was not sea-worthy; and he need not inform their Lordships that there was an implied warranty in every such contract, that the ship was sea-worthy at the commencement of the risk. There might be evidence as to this from circumstances, at or before her sailing, or circumstances occurring after she sailed disabling her to proceed, but which would not have had that effect, if the vessel had been sea-worthy at the commencement of the risk, that is, at the time of her sailing on the voyage insured. Every ship ought to be sufficiently provided in cables and anchors, and the only question here was, whether or not this vessel had been so furnished. On the general principle nothing was more clear than that the Courts required not only that the ship itself should be tight, staunch, and strong, but that it should be furnished with sufficient ground tackle to encounter the ordinary perils of the sea, and another principle was that the Courts would require the evidence to be clear in the affirmative, as the interests of commerce and a due regard to the lives of the seamen were so much concerned, that this [60] point should be strictly made out. Here they had only to decide upon the matter of fact, whether or no the vessel had been provided with sufficient tackle; and his belief was, that if the case had been submitted to a jury, they would have said that upon this evidence it did not appear that she had been so provided. That was his opinion, and he therefore thought that the judgment given below ought to be reversed.

Lord Redesdale. He agreed in that opinion. Unless the assured were bound to take care that the vessel was in every respect sea-worthy, the consequence would be most mischievous: for the effect of insurance would be to render those chiefly interested much more careless about the condition of the ship, and the lives of those engaged in navigating her. From the evidence in the present case it appeared not only that the best bower anchor was too light, but that the cable of the small bower anchor was wholly defective.

Judgment of the Court below reversed.

Agent for Appellants, BERRY.

Agent for Respondent, MUNDELL.

[61] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

ODELL, and Others,—*Appellants*: CRONE, and Others,—*Respondents*

[April 19, 1815].

[Devise and bequest by testator of the residue of his estates and property of every kind and nature whatsoever, both real and personal, of which he should be seized, possessed, or entitled to at the time of his death, to his son and two daughters, and all their younger children, their heirs, executors, and assigns for ever: but nevertheless that his intentions were, that each of his three children should take for life the interest of such part as he the testator intended for the younger children of such child. Held that the fund was at the time of the testator's death to be divided into three equal parts, the interest of one of these third parts to be paid to each of testator's children, during his or her life, and then to be distributed among his or her younger children, and that the younger children took *per stirpes*, and not *per capita*, and that the younger children who came in *esse* after testator's death were included, and entitled to share along with those living at the time of the testator's death.]

John Crone, at the time of making the will upon which the question arose, (September 15, 1789) had four children, Aphra and Constance, his daughters, and Robert Fennel and John, his sons. He first devised certain lands to trustees, subject to

an annuity to his son John, (who died in the testator's life-time,) and other annuities to the use of his daughter Aphra, wife of William Odell, for her life, and after her decease to the use [62] of all, and every her younger children, to be divided among them in such manner, shares, and proportions, as she should by deed or will appoint, and in default of appointment, equally amongst such younger children as tenants in common, and not as joint tenants; and he empowered her to charge the lands with £500 for each of such younger child and children, as she then had or might thereafter have. And he also devised certain other lands to Aphra for life, with power to charge them with £1000 for her younger children, to be raised if she thought proper in her life-time, and to be divided among them, share and share alike, at their ages of twenty-one years, or on their marriage, with their parents' consent, and after her decease, to her first and other sons in tail-male. He next devised certain other lands to trustees, to the use of his son, Robert Fennel Crone, for life, subject to an annuity to his son John Crone, and other annuities, remainder to the trustees to preserve contingent remainders, remainder to the first and other sons of Robert successively, in tail-male, remainder to his daughters Aphra and Constance, and their heirs, share and share alike, as tenants in common: and he authorized Robert to charge these lands with £500 for each of such younger child or children as he then had, or thereafter might have. He then bequeathed his interest in certain leasehold premises to trustees, in trust to pay the issues and profits to his daughter Constance for life, subject to an annuity to his son John Crone, and other annuities, and after her death to the use of her issue, in such manner as he should distribute the [63] same amongst them, and in failure of such distribution, then the whole to her child, if only one, and if more than one, to be equally divided between or amongst them, share and share alike, and in case of her death without issue, he bequeathed these premises to Robert and Aphra, and their younger children, share and share alike. He also bequeathed to his daughter Constance a sum of £4000, to be reduced to £2000 in case she married without the consent of certain persons named by the Testator. And he then bequeathed £500 to each of the grand children he then had, or should have at the time of his death:—and, along with some other bequests and directions of less consequence, the will contained the following residuary clause:—

"I leave, devise, and bequeath the rest and residue, not hereby particularly
 "devised and disposed of, of all my estates and property of every kind and nature
 "whatsoever, both real and personal, of which I shall be seized, possessed, or entitled
 "unto at the time of my death, (subject to and charged with my debts and legacies.)
 "unto my eldest son Robert Fennel Crone," (who had then one younger child) "my
 "daughter Aphra Odell, and my daughter Constance Crone," (who had then no
 "child,) "and all their younger children, their heirs, executors, administrators, and
 "assigns, for ever: but nevertheless my intentions are, that my said son Robert
 "Fennel Crone shall have and receive the entire interest or yearly produce of such
 "part of my said real and personal fortune, as I by this my will intend for his [64]
 "younger children, during his life: and that my daughter Aphra Odell shall have
 "the entire interest or yearly produce of what I hereby intend for her younger children
 "during her life; and that my said daughter Constance Crone shall have the entire
 "interest or yearly produce of what I hereby intend for her younger children, during
 "her life; and in case any of my said three children, Robert F. Crone, Aphra Odell,
 "or Constance Crone, shall die, the share of my child so dying, if such child shall
 "have younger children, shall go to the younger children of such child; but if any
 "of my said children shall so die without leaving younger children, the share of my
 "child so dying shall go to the survivor or survivors of my other children, and their
 "younger children, share and share alike. And I do hereby declare my will and in-
 "tentions to be, that my said son Robert F. Crone, and my daughters Aphra Odell,
 "and Constance Crone, shall respectively have a power of distributing and dividing,
 "by any instrument in writing to be executed by them under hand and seal, or by their
 "respective last wills and testaments in writing, among his and their respective younger
 "children, such parts of my said real and personal estate and fortune as such younger
 "children respectively may be entitled unto under this my will; and in failure of
 "such distribution, or division, that all my said children and grand-children shall
 "have equal shares of the said residuum of my said real and personal estate and fortune.
 "And further, that in case any of my said grand-children shall happen [65] to die

"under their respective ages of twenty-one years, or days of marriage, the shares and proportions of such of them as shall die shall remain to the brethren of the child or children so dying."

By a codicil dated April 11, 1790, the testator revoked the legacy of £4000 to his daughter Constance, having, as he stated, made a proper provision for her in lieu thereof, on her then intended marriage with Mr. Massy. The testator died very soon after, and at the time of his death, Aphra had nine younger children, Robert one younger child, and Constance no child. Robert on the 14th May, 1791, filed a bill in the Exchequer, praying that the property which was the subject of the residuary clause might be divided into three equal portions and secured, and that the interest of one third should be paid to himself for life, the interest of another third to Aphra, and the interest of the remaining third to Constance; but this suit was never effectually prosecuted, and in August, 1791, Aphra and her husband in their own right, and as next friends of their children, filed a bill in Chancery against the proper parties, praying an account of the residue of the testator's property, and the application of the fund according to his intention. This cause came to a hearing before Lord Clare, in December 1792, who made a decree declaring "that the testator's three children, and such younger children as they or any of them had at the time of the testator's death, were entitled to the residue in equal shares, subject to the power of appointment and distribution mentioned in the will"; [66] that is, that the residue was to be divided into thirteen shares, one for each of the testator's three children, and ten for the younger children living at the time of the testator's death: so that Aphra in respect of her nine younger children would, in addition to her own share, have the interest of nine shares for life; Robert in respect of his younger child, in addition to his own share, the interest of one share for life; and Constance, having no child at the time of the testator's death, would have nothing beyond her own thirteenth share. The son, and the daughters and their husbands, agreed that the fund should be divided according to this decree, and a consent in writing to that effect was entered into, and on May 3, 1794, made an order of Court, and the residue amounting to £25,000 was divided accordingly, and directed to be paid over to the parents. Subsequent to the testator's death, Robert had seven younger children born, and Constance four children, who by their next friend on May 28, 1806, filed their bill in Chancery, insisting that by the true construction of the will, they were entitled to a share of the residue, and were not bound by the decree of Lord Clare, not being parties to it. This cause having come on to be heard before the Lord Chancellor Manners, assisted by Chief Justice Downes, it was on February 14, 1811, decreed that the decree of December 3, 1792, should be reversed, and that by the true construction of the will, the residue at the time of the testator's death became divisible into three equal shares, and that Aphra, or her husband in her right, became entitled to the interest of one-third part for her life, with [67] power of distribution among all her younger children, whether born before or after the testator's death, as in the will mentioned; Robert, to the interest of another third for life with the like power of distribution; and Constance, or her husband in her right, to the interest of the remaining third for her life, with the like power of distribution; that an account should be taken, and the money paid into Court, and laid out with the privity of the Accountant-general, in the usual manner; and that the interest should in the mean time be paid according to the consent order, which was not objected to, that is: the interest of ten-thirteenths to Aphra's husband for her life, of two-thirteenths to Robert for life, and of one-thirteenth to the husband of Constance. From this decree Aphra, and her husband and children, appealed (1 Ba. and Bea. 449).

Lord Eldon (C.). Is it the practice in Ireland, in case of bequests to parents for life, and then to their children, with power of appointment and distribution to the parents amongst the children, to order the fund to be paid over to the parents? That is what is done by Lord Clare's decree.

Cited for Appellant, *Ellison v. Airey*, 1 Ves. 111.—*Horseley v. Chaloner*, 2 Ves. 83.—*Buffar v. Bradford*, 2 Atk. 220, to show that in case of a bequest to children, the tendency of construction is in favour of a vested interest in those then living. Cited for Respondent, *Douglas v. Chalmer*, 2 Ves. 501, to show that the words, in case any, etc. shall die, may be construed when any etc. shall die. [68] *Whitbread v. St. John*, 10 Ves. 152.—*Andrews v. Partington*, 3 Bro. C. C. 60, 401, to show that

the inclination of the Courts is to extend the construction to as many objects as possible. *Walker v. Shore*, 15 Ves. 125, to show that the bequest must extend to all that should be in existence at the period of distribution, viz. the death of the parents who had only a life interest.

Leach and Nolan for Appellants; Romilly and Fonblanque for Respondents.

(April 21, 1815.) Lord Eldon (C.). In this case it appeared that the testator was desirous to provide for three families, that of his daughter Aphra Odell, that of his son Robert Fennel Crone, and that of his daughter Constance Crone, now Massy; and in construing a will, he might state what was the situation of the testator's family at the time when it was made. His daughter Aphra had nine younger children, his son Robert one younger child, and his daughter Constance was unmarried. He first devised his lands in a place called Tomeline, and other places mentioned in the will, to trustees, to the use of his daughter Aphra Odell, for her life, subject to certain annuities, the trustees to permit her to take the rents and profits to her sole and separate use, during her natural life; all which was expressed in terms sufficiently artificial; and then to the use and behoof of all and every the younger children of his said daughter, to be divided among them as she should appoint, and in failure of such appointment to be divided among them equally, share and share [69] alike, as tenants in common, and not as joint tenants. Then the testator empowered her to charge the lands with £500 "for each and every such younger child or children as she now hath, or hereafter may have," and from these words an argument had been drawn, that when he meant to include children to come in *esse*, he had so distinctly expressed himself; but it was unnecessary to state to those who knew any thing of the principles adopted in the construction of wills, that where it appeared from the words of the will to be the intention of the testator, that children to come in *esse* should take, they would take, though the testator should not have expressed such his intention in technical language. Then he devised certain other lands to Aphra for life, charged with £1000 for the use of her younger children, to be divided among them, share and share alike, remainder to her first and other sons, in tail-male. He next devised certain other lands to trustees, to the use of his son R. F. Crone, with power to charge the same "for the benefit of the younger children of the said Robert, etc." which expression, younger children, in case the testator had died immediately on the execution of his will, must, as Robert had then only one younger child, have extended to children born after the testator's decease, remainder (after the usual remainder to trustees) to his first and other sons, in tail-male, remainder over; and then he empowered Robert to charge the lands with £500 "for each and every child or children, he now has, or hereafter shall have." He then devised certain lands to the use of his daughter [70] Constance Crone, for life, and after her decease to the use of her issue; Constance being then unmarried, and so described, and he bequeathed her a legacy of £4000 to be paid on her day of marriage, and he afterwards reduced that legacy, in case she married without the consent of persons whom he named, so that it was clear that she was then a single woman, and could have had no lawful issue, and that he contemplated her marriage and having children after his death, as he might in his lifetime have himself given or withheld the consent, and the condition would have been considered as so satisfied. The testator then bequeathed £500 to each of the grandchildren he should have at the time of his death, and it was proper to mention that he bequeathed £5 to each of the five younger children then in *esse* of John Coughlan, his herdsman; and made a similar bequest to each of the seven younger children of John Magney, one of his tenants. The residuary clause was in these words, (*vide ante*).

Then came the decree of Lord Clare, the import of which he took to be that this was a residuary devise and bequest, of one share to R. F. Crone, and one to his younger child; of another share to Aphra, and nine shares to her nine younger children; and one share to Constance, who had no children at the time of the testator's death; or that the whole was to be divided into thirteen shares, of which the three children of the testator, and such of their younger children as were living at the time of the testator's death, were each to have one. Aphra and her family having by this [71] means ten shares; R. F. Crone and his family, two shares; and Constance only one share, having no children at the time of the testator's death, who by this construction could be objects of his bounty.

With respect to the first part of the clause, it had been truly enough said, that if this were to be considered as an immediate devise, it would make them joint tenants in fee as to the real estate, and joint tenants as to the personal : and no doubt if it was meant to describe the persons who should be living at the time of his death, and this was an immediate devise to them, such would be the effect of the law. But it was difficult to believe that he, having a daughter unmarried, could really mean that those only should take who were born before his death, and that this was a devise to them *in presenti*. But nothing was more clear than that where there was an immediate devise, unless the testator could use such technical words as would not give way to his own exposition of his meaning, that exposition ought to be attended to in order to determine the meaning of words which, without such an exposition, would have a fixed legal sense. And then the testator went on : " But nevertheless," etc. (*Vide ante*.)

They had been driven to this : that R. F. Crone was entitled during his life to the interest of the share of only one child ; and to admit the effect to be that Aphra took not only the share originally given her, but also the interest for life of the nine shares given to her children ; and that as to Constance who had no children, she had only one out of thirteen shares, and that the benefit given her [72] in respect of her children was nugatory. It was besides provided that the share of a child dying should go over to the younger children of such child. If then Lord Clare was right that the thirteen persons living at the time of the testator's death took as devisees, he still overlooked all the last part of the residuary clause, for there was nothing in the decree as to the taking for life, or going over in case of death : so that the decree even on its own principle could not be maintained. Then came the decree made by Lord Chancellor Manners, assisted by one of the Judges ; and he never in the whole course of his experience knew of more efficient advice and assistance having been given in this way to the Chancellor, than was given to Lord Manners by Chief Justice Downes in this case : which decree was that, at the testator's death, the residue real and personal was to be divided into three equal parts or shares, one third part or share to Aphra and her children, another to R. F. Crone and his children, and the remaining third to Constance and her children, with power of distribution as in the will. And the question was, whether this was an intention which, consistently with the rules of law, their Lordships could impute to the testator ? That could not be done under the first words of the residuary clause. But the question was, whether considering the state of the family and the general intent as to be collected from the whole, and the principles of law applicable to the case, such might not be held to be his intention. Then take it with the exposition, and what did the testator say ? That his son and two daughters should [73] each receive for life the interest of what he intended for his or her younger children. Could he mean under such circumstances that one daughter should, in addition to her own share, have the interest of nine shares, his son the interest of one additional share, and his other daughter only her own share, without any thing in respect of her children (unless he contemplated her having younger children at the time of his death), though she should have never so many younger children after his death ? But it did not stop there ; for he went on, " in case any of my said three children shall die,"—shall die : it was certain they must die some time or other, and that might be legally construed, when they shall die, " the share of my child so dying," on the Appellant's construction that could mean only one-thirteenth share, " if such child shall have younger children, shall go to the younger children of such child ; but if any of my said three children shall so die without leaving younger children, the share of my child so dying shall go to the survivors or survivor of my other children, and their younger children, share and share alike." Now it was the share of his child so dying that was to go over : but Aphra in addition to her own share, might by the Appellant's construction have the interest of nine shares in respect of her younger children ; and yet what was to go over to her brother and sister, and their children, in case she died without leaving younger children alive at the time of her death, was merely her own one thirteenth share instead of the whole shares. Then what were they to make [74] of this power of distribution, when R. F. Crone had only one younger child and Constance no child ? The principle of law was this, that where persons were to take under this general description, the object of the Court should be to comprehend as many as by fair con-

struction could fall within it, and unless it was necessary under the words to shut out all except such as were born at the time of the testator's death, the rule was to include all such as might have come into existence before the time when the fund was to be distributed. On the best consideration he could give this case, it appeared to him that the last decree was right, and ought to be affirmed. He said nothing about the interest, for though he doubted whether the consent was binding, there was no appeal from the consent order, and therefore that question was not properly before their Lordships.

Lord Redesdale. He should not have thought it necessary to say any thing, if there had not been a contradiction between the decrees. The decree of Lord Clare was manifestly in contradiction to the will throughout; for it was clearly the intent of the testator that the younger children should take nothing during the lives of their parents. The question was, whether the subsequent decree of the present Chancellor was correct, and he thought it perfectly well founded; and that the argument against it proceeded on a misconception of the words "all their younger children;" for by their construction all their younger children did not mean all, but some. It was true that in many [75] cases the Courts were obliged to restrain the meaning to persons living at the death of the testator, and could not extend it where he distinctly so expressed himself. Suppose it had been to the parents for life, and then to all their younger children, all would take. And what was the subject of dispute here? It was said, "to all their younger children." How? Immediately? No—The whole was suspended till the death of the parents, and so it was to the parents for life, and then to the younger children. They took *per stirpes*, and it was impossible to execute the will in any other way. And then the question was, in what proportion the fund was to be divided. If all took, it must be by thirds, each of the parents taking what was intended for, not given to, his or her younger children, so that the testator adverted to the future by strong implication, and also to the marriage of one of his daughters after his death, for wills were generally made in contemplation of death. He had no doubt that this decree was right, and that the decree of Lord Clare was unfounded. As to the order by consent which the Chancellor had considered as binding on Crone and Massy, he had some doubt about that, and confessed that the inclination of his opinion was the other way. But as that order was not appealed from, they could not meddle with it.

Judgment affirmed.

Agents for Appellants, WILLIAMS and BROOKS.

Agents for Respondents, CANNON and GARGRAVE.

[76] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WARNER,—*Appellant*; CUNNINGHAM,—*Respondent* [April 25, 27, 29, 1814;
May 19, 1815].

[See *Hill v. Wylie*, 1865, 3 M. 541, 543.]

[Where the proprietors of two adjoining estates, the one containing fields of coal, the other, besides coal, having salt-works belonging to it proper for the consumption of the small coal, entered into a contract for 124 years, to carry on the coal and salt-works as a joint concern, and for that purpose executed to each other mutual leases or tacks, that is, Warner set in tack for 124 years, to Cunningham, his heirs and assignees, and to himself, Warner, his heirs and assignees, equally betwixt them, certain seams of coal, and Cunningham in the same manner set in tack for 124 years to himself and Warner, and their respective heirs, certain coal-fields and salt-pans; held that this was a lawful contract, and binding on the heirs taking up

the succession and representing the parties; and that when the concern was prosperous, and there was no reasonable apprehension of loss, the heir of one of the parties was not entitled to a dissolution to the prejudice of the other party.]

The Appellant's father, Mr. Warner, of Ardeer on the western coast of Ayrshire, had considerable fields of coal within his property, and his neighbour Mr. Robert Reid Cunningham, of Auchinharvie, the Respondent, besides some coal, had salt-works on his property, proper for the consumption of small coal. The expediency of a connexion, so as to carry on the coal and salt-works together, [77] having suggested itself, a verbal agreement was entered into in 1770, for working the coal on Mr. Warner's lands, with some part of the coal on the Respondent's lands, and the Respondent's salt-works as a joint concern, under the Respondent's management, and the operations for that purpose were immediately commenced by way of experiment, it being understood that the expenses and profits were to be equally divided. After four years' experience, and when the profits had been exhausted by the necessary outlay, and a farther advance of £850 was required, the agreement was in 1774 reduced into writing, in the form of a regular contract and lease. The deed, after reciting the verbal agreement and the operations under it, and that the Respondent was to keep the books and continue the management, and that it was the intention of the parties that the endurance should be twenty-five years from 1770, and an additional six years, unless revoked at the end of the twenty-five years, as therein mentioned, proceeded as follows:—

“ And the parties judging it proper to have their agreement extended in form, and for the better securing the same, that the mutual tack hereinafter written be executed, therefore the said Patrick Warner hereby sets in tack to the said Robert Reid ” (afterwards Cunningham) “ himself, and his heirs or assignees, and to the said Patrick Warner himself, his heirs or successors, proprietors of Ardeer, equally betwixt them the said Robert Reid and Patrick Warner, all and hail the whole seams or seam of coal within all [78] or any part of the said lands sometime called Dovecote-hall, now Ardeers, and the lands of Pyperheugh, belonging to the said Patrick Warner, lying within the parish of Stevenston and sheriffdom of Ayr, which includes all his lands in that parish; also all and hail whatever part of the said lands as are, or shall be necessarily required for coal-hills, coal-bings, road and canal, or otherwise, anent the work; and that for the space of twenty-five years, and six years, making together thirty-one years full and complete, from and after the 20th April, 1770, which was the commencement thereof; with power to set down pits, make coal-hills, and others foresaid, excepting only such land as is generally in tillage, on which no coal-hill or bing shall be made, without consent of the proprietor; but the coal beneath the same is not reserved; and on the other part, the said Robert Reid hereby sets in tack to the said Patrick Warner, and to himself the said Robert Reid, and to their several and respective heirs aforesaid, equally betwixt them, the foresaid salt-pans, and materials thereof, with the salt garnel, and such of the land belonging to the heirs of Auchinharvie, or their assignees, as is used for the canal and coal-yard; and that for the like space above-mentioned: and the parties hereby agree and condescend, that the rent of the said coal and ground used and to be used for coal bings, canal, and otherwise aforesaid, shall be £100 sterling yearly; and that the rent of the said salt pans and garnel, with the ground of the rest of the [79] canal and coal-yard, shall be £100 sterling; and both parties hereby contract and agree, and bind and oblige them and their foresaids, to advance and lay out, from time to time, whatever money shall be necessary for carrying on the said works; each party paying the one-half; and in case any party shall advance more than his own half at any time or times, he shall draw or be entitled to receive the lawful annual rent of the same from the other party, from the several times of outlay, until re-payment, and have power to demand the principal and interest when he thinks proper; and it is also agreed, that the parties shall equally draw and receive betwixt them the whole profits that shall be made on the said works, and in like manner to suffer and pay the whole loss that shall be made thereon.” “ Further it is hereby particularly agreed, that the said Robert Reid shall have the management and direction of the whole works, and sales of every kind; but in case of his decease,

" the managers shall be chosen by the tacksmen or parties for the time ; and in case
 " of their variance, by the sheriff depute of Ayrshire for the time being, upon caution
 " acted in his court books : and albeit there is no liberty herein granted of setting
 " down pits in the ground, belonging formerly to Auchinharvie, now to his heirs and
 " assignees, called Saltcoats Campbell, adjoining to the said lands of Patrick Warner,
 " yet liberty is granted to work the coal beneath the same from any pit in Mr. Warner's
 " ground, so far as the levels will admit of : provided always, as it is hereby ex-[80]-
 " pressly provided and declared, that it shall be in the power of the said Patrick Warner
 " himself, or the lawful heirs of his body, or Mr. John Warner in Kilbarchan (in case
 " of his succeeding to the said Patrick Warner), and the lawful heirs of his body, but
 " not to any other successor, or assignee, to dissolve this contract and tack at any
 " time after the elapse of the said twenty-five years, upon six months' premonition : and
 " providing also, that in case the coal foresaid shall happen to be wrought out before
 " the elapse of the said twenty-five years, or at any time thereafter, then and in that
 " event this contract shall become void thereafter, and be at an end as to both parties."
 And in the close of the deed, both parties bind themselves in warrandice of the mutual
 tacks, as follows : " And as on the one part, the said Patrick Warner obliges him
 " and his foresaids to warrant the tack herein granted by him, so the said Robert Reid
 " obliges him and his foresaids to warrant the tack on his part ; and both parties
 " bind and oblige them to perform the premises, *hinc inde*, to others, under the penalty
 " of £50," etc.

Under this contract the concern was carried on apparently to the satisfaction
 of both parties, till 1783, when it was thought proper very considerably to extend
 the scale of their operations, and for this purpose to add a period of ninety-nine years
 to the endurance of the contract and tacks, and to include some additional fields of
 coal, and accordingly a second contract was entered into for these purposes, previous
 to which Cunningham had ob-[81]-tained from Warner a lease of an additional field
 of coal called the Misk, which the parties also wrought as a joint concern. The second
 contract, after reciting the former, proceeded thus :—

" The parties now finding that the endurance of the said tack or contract is too
 " short ; that it will tend to their mutual benefit, and to the advantage of their heirs,
 " that the same shall be prolonged and continued for a much longer space of time ;
 " and albeit their first intention was to ship off coals at Saltcoats, they afterwards
 " enlarged the plan, and have laid out a very considerable sum of money at the colliery
 " in the Misk, from which they now ship off a considerable quantity of coals at Irvine ;
 " —the parties, therefore, by these presents, not only prorogate the foresaid tack
 " or contract on both sides, for the further space of ninety-nine years ; but also of
 " new, the said Patrick Warner sets to himself and the said Robert Reid Cunningham,
 " equally betwixt them and their respective heirs, the foresaid coal in the whole lands
 " in Stevenston parish belonging to him the said Patrick Warner, with whatever land
 " shall be necessary for coal-hills, bings, roads, and canal, and that for the space of
 " 124 years, from and after the foresaid 20th April, 1770, for the foresaid yearly rent
 " of £100 sterling ; and the said Robert Reid Cunningham sets to himself and the said
 " Patrick Warner, equally betwixt them, and their respective heirs, the foresaid
 " salt-pans, materials thereof, and garnels, and such land of his as is used for the canal
 " and the coal in his lands lying east of the [82] Capon-crag, and that for the like space
 " of 124 years, from the said 20th day of April, 1770, for the yearly rent of £100 sterling,
 " including in this let the coal in Little Dubs and Bog, and also whatever coal he may
 " succeed to in the Broom. And they the said parties engage to advance equally
 " in carrying on the works, and shall equally share in the profit and loss to be made
 " thereon, for and during the space of 124 years, during which space the whole obliga-
 " tions and articles contained in the former contract are hereby prorogated ; and
 " the said Patrick Warner, for himself and his heirs, hereby renounces the power
 " and liberty reserved to him and his heirs, of annulling the said contract at the end of
 " twenty-five years, or any time whatever ; but providing, nevertheless, that if the
 " said coal shall happen to be wrought out, or become not workable on any account,
 " conform to the opinion of men of skill to be mutually chosen, then, and in that
 " case, this contract, from thenceforth, shall no longer be binding on both parties :
 " but if the coal continue workable after the expiry of the above space of 124 years,
 " the parties, in the strongest manner, recommend a joint working of the said coals,

"and desire their heirs to continue the contract as long as the coal can be wrought to advantage."

In consequence of the expenses which these additional operations required, a debt of between five and six thousand pounds was incurred, for the payment of which Warner was under the necessity of mortgaging his estate. Till 1792, Warner [83] appeared to have relied wholly on the fidelity and capacity of Cunningham, and had never thought it necessary to examine the books of the concern. In that year, being then about eighty years of age, he appointed his friends Dr. Woodrow, minister at Stevenson, James Miller, and Francis Russel, his commissioners, to manage his affairs and investigate the conduct of Cunningham in the management of the coal and salt-works. The commissioners upon this investigation were dissatisfied, and caused an advertisement to be inserted in a Glasgow newspaper, that no debts of the concern from that period would be paid by Warner. In 1794 Warner died, and the powers under the commission were at an end: but the three persons who had been in the commission had been appointed tutors and curators to Warner's eldest son, the Appellant, as well as to his other children. In that character they caused a notorial intimation in their own names, and that of the Appellant, to be given to Cunningham, that, as the copartnery had never tended to the mutual benefit of the parties, and a large debt of more than £5000 had been incurred, which was yearly increasing, without any prospect that these works would be sufficiently productive to discharge it, and that as by the common law of the land the Appellant was entitled to renounce, it was his intention to do so, and that he meant to avail himself of the benefit of the stipulation, to put an end to the concern at the close of the twenty-five years, viz. in April, 1795.

Two separate actions were then raised against the Respondent, in the name of the Appellant and [84] his curators. The first of them proceeded upon the narrative of the terms of the first contract of copartnery, and the intimation which had been given to the Respondent, that the Appellant meant to avail himself of the option therein stipulated, of retiring from the concern at the end of twenty-five years: and concludes, that "the defender should be ordained to exhibit and produce the whole books, accounts, and vouchers, which concern or relate to the management of the coal and salt-works carried on by him under the said contract, and to hold just count and reckoning with them for his management of the said works, and intrusions with the funds which have come into his hands in consequence thereof: that he should be ordained to make payment to them of £2000, or such other sum as should, upon a fair count and reckoning, appear to be due to them from his concern."

The other was an action of reduction for setting aside the second contract. The reasons of reduction were:—1st, that the contract itself was vitiated and erased, etc. and—2d, the said contract and tack "was elicited and impetrated by the defender, through gross fraud and circumvention on his part, and through facility on the part of the granter, without any onerous and just cause, and to his and the Pursuer's great hurt and enormous lesion." It therefore concludes, "that the foresaid contract and tack, with all that has followed or may follow upon the same, ought and should be reduced, retreated, rescinded, cassed, annulled, decerned, and declared, by decree of [85] our said Lords, to have been from the beginning, to be now, and in all time coming, null and void, and of no avail, force, strength, or effect in judgment, or out, with the same in time coming, and the Pursuer restored and reponed there against."

A third action was raised to reduce the Misk lease, on the ground of incapacity in Warner, and advantage taken of it: and after some previous proceedings the cause came on to be heard before the Lord Ordinary (Meadowbank), who pronounced the following interlocutor:—

"The Lord Ordinary having considered the condescendence for the Pursuers, answers, replies, and duplies, and being of opinion that it is for the interest of the parties, before exposing them to the expenses of a proof, to have the points of law pleaded by the Pursuers determined: Finds, That as the Pursuer Mr. Warner represents his father, he is bound to fulfil his lawful engagements: Finds, That it was a lawful engagement for him to enter into a copartnery connexion with the Defender, for a term beyond the probable endurance of his own life, where the subject of the concern was to consist of coal and salt-works, on which a great expenditure was

" required to render them profitable, and a tract of years to realize that profit : Finds
 " it was a lawful provision in such a contract, to appoint the Defender manager of
 " the concern during his life ; and that of consequence, there is, *in hoc statu*, little
 " room for the Pursuer's founding on a cordial co-operation of partners, as essential
 " to the con-[86]-tract of partnership, rendering it impossible for the ancestor to bind
 " his heir to succeed to him as a partner. But the Lord Ordinary being, nevertheless,
 " of opinion, that if the partnership challenged was obtained by deception practised
 " against the late Mr. Warner, a reduction of it is competent ; and also, that if it is
 " a losing concern, and threatens to involve the Pursuers in future loss, or if the
 " Defender's conduct as manager has been such as to render his fidelity or ability for
 " the undertaking justly suspected, it must be competent to the Pursuer to get free of
 " the concern, by obtaining a dissolution of the partnership, and a sale of its property,
 " whether heritable or moveable, and thereupon a final division of the profits and
 " loss. Appoints the Pursuers to put in an articulate condescendence of facts,
 " without any argument, of what they allege on one or all of these grounds for
 " getting free of the partnership."

This interlocutor having been brought under the review of the Court in a reclaiming petition, after considering it with the answers, the Court adhered. The law having been thus finally determined in the Court of Session that the contract was binding on the heir, as representing his father ; a condescendence was given in as to the other points, and a proof was allowed, and a great deal of evidence taken. After the evidence was closed and before decision upon it, the Appellant, by permission of the Court, amended his summons of reduction by adding the following words, " that
 " whether the said contract and tacks should be reduced or not, [87] it ought and
 " should be found and declared, that in the circumstances of the case, the copartnery
 " concern, and the joint leases of the coal and salt-works contained in the said contract,
 " and executed in contemplation of the said copartnery, ought and should be dissolved
 " and put an end to, from thenceforth and for all time coming."

The Court in 1802, then pronounced the following Judgment :—

" The Lords having advised the state of the process, and having also considered
 " the amendment allowed to be given in by the Pursuers of their summons of reduction
 " of the coal contracts, conjoin the process of reduction of the Misk lease, with the
 " previous process of declarator and reduction regarding said coal contracts ; and in
 " these reductions repel the reasons thereof, assoilzie the Defender, and decern, find him
 " also entitled to the expenses of these reductions, and allow an accmpt thereof to
 " be given in ; but before answer as to the other conclusions of the Pursuer's actions,
 " as now amended, appoint the parties to prepare memorials on the case, and to see
 " and interchange the same betwixt and the 4th day of May next."

It being thus decided that there were no grounds, from deception or otherwise, to reduce the contract and tacks as void from the beginning, the question came to this, whether in terms of the amendment there was a reasonable apprehension of loss as to call for a dissolution *hinc inde*. A correspondence having taken place with a view to a compromise, [88] the Appellant did not give in the memorial ordered by the Court till nearly seven years from the date of the last interlocutor ; but memorials having at length been given in, the Court (2d division), in 1809, pronounced this judgment :—

" The Lords having advised the mutual memorials for the parties,—Find the
 " Pursuer barred by final interlocutors from maintaining in this Court, that he was
 " not bound by either or both the contracts of copartnery entered into by his father
 " with the Defender for long terms of years, or challenging these contracts on account
 " of fraud, lesion, circumvention, or facility ; or challenging the leases mutually
 " granted by his father and the Defender as following the fate of the contracts : and
 " as to the point, whether, when the investigation took place, there were sufficient
 " grounds to entitle the Pursuer to get free of the concern as a losing one, or to have
 " the Defender removed from the management, on account of want of skill, or want
 " of fidelity then detected : Find, That whatever grounds or appearances of grounds,
 " there might have been at the time for one or more of these claims, there has been
 " unreasonable and unjustifiable delay in putting in the memorials with respect to
 " this matter, implying a consciousness, that, as circumstances then stood, these claims
 " would not appear tenable, under the very full and recent investigation which had

"taken place: Find, that it is incompetent now to insist in this matter, without taking into consideration the subsequent events that have occurred in this concern down to the present time, during which [89] period, it seems not to be disputed that above £4000 per annum of profits have been divided betwixt the parties; so that the concern, instead of having threatened impending ruin, as held out by the Pursuer when the memorials were ordered, has proved the source of great emolument to both the Pursuer and the Defender: Therefore, *in hoc statu*, sustain the defences against any conclusion in the Pursuer's libel, not formerly disposed of by final interlocutors."

From these interlocutors, viz. the Lord Ordinary's of the 17th Jan. 1797, adhered to 1798, of the Court, Feb. 12, 1802, and this last one of 1809, Warner appealed.

For the Appellant it was argued, that from the very nature of the contract of partnership, which depended more than any other upon a *dilectus personæ*, it was impossible that an original party could bind his heir so as to prevent his withdrawing from the concern at the death of that party: that as the contract is founded upon mutual confidence, and a sense of mutual benefit, consent was necessary not only to its formation, but to its continuance, Stair b. 1. t. 7. s. 4.—and that by the Roman law, which was also as to this point the law of Scotland, either party might at any time renounce, answering only to the other in damages, and that if the party himself could not be bound to continue the concern against his will, much less could the heir be so bound; and that the opinions of the text-writers on the law of Scotland were in this respect conformable to the Roman law, Bank. b. 1. t. 22. s. 18.—Stair, b. 1. t. 16. s. 5.—Ersk. b. 3. t. 3. [90] s. 18.—that there was nothing peculiar in the working of collieries to take them out of the general rule: that the Appellant, at the time of his father's death, had a right to continue a partner under either or both of the contracts if he chose, and that he did elect to become a partner under the first contract for twenty-five years, and in that character brought his first action for an account, and for taking the benefit of the conventional breach: that the Appellant had brought another action to set aside the second contract *in toto*, and that as to his receiving the dividends in the mean time, it was *pendente lite*, and at any rate they were the produce of his own collieries, so that there was no homologation: that the leases were merely ancillary to the contract of copartnery, and must therefore fall with it; for when the end failed, the obligation granted with a view to that end must also cease, Young v. Erskine, Falc. Jan. 25, 1745.—This was binding the heir not merely to the extent of the property derived from the ancestor, but binding him personally, which could not be. There was an inconsistency in the leases being made to the party himself and another, by which means he was landlord and tenant. The purpose could not be effected unless they had been made to trustees.

For the Respondent it was argued, that there was no authority in the laws or customs of modern nations by which a contract of copartnership, extended by special provision to the heirs and successors of the parties, was thereby rendered incompetent, null, and void; that neither the heir nor any one else could be bound to accept and make [91] himself personally liable against his will, and no such doctrine was here maintained. If the heir thought the scheme too hazardous, he might throw up the succession; but if he chose to take up the succession and represent his ancestor, he must take it with its burthens, and by the law of Scotland he became personally bound to fulfil that ancestor's lawful engagements. The Romans were not a commercial people, and therefore a question of partnership was not to be judged of by the civil law, but by the laws and customs of modern Europe; though even by the civil law such a contract as this would have been good to every substantial effect; and Stair was of opinion that such a contract would by special provision or custom have been good, Stair, b. 1. t. 16. s. 5.—The ancestor holding in fee simple might alienate altogether, and certainly might make leases beyond the probable endurance of human life, which would be binding on the heir; and by the law of Scotland, a lease would not merge in the fee, where the interest of a third party was concerned to keep them separate. The leases here were not ancillary, but the principal subject; and even though there should be a defect in form the heir was bound to execute them in proper form as representing his ancestor. The general law of partnership was the same throughout the civilized world, though there might be some peculiarities in that law in each country, and such partnerships as this were common here, and it happened

that their Lordships had lately such a one before them, *Stuart v. Bute* (1 Dow, 73). (Redesdale. The legality of the partnership was not in question there.) The question of [92] law had been in this case finally settled in 1802, and it was doubtful whether it was competent to appeal from it seven years after. The opinion of Lord Braxfield (M'Queen) was in favour of Lord Meadowbank's interlocutor.

Leach and Horner for the Appellant; Romilly and Cunningham for the Respondent.

Lord Redesdale. The contract of 1770 and 1774 had been complained of as unfavourable to the Appellant, who was stated to have derived no advantage from it, proportionate to the property which he had contributed. And in the farther contract of 1783, it had been said that Warner had been imposed upon, by the accounts of profits exhibited by Cunningham. Their Lordships would see that this contract being entered into in 1783, the parties had been engaged in the business of the partnership for thirteen years before, so that they had all that time to inform themselves of the nature and prospects of the concern. The second contract was in effect a prorogation of the former with some little addition, and after several years' trial it appeared that the plan of working the Misk colliery, and shipping coals at Irvine, was given up; and that a considerable debt was incurred by the company, for the payment of which Warner mortgaged his estate, the fact being that Cunningham was not in circumstances to advance the money, which was therefore supplied by Warner. In 1792 some dissatisfaction arose on the part of Warner, who was then stated to be about eighty years of age, [93] and having thought proper to institute an investigation into the state of the concern, he granted a commission to three persons therein named, to take upon them the management of his affairs, and investigate the plan of management pursued by Cunningham; and they represented to Warner what appeared to them to have been improper conduct on the part of Cunningham. While this proceeding was going forward Warner died; and his son, for whom the commissioners had been appointed to act as tutors and curators, succeeded to the estate. These persons being advised that in terms of the first contract Warner's heir might put an end to the copartnership at the close of the twenty-five years, resolved to give an intimation of their resolution to insist upon a dissolution at that period; and a notorial intimation was accordingly given to Cunningham, narrating the contract, and stating that the copartnership had never been productive of mutual advantage to the parties, but on the contrary that after a trial of twenty-five years a debt of £5000 had been incurred, and that there was no prospect of these works discharging the debt which was yearly increasing; and it was represented that as by the common law of the land the Appellant was entitled to renounce all interest and concern in the copartnership and contracts, he accordingly intimated his intention of doing so. Their Lordships would observe that this intimation was given upon the foundation of the first contract, not advertent to the second, by which the right of determining the copartnership at the end of the twenty-five years was renounced. Then two actions [94] were raised against the Respondent in the name of the Appellant and his curators. The first action proceeded on the narrative of the terms of the first contract, and the intimation given that the Appellant intended to avail himself of the option to retire from the concern at the end of twenty-five years, and then concluded for production of the books, etc., and for an account and payment of what should appear due to the Appellant. The other was an action of reduction for setting aside the second contract, and the reasons were, 1st, that the contract itself was vitiated and erased; 2d, that it was elicited and impetrated by fraud and circumvention through facility on the part of Warner, without onerous cause and to his great hurt and enormous lesion, and concluded to have it declared void from the beginning. It appeared that Cunningham had obtained a lease from Warner of a large tract of land for fifty-seven years, from Whitsunday 1781, at the rent of £58 during the first nineteen years, and £68 during the remainder of the term; and another action was raised to set aside that lease on the ground of incapacity in Warner. A condescendence and answers having been given in, in which the parties differed as to their statements of facts, the Lord Ordinary pronounced the interlocutor first appealed from. Their Lordships would observe that it had been contended by the Appellant that where a copartnership was by the contract to endure for 124 years, that was a contract which by the law of Scotland could not be entered into so as to bind the heirs of the parties. The Lord Ordinary

however found (*vide* [95] *ante*). Their Lordships would observe therefore that the question was determined by this interlocutor to this extent, that as Mr. Warner (the Appellant) represented his father, he was bound to fulfil his lawful engagements, and that it was a lawful engagement for him to enter into a copartnery concern with the Defender (Respondent) for a term beyond the probable endurance of his own life, where the subject of the concern was to consist of coal and salt-works, where a great expenditure was required to render them profitable, and a tract of years to realize that profit : but that if the partnership was obtained by deception, a reduction of it was competent ; and that if it was a losing concern it was competent to the Appellant to quit it ; and that if the Respondent had not acted as a proper manager, this was a ground for putting an end to the partnership, or to that part of the contract by which Cunningham was appointed manager for life. And the Lord Ordinary appointed the Pursuers to give in an articulate condescendence of what they alleged on one or all of these grounds. A reclaiming petition was presented to the Court, and the desire of it refused ; and the consequence was that the case rested on the deception, the reasonable apprehension of future loss, and the incapability and suspected fidelity of the Respondent as a manager. A statement of facts applicable to those grounds was accordingly given in, and on this statement evidence was allowed. But before the decision the Appellant with permission of the Court amended his original summons of reduction by adding that " whether the contract [96] or lease should be " reduced or not, it ought to be found and declared that in the circumstances of the " case the copartnership concern and joint leases ought to be dissolved, and put an " end to from henceforth," so as to make the period of the institution of the suit the time from which the copartnership ought to be dissolved. The Court pronounced a judgment " conjoining the processes of the reduction of the Misk lease, with the " previous processes of declarator and reduction regarding the coal contracts, and " repelling the reasons of reduction ; but as to the other conclusions of the actions " as amended (the dissolution), appointing memorials to be given in." Some correspondence then took place between the parties with the view of settling matters by a compromise, and a considerable delay took place in giving in the memorials. But this proposal for a compromise having failed, the Appellant gave in a memorial, in which he endeavoured to prove the reasonable apprehension of future loss, and the incapacity of Cunningham as a manager. In the counter memorial a statement of profits was given for the purpose of showing that the concern was prosperous and lucrative. The Court then pronounced the interlocutor of the 7th and 14th Feb. 1809, which was the last appealed from (*vide ante*), finding " that the Appellant was " barred by final interlocutors from maintaining in that Court that he was not bound " by the contracts for long terms of years, and from challenging the contracts on " account of fraud, lesion, circumvention, or facility, or challenging the leases as follow- " ing [97] the fate of the contracts, and that as to the grounds of getting free of the " concern on account of apprehension of loss, or removing the Respondent from the " management on account of inability or want of fidelity, there had been an unjusti- " fiable delay in putting in the memorials, and that the state of the concern down " to the present period must, under these circumstances, be taken into consideration, " and the concern appeared now to be in a flourishing condition, above £4000 per " annum of profits having been divided, and therefore *in hoc statu* they sustained " the defences as to all the conclusions not before disposed of by final interlocutors." From this Warner appealed, and it remained for their Lordships to determine as to the propriety of the judgment.

The first question which was raised, and which was a material one, was that which was decided by the first interlocutor, viz., whether Warner the father could legally bind his heirs as well as himself by the contract of 1783, for 124 years, from 1770. On that point it had been contended that this was a personal contract, and that the father could not bind his heir to engage in it unless the heir thought fit to do so ; as otherwise the consequence would be to involve the whole property of the son in the contract. The answer was, that the question was not whether a father could bind his son or heir to enter into a copartnership whether he would or not ; but whether the son, as he represented the father and took up the succession, was bound to fulfil the engagements attached to that succession. [98] And as far as he could judge there appeared no good reason to quarrel with that decision.

It was not uncommon in the working of collieries to carry on the coal-works of two or more adjoining estates as a joint concern, and thus managing them in the way most beneficial to all the proprietors. And thus in a case which their Lordships had lately before them, it appeared that an estate of the Bute family was involved with those of two other families for ninety-nine years. And their Lordships would likewise observe that the concern was of such a nature as to require a certain length of time to make it beneficial to the parties. The coals belonged to Warner, but the expense of working was to be joint, though Warner advanced the money; and if a large sum were expended, and there was a reasonable prospect of the concern turning out a profitable one, it would be injurious in the highest degree to put an end to it before the time came for realizing the profits, which must be at the latter part of the term. And he confessed therefore that he saw no ground for quarrelling with that decision.

That reduced the question to the point of deception, whether a reduction was competent on that ground. On this point evidence had been entered into, and it had been contended that Warner was a man far advanced in life, and had been imposed upon in the contracts of 1770, 1774, and 1783. Now it was to be observed that the verbal contract in 1770 was acted on for four years, and Warner was not then so advanced in life that he could not understand it, and he might have refused [99] to enter into the written contract, and so have put an end to the experiment. But he did enter into the written contract of 1774, and it did not appear that he had not then before him what might have enabled him to judge with accuracy of its nature. From this time to 1783, the concern was carried on under the management of Cunningham. With respect to the management, the state of the accounts was a different question from that which they had now to consider. The question here was, whether there was fraud so as to avoid the contract. Now nine years elapsed, during which time Warner had an opportunity of examining into the accounts, and no dissatisfaction appeared to have been expressed till 1792. Then it appeared that Warner was dissatisfied, and appointed certain persons to examine the accounts. He should mention here that it had been objected that the salt-works bore no proportion to the coals, which were chiefly the property of Warner, that part which belonged to Cunningham being much inferior. But this equality of advantage did not appear to be the foundation of the contract, the real ground of which seemed to be this, that as some sorts of coal were good for salt-works, which would answer no other purpose so well, the union of the two concerns would operate so as to enable the proprietor of the coals to sell the whole to the greatest advantage. The commissioners proceeded to examine the state of the accounts, with which they were not satisfied, and then Warner the father's death put an end to their investigations in that character. But being appointed tutors and curators for the [100] younger Mr. Warner, they instituted these several actions. As to the first action, if the second contract was good, there must be an end of that action, as it proceeded on the ground that the Appellant had a right to put an end to the copartnership at the end of the twenty-five years. But that was at any rate immaterial, as the whole term of the first contract expired in 1801. As to the second point which was left open by the Lord Ordinary's interlocutor, viz. the reasonable apprehension of future loss, it appeared, as far as he could judge from the statement, that, whatever might have been the case in 1792, the state of the concern in 1809 was prosperous, so that during the course of the intermediate twelve years, the concern had become not a losing but a profitable one. But then it was said that this arose from the coals. Well, be it so; but that was the nature of the contract, the coal-works being the object which occasioned the greatest expenditure, and which therefore ought to produce the greatest profit. Then as to the conduct of Cunningham as a manager; on that point it was difficult to ascertain upon the evidence what was the best plan of management, and a great deal had been said on that subject. But as far as he could form a judgment from the evidence, it seemed clear that there was no such mismanagement as ought to put an end to the concern, and that was the whole that appeared to him to have been decided in this case. The Court found "that whatever grounds, or appearances "of grounds, there might have been at the time when the investigation took place, "to entitle the Appellant to get free of the concern as [101] a losing one, or to have "removed the Respondent from the management, there had been an unreasonable "and unjustifiable delay in putting in the memorials with respect to that matter,

"and that it was incompetent now to insist in it without taking into consideration the subsequent events that had occurred in this concern down to the present time, during which period it seemed not to be disputed that above £4000 per annum of profits had been divided between the parties: so that the concern, instead of having threatened impending ruin, as held out by the Pursuer when the memorials were ordered, had proved the source of great emolument to both Pursuer and Defender." Their Lordships would observe then that the whole object being to get rid of the contract, the decision was that there was nothing to show that the contract was not a valid one, and that the question as to profits was decided by events which took place in the mean time, that the delay between the time of ordering and giving in the memorials was attributable to the Pursuers, and that therefore it was proper to consider the state of the funds in 1809, and that the concern was not then a losing one arising from mismanagement, or any other cause. And it did appear to him that, under the circumstances, it was a fair way of judging to say that this was finally a productive concern.

Upon the whole therefore it did appear to him that there was no ground to invalidate the contracts, and that there was no ground to invalidate the leases, which leases were made solely for the purposes of the contracts at a nominal rent which was [102] the same in both; that there was no fraud so as to invalidate the contract; and that there was no ground to put an end to the concern on account of its being a ruinous one, or from any improper advantage having been taken of the appointment of the Respondent to the management for life. That stipulation would end with his life, and then the parties would have an opportunity to determine who should be the manager. It appeared to him then that there was no sufficient ground to reverse this judgment, and that it ought to be affirmed.

Judgment accordingly affirmed.

Agent for Appellant, RICHARDSON.

Agent for Respondent, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (2D DIV.).

SHARPE, and Others, *Appellants*: BICKERDYKE, and Others, — *Respondents*
[Feb. 20, 22, 24, 1815].

[3 Scots R. R. 265, and references at p. 267.]

[Where an arbitrator thought it necessary before decision to have the admission of the parties in writing that they had nothing further to offer, and that they desired a decision on the case as it stood, and was led to believe that a letter to that effect signed by all the parties was in the hands of the clerk to the submission, and stated on the face of the award that he had considered that letter, and it afterwards appeared that one of the parties had made no such ad-[103]mission, and had signed no such letter, and had material evidence still to produce, and on that account applied to the Court to have the award set aside; held by the House of Lords, reversing a judgment of the Court of Session, that the award ought not to stand.]

This was a process raised in the Court of Session by Bickerdyke and others, against Sharpe and others, to recover a sum of about £2000, which was alleged to have been paid by mistake, by the former to the latter, in the course of certain transactions not necessary for the present purpose to be stated. After some proceedings in the Court of Session the matters in dispute were submitted to arbitration, and the arbitrator after the case had been depending before him for about four years, pronounced his decret arbitral (award), in which was the following passage: "Having considered the aforesaid depending process, whole steps and grounds, and warrants

"thereof, and the memorial for the said first party, answers thereto, and whole productions by the parties, and also the letter from the parties of the 21st day of April, 1805, wherein they stated, that they had nothing further to add to the above-mentioned pleadings: and having heard parties, or their doers, *virii voce*, and being now with the whole matters submitted well and ripely advised." etc.

Messrs. Sharpe and Co. raised a process of suspension of the charge for implement, and then a summons of reduction of the decreet arbitral, on the ground that no such letter as that of the 21st of April, mentioned in the decreet had been signed [104] by them or any person on their behalf, and that they had not been heard *virii voce* before the arbitrator as erroneously stated in the decreet. The Court of Session allowed a proof as to the allegation respecting the letter. It was admitted that the arbitrator himself had never seen the letter, but had trusted to the information of the clerk to the submission. One Mathie, the agent for Messrs. Sharpe and Co., deponed "that he never, as such agent, signed any letter or paper mentioning that they had nothing to state in addition to what was already before the arbiter, but he was applied to by a clerk of Messrs. Graham and Mitchel (Mitchel was the clerk to the submission) to sign on the part of the Pursuers (Sharpe and Co.) a letter which the said clerk presented to the deponent, and which was signed by Lang and Newbigging, writers, on behalf of the other parties, that the import of the letter was, that the parties had nothing further to state, and craving a decision of the arbiter: that deponent told the person who presented the letter that he could not sign it, that the Pursuers had offered to adduce proof, but had not yet had an opportunity of doing so, that the letter presented to him was dated 17th April, 1805." Mr. Oswald, the Arbitrator, deponed that he directed A. Mitchel, clerk to the submission, to procure a letter from the parties, stating that they had nothing further to say, and stated to Mr. Mitchel that agreeably to his uniform practice as an arbitrator, he could not pronounce any award until he received a declaration to the above effect: that in general in other [105] cases where he had frequent opportunities of seeing the parties, he was satisfied with a verbal declaration, but in the present instance he was anxious to have a written declaration, particularly from the Pursuers, that the letter 17th April, 1805, signed by Lang and Newbigging, was in terms of the directions to A. Mitchel, that he never saw any written declaration from the parties in the present case, bearing that they had nothing further to say, at least he has no recollection of having seen any such written declaration, and he believes he never did see any such writing: that Mitchel repeatedly informed deponent that he had obtained from the parties the written declaration which deponent had desired him to get, and as to that particular deponent trusted to Mitchel, that as to the correctness and truth of what was stated in the award relative to the letter of 21st April, 1805, he trusted to Mitchel." Mitchel deponed "that he is satisfied that the part of the decreet arbitral which relates to the letter of the 21st April, 1805, is correct, from his having carefully revised the scroll of the decreet both by himself, and along with Mr. Oswald, and from the particular accuracy of Mr. Barrowman, and not from recollection of having compared the draft of the decreet with the papers therein referred to, the deponent at this distance of time having no distinct recollection as to that matter, but from his general practice in such matters he has no reason to doubt that he examined the writings referred to in the scroll of the decreet arbitral in question." Barrowman, Mitchel's clerk, depones [106] "he cannot say from recollection at this distance of time that he ever saw the letter of the 21st of April, 1805, referred to, and though he thinks he must have seen such a letter when he prepared the scroll, etc., and he has farther a sort of faint recollection of having seen such a letter, though it is so indistinct that deponent himself does not rely much upon it." The Court below decided that the award ought to stand, and the Pursuers appealed.

Cases cited for Appellants, Logan v. Lang, Fac. Coll. 15th Nov. 1798.—For Respondents, Kirkaldy v. Dalgairns, Fac. Coll. Dec. 1808–9, *et ibi cit.* Black and Knox v. Livingston.—Hardie v. Hardie, 18th Dec. 1724, Dict. 1.—Williamson v. Fraser, Dict. 3.—Hetherington v. Carlyle, Fac. Coll. June, 1771.—And the act of Sederunt, or regulation of 1695, was particularly relied upon.

Romilly and Horner for Appellant; Leach and Brougham for Respondent.

(Feb. 24, 1815.) Lord Eldon (C.). The question was whether—if the arbitrator was of opinion that he ought to have the admission of the parties that they had nothing

farther to offer, and that they desired a decision upon the case as it stood, and he expressed that opinion on the face of the award, and that the parties had stated that they had nothing farther to offer, apprehending that he had their admission to that effect when he had not, and the circumstance was material—any acts of Sederunt or proceedings of Court ought to prevent the award from being [107] impeached; they who said that the award could not be impeached, contending that an arbitrator might say that one party should be heard throughout, and the other not at all: for to that extent the argument must in principle be pushed. But his (Lord Eldon's) opinion was, that by the great principle of eternal justice, which was prior to all these acts of Sederunt, regulations and proceedings of Court, it was impossible that an award could stand where the arbitrator heard one party, and refused to hear the other; and on this great principle, and on the fact that the arbitrator had not acted according to the principle upon which he himself thought he ought to have acted, even if he decided rightly he had not decided justly; and therefore the award could not stand. In order that the ground of their Lordships' decision might not be misunderstood, it would be proper to embody the principle in the Judgment which they pronounced.

Judgment of reversal accordingly: the whole of the facts and circumstances being there recited, so as to prevent its being a precedent for any case differing in the facts and circumstances.

Agent for Appellants, SPOTTISWOODE and ROBERTSON.
Agent for Respondents, RICHARDSON.

[108] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERTSON (GENERAL), *Appellant*; ATHOL (DUKE OF), *Respondent*
[Nov. 14, 16, 30, 1814; May 10, 1815].

[3 Scots R. R. 267.]

[Two cases of adjudication, without infeftment in the one case, in the other with infeftment but without any declarator of the expiry of the legal. The decret of adjudication was obtained in 1677, and that title was transferred to the Athol family in 1688. That family having thus got possession of the lands obtained two crown charters, the one in 1691, the other in 1725, including the lands in question, and held the peaceable and uninterrupted possession till 1803, when the title was challenged as depending only on the adjudication, and as being still redeemable because in the one case it was not followed by infeftment, so that prescription would not run; and because in the other, though followed by infeftment, there was no declarator of the expiry of the legal. Held by the Court below that the crown charters and forty years' possession formed a good title by prescription, and excluded all question on the subject. This decision affirmed above, the Lord Chancellor being also apparently of opinion that an adjudication with infeftment and forty years' possession after the period of the expiry of the legal, though without a declarator, formed a good title by prescription independent of the crown charter.]

Two separate actions were, in 1803, raised by General Robertson, of Lude, against the Duke of Athol, the one to set aside the Duke's title to the lands of Clunes and Strathgroy, the other to set aside his title to the lands of Inchmagrenoch. The [109] facts as far as they concern the present purpose are these. The lands in question had, in 1677, been adjudged by Robertson of Fascal from an ancestor of Lude. Fascal obtained a charter of adjudication from the prebend of Dunkeld, superior of the lands of Inchmagrenoch, and was infeft in these lands, but he took no infeftment in the lands of Clunes and Strathgroy. In 1688 Fascal assigned and disposed

the adjudication and lands mentioned in both cases to the then Marquis of Athol who took no infeftment on this conveyance.

But in 1691, John Lord Murray, afterwards first Duke of Athol, son of the Marquis, upon a deed of entail executed by his father, obtained a crown charter (which was produced) of "all and whole the Earldom of Athol, and of all and sundry the lands of the said Earldom with the pertinents." This charter, upon which the grantee was regularly infeft, mentioned the lands of Inchmagrenoch *nominatim* as acquired by adjudication from Fascally, but did not specially mention the lands of Clunes and Strathgroy, these, as was contended, being included in the general description of the Earldom of Athol. In 1725 James, the second Duke of Athol, was served heir in special to his father, and was regularly infeft in the Earldom of Athol, and also in the lands of Inchmagrenoch, which were expressly mentioned in the precept: those of Clunes and Strathgroy not being specially named. In this manner the sasines were regularly continued from 1691 down to 1803, and during that period the family of Athol had been in uninterrupted and peaceable possession both of the [110] lands of Clunes and Strathgroy, and of Inchmagrenoch.

Thus the titles stood at the period when the actions were brought, with this distinction between the two cases as far as respected the adjudication title, that there had been no infeftment at all upon it in the case of Clunes and Strathgroy, but that there was an infeftment upon it in the case of Inchmagrenoch, but no declarator of the expiry of the legal.

The Court of Session decided for the Duke of Athol in both cases, on the ground that the charter of 1691, or that of 1725, with infeftment and forty years' peaceable and uninterrupted possession, formed a good title by the positive prescription to exclude all farther question; one Judge (Hermand) also observing with respect to Inchmagrenoch that an adjudication with infeftment and forty years' peaceable uninterrupted possession after the period of the expiry of the legal, would form a good title by prescription, though there were no declarator.

The grounds of appeal from these decisions were in substance that the adjudication assigned by Fascally was the only title under which the Athol family possessed, as appeared from their own charters, and that it was not competent for the adjudger to attribute his possession to any other title to the prejudice of the party on whose right of property the adjudication depended. *Blackburn v. Gibson*, Du. 1628.—*Dickson v. McCulloch*, Fount. 1686.—*Carnegie v. Magistrates of Montrose*, 4 Dict. 1777. That as in the one case there was no infeftment, and in neither case any declarator [111] of the expiry of the legal, the title was still redeemable, the effect of the statute (1617, c. 12.) being merely to preclude all challenge of this title as an adjudication, but not to convert a redeemable into an irredeemable title, (*Campbell v. Scotland*, and *Jack*, 1794 :) that the charter and infeftment of 1691, the retour and saisine of 1725, etc., afforded no ground of title by prescription, because in that charter and subsequent titles the title to Inchmagrenoch was described as a title by adjudication acquired from Fascally, and Clunes and Strathgroy were not specially mentioned; but supposing they were comprehended under the general description of the Earldom of Athol, the charter, etc. both as to these lands and Inchmagrenoch, could only give the superiority, and it had been decided that the property was not *ipso jure* consolidated with the superiority, and here there had been no resignation *ad remanentiam*. *Bald v. Buchanan*, 1786.

It was answered for the Respondent that Clunes and Strathgroy were included in the Earldom of Athol (which did not appear to be very seriously disputed) granted by charter 1691, and that at any rate Respondent's predecessor, John Lord Murray, had right to them by a previous charter of 1683, with which Respondent connected by progress, and that under a charter containing *in gremio* a right to the whole property, and infeftment, with continued peaceable possession for forty years complete, he had an unchallengeable right by the positive prescription which precluded all further inquiry. (Stat. 1617, cap. 12.) *Millar v. Dickson*, 7th Feb. 1766.—*Middleton v. Dunmore*, 22d Dec. 1774.—That, supposing [112] the inquiry were competent, and it appeared that the possession had commenced on the adjudication, the Respondent was entitled now to ascribe the possession to the charter 1691, and subsequent investitures. *Ersk. b. 2. t. 1. s. 30.*—*Smith v. Gray*, 1752, *Kilk.*—That with respect to Inchmagrenoch, if it had been necessary to resort to that plea, an adjudication

with infeftment and forty years' possession from the period of expiry of the legal, though without declarator, formed a good prescriptive title. *Johnston v. Balfour*, 1745.—*Caitehiou v. Ramsay*, 1791, 4 Diet.—*Ormiston v. Hill*, 1809.—*Gedde v. Baker*, 1745, Kilk.—(*Vid.* *Ersk. b. 2. t. 8. s. 14.*)

Romilly, Leach, and J. P. Grant for Appellant; Horner and Adam, Jun. for Respondent.

(Nov. 30, 1814.) Lord Eldon (C.). The first of these cases is one in which there was an adjudication with no infeftment upon that adjudication, but where there was a crown charter and more than forty years' peaceable and uninterrupted possession; and the question is, whether the crown charter, connected with the adjudication and possession, forms a good title by prescription. The other is a case in which, independent of the crown charter, there was an adjudication followed by infeftment, but no declarator of the expiry of the legal, though there was an adverse possession for forty years subsequent to the period of the expiry of the legal, and the question was whether there too there was a good title by prescription. If there were a necessity for deciding [113] these cases now, I should say that my opinion, my individual opinion, is that both of these cases are rightly decided. But it is not my intention to move your Lordships to go to judgment on either of them now, for this reason, that while with respect to a point upon which one would think there could be no more doubt in the law of Scotland, than there can be that this table stands here—I mean the question whether an adjudication with infeftment and forty years' possession after the period of the expiry of the legal, without any declarator of the expiry of the legal, forms a good title by prescription—it has been on one side roundly asserted at the bar that it is not a good title by prescription, it has been on the other side positively asserted that it is a good title by prescription, and universally known to be so. And yet in point of actual authority brought before us, it is a little difficult to decide which side asserts rightly. Wherever a case is so circumstanced with respect to the law of Scotland, I have always felt it, since I have had the honour of giving your Lordships advice on these subjects, a positive duty imposed upon me to prosecute to the utmost those inquiries which I have it in my power to make, in order to ascertain how the matter really stands. And therefore though my own opinion at this moment is—I desire nevertheless it may be understood that it is an opinion subject to correction—that in the one case the adjudication with the crown charter and possession, and in the other the adjudication with infeftment and forty years' possession after the period of the expiry of the legal, though without declarator, do make a good title by prescription, yet it is not my [114] intention to move your Lordships so to decide till we meet again; and if in the interim I should see any reason to alter my opinion, I shall then most readily state to your Lordships the grounds of the opinion I have this day given, and the reasons which have induced me to change it. It may perhaps be right however to say that I really cannot perceive where, in what statute at least, is to be found prescribed the necessity for that declarator of the expiry of the legal; and speaking by analogy with reference to what passes in our own Courts, if you can consider an adjudication as in the nature of a mortgage, the practice is familiar enough. By our mortgages the money is to be paid within a given time, and if it be not paid within the time the instrument upon the face of it declares that the title of the mortgagor is gone. But we nevertheless hold that the title of the mortgagor is not gone without a judgment of a Court of Equity that it is gone. And accordingly when a party wishes to have that title, which upon the face of it is declared to be absolute, in substance and in fact absolute, he applies to a Court of Equity for (I may use the very words) a declarator of the expiry of the legal, that is, to have it declared that if the other party does not pay the money in six months he is totally foreclosed, and that which is described in the instrument as a legal title shall be considered as an equitable title also. But where length of time is to form the title, although there be no such decree of foreclosure, no such declarator, if I may say so, of the expiry of the legal, yet if there is an adverse possession for twenty years, that shuts out all question, and dispenses [115] with any such decree or declarator; and my present impression is that it may be so in Scotland, I say my present impression, guarding myself to the extent I have done.

(May 10, 1815.) Lord Eldon (C.). There are two cases, in which General Robertson of Lude is Appellant, and the Duke of Athol is Respondent, and which were heard

previous to the Christmas recess, now standing for your Lordships' judgment : both of them raising questions of very great importance with respect to the law of Scotland : the one relative to the title to an estate called Inchmagrenoch, or some such name, the other relative to the title to two estates called Clunes and Strathgroy, where, as your Lordships will recollect, the argument turned principally on the effect of forty years' possession under titles originating in adjudication, in the one case followed by infeftment, in the other, as was contended, not followed by infeftment. And the question was, whether the Duke of Athol had in both cases acquired a good title to the lands in question. I hinted to your Lordships on a former occasion, the inclination of my opinion that the Judgment of the Court below was correct. But I thought it my duty before calling upon your Lordships to come to a final decision upon these cases, to make such farther inquiry as appeared to me to be useful, considering the importance of the points which occurred in these causes : and I accordingly solicited assistance in a way which I believe has not been unusual with those who have held the situation which I have at present the honour to hold : and I have also perused very important papers sub-[116]-mitted to me in another way. And upon the best consideration which I have been enabled to bestow upon these causes (and I can assure your Lordships I have bestowed a great deal upon them) I cannot offer your Lordships my advice to reverse either of these Judgments. I see by the papers that costs have been claimed in both cases ; but where points of so much importance arose for consideration I cannot say that it was at all improper to bring these cases before your Lordships for your opinion ; and therefore I should propose to your Lordships to affirm the judgments, but without costs.

Judgments affirmed.

Agent for Appellant, CAMPBELL.
Agent for Respondent, FRASER.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

PHAYRE,—*Appellant* ; REPRESENTATIVES OF PEREE,—*Respondents*
[Feb. 17 ; June 28, 1815].

[Mews' Dig. xiv. 779, 921. See *In re Pumfrey*, 1882, 22 Ch. D. 255, 262.]

[A trust fund of £15,000, created under a marriage settlement by which certain lands were limited to the husband for life, remainder to the first and other sons in tail, with a power to the husband of leasing for forty-one years, or three lives at the best rent, was directed by the deed to be laid out with all convenient speed, in the purchase of lands in fee simple, to be conveyed and limited to the same uses as the other lands mentioned in the settlement, and in the mean time the trustees were empowered with the [117] consent of Phayre to lend out the money on any public or private security. The husband purchased a leasehold interest for £8911, to which he took the assignment for himself alone, and obtained from the trustees, out of the trust fund, money to complete the purchase, and for other purposes, to the amount in all of £11,696, as a security for which they took a mortgage of the leasehold interest and a collateral security for £1310, amounting with the purchase money to £10,221, being upwards of £1400 less than the sum advanced out of the trust fund. The husband granted a lease at a great under-value for his own term, of part of the purchased lands, to the attorney who managed the purchase for him, which purchase turned out a very beneficial one. Held by the House of Lords, reversing a decree of the Irish Exchequer, that the first son of the marriage was entitled to follow that part of the trust fund which had been misapplied, and to have the benefit of the purchase, and to have the lands sold discharged of the lease to the attorney, whose equity against him (the son) as personal

representative of his father, was barred by notice of the settlement and breach of trust.]

In contemplation of a marriage which afterwards took place between Robert Phayre, the elder, the Appellant's father, and the Honourable Richarda Annesley, a deed of settlement dated July 13, 1761, was executed, by which the said Robert Phayre the elder conveyed certain lands and tenements therein mentioned to the Hon. Arthur Saunders Gore, then called Lord Sudley, afterwards Earl of Arran, one of the Defendants, and Thomas Patrickson, trustees therein named, to the use of the said Robert Phayre the elder, for his life, with remainder to the first and every other son of the said marriage successively, in tail male, with remainders over; in which deed of settlement was contained a leasing power, whereby Phayre the elder was empowered from time to time during his [118] life to demise the said settled lands, and also all such other lands as should thereafter be purchased with part of a trust fund of £19,000 created by the settlement, and thereby vested in the said trustees, or any part or parts thereof, for any terms or number of years not exceeding forty-one years, or three lives in possession, and not in reversion, remainder, or expectancy; and so as upon every such lease there should be reserved and made payable during the continuance thereof, the best and most improved rent that could be reasonably had for the same, without taking any sum of money or other thing by way of fine or income, for or in respect of such lease or leases. By this settlement, a sum of £15,000, part of the trust fund of £19,000, was directed to be laid out, with all convenient speed after the execution of the settlement, by the trustees, with the consent of Phayre the elder, in the purchase of lands, tenements, or hereditaments, in fee-simple in Ireland, and that such lands, when so purchased, should be conveyed and assured in strict settlement, and to the like uses and purposes, and with the same limitations as were contained in the settlement, with respect to the lands and other fee-simple estates therein limited in strict settlement; and a power was thereby given to the said trustees, until such purchase should be made, to call in the trust funds, and to place the same out at interest on any public or private security, with the approbation of Phayre the elder, during his life, and after his death with the approbation of the person or persons to whom the right of the said money should belong, under the limitations therein mentioned.

[119] Robert Phayre the elder, Appellant's father, on the 6th of February, 1764, entered into an agreement, in writing, with a person of the name of Sarah Cooley, for the purchase of the interest in the lands of Davidstown and Ballynockan, and other lands in the said county of Wexford, which she held for the residue of a term of 2000 years, commencing on or about the 1st day of April, 1667, and which agreement having been reduced into writing by articles bearing date on 6th Feb. 1764, Sarah Cooley afterwards, in pursuance of these articles of agreement, in consideration of the sum of £8911 12s. 9d. to her paid by Phayre the elder, and which sum of £8911 12s. 9d. was part of the sum of £15,000 vested in the trustees, "by deed bearing date 23d October, 1765, granted, assigned, and conveyed unto the said Robert Phayre the elder, his executors, administrators, and assigns, the said lands of Davidstown and Ballynockan, for the then residue of the said term of 2000 years, for his "and their own use and benefit." The next day after the execution of this assignment by Sarah Cooley, a deed purporting to be a deed of mortgage was executed by and between Phayre the elder, and the trustees, reciting the marriage settlement of 1761, and the trust fund and the use thereof, as mentioned in the settlement; and that £8200 of the trust fund had been theretofore paid in to Phayre the elder, and that he had laid out the greatest part thereof in the purchase of a leasehold interest for a long term of years, of lands in Wexford, from Sarah Cooley, and that the said Robert Phayre had occasion for the farther sum of £3856, to complete [120] the purchase; and that he had applied to the trustees to call in the sum of £3998 6s. 3d., part of the said trust fund, and to lend the same to him, or so much thereof as would pay the remainder of the purchase money, and enable him to procure a legal assignment of the said leasehold interest, and that they had accordingly done so; and that the said Robert Phayre had then in his hands the sum of £11,696 of the said trust fund; and also reciting the deed of assignment from Cooley to Phayre; by which mortgage deed Robert Phayre the elder assigned and conveyed to the trustees all

his estate and interest in the said term of years, in consideration of the said sum of £11,696, and also assigned to them securities for £1310 4s. of his own property, as a collateral security, all subject to redemption on payment of the £11,696 with interest.

The articles of agreement, the assignment of the purchased lands to Phayre, and the mortgage to the trustees, were all prepared by Phayre's attorney, Thomas Peree, who therefore had notice of the marriage settlement, and the nature and terms of it, as it was recited in the mortgage deed; and the money thereby secured was expressly made subject to the uses of the trust fund mentioned in the settlement.

It was in evidence in the cause that in May, 1764, soon after the agreement with Sarah Cooley, and before the purchase was completed, Peree had applied to Phayre for a lease of part of the lands, and on the 20th April, 1767, Phayre executed to Peree a lease of that part of the lands known under the denominations of Davidstown and Ballynockan, "containing 227 acres and upwards, together with [121] all timber and "other trees then growing or thereafter to grow on any part thereof, to commence "on the first day of May then next, for a term of 1800 years, at the yearly rent of "£36 8s. for the first six years, and at the yearly rent of £80 for the remainder of the "term." It was in evidence that the rent was far below the value, and certain letters from Peree to Phayre were produced and proved, in one of which, dated 14th June, 1766, he objected to the terms required by Phayre, and then stated his reasons for thinking that he ought to have the lease on lower terms, in the following words:—"I must certainly lay out some money to erect a decent dwelling and offices, with "other improvements; and therefore conceive, even in that light, I am not to be "put upon a footing with the common run of farmers; and as I have the vanity to "think in the article of paying rent I am entitled to a preference to them and abatement, I imagine a difference of at least two shillings an acre ought to be made on "those considerations, and I think I may reasonably expect it, and the rather as you "well know, had I acted upon the principles of many people in the world, I might "have been at liberty of purchasing any one denomination of the estate on the same "terms you did at the time you agreed for that; and add to this, that if this takes "place, whatever demand I have to you, which you may believe from matters of this "nature is no trifle, shall sink from thenceforth." It also appeared that Peree had procured opinions of counsel upon cases manufactured for the purpose, in order to induce the trustees to consent to these transactions.

[122] Phayre the elder died in 1786, leaving the Appellant his eldest son of the above-mentioned marriage. He had made a will; but the executors renounced, and administration with the will annexed was granted to the Appellant, who was the residuary legatee. It appeared from the counterpart of the lease which came into the Appellant's possession on the death of his father, that the trustees who were considered as having the legal estate in them, in virtue of the mortgage of 24th October, 1765, had not executed it; and the Appellant brought an ejectment, on the demises of himself and the trustees, to recover possession of the lands let to Peree. But before trial it was found that the trustees had, by indorsement on the back of Peree's part of the lease, confirmed and ratified it as far as they had power to do so, and the ejectment was abandoned. The Appellant then on the 9th June, 1792, filed his bill in the Exchequer to have the lease to Peree decreed fraudulent and void: 1st, as being a fraud on the settlement and leasing power contained in it; 2d, as having been obtained from Phayre the father by fraud and undue influence, and at a gross undervalue, at a time when Phayre and Peree stood in the relation of attorney and client. Thomas Peree died before answer, and the suit being revived against his representatives, and issue being joined, and witnesses examined, and the bill being amended by making the Earl of Arran the surviving trustee a party, the cause came on to be heard on the 16th Nov. 1804. The Court of Exchequer were divided in opinion, the Chief Baron, Lord Avenmore, and one of the puisne Barons, being of opinion that the [123] Appellant was entitled to the relief prayed by the bill, and the other two Barons being of opinion that the bill ought to be dismissed. It was agreed however to dismiss the bill without costs, to give an opportunity to appeal, and to avoid changing the possession during its pendency. The Appellant then lodged his appeal.

It was contended for the Appellant, that there was fraud and breach of trust, 1st, in the purchase of the leasehold interest of Sarah Cooley, for the benefit of Phayre alone; whereas, under the settlement, the money ought to have been applied in

the purchase of fee simple estates for the uses and according to the terms of the settlement : 2d. in taking as a security for £11,696 advanced out of the trust fund, lands purchased at £8911 along with collateral securities for £1310, being together about £1400 short of the sum advanced : 3d. in confirming the lease made to Peree at a gross undervalue : that Peree's lease was obtained by undue influence and imposition on Phayre and the trustees, besides being a fraud on the settlement ; that the act of the trustees could not prejudice the *cestui que* trust, and that the Appellant was entitled to the benefit of the purchase from Cooley, the consideration for which was paid out of the trust fund, and that he was entitled to have the lands sold, discharged of Peree's lease, and the proceeds invested in fee-simple estates for the uses of the settlement, and that Peree's equity as against the Appellant was barred by the notice.

For the Respondents it was contended, that there were many cases where the *cestui que* trust could not follow the trust money : that the trustees had [124] power to lend out the money on securities, and they had accordingly taken these lands as a security, without clothing them with the trust ; and that the Appellant could therefore only demand the amount of the loan or money secured, and not the lands themselves, and had therefore no right to set aside the lease to Peree, if the security was sufficient.

Romilly and Horne for Appellant ; Leach and Horner for Respondents.

The cause stood over for a few weeks, that some person might appear for the Earl of Arran, or his representatives. Counsel appeared at the bar accordingly, and stated that he was instructed merely to appear without saying any thing.

(June 28, 1815.) Lord Redesdale. This suit, which originated in the Court of Exchequer in Ireland, was founded on a settlement dated 13th July, 1761, made on occasion of the marriage of Robert Phayre the elder, the Appellant's father, with Richarda Annesley, by which the father conveyed certain lands and tenements therein mentioned, to the Hon. Arthur Saunders Gore, then called Lord Sudley, afterwards Earl of Arran, and another person who died soon after, as trustees to the use of Phayre the father, for life, remainder to the first and every other son of the marriage successively in tail male, with remainders over. And the settlement contained a leasing power, by which R. Phayre, the father, was empowered from time to time during his life to demise the settled lands, and also other lands to be purchased with a trust fund of £19,000 [125] to be created by the settlement, and vested in the trustees, or any part or parts thereof, for any term or number of years not exceeding forty-one years, or three lives in possession, and not in reversion, remainder, or expectancy, reserving the best and most improved rent that could be reasonably had for the same without taking any fine. By this settlement a sum of £15,000, part of the trust fund of £19,000, was directed to be laid out by the trustees, Lord Sudley and Thomas Patrickson, with the consent of Phayre the father, in the purchase of lands in fee-simple, to be conveyed and assured to the same uses and purposes as the other lands in the settlement. And power was given to the trustees to call in the trust funds, and to place the same out at interest with the approbation of Phayre the elder, during his life and after his death, with the approbation of the person or persons to whom the right of the money should belong, under the limitations in the settlement. This trust fund was partly composed of judgment debt due to Phayre, and partly of a mortgage debt, all which were specified in the settlement. After the marriage, Phayre the elder, entered into an agreement with one Sarah Cooley for the purchase of her interest in certain lands which she held for the residue of a term of 2000 years, commencing on the 1st of April, 1667. This agreement was reduced into writing by articles dated 6th Feb. 1764, by which, in consideration of a sum of £8911 paid her by Phayre, which sum was part of the sum of £15,000 vested in the trustees for the purposes of the settlement, Sarah Cooley assigned her lease of the lands to Phayre, his executors, administrators, and assigns, for the [126] remainder of the term. The purchase was in point of form therefore made by Phayre for his own benefit, but the purchase money was clearly part of the trust fund. Then a deed in the form of a mortgage was made and executed by and between Phayre the father, and the trustees, reciting the marriage settlement, the trust fund, and the purposes of it, and that the sum of £8200 secured by judgments as mentioned in the settlement, had been paid to Phayre, and that he had laid out the greater part of it in the purchase of the leasehold interest of Sarah Cooley, in the lands mentioned, and that he had

occasion for a farther sum of £3856 to complete the purchase, and that he had applied to the trustees to call in a sum of £3998 due upon the mortgage mentioned in the settlement, being part of the trust fund, and to lend the same or as much thereof as would enable him to complete the purchase, and that they had accordingly done so : and that Phayre had then in his hands a sum of £11,696 of the trust fund, and Phayre by the said deed of mortgage of October 24, 1765, assigned and conveyed all his estate and interest in the said purchased lands to the trustees in consideration of the said sum of £11,696, and also assigned to them securities for £1310 of his own property as a collateral security subject to redemption on payment of the said sum of £11,696 with interest.

Your Lordships observe therefore that this was a mortgage of a leasehold interest purchased for a sum of £8911 part of the trust property, in addition to a collateral security of £1310 making together a sum of £10,221 in order to secure a sum of £11,696 advanced to Phayre out of the trust [127] fund : so that this was a very improper transaction in the trustees, independent of the other circumstances in the case. In fact however this turned out a beneficial purchase, and it was contended that the benefit belonged to Phayre alone, though the money was advanced out of the trust fund, and applied in the purchase of this leasehold interest instead of being applied in the purchase of lands in fee-simple, to be limited according to the terms of the settlement. The articles of agreement, the assignment, and this mortgage, were all prepared by Peree, who was the attorney and confidential agent of Phayre in such transactions, so that Peree was perfectly acquainted with the settlement, and must have known that this was a gross misapplication of the trust fund. Peree, having thus assisted Phayre, seems to have thought that a share of the benefit ought to arise to himself, and proposed that Phayre should execute to him a lease of a portion of the said purchased lands amounting to 227 acres and upwards, together with all timber and other trees then growing or thereafter to grow on the same or any part thereof, to commence on the 1st of May 1767, for a term of 1800 years, at the yearly rent of £36 8s. for the first six years, and the yearly rent of £80 for the remainder of the term. My Lords, it is perfectly clear that this was less than the value of the lands, and it is also clear that the lease was obtained from Phayre under circumstances which created an impression that Phayre was under a sort of obligation to Peree for managing this business with the trustees. Opinions of counsel, upon cases manufactured for the purpose, had been produced ; but when these came to be looked at [128] it appeared that Sir A. Wolfe, then a celebrated lawyer especially in matters of conveyancing, clearly considered the transactions as improper, though he expressed himself in delicate terms with respect to Phayre. The pretence, as stated expressly in Peree's letter, for having the lease at a lower rent than the common run of farmers, was, that he intended to build a mansion house and offices, and to make other improvements on the lands. Now the building a mansion house and offices on lands let for 1800 years, with a view to the benefit of the person who would be entitled at the end of that period, could not be any real inducement : so that advantage appears to have been taken of the situation in which Phayre stood with respect to the property.

The suit has been instituted with a view different from that which your Lordships must take of it ; for your Lordships must look at the case not with reference to the objects of the parties, but with a view to the effect of the decision as it may concern all others in similar circumstances. It is quite clear that if the trustees had purchased this interest, or taken this lease, for themselves, all the benefit would have belonged to the trust fund ; for it is perfectly settled that trustees can never deal with the trust fund for their own benefit ; nor could Phayre the father, who was only tenant for life, take the purchase for his own benefit solely. This was a very beneficial leasehold interest, but the benefit must belong to the trust fund. If a purchase of stock had been made in the name of Phayre with the trust money, and the funds had risen, according to innumerable cases in the Courts of Equity, the [129] profit must belong to the trust fund. I think then there is no doubt that the situation of Peree with respect to this lease is not such as to entitle him to claim the benefit of it as against the Appellant, tenant in tail under the settlement.

But the Appellant stands in two different situations, being tenant in tail under the settlement, and also personal representative of his father. Under the first character he is clearly discharged, because Peree certainly had complete notice of the

nature of the settlement, and of the misapplication of the trust fund, as he prepared the cases for counsel, and was employed in all these transactions. He therefore could not maintain his claim against the tenant in tail under the settlement; and no doubt the property must be considered as having vested in the trustees, not in the nature of a mortgage, but as part of the trust property which was subject to be sold and laid out in the purchase of lands in fee-simple, for the uses and according to the terms of the settlement. It appears that the trustees had been prevailed upon to sign an approval of the lease. But Peree could not avail himself of that circumstance, as he must have known that they were acting contrary to their trust, and that they had no right to stand as mortgagees of this property, in which character only they confirmed the lease. The Appellant then had a right to pursue this property, as it had been vested in the trustees for the uses and purposes of the settlement, and as the act of the trustees in confirming the lease was a breach of their trust, of which Peree had full notice. The consequence is that he (the Appellant) is entitled to have the benefit of the [130] lease from the time of his father's death, to have the property sold, and the produce applied to the purchase of fee-simple lands for the uses of the settlement.

The question then is, whether Peree has a claim against the son, as the personal representative of the father. If this transaction had taken place in the common course of dealing between lessor and lessee, and Peree had no notice of the real state of the case, there would be no ground for contending that the Appellant was not answerable. But that is not the nature of this transaction. Peree knew all, and the lease was his reward for managing the business; so that it was obtained by taking advantage of the situation in which Phayre the father found himself with respect to this property, and was therefore a fraud upon him. It was a fraud likewise if considered as resting on the representation in Peree's letter, which never could be a fair ground for such a transaction. To represent that the lease ought to be granted at a lower rent than might otherwise be justly demanded for it, because the lessee of a term of 1800 years intended to build a dwelling house and offices on the property which was the subject of the lease, was such a manifest imposition, or such a clear proof of improper influence, that the transaction never could stand on that ground. There was no foundation therefore for any claim by Peree, in respect of this transaction, against the assets of the late Mr. Phayre.

The Court of Exchequer having then dismissed the bill without acting with regard to the trust property, as I apprehend they were bound to act, it is necessary to reverse the decree in as far as it dis-[131]-misses the bill, and to declare that the purchase of the leasehold interest in the lands mentioned in the articles of agreement of 6th Feb. 1764, between Phayre the elder, and Sarah Cooley, and the assignment of 23d Oct. 1765, of the said leasehold interest to Phayre for his own benefit, and the mortgage and assignment of 24th Oct. 1765, ought to be deemed a fraud in Phayre the father, and in Peree, and an imposition on the trustees; for it is manifest that a great deal of art was employed to impose on the trustees, by procuring and showing opinions of counsel on manufactured cases: and also to declare that neither Phayre the elder, nor Peree, ought to have the benefit of the said purchase or lease, and that the Appellant as tenant in tail under the settlement is entitled to the benefit of the lease to Peree from the time of his father's death, and to have the lands sold discharged of the said lease, and to have the produce applied to the uses and purposes of the settlement; and to declare that the Appellant is entitled to stand as a creditor on the assets of his father, for the difference between the sum of £11,696 which had got into his hands out of the trust fund, and the sum of £8911 which had been paid to Sarah Cooley, as the consideration for her leasehold interest in these lands, and that the lands ought to be sold discharged of the mortgage to the trustees, and the money applied to the purchase of lands in fee-simple for the uses and according to the terms of the settlement: and to declare that the lease to Peree, and the confirmation of it by the trustees, was a fraud on the marriage settlement, on the trustees, and on Phayre the father; and that the cause should be remitted [132] to the Court of Exchequer, to have an account taken of the rents and profits of the lands and premises comprised in the said lease, come into the hands of Peree and his representatives since the death of the Appellant's father, and that, after all just allowances made, the same should be paid and applied according to the settlement, and that all proper directions should be given by the Court for that purpose: and that as the bill had been dismissed,

no costs ought to be given on either side up to this time, but that it should be referred to the Court of Exchequer, to make such order as to future costs as it might judge proper. This is the way in which it appears to me fitting that the cause should be disposed of.

Lord Eldon (C.). I feel obliged to my noble friend for having gone so fully into the merits of the cause, as I cannot at present state my own view of it at so much length as I should wish to do if I had not the benefit of his assistance.* But I have had an opportunity of considering every point of the cause, and of discussing them with the noble Lord, and I rise to declare my entire concurrence in all that he has stated.

Decree accordingly reversed.

Agents for Appellant. DAWSON and WRATISLAW.

Agent for Respondents, ———.

[133] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

BERNAL, *Appellant*; MARQUIS OF DONEGAL, and Others, *-Respondents*

[March 28, July 29, 1814; April 14, July 7, 1815].

[Mews' Dig. vii. 270, 271, 285; xi. 579. See also 1 Bli. N. S. 594.]

- [A. an expectant heir being indebted to B. his friend and father-in-law, and B. being indebted to C., A. gives C. post-obit bonds in discharge of his debt to B., and C. gives B. credit in account for half the amount of the bonds. After the death of A.'s father, when the bonds had become payable, A. and B. by deeds deliberately executed acknowledge the fairness of the transaction. A. then files a bill against C. and B. to set the bonds aside on the ground of imposition and want of consideration; and afterwards dismisses his bill as against B. and examines him as a witness; so that no relief could be had by any party against B. in that cause. Held by the Lords, reversing a decree of the Irish Chancery, [1 Beat. 353,] that under these circumstances of acknowledgment, dismissal, and examination of B. as a witness, A. had debarred himself from impeaching the consideration for the bonds, and that he could not impeach the securities for fraud or imposition: but that, from the confidential situation of B. with regard to A., and the knowledge which C. had of all their transactions, the bonds ought not to be available as post-obit bonds, but only for the sums actually allowed by C. as the consideration for them, with interest from their dates.]

The proceedings in this cause commenced by a bill filed by the Respondent, the Marquis of Donegal, against the Appellant Bernal, and against Edward May, to set aside certain securities granted by the Marquis to Bernal, on the ground of want of consideration. The amount of the case stated in [134] the bill was that, in 1795, the Marquis, at that time Lord Belfast, his father, who afterwards died in 1799, being then alive but unwell, was much distressed for money, and that he applied to Edward May for certain bonds in May's possession, executed by one Wharton, for the purpose of raising money upon them. He was then informed that the bonds belonged to Bernal, and it was agreed that the Marquis should have them upon giving to Bernal four post-obit bonds, conditioned for payment, on his father's death, of the several sums of £24,000, £12,000, £500, and £10,000. The bills stated, that the only consideration for these post-obit bonds were the bonds of Wharton, which turned out to be of no value, as no money could be raised upon them. The bill also stated, that in 1795

* He had just recovered from a severe indisposition.

a suit in the English Chancery had been instituted by Wharton against May and Bernal, and that an account of all dealings and transactions between the parties had been decreed, but did not mention any thing as to the nature or result of that suit. It was further stated, after the death of the Marquis's father, Bernal had proceeded on the post-obit bonds, and also on a bond for £40,000 given without any consideration for it, and levied several sums, and the bill prayed that they might be delivered up to be cancelled, the Marquis offering to restore Wharton's bonds, and that accounts might be accordingly taken, and an injunction granted, etc.

Bernal's statement in his answer placed the matter in a new light. He stated that he had been first employed in 1791 as agent in London for May, who then resided at York, to pay and re-[135]-ceive monies; that in 1795 May was indebted to him for cash advanced, and for acceptances to the amount of £28,000, and that having then refused to make any further advances, he was informed for the first time that the money, together with other sums, had been applied by May to the use of the Marquis; that it being represented to him that the Marquis was thus indebted to May, he consented, at his and May's request, to accept of the first post-obit bond for £24,000 from the Marquis, who wished to discharge part of his debt to May in this manner, and he, Bernal, allowed May credit in account for £12,000 for this bond; and that the Marquis, before executing the bond, being interrogated by Mr. G. Ellison, Bernal's solicitor, declared that he had received the full consideration for it; that Bernal then continued his advances to May, who stated that he applied the money to the Marquis's use, and that the other post-obit bonds were given for a similar consideration, amounting in all to £23,250; for which sum May was allowed credit in his account. It was further stated in the answer, that in February, 1796, the Marquis, who had previously married May's daughter, conveyed his estates expectant on his father's death to May, in trust for the payment of his debts, and that in this conveyance it was recited, that May had received the full consideration of these post-obit bonds from Bernal, and the Marquis from May, and that the Marquis and May had in December, 1795, executed another bond in the penal sum of £40,000 conditioned for payment of £20,000 for the security of Bernal, on account of still further ad-[136]-vances by him to May, for the use of the Marquis. The answer further stated that in 1799 the Marquis, upon the death of his father, conveyed his estates to trustees to settle his affairs, with powers to issue assignable debentures to his creditors; and that upon Bernal's agreeing to withdraw certain executions issued upon the above securities, the Marquis, at a meeting requested by Lyon his solicitor and one of the trustees in the presence of the solicitor, in March 1800, gave Bernal an undertaking in writing, to procure for him debentures on his Irish estates for £46,500, the amount of the post-obit bonds; that the debentures were not given, and that another execution having issued, the Marquis, by deed of covenant dated 18th October, 1800, again ratified the debt, and engaged to procure the debentures, upon which that execution likewise was withdrawn, but that still the debentures were not given.

The bill was then amended, and further stated that Bernal was proceeding at law on a £60,000 bond procured from the Marquis without consideration and by fraud, and prayed to have it cancelled, and for an injunction. In the answer to this, various transactions between the parties were set forth, the effect of which was to show that the bond was given further to secure Bernal, both as to the former and future advances for May and the Marquis; and it was further stated that this bond, as well as the deed of October, 1800, had been deliberately considered by the Marquis and his legal advisers before the execution. The answer also stated a deed August 27, 1795, between the [137] Marquis, May, and Bernal, in which the Marquis admitted himself debtor to May in more than £23,000, and it was agreed that the debt should be discharged by the post-obit bonds to Bernal. To this suit May put in no answer.

The Appellant then filed a cross bill, to which the Marquis, May, the trustees under the deed of 1799, and Mr. Const, who had some concern in it, were made parties; praying that the trusts of the deed of February, 1796, conveying the estates to May for payment of the Marquis's debts might be carried into effect, and Bernal declared an incumbrancer, etc. To this the Marquis and May put in answers, stating in substance as in the Marquis's bill, and the other parties did not appear.

The Court was afterwards moved on the part of the Marquis to continue the in-

junction in the first cause till the hearing ; and at the same time on the part of Bernal in the cross cause, that the Marquis might give security to abide the decree in the first cause, etc., or that the injunction might be dissolved. Upon the hearing of these motions, the Court made an order of July 18, 1805, entitled in both causes, by which the injunction was continued, " the said Edward May, the Marquis of Donegal, " and J. Bernal, respectively consenting in open Court that the accounts therein " directed should be forthwith taken." The order then went on to direct, " that the " Marquis should give security in £20,000 to abide the result of the accounts ; and that " an account should be taken of all dealings and transactions between May and Bernal, " between May and the Marquis, and be-[138]-tween the Marquis and Bernal," with particular directions as to each, so as to unravel the whole matter. The Marquis having neglected to give the proper security, Bernal obtained orders of the 2d and 25th January, 1806, dissolving the injunction as to £23,000, etc. and proceeded at law to levy, etc.

Under the order by consent, the Master made a report upon the facts as appearing on the evidence for Bernal, the other parties not having examined any witnesses, and stated that after the draft of his report had been made up, and notice given of a day for signing it, the Marquis on that day applied for leave to examine witnesses and adduce further evidence, but that he, the Master, had refused, on the authority of *Thomson v. Lamb*, 7 Ves. 587.

The Marquis then moved, as Bernal had proceeded at law to stay proceedings on this report on affidavits, that he had not been able to procure his evidence in time for it ; and Bernal at the same time moved, among other things, that the causes might be set down to be heard on the Master's report, under the consent order of July 18, 1805 : whereupon the Court, by order in both causes dated March 1, 1806, dissolved the injunctions obtained in the original cause, and discharged the order by consent of July 18, 1805, and the Master's report under it, etc.

The Marquis then had his bill dismissed as far as respected May, who had never answered it, and then examined May and other witnesses in chief for the hearing, and cross-examined Bernal's witnesses who had been previously examined.

[139] By an order or decree made in the cross cause dated March 14, 1805, the bill had been ordered to be taken as confessed as against the Defendants who refused to appear ; and it was ordered that the Marquis should carry into effect the trust deed of February, 1796 ; and that an account should be taken, and the sums which should be found due to the Appellant should be charged on the estates of the Marquis, etc. As the order of July 18, 1805, included every thing, Bernal did not proceed upon this order in the cross cause. This cross cause, however, was brought on for hearing (it did not appear how) along with the first cause, on June 9, 1807.

On that day the Court decreed in the first cause, " that the post-obit bonds and " bond for £40,000 were obtained by fraud and imposition on the Marquis, then an " expectant heir ; that the bond for £60,000 was also obtained by fraud and imposition " on the Marquis ; and that these several bonds and judgments should stand only as " a security for what should appear to be really due from the Marquis to the Appellant ; " that the other deeds were fraudulent and void ; and that the Master should take an " account of all dealings and transactions between the Marquis and Bernal, and of " the money received by the Marquis from Bernal himself, or advanced by Bernal " to May, or any other person, for the Marquis's use, and which actually came to " the Marquis's hands, etc."

On the same day, in the cross cause, the bill was ordered to be dismissed with costs, as to [140] all the parties except May and the Marquis, and as to them without costs.

From the order of March 1, 1806, setting aside the consent order, and from the decree and order of June 9, 1807, Bernal appealed.

Sir S. Romilly (for Appellant) argued that the Court had no authority to set aside the consent order of the 18th July, 1805 : 1st, because it ought to be considered as a decretal order ; and a decree could not be set aside on motion or petition, but on re-hearing or by bill of review : 2d, because a consent order could not be set aside except by consent. *Northcote v. Northcote*, H. 1702, Vin. Abr. 398 (Colles, P. C. 287.—2 Eq. Ab. 279).—*Harrison v. Rumsay*, 2 Ves. 488, 9.—*Wall v. Bulkely*, 1 Bro. C. C. 484, and other later cases might be mentioned. The Marquis was not entitled

to have a reference back again to the Master. Could any instance be produced of a party being allowed to keep back his own witnesses, waiting to see the evidence on the other side, and then producing his own? No error was pointed out in the report, nor was the application for leave to except, but to be permitted to produce new evidence. The decree of 1807 was besides objectionable, in as much (among other reasons) as it directed the accounts to be taken on a most unjust principle—Bernal being to be allowed only such sums as he could prove to have actually come into the hands of the Marquis.

Mr. Hart on the same side stated, as a farther authority in support of the inflexibility of a consent order, the case of *Noel v. Godfrey*, at the Rolls, 27th April, 1812. But even on the merits, which [141] he commented on at some length, admitting the additional evidence, the decretal order of July, 1805, ought to stand, and not the decree of 1807.

Mr. Leach (for the Respondents). The merits appeared to be abandoned, and the case was put on the want of authority in the Court to alter the order of 18th July, 1805; but an interlocutory order might be altered by an interlocutory order; and as to the point of consent, it was not an order by consent, or if it had been so, the Appellant must be held by his subsequent acts to have consented to the discharge. The report did not accomplish the object of the Court, the Master not having inquired at all; and he, Leach, was informed that in Ireland exceptions did not lie to a report on an interlocutory order, and that the way was to move to discharge it.

Lord Eldon (C.). They will contend that the Court had no authority to introduce the words "and which came to the hands of the Marquis," unless under special circumstances, and that here there was no evidence to warrant so unusual a direction. In many cases it may be right, but it must be founded on evidence. The Appellant says there is no such evidence, and in the case of a decree so special the Respondents must show the grounds of it. Now where is that evidence?

Mr. Wetherell followed on the same side, and argued the cause with reference both to the consent order and the merits.

(July 29, 1814.) Lord Eldon (C.). I certainly have peculiar satisfaction, and I am sure it must afford satisfaction [142] to your Lordships, and be considered as a great protection to the House, that my noble and learned friend (Redesdale) who has presided in the Irish Court of Chancery happens to be present when we are called upon to give judgment in these Irish causes: and looking at the manner and form of proceeding here, and all the circumstances of the case, and the judgment given, I hope I do not go too far when I say, that it is a case which has puzzled me more than almost any other I ever met with in the whole course of my professional life. The original cause arose upon a bill filed by the Marquis of Donegal in the Court of Chancery in Ireland, in 1803, which, however, by no means stated many of the most important circumstances of the case. It represented that the Appellant, Bernal, had by some undue means obtained from Wharton certain bonds and securities (the history of which has been amply detailed in a late proceeding in the Court of Chancery here), (*Wharton v. May*, 5 Ves. 27.) amounting to about £26,000 in the whole; and that in 1794 Wharton applied to the Respondent, Edward May (afterwards the Marquis's father-in-law, your Lordships will please to recollect), to assist him in getting up the same, and making some composition with the Appellant Bernal; that it was agreed that Wharton should execute other bonds to May, which were to be assigned to the Appellant for whatever sum May should so compound with him on account of Wharton; that May accordingly received these other bonds, and that the originals were cancelled or given up; that the Marquis's father being then alive, but in a very weak and delicate state of health, and not expected to live long, and the Marquis being his eldest son [143] and heir apparent, and entitled to considerable estates, etc., and being then about twenty-three years of age, and distressed for money, and it being suggested to him that Wharton's securities were good, and that money could be raised upon them, he applied to May to purchase for him these bonds of Wharton. (His Lordship here stated at length the case made by the bill, which, as it has been before stated, it is unnecessary to repeat, and then continued.) So that the original bill was of this nature: that Wharton's bonds which were worth nothing were, through the intervention of May, given by Bernal to the Marquis, and that in consideration of these bonds so worth nothing the Marquis had given these four post-obit

bonds for the sums therein mentioned, and a bond and judgment in the penal sum of £40,000. And now by this bill he says, "Take back Wharton's paper which is "worth nothing, deliver me up the post-obit bonds, relieve me from the obligation "of the judgment for £40,000, and so make an end of the business." To this bill May was made a party, and properly so made if it turned out that he had any thing to do with the considerations which have been passing between these parties, and with the transactions in which they were engaged. Your Lordships will see presently how that matter stands.

The Appellant put in his answer to this original bill, and he admitted that he had obtained these four post-obit bonds of the Marquis; but he said it was by no means true that the consideration for them was these bonds of Wharton; for that May was very largely indebted to him, Bernal, and that [144] it was represented to him, on the other hand, that the Marquis of Donegal was very largely indebted to May; that therefore the real transaction was this, that inasmuch as Lord Donegal was thus alleged to be largely indebted to May, and that as May was very largely indebted to Bernal, and as the Marquis of Donegal could only pay by these post-obit papers, the real nature of the case was this—that the Appellant, Bernal, discharged May to the amount; and that the Marquis, in consideration of these bonds, was to have credit as against May to the same amount as that in which May was released by Bernal; that the whole was a mere transfer of the debt, and that all this story about Wharton's bonds was mere moonshine. Bernal says, "If I am to receive neither "what May owed me nor what is secured by these post-obit bonds, the Marquis and "May have contrived to deprive me of what I have advanced; and the Marquis having "thus got rid of May as his creditor, the result of the whole is this, that May being "released by me by putting the Marquis with these post-obit bonds in his place, releasing "the Marquis to the amount, the Marquis now alleges that he received no consideration "for these post-obit bonds, and desires that as May has got his receipt in full from "Bernal, he, the Marquis, who came in his place, may have his receipt in full too, leaving me, Bernal, without debtor or remedy." (His Lordship then proceeded to state Bernal's answer (*vide ante*), and called the attention of the House to the recital in the trust deed of February, 1796, where it was stated that May stood justly indebted to Bernal [145] in the sum of £23,250, being the consideration, as alleged in the answer, for the post-obit bonds; and their Lordships would observe, that this was in a deed between May and the Marquis.) To this suit there were no other parties but the Plaintiff the Marquis of Donegal, and Bernal and May the Defendants.

Bernal then filed a cross bill, for the purpose of establishing his securities, etc., and to this suit he made the Marquis, May, the trustees under the trust deed of 1799, and Mr. F. Const, a gentleman of considerable reputation at the bar here—in short, all necessary persons—parties. The Marquis put in an answer to this bill, in which he again suggested, that the consideration of the securities he had given was of the nature he had stated in his bill. May likewise put in a short answer amounting to little; but which was meant certainly to confirm the representation made by the Marquis as to the consideration. My noble friend (Redesdale) puts me in mind of what is a very material circumstance, that it is not stated any where in these pleadings that any assignments were ever made of these bonds of Wharton, and one can hardly suppose that, if they had been the real foundation of this transaction, assignments would not have been made of them for obvious reasons.

May having put in an answer to this bill of Bernal's, but no answer to that of the Marquis of Donegal, an order was made in both causes on the 18th July, 1805, and I shall read that order to your Lordships, putting you in mind that it is the order which has been so often spoken of as an order [146] made by consent. I think your Lordships will see that that order had directed inquiries which would certainly have brought before the Court what was the real truth, and what was the actual nature of the transactions between Bernal and the Marquis, between Bernal and May, and between May and the Marquis. It was to this effect: (here his Lordship read the order, for the substance of which, *vide ante*.)

Your Lordships will observe that, if this had been proceeded in, the truth of the case as between all these parties, and as between each class of them, and every two of them, in every way of classing them, would have been made to appear: and if it turned out that Bernal had given releases of debts which May substantially and truly

owed to him in consideration of the Marquis's giving him his bonds, then it would be most obvious and just that, if May was placed in a situation in which he should have the benefit of those releases, Bernal should have his money; and that Bernal was not to be sent out of doors, making a present to May of all that May was indebted to him, and not leaving any demand either upon May or upon the Marquis.

It has been stated very truly that an order by consent cannot be got rid of but by consent; but where any proceedings are taken, in a cause by a party, if those proceedings are not consistent with the execution of that order to which he alleges all parties have consented, he has waved the right to insist upon the rule, that an order made by consent cannot be got rid of but by consent. And I apprehend that the Lord Chancellor of Ireland discharged [147] this order by consent, upon grounds such as those to which I allude—that Bernal's proceedings in the cause were such as made it fit, as against him, to throw matters back again into that state in which they stood before this order was made. Such I take to have been (the noble Lord will tell me whether I am right) the ground on which the noble Lord proceeded.

Lord Redesdale. The ground was this. Bernal represented that the conditions on the part of the Marquis and on the part of May, upon which that consent was given, not having been complied with, he ought to be at liberty to proceed at law, and to take out execution for the money which he had a right to levy. It was impossible to suffer him to take out execution at law and to proceed upon the account in equity; because, if he elected to proceed on the account in equity, the injunction must be continued of course. When therefore he insisted upon the right to take what he could at law, he necessarily abandoned his right to proceed in equity. And as he insisted upon that which, the Marquis not having given the security, he had a right to, the necessary consequence was that the whole order was to be set aside. But this having arisen in consequence of the default of the Marquis to give the proper security, the whole expense of the proceeding was thrown upon the Marquis, who was directed to pay all the costs which had been incurred under that order by consent; because the order failed in consequence of the Marquis not having given that security.

Lord Eldon (C.). Your Lordships will accord [148]-ingly find that the Marquis did not give the security for the £20,000 mentioned in this order, and that he did not deposit the bonds of Wharton in the Bank of Ireland as directed, and therefore the Court at the instance of Bernal, on 2d January 1806, made an order to dissolve the injunction issued against the Appellant, as far as respected the sum of £23,000; and that the Sheriff of Antrim should pay the monies which might come to his hands into the Bank of Ireland, in the name of the Accountant General, to the credit of the causes; and then by another order, dated 25th January, 1806, the Sheriff was directed to keep the money levied under the executions in his own hands.

Then there was a report made by the Master which I do not state to your Lordships; and motions were made on the one hand to stay the proceedings; and counter-motions made on the other side, which produced an order to which it is necessary to call your Lordships' attention. It is dated the 1st March, 1806, and is the order first complained of, and it is in these words: (reads the order dissolving the injunction obtained in the first cause, setting aside the consent order and report, and ordering the Marquis of Donegal to pay the costs, etc.)

This order having been made, your Lordships will permit me just shortly to observe, that it restored the two causes to this state. It restored the Marquis of Donegal's cause to a state in which he was Plaintiff, and Bernal and May were Defendants, May having put in no answer. It restored the cross cause to a state in which Bernal was Plaintiff, and [149] Lord Donegal and May were Defendants: they had put in answers: the other Defendants, the Trustees had put in no answers; and the causes respectively being in this state, they should have been proceeded in as causes in those respective stages required to be proceeded in. The first step which the Marquis of Donegal took was to obtain an order to dismiss both his original and his amended bill as against May, so as to leave Bernal the only defendant to that suit: to a suit which, as your Lordships must have heard in the course of what I have been stating, involved so directly the consideration of the state of the accounts of May with Bernal, and May with the Marquis of Donegal, as bearing upon the consideration for these bonds which the Marquis had given to Bernal: a proceeding most injurious to Bernal, if the Marquis could make out that he ought to be relieved from those bonds, if it was

possible to contend that he could be relieved from them after so many deeds reciting his liability, and notwithstanding the effect of so many releases and discharges, which, in that way of putting it, ought not to be effectual releases and discharges.

They then proceeded in the cross cause, according to the course of their practice in Ireland, taking the bill as confessed against these other defendants, and so on, till at length the cross cause comes on to be heard I cannot very well tell how. My noble friend says, perfectly irregularly. It is enough for me to say I cannot find out how it came on.

Lord Redesdale. It is stated that no proceeding was taken in it by Bernal after the order of March 14, 1805, and therefore it could never have come on [150] regularly, as he had not complied with the order. It could not be brought on by the Defendant, as he could only dismiss the bill for want of prosecution.

Lord Eldon (C.). I should have no difficulty in the world, if this were a cause in the Court of Chancery in England, to have said that it came on as it ought not to have done : but the practice in these Irish causes is so different, that I rather choose to state my ignorance than to apply to an Irish Chancery cause those decisive assertions which would better become me in an English cause, the form of which I am better acquainted with. But here I should mention to your Lordships a circumstance of a very singular kind ; that the Marquis not only dismisses his bill as to May, but examines May as a witness forsooth to support him in his suit. Now there is nothing better established than this, that if you choose to examine a defendant as a witness you cannot have any decree against him. If May had remained a party to the cause, the examining May as a witness would have been clearly on the part of the Marquis saying this, " I can have no decree against May." It would be saying, also, " I cannot give you, May, the benefit of any decree I obtain against Bernal." But it would be saying a great deal more still : for if the real equity of the case were that the releases and discharges given to May should not stand as against Bernal, but that May should pay to Bernal what he was indebted to him, and that he should take these pieces of paper, the post-obit bonds ; if Lord Donegal has, by examining him as a witness, put the case into such circumstances that no relief can [151] be had against May in that cause, he must be considered as having undertaken to do what the equity of the case would have required to be done with respect to Bernal by May ; and if you cannot restore him to the situation of a defendant, with the demand of an account open against him exactly as it was before, your Lordships must consider this as a case, in my judgment, in which the Marquis of Donegal would be bound to place Bernal in that situation, whatever it might be, if he was a creditor of May, which he would be entitled to hold as against May, and as against him, the Marquis : which would undoubtedly be to say, that he must pay the debt, the relinquishment of which was the consideration of these bonds.

Upon what ground the decree made in this cause proceeds I am totally at a loss to state to your Lordships. I agree in the principle as to expectant heirs, that Courts of Equity throw around them a security against the effects of their own contracts, which security no other person but those acting from distress or ignorance receive ; and when persons deal with expectant heirs, there is thrown upon them the *onus* of proving the transaction a fair transaction. But we are not to carry the principle to the extent of saying that an expectant heir may take out of any man's pocket any thing he pleases, and never replace it ; and it will not do setting up by a bill, unless you prove it, that you received as a consideration bonds of which you can make nothing. If you can make out that case in fact, you make out a case entitling you to substantial relief. But if the Marquis of Donegal thought proper to relieve May, [152] standing in that situation of friend and acquaintance, and afterwards father-in-law, and to procure for him the benefit of a release of Bernal's demands upon him, it is carrying the thing too far to say a man shall not be placed in a situation, in which, to use a homely phrase, he shall have his own again.

The decree declares, " that the four several post-obit bonds, amounting together to the sum of £46,500, and also the bond for £40,000, and also the warrants of attorney to enter judgment on the same, were obtained by fraud and imposition practised upon the Marquis of Donegal, then an expectant heir ; and that the bond of £60,000 was obtained by fraud and imposition on the Marquis ; and that the several bonds and judgments should stand as a security only for the sums which, on the accounts

"directed, should appear to be really due from the Marquis of Donegal to Bernal." Why so? The case made out on the part of Bernal never was this, that the Marquis of Donegal himself was his debtor, but that the Marquis of Donegal was debtor to May; that May was indebted to him; that they shifted the relation of debtor and creditor: "And that the deeds of August 27, 1795, and October 18, 1800, were fraudulent and void as against the Marquis of Donegal." Why are these deeds fraudulent and void? Upon what evidence? If the bonds and judgments though obtained by fraud and imposition were still to stand as securities for what was really due in that way of taking the accounts, why are they not directed so to stand as a security? Then there was to be "an [153] account of all the dealings and transactions between the Marquis of Donegal and Bernal; and of all and every the sum and sums of money received by the Marquis of Donegal, of Bernal himself, or by advances made by Bernal to May, or any other person for the use of the Marquis." And then follow these words; "and which came to the hands of the Respondent, the Marquis of Donegal." It will perhaps be in the recollection of some of those who now hear me, that at the time this matter was argued at the bar, I put it to Mr. Leach to state what were the particular circumstances in proof in this case, which led the Court to say that Bernal was not entitled to have credit against the Marquis of Donegal, according to the usual terms of a decree, for the sums of money he had advanced to him or to any other person to his use; and why he was to be limited by the decree to such sums of money as he had advanced to May, for the use of the Marquis of Donegal, and which May had actually advanced to the Marquis; the ordinary decree being, as in all justice it must be, "I have a right to all sums of money which I have advanced to you or for your use." There ought to be something like fraud proved between May and Bernal, if Bernal was to have cut off from his demand all such sums as he had advanced to May for the Marquis, but which May had not applied to the purpose for which it was advanced. To be sure, if Bernal was not to have against the Marquis an account of the sums of money which May had received to his use, but had not so applied them, the Marquis must have done great injustice; for in-[154]-stead of praying that May might account for the sums he had received to his use, he so arranges his cause, as to make May no longer a party to it, and therefore so as to make it impossible for Bernal to have relief for those sums which May—in this way of putting the case—is supposed to have received of Bernal for the use of the Marquis, but did not apply to his use. I never heard the circumstances stated which would justify that part of the decree; and having charged myself with the duty of looking through the proofs, I have never been able to find any such circumstances.

Then as to the cross cause, to be sure one should have thought it impossible to dismiss the bill. If the Marquis of Donegal had a right to have a decree directing all these accounts, cutting down these securities, ordering some of them to stand as a security for the just balance, but totally destroying others of them; if Bernal filed his bill to have an account taken upon the plan and the principles upon which he said the account ought to be taken, in order to do justice, surely the Court ought to make a decree in his cause, to give him at least that benefit which, as a defendant in the Marquis's cause, they did give him; and more especially as in the other cause the Marquis had not brought before the Court his friend May, in whom estates were vested for the payment of the Marquis's debts, and these among the rest as far as they could be demanded. The Marquis had not brought the trustees before the Court; and therefore in that cause in which they were made parties, unless the Court went the length of declaring that these reiterated securities were one [155] and all tainted with fraud, in such a way that no benefit could be taken of them, Bernal was entitled to a decree to a certain extent. If there was any truth in that which Bernal stated, that the Marquis was really indebted to May, and that Bernal was a creditor of May; if the Marquis would not permit his bonds to be bonds operating to the extent of the sum that May had his release for, Bernal was clearly entitled to stand in the place of May, as against the Marquis, to the extent to which he had been a creditor of May, and so far to have the benefit of these securities; and although the bill had been taken *pro confesso* as against all the other Defendants in the mode of proceeding I before alluded to, even as against all these Defendants who could not be before the Court, and although a decree had been made against these Defendants that bill is dismissed with costs to be paid to those very persons! Such being the

very singular nature of these proceedings. I trust your Lordships will not think I have betrayed great imbecility of mind, (God knows my head is so much fatigued with the great number of causes to which I have given my attention, that I should not much wonder at a great degree of imbecility,) when I say that I never saw a case which puzzled me more than this, and I scarcely know how to get out of it; indeed without the assistance of my Noble and Learned Friend I never should have got to the end of it, for I could not understand it. But then to get to the end of this cause now, there is nobody who carries further than I do, or is more willing than I am to apply, the principle of guarding expectant heirs against the [156] effects of their own profligacy and ignorance. But you cannot carry that to the extent of saying that you shall brush away every deed that a man has executed in the course of a long period of time acting deliberately with the advice of counsel and solicitors at different periods of the transactions, and so shall brush them away as not to call upon the heir expectant when he becomes possessed of property with which he can do justice, at least not to keep in his own pocket the money which has come out of the pockets of other persons. Now where the evidence is to be found which justifies this decree I do not know. I have considerable difficulty whether, after the risk was run upon the post-obit bonds, we are quite justified in relieving against them as post-obit bonds; and yet I think we are; for considering the situation of confidence in which May stood with respect to the Marquis, and the sort of intercourse and knowledge of all the transactions of May which I think Bernal must have had in this case, I am disposed upon the whole rather to advise your Lordships to make these instruments a security only for the sums which were actually advanced to the Marquis, or to his use, than to say in this case that the post-obit bonds should be available as post-obit bonds. But the misfortune of the case is, as it seems to me, that attending to the nature of the proceedings we can go no further than to declare what is the fair result in point of principle and fact of such transactions as we know, and then direct accounts to be taken according to the principle which follows from the facts as we have them. I shall therefore propose to [157] your Lordships in both the cases to come to this decision (reads the judgment, *vide post*).

It appeared that some errors had crept into the judgment of the House as first drawn up, and upon petition by the Marquis to have the mistakes rectified, and the statement of his agent at the bar that counsel had some additional reasons to urge, the parties were permitted to bring one counsel on each side, the Lord Chancellor observing that this was not meant as a rehearing, but simply to correct the mistakes which had been made in drawing up the judgment. On the 14th April, 1815, Mr. Leach appeared for the Respondents, and Sir S. Romilly for the Appellant. Mr. Leach stated that he had not before gone into the merits, as he understood that the counsel on the other side rested their case on the want of authority in the Court to discharge the consent order; and he was proceeding to argue the case on the general merits, when Sir S. Romilly interrupted him, observing that it was at any rate incompetent now to go into the general merits, but that in point of fact the merits had been before fully argued on both sides.

Lord Eldon (C.) This now becomes a very important point with a view to the practice of the House, and the matter must stand over till we consider of it. I apprehend the contents of the printed cases are to be considered a judicial representation as much as the speeches of counsel.

Lord Redesdale. The papers at least went into the merits, but at any rate the House is not to have [158] its judgment reviewed merely because counsel may have omitted to make observations.

Counsel were ordered to withdraw, and were no more heard in the case. On the 7th July the House ordered the proper alterations to be made. The corrected judgment is as follows.

"It is ordered and adjudged, etc. that the order of the 1st March, 1806, complained of in the said respective appeals be, and the same is hereby affirmed. And "it is further ordered and adjudged that the decree of 9th June, 1807, complained of in the said first-mentioned appeal be, and the same is hereby, reversed. And "it is hereby declared that the Respondent, the Marquis of Donegal, by the indenture "of the 18th October, 1800, having acknowledged that the several post-obit bonds "of the 8th June, 1795, for £24,000; of the 20th June, 1795, for £12,000 and £500;

" and of 6th July, 1795, for £10,000 ; had been given in consideration of the sums of
 " £12,000, £6000, £250, and £5000, advanced, lent, and paid, by the Appellant to
 " the said Respondent, or for his use, and at his direction and request : and it also
 " appearing that the said Respondent's bond of the 18th October was defeasible on
 " payment by the said Respondent to the Appellant of several sums advanced and
 " to be advanced by the Appellant to or for the use of the said Edward May in manner
 " therein mentioned, and such costs, charges, damages, and expenses, as therein
 " mentioned : and it appearing by the evidence in the cause that the drafts of the
 " said deed and bond of the 18th October, 1800, were taken by the said [159] Re-
 " spondent for the purpose of laying the same before Francis Const, Esq. in the said
 " proceedings named on behalf of the said Respondent, and were afterwards returned
 " by the said Respondent to the solicitor for the Appellant, with a declaration that
 " the same had been perused and approved by the said Francis Const, and that the
 " said deed and bond were afterwards deliberately executed by the said Respondent ;
 " and the said Respondent having dismissed his bill as against the said Edward May,
 " and examined him as a witness, so that no account can be taken against the said
 " Edward May, either of his dealings or transactions with the Respondent or with
 " the Appellant, the said Respondent has debarred himself from impeaching the con-
 " siderations of the said several securities as appearing thereon, and as stated in the
 " said deed and bond of the 18th October, 1800, and the said Respondent cannot
 " now impeach the said securities for fraud or imposition, or the considerations for
 " the same. But it is further declared that under the particular circumstances of
 " this case the said post-obit bonds ought to stand as a security only for the principal
 " sums stated in the said deed of the 18th October, 1800, to have been the considera-
 " tion for the same respectively, with interest thereon at the rate of five per cent.
 " per annum from the dates of the said bonds respectively. And it is further ordered
 " that it be referred to one of the Masters of the Court of Chancery to take an account
 " of what is due to the Appellant for principal and interest on the said post-obit bonds
 " according to the declaration aforesaid, and to take an account of what is [160] due
 " to the Appellant on the bond of the 18th October, 1800, according to the declaration
 " aforesaid. And it is further declared that in taking such account the Respondent,
 " the Marquis, must under the circumstances be bound by the accounts settled between
 " the said Edward May and the Appellant, except so far as the said Marquis shall
 " be able to falsify the same, or show any errors or over charges therein, etc. etc."
 The remaining part of the judgment consisted of directions for taking the accounts
 on the above principles.

The decree of dismissal in the cross cause was reversed.

Agent for Appellant, COLE.
 Agent for Respondents, LYON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (1ST DIV.).

ARBUCKLE,—*Appellant* ; TAYLOR, and Others,—*Respondents*

[April 27, May 1, 1815].

[Mews' Dig. ix. 734. Followed on the point as to probable cause in *Sheppard v. Fraser*, 1849, 11 Dunlop, 446 ; and see *Green v. Chalmers*, 1878, 6 Rettie, 318, 320.]

[It seems that where a partner of a firm prosecutes for an alleged theft of property belonging to the partnership, and an action is brought for a malicious prosecution and wrongous imprisonment, neither the company nor the other individual partners can be dealt with as prosecutors merely because the property belonged to the firm.]

[It seems that an action for a malicious prosecution cannot be sustained, though

the accusation be false, if the prosecutor can show probable cause for the charge.]

[*Dicente* Lord Eldon, Chancellor, that a magistrate is [161] bound to terminate his commitment for further examination within a reasonable time, otherwise he will be liable in damages; but the inclination of his opinion was that the provisions of the act 1701, cap. 6, did not apply to commitments for further examination.]

At a sale of the thinnings of Lord Roseberry's woods near the Queen's-ferry, Arbuckle the Appellant, and Messrs. Taylor and Sons Respondents, Wood-merchants, in Queen's-ferry, purchased several lots. Arbuckle and his servant in bringing home their wood by mistake, as the Appellant maintained, fixed upon a lot belonging to the Taylors, and carried with them some small trees worth about 10s. out of it. William Taylor, one of the partners of the firm of Taylor and Sons, wrote to the Respondent, Salmond, Procurator Fiscal for the county of Linlithgow, to prosecute Arbuckle for theft, in his (Taylor's) name. Mr. Salmond accordingly, in his own name and that of Taylor, petitioned the Sheriff Substitute of Linlithgow, who granted a warrant to apprehend Arbuckle and his servant for examination, and they were apprehended accordingly, on the 23d March, 1809. Arbuckle verbally offered bail to any amount, but the Sheriff Substitute refused it, and committed him to prison, under a warrant dated 25th March, 1809, for further examination, or until he should be otherwise liberated by due course of law. No copy of this warrant was given to the Appellant. Arbuckle then wrote a petition to the Sheriff Substitute repeating the offer of bail, but his agent neglected to present it. The Appellant then petitioned the Court of Justiciary, [162] and Lord Armadale made an order appointing him to produce a certified copy of the warrant, but none such could be immediately found. The application to Lord Armadale was read to the Sheriff Substitute, who still refused bail. The warrant, or a copy of it, had been sent to the Sheriff Depute, who sent instructions to receive bail, and transmitted a copy of the warrant in obedience to Lord Armadale's order. On the 28th March, Cunningham intimated to Arbuckle that though he was committed for further examination, he was ready to bail him. Arbuckle took no notice of this, expecting to be liberated on bail by the Court of Justiciary, and he was accordingly liberated on 29th March, by warrant of Lord Armadale, on bail for £100, to appear and stand trial within six months.

The Appellant then brought an action for a malicious prosecution and wrongous imprisonment, at common law and under the statute 1701, cap. 6, against the Taylors as a company and as individuals, and against Salmond the Procurator Fiscal; and against Cunningham the Sheriff Substitute, concluding alternately for the penalties under the statute 1701, or damages at common law.

For William Taylor it was stated in defence, that he had probable grounds for the accusation, and acted *boni fide*. For the firm and the other individual partners it was answered that the petition on which the warrant of commitment was granted was in the name of William Taylor only, without the knowledge of the others, and that they had no concern with the matter. For Salmond the Procurator Fiscal, it was stated that he granted his con-[163]-currence in consequence of a written information signed by the private complainer; and for Cunningham, the Sheriff Substitute, it was answered that he acted legally and according to his duty.

After some previous proceedings, the Lord Ordinary (Bannatyne) pronounced an interlocutor assailing Cunningham, on the ground that no written petition for being admitted to bail was presented to him, and that even if it had, the commitment being for further examination, he was entitled to refuse the liberation on bail, and that there was nothing stated as a ground at common law for holding the commitment malicious or injurious; assailing Salmond, because the signed information would have warranted an application by him as Procurator Fiscal, and that the only concern he had with the matter, further than giving his concurrence as Procurator Fiscal, was as agent for William Taylor, in which view no circumstances had been stated which could make him personally responsible for any irregularity or wrong supposed to have taken place in the proceedings; also assailing the firm of Taylor and Sons, and the partners as individuals, who had taken no part in the proceedings, and therefore were not responsible. As to William Taylor, an additional conde-

scendence was ordered. To this judgment the Court adhered, except as to the Taylors, with respect to whom the Lord Ordinary was instructed to receive an additional condescendence of what he averred and offered to prove against them, both as a company and as individuals. A condescendence and answers were given in, and [164] a proof taken, from which it appeared that there was probable cause for the prosecution, and the Court unanimously assailed the Detenders. From this judgment Arbuckle appealed.

For the Appellant, with reference to the alleged illegality of the mode of prosecution by Taylor in his own name, *ad vindictam publicam*, were cited the cases of Lockart v. Lee, July 1751.—Robb v. Halliday, 1767, MacLaurin Crim. Ca. 299.—Geddie v. Dempster, Nov. 1767.—La Motte v. Jardine, July 1797, MacL. Crim. Ca. 382.—Dundas v. Belsh, Jan. 1806. And as to the point of *Bona fides*, Jardine v. Creech, 22d June, 1776.—Anderson v. Ormiston, Jan. 1750.—Græme v. Cunningham, March 1765.—Woods v. Gordon, March 1812.

For the Respondent, W. Taylor, with reference to the point of probable cause, were cited; Lindsay v. Kinloch, Burnet Crim. Law, 328, n.—Jamieson v. Napier, Kilk. 160.—Henderson v. Scott, Feb. 1793, Fac. Coll.—Græme v. Cunningham, March 1765, Sel. Dec. For the Respondent, Cunningham, Fife v. Ogilvie, 1762.

Sir S. Romilly and Mr. Adam for Appellant; Solicitor General for Scotland for Respondents.

(July 10, 1815.) Lord Eldon (C.). A cause, in many respects of great importance, was heard before your Lordships, in which Hugh Arbuckle, a wood-merchant, and Burgess of the Royal Burgh of Queen's-ferry, is the Appellant: and this case embraces demands for damages against William Taylor and Sons, merchants, in Queen's-ferry, as a company, and against William, [165] John, and Patrick Taylor, individual partners of the said company; George Cunningham, Sheriff Substitute of Linlithgowshire; and William Salmon, Procurator Fiscal of the Sheriff Court of the County of Linlithgow; and when I have had the honour of stating to your Lordships the nature of the several demands made by the summons, in this case, against the several defendants, I am satisfied that such of your Lordships as are conversant with the proceedings in English Courts of Justice, will be surprised to find that, according to Scotch forms, persons can be joined in an action for damages, where the causes of the damages are so perfectly different in their nature as these are stated to be. This action was raised by a summons which is printed in the book now before me, and which I shall take the liberty to read. The summons is in these terms:—"Hugh Arbuckle, Pursuer, "insists in an action of wrongous imprisonment, damages, etc. against Messrs. John "Taylor and Sons, merchants, in Queen's-ferry; and John Taylor, Patrick Taylor, "and William Taylor, all merchants there, the individual partners of that firm." When I state that this is an action of wrongous imprisonment, it will strike your Lordships as singular that the summons is against Taylor and Sons, as a company, and against the individuals who form the firm, taking both the company as prosecutors, and the individuals as prosecutors. The summons is also against William Salmon, who is here stated to be Procurator Fiscal; and George Cunningham, Sheriff Substitute of the county of Linlithgow; and when I come further to read the summons, you will find [166] that this is an action of damages against a company, and the individuals of it supposed to be prosecutors, and also against the magistrates, that is, involving the prosecutors, and the magistrates acting on the information given by the prosecutors in one action of damages, saying as to some of them, "you ought not to have prosecuted, this is a malicious prosecution;" and to others (the magistrates) "you "ought not to have committed me, and therefore for that wrongous imprisonment "I seek damages against you." The inconvenience we should feel in this part of the island from such a proceeding is this; that when the question as to the magistrate is a short one, whether he has acted rightly as a magistrate, or not, he is made party to a proceeding in which all the examination is gone into, as to what were the motives of the prosecutors, and what the circumstances that might furnish an inference as to whether others acted rightly or not: however, this I understand is not contrary to their practice. Then it goes on to state, "that by the common law of this kingdom, "the wrongous imprisonment of any of his majesty's liege subjects upon illegal war- "rants, maliciously or unduly obtained, or obtained or used on false pretences, or

" wrongous imprisonment in any way, or wrongous personal apprehension or detention in prison, without just cause and legal warrant ; and in general the oppressive and illegal infringement of the liberty of the subject in any manner, are grievous injuries, more especially to a merchant in considerable trade, whose credit may be thus ruined ; which, or any of them, entitle the suffering party to ample [167] redress." Then the summons proceeds to state the Act of the 8th and 9th Sessions of the first Parliament of King William, cap. 6, by which it is provided " that all informers shall sign their informations, and that no person shall be hereafter imprisoned for custody, in order to trial." (Reads the provisions of the Act, pointing the attention of the House particularly to the words " for custody in order to trial.")

Your Lordships will find that this summons has no such conclusion as there was in the case of Andrews and Murdoch, viz. to have it declared that the magistrate had lost his office, and was incapacitated from holding any public trust in future. This summons concluded only for the damages which the statute gives, and I mark that circumstance because it enables me to lay out of the case a point agitated at the bar, in that case of Andrews v. Murdoch, whether it was competent for the injured party to proceed in Scotland, without what they call in that country, the concurrence of his Majesty's Advocate, when he concluded that a magistrate should be deprived of his office, and be declared incapable of public trust. In that case it was further contended,—not successfully contended,—that, with respect to those sums which are given to the party imprisoned, these being pains in the nature of penalty, the party could not sue for them without the concurrence of his Majesty's Advocate. But I think it was pretty well understood both at the bar and by your Lordships, that as those pains and penalties were given in the nature of damages to a subject who had been injured, it was not necessary, if he concluded on the Act of [168] Parliament only for these pains and penalties, that he should have the concurrence of his Majesty's Advocate ; and indeed it is obvious that a proceeding requiring a magistrate to be prosecuted to the extent of being declared incapable of acting again is very different from that which merely calls upon him to make compensation in the shape of damages ; and it would be an extraordinary proposition to say that a subject could not ask for compensation in damages, unless the King's Advocate joined with him in so doing. I mention this, however, because it becomes very material when we are considering whether this is a commitment for further examination in a case where no double of the warrant has been given, to advert to the circumstance, that it is a point of contention between the parties, whether this act of wrongous imprisonment relates only to commitment for custody in order to trial, or whether, under some general words in a subsequent part of the Act, it relates also to commitments for further examination, for if your Lordships should be of opinion that it relates to a commitment for further examination, with reference to the damages to be recovered, it would follow also that commitments for further examination had connexion with the clause disabling the magistrate, if his Majesty's Advocate chose to concur, and it is with that view I have pointed out to your Lordships the importance of that distinction.

I would just notice as I pass, that the Appellant in one of the cases is stated to be a timber-merchant, and in the Respondent's case he is stated somewhat flippantly, I think, to be Hugh Arbuckle, describing himself as a timber-merchant, a circumstance which [169] was noticed at the bar, and led perhaps to our hearing more evidence on that head than was necessary.

The summons then states, " that Messrs. John Taylor and Sons, etc. and the individual partners of the firm, especially William Taylor the acting partner, as an individual, and W. Salmon the private agent, employed by W. Taylor, in behalf of " himself and the company, and Procurator Fiscal, etc. and George Cunningham, " Sheriff-substitute, etc. had committed these injuries against the Pursuer in the " following manner :—Upon the 23d and 24th days of February, 1809, he attended " Sales of the Weedings of Lord Roseberry's Woods," etc. etc. (His Lordship here read at length from the summons the facts as there set forth, and of which the substance has been before stated ; and after reading that passage where the Pursuer stated his apprehension, and that " no double or copy of the warrant, etc. was then, " or had since been, served on the Pursuer, or in any way furnished to him," his Lordship continued.) With reference to this I would state that, unless it be different by

the common law, it appears to me that the statute does not require, where an information is given to a magistrate, and where the warrant goes merely to bring the party before him, that there should be a copy of that warrant given to the party. This is not the warrant upon which this question turns; it turns upon the warrant for further examination, which the warrant afterwards made out has been contended to be.

The Pursuer then proceeds to state—"That the officer merely showed him the " paper, which he [170] termed the warrant against him, and also against Wm. Allan " his carter, as charging them with the crime of theft, and appointing them to be " carried to Linlithgow for examination. They were accordingly then carried from " the Pursuer's house and trade at Queen's-ferry, like common felons, in the custody " of two sheriff's officers, to Linlithgow, between seven and eight o'clock of the evening " of the 23d of March, 1809. When they arrived at Linlithgow upon this evening, " it was however found too late to examine them that night; they were therefore " dismissed under condition that they should return on the morning of the 25th of " March, then current."

This circumstance has been observed upon as a circumstance of aggravation; that when they came before the magistrate on the evening of that day, he took their word of promise that they would return the next morning but one. It might perhaps be irregular on the part of the magistrate so to act, and I do not mean to say that the circumstance of his having done so might not be considered as evidence of the motives upon which he acted in other parts of the proceeding; but it is impossible to say that that irregularity, taking it merely as such, could prove that his motives were malicious, or that the irregularity can be treated as a circumstance in itself decisive, and I am surprised that it has been so much dwelt upon. Then the summons proceeds—

"The sheriff required no security for his reappearance. Accordingly they did " voluntarily return for re-examination at the time appointed; and being examined, " the Pursuer stated the whole [171] facts above set forth, every circumstance of " which was before, and all along, perfectly known to the accusers." And as frequently happens, they on the other hand say, "many of these circumstances we did know, " many we did not know; but there were many other circumstances which both " you and we know, and which you have not stated."

Immediately after this examination, the following deliverance, it appears, was pronounced by George Cunningham:—"Linlithgow, March 25, 1809—The Sheriff- " substitute having considered the foregoing petition (viz. of Taylor) and declaration " emitted by Hugh Arbuckle, wood-merchant, in Queen's-ferry, one of the persons " therein complained upon before him this day, as on paper apart, grants warrant " to the officers of Court, to carry the person of the said Hugh Arbuckle to the gaol " of Linlithgow, and to incarcerate him therein; the keepers whereof are hereby " required to receive and detain the said Hugh Arbuckle in gaol for further examina- " tion, or that he is otherwise liberate in due course of law." Your Lordships see that this is a warrant as it is expressed, for further examination; but then it is contended on the other side, that it is only colourably a warrant for further examination, and that these words—or that he is otherwise liberated in due course of law—make it not a warrant for further examination, but a warrant for safe custody, in order to trial; that is what they contend.

The Pursuer then states, and the fact is, "that he instantly offered security for " his appearance at any after diet of examination, and bail to any [172] amount to " underlie (as they call it) the law, for the crime of which he was accused, and demanded " on these conditions to be set at liberty; but this application was rejected by the " said George Cunningham, who declared that the crime was common theft, and not " bailable, and verbally ordered that the Pursuer should be instantly lodged in the " lower room of the prison of Linlithgow, which is set apart for the confinement of " common thieves." I do not find that in this warrant; "and this order would have " been carried into execution if the magistrates of Linlithgow had not taken it upon " themselves to instruct their gaoler, that he should be confined in a more suitable " apartment of that gaol. As soon as he found himself thus most illegally committed " to prison, the Pursuer with his own hand likewise wrote out and subscribed an " application to be admitted to bail. This petition was immediately carried to a person

" of the name of James Watson, writer, in Linlithgow, to be presented to the Sheriff-
 " substitute, by him, as agent for the Pursuer; but that he afterwards on the same
 " evening returned it to the Pursuer, and informed him that the Sheriff-substitute
 " would not receive bail; and the said George Cunningham, in direct violation of
 " the said act, did refuse to admit the Pursuer to bail, and did not serve him with a
 " warrant of commitment within 24 hours, as required by the statute, and did not
 " till between the hours of ten and eleven o'clock in the forenoon of the 28th of March
 " following, intimate that he was then ready to admit the Pursuer to bail, as will
 " appear from a written instrument of intimation to [173] that effect, to be also pro-
 " duced with the said summons, in which it was falsely pretended that the Pursuer
 " had been imprisoned and detained for further examination, although no further
 " examination ever was sought, or took place."

Your Lordships will permit me to observe here, that where a person is committed to custody for trial, by the Act to which I have referred, a petition may be presented to the magistrate, requiring that the party may be bailed; and it has I believe been universally agreed, that the petition must be in writing. The House will recollect that in the case of *Andrews v. Murdoch*, we had a great deal of discussion as to whether we could falsify a date, but it seemed to be admitted that the petition must be in writing, and then the magistrate was to cognosce whether the offence was bailable; if it is bailable, he is within a certain number of hours to admit the party to bail; and here your Lordships observe the materiality of the exact date of the petition. Now in this case there can be no doubt whatever with reference to this application, that the petitioner fails, because in point of fact, though the party did write out his petition—considering this as a commitment not merely for further examination, and insisting that even if it was, he had a right to be liberated on bail—though he did prepare such a petition, he gave it to this Mr. Watson in order to be carried to the Sheriff, and Watson never did carry it; and the consequence is, that the Sheriff never having received the petition, it is utterly impossible to charge him with neglect of duty, as if it had been delivered.

[174] Then the Pursuer states, that " he remained in the prison to which he was
 " committed in manner above mentioned, at one o'clock of the afternoon of March 25,
 " 1809;" and he further states, " that Messrs. John Taylor and Sons, and William
 " Taylor as an individual, and William Salmon, the accusers, and George Cunning-
 " ham, most illegally omitted to lodge with any of the magistrates of Linlithgow,
 " or their gaoler, or keeper of their prison, a warrant expressing the cause of the
 " Pursuer's imprisonment, in terms of the foresaid Act." Now if a warrant expressing the cause of the Pursuer's imprisonment must be so lodged, though the commitment be only for further examination, then this allegation is right; but on the other hand, if the statute means only that the warrant is to be lodged where the commitment is for custody for trial, then, as there was no such commitment for custody for trial, unless this can be considered as such, in consequence of the insertion of the words, " or that he is otherwise liberated in due course of law," that allegation likewise must fail.

The Pursuer further states, that he afterwards presented a petition to the High Court of Justiciary, and that Lord Armadale gave a deliverance, and appointed the petitioner to produce a certified copy of the warrant; but he was not able to get a copy of it, for that neither the warrant nor a copy thereof was to be found even in the possession of the Sheriff's clerk nor in his office, nor in the possession of George Cunningham, which facts he next morning reported in writing to the Lord Armadale. It appears that a copy was afterwards transmitted by [175] Mr. Hume, the Sheriff-depute of the county, and upon the receipt of that, Lord Armadale bailed the Pursuer in the amount of £100 to stand trial within six months on any indictment for the crime alleged; and in consequence of this, after having obtained this warrant for his liberation, he was at last released from his confinement, after having been confined a close prisoner three days and a half upon what he calls " the above-mentioned
 " most groundless, false, and malicious charges, and without being allowed to find
 " bail, or having access to the warrant of his commitment, notwithstanding the terms
 " of the statute above quoted." He then alleges himself to be a wood-merchant in considerable trade, both home and foreign, with a large stock on hand, and many

dealings that required his constant presence and superintendence, and that he had until he sustained this most grievous injury always preserved his character and credit unimpeached: and then the conclusion of the summons was as follows: and here your Lordships will see the manner in which they join together persons in the same action for different species of injury, and involve them all in the expense of the litigation, not merely as it affects themselves, but as it affects others. He first concludes "that John Taylor and Sons, merchants in Queen's-ferry as a company, and J. Taylor, P. Taylor, and W. Taylor, all merchants, and individual partners thereof, and the said W. Taylor personally and as an individual, and the said William Salmond, Procurator Fiscal of the said Sheriff's Court of Linlithgow, and the said George Cunningham, Sheriff-substitute thereof, ought [176] and should be decerned and ordained by decree of the Lords, etc., to make payment to the Pursuer of the sums of money following, viz. the said Messrs. J. Taylor, etc. as a company, and the said J. Taylor, P. Taylor, and W. Taylor, individual partners thereof, and the said W. Salmond, conjunctly and severally." Your Lordships know very well what would become of pleadings in this country if we were to hear from an English lawyer the words I am now about to state—"or at least such or any of them as may be found to have committed the wrongs or injuries libelled, of £5000 of *solatium*, damages, and expenses, sustained by the aforesaid wanton and groundless charge exhibited against the Pursuer, and by his being wrongously imprisoned and detained in prison in consequence thereof." Then he proceeds to pray as to the said George Cunningham that he may pay £2000 Scots, which is the statutable penalty, together with £33 6s. 8d. for each day the Pursuer was detained in prison after refusing his application to be admitted to bail, being the pains of wrongous imprisonment inflicted by the aforesaid Act of Parliament on the transgressors thereof, or of such other penalty as the said Lords shall determine to have been incurred by the said George Cunningham in terms of the aforesaid Act or otherwise. And in case the said George Cunningham should not be found liable in penalties according to the said statute, that he ought and should be decerned, etc., to make payment to the Pursuer of the sum of £200 in name of damages at common law. And further that the said Messrs. [177] John Taylor and Sons as a company, and the said, etc. individual partners thereof, and the said W. Salmond and G. Cunningham, ought also to be decerned by decree aforesaid jointly and severally to make payment to the Pursuer of £1000 as the expense of this process."

This being the summons, the defences for John Taylor and Sons, and John Taylor as an individual partner, were to this effect. The present action concludes against the defenders John Taylor and Sons, and John Taylor as an individual partner of that concern for £5000 damages, for an alleged wrongous imprisonment of the Pursuer. The defence against this action is, that the petition on which the warrant of commitment was granted was not made out in the name of John Taylor, nor of John Taylor and Sons, but in the name of William Taylor, one of the partners, and without the knowledge of the others, and they therefore insist that they should be assoilized with expenses. Patrick Taylor puts in the same defence. William Taylor, who is the individual who gave in the information, insists that he is not liable in damages, for that he had good, or at least probable, grounds for the petition and complaint which was presented to the Sheriff by the Procurator Fiscal in his name; and that the facts having been proved by the declaration of the Pursuer himself, he was incarcerated for further examination by the Sheriff: that the facts were also proved in a precognition which was taken before the Sheriff, and that the defender acted *boni fide* in the whole transaction. The Procurator says he had nothing to do with it but in his character of agent, [178] and Cunningham says he is not liable under the circumstances, which as far as they related to him are not correctly stated by the Pursuer.

To dispose first of the whole of the Taylors, except William Taylor, it is a singular thing to be sure to be contended that if an individual thinks proper to prosecute for stealing property which belonged to that individual and others in partnership, though nobody appears in that prosecution but that individual, yet because the property was the property of the partnership, it is therefore to be dealt with as a prosecution by all the individuals in that partnership. However, the Court gave Arbuckle an

opportunity of making out this sort of case ; that this was a proceeding on the part of the partnership ; that William Taylor acted under their directions ; that all the expenses and trouble the Pursuer was at was in consequence of the conduct of the partnership, and that it was in truth their prosecution, that is, a prosecution of the company. It appears to me at least, upon looking into the evidence, that there is no possibility of maintaining these facts, and the consequence is that William Taylor must be looked upon as the only prosecutor. The interlocutor, therefore, in as far as it assuiled all the other persons of the name of Taylor, appears to me to be clearly indisputable.

With respect to Salmond, it was contended that because having the character of Procurator Fiscal, he also interposed himself in this instance by his advice and assistance to the person who was the prosecutor, he was conjunctly liable. It seems to me, however, that unless he appeared, not merely [179] as an adviser, but actually as a prosecutor, there could be no ground for including him as a party, and therefore I think the suit was by the Court of Session rightly disposed of as to him.

With respect to those, then, alleged to have been concerned in the prosecution, there remains only the case of William Taylor, which deserves a good deal more consideration.

It was said that the property alleged to be stolen was of the value of 10s. only, and that it was impossible for any man under the circumstances to conceive that Taylor could honestly charge Arbuckle with a 10s. theft in these articles. With respect to that, your Lordships will permit me to say, that I have found considerable difficulty in the case, not because I should not know how to deal with it if it were an English case, for then I should know what were the proper modes of proceeding ; and I think I should know the principles upon which, if an action for a malicious prosecution were brought, I ought to adjudge that case. But I cannot be sure what are the principles (and I do not think I have had a great deal of assistance upon that point) upon which the Court of Session acts in such cases—first, as to the form of proceeding ; and, secondly, as to the grounds upon which such an action for a malicious prosecution can or cannot be supported. In this case it was very strongly objected at the bar that the magistrate, Mr. Cunningham, proceeded on nothing more than a petition of Taylor, signed by Taylor, but not sworn by him. On the other hand it was contended that that was the usual mode of proceeding in Scotland ; and if your Lordships will look at the [180] terms of the Act of Parliament to which I have referred, you will find that it speaks of the information being signed by the party. Whether that information signed by the party must by the Scotch form be also sworn by the party signing it, is more than I can undertake at this moment to state. Supposing it, however, to be insufficient for the magistrate to proceed upon without oath, I do not apprehend that an action for a malicious prosecution can be sustained against the person who gave the information without swearing to it ; for it is not an injury on the part of the person who gave the information, unless it can be shown that it was put to him to swear to it, and he refused to do so.

With respect to the history which William Taylor gives of this transaction, I cannot undertake to state it fully ; but I think I can give your Lordships a general representation of it, which will enable you to understand it, after first stating that I conceive that by the law of England an action for a malicious prosecution cannot be supported unless it is proved to the satisfaction of the jury that it was malicious, and that it was without probable cause. It has been stated, and I think correctly, that admitting it to be malicious, yet if there was probable cause for it the verdict cannot be for the Plaintiff ; and that admitting it to be without probable cause, if it was not malicious, the verdict cannot be for the Plaintiff, the fact of the want of probable cause, however, being to be considered as evidence of the malice. But still it is but evidence ; and if the jury should conclude upon the whole that there was not malice, such an action cannot be maintained. And the reason is [181] this, that if there be probable cause for the prosecution, the policy of the law requires that men should be protected who bring forward accusations founded upon probable cause ; and it would be a great deal too much to say that every prosecution which failed, though there should be ever so much probable cause for it, must be considered as a prosecution for which the prosecutor is liable in damages. The law therefore

protects the prosecutor, unless you can say that he has acted maliciously, and that there was no probable cause for his proceeding.

Now it was very strongly represented at the bar that this was a most flagrant and iniquitous case of malice and oppression—of malice most evident by the nature of the information given by Taylor—of malice most evident by the nature of the evidence which was stated. I think it does appear that Taylor did not like Arbuckle. It is probable that they had disputes about elections, and that Taylor had in his mind a determination to prosecute Arbuckle if there was probable cause for the proceeding. But it appears from the evidence that when these two parties were contending to whom the property belonged, Arbuckle himself, while asserting that the property was his, had no difficulty in stating to Taylor, who was likewise a merchant in considerable trade, that he (Taylor) was a thief with respect to those articles, and that he (Arbuckle) was determined to prosecute him.

It appears that there had been previous sales at these plantations; and it is a fact clear from all the evidence that theft, or something like it, had been very common. Upon this occasion Taylor and [182] Arbuckle had both attended at the sale. (His Lordship here stated the evidence as bearing upon the question whether there was probable cause for the prosecution, and then continued.) Under these circumstances the question is not what any one of us may believe as to whether Arbuckle did or did not steal this wood. I should be sorry if any thing said by me should make any one suppose that I thought he did. I think no such thing. But the question is whether these circumstances do not afford that sort of probable cause upon which one might be charged with this species of theft who himself said that he would charge another with this sort of theft under pretty nearly the same circumstances; and whether, regard being had to the policy of the law, the charge can be said to have been made both maliciously and without probable cause. I do not mean here to conclude the subject, for a reason which I shall presently state; but I take it to be a principle of Scotch law, because I think it ought to be a principle of every law, that a suit would not lie against William Taylor, the prosecutor, if there was probable cause for the charge, even taking the accusation, when you come to sift the matter, to be perfectly false, and taking Arbuckle to be just as honest a man as Taylor himself can be.

The next thing to be considered is the conduct of Mr. Cunningham, the Sheriff-substitute. It has been asserted at this bar that the case, with respect to proceedings in Scotland as to magistrates, is of so much consequence, and protection is so justly due to those who are to act in the administration of the law, that I am sure your Lordships will not refuse [183] a further consideration of this point in the way I put it. I am quite ready to admit, and I think it would be improper if I did not avow it as a principle admitting of no judicial denial, that where an act of parliament points out to a judge that he is to do a thing which is prescribed by that act of parliament, do it he must. It signifies nothing what his motives may be. He must obey the legislature, and give to the king's subjects the benefit of that law which the legislature has enacted: and therefore if he declined to do any thing which he was bound by the act to do, it is not enough to say (that which I dare say may be said) that he meant to act most accurately and honestly; but the question will be whether he has omitted to do that which he was bound to do.

I see it argued in the cases here that, attending to the principles of this statute of 1701, a commitment for further examination ought to be considered as standing upon the same principle as a commitment for custody in order to trial. It would be quite answer enough to say that if it is not so considered by the statute, the statute must decide, for the present, upon the subject. And supposing the statute not to have decided it, I cannot bring myself to think it would be a wholesome doctrine that a commitment for further examination should be looked to in the same way, or upon the same principle, as a commitment for custody in order to trial. If I understand the law upon this subject, a commitment for further examination is not a proceeding against the party, but a proceeding for his benefit. It is a proceeding with a view to protect him against [184] a commitment for trial, if during a reasonable time for examination it can be found that there is no ground upon which there ought to be a commitment for custody in order to trial. And if you were to say that where

a party is committed for further examination bail shall be required before that further examination takes place, you put him to this inconvenience, that he must give security to stand a trial which he may never have to stand. I take it therefore to rest upon quite a different principle. At the same time what I said in the case of *Andrews v. Murdoch*, I repeat in this; a commitment for further examination must not be made use of as a commitment for custody in order to trial, and therefore the law has very properly limited it; the law has said that it shall be a commitment for further examination, to take place within a reasonable time. What is a reasonable time may be difficult to say; whether one, two, three, four, or five days; for what may be a reasonable time in one case may not be so in another, but a magistrate is bound to terminate his commitment for further examination within a reasonable time, and I cannot entertain a doubt that an action might be maintained against a magistrate for committing for further examination, if his view and purpose in so doing were to put the party under the same hardship and oppression as would belong to a commitment for custody in order to trial; but then, if you can sustain an action upon that ground, you must state your cause of action accordingly.

Now in the case of *Andrews v. Murdoch* (2 Dow, 401), if I do not misrecollect the circumstances of that case—it is [185] very difficult to pledge myself to accuracy, with a head which has so much upon it as mine has—but if I do not misrecollect the circumstances of that case, it was there argued that the commitment was for further examination, to which the statute of 1701 did not apply. It was contended on the other hand, that according to the terms of the warrant it was not a commitment for further examination, but for trial, and that even if it were for further examination the statute applied. It was then again said, that even if the act of 1701 applied to commitments for further examination, which the commitment there was contended to be, yet as a late statute (39 G. 3, c. 49) had passed, which in consequence of supposed seditious crimes had given the magistrate a power of requiring bail in a larger amount than had been authorized by the former statute, the party must be kept under that warrant, while a correspondence took place with the Lord Advocate in Edinburgh, in order to know whether he would have more bail than was required under the statute of 1701, and eventually there he did insist upon further bail. If that case of *Andrews v. Murdoch* is cited for what was done there, it will be recollected that in consequence of the importance of that case, both to the subject and to the judges of the country, which judges always deserve every protection that can be given them, as far as protection is given on the principle that justice must be done them, and that they must not be harassed for acts which they have done in the fair and conscientious administration of justice, without fear or favour, it was thought proper to remit that case to the Court of Session.

[186] Then we are told further that the magistrate did wrong—and I am sure I cannot take upon myself to say it is otherwise—in taking the declaration without the oath of the party, and in taking the precognition under the subsequent circumstances stated at the bar.

If I were to state my own opinion upon the subject, I should say that the strong inclination of that opinion is that a warrant for further examination is not a warrant in respect of which the terms of the statute apply. But I do not mean to conclude myself by any thing I shall now say upon the subject; I think, however, that this warrant may fairly be considered as a warrant for further examination; for though the words are "for further examination, or that he is otherwise liberated in due course of law," he might be liberated by due course of law before any further examination. If, for instance, the Prosecutor had come and stated that he had discovered circumstances which satisfied him that there was no intention to steal, there would have been no occasion for further examination, and I think it would have been rather too much to say that, because the warrant had these concluding words, it was not a commitment for further examination. But then it is said, if it was a commitment for further examination, you did not further examine. The question, however, is whether the reasonable time for further examination had elapsed before the Pursuer was relieved by Lord Arnadale's order; and next, whether the action could be sustained upon such a summons as this, supposing the warrant to be under colour of a warrant for further examination, a warrant for quite a [187] different purpose, which it would

be wrong to impute, unless that was specifically complained of as such, and precisely proved to be so.

It has therefore struck me that the proper way of disposing of this case at present will be to affirm the interlocutors as to the complaint against the company, and the individuals of that company, who were not Prosecutors; to affirm them, also, as far as they assolzie Salmond, who was acting in the character I have mentioned; and with respect to William Taylor, my judgment certainly as an English Judge would be conformable to the judgment of the Court of Session, that he also ought to be assolizied; not because I think Arbuckle guilty, or that he is otherwise than innocent, or that he would not turn out to be innocent if the case were sifted to the bottom, but because on English principles such an action could not be maintained, unless the Prosecutor had acted maliciously, and without probable cause. I think under the circumstances it cannot be justly said that there was not probable cause to accuse; and indeed Arbuckle himself has so far given evidence against himself, that he threatened the same accusation against the other, if they turned out to be his property; and I cannot say that the circumstances do not amount to a probable cause for inquiry and investigation, carried on under the form of accusation. Upon these grounds I should be for assolzieing William Taylor, but not being quite sure what are the grounds upon which, in administering the law of Scotland, I should proceed, I should humbly call on the Court of Session to review their determination. And with respect to the [188] Sheriff-substitute, though it is my own individual opinion that he ought to be assolizied also, yet considering what this House did in the case of *Andrews v. Murdoch*, and considering of how much importance it is to the magistrates of Scotland that this matter should be fully investigated, and clearly understood; and likewise considering that it is of still greater importance to the Lieges in Scotland that they should clearly understand what the duty of the magistrate is, I should propose to remit the cause for review as to Taylor and Cunningham, and to affirm the interlocutors as to the rest. If your Lordships should adopt this mode of proceeding, I think the whole will be settled. I am, however, anxious to say that the view I take of this case is not one in which I ought to be understood as parting with this case under any notion that I impute to Mr. Arbuckle any thing, but only maintaining that principle of law, which in this part of the island is established, that the public interest requires that a prosecutor should be protected if he acts without malice, and has probable cause for the proceeding.

Judgment remitted for review as to Taylor the Prosecutor, and Cunningham the Magistrate;—affirmed as to the other parties.

Agent for Appellant, CAMPBELL.

Agent for Respondent, GRANT.

[189] ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BLAKE, and Another—*Appellants*; VEYSIE, Clerk,—*Respondent*

[July 27, 1814; July 5, 1815].

[A party can only succeed in his suit *secundum allegata et probata*, and, unless the case proved corresponds with the case laid, the suit cannot be supported, though the party makes out in evidence a case which might be a good one if it had been properly laid in the pleadings. And, therefore, where in the answer to a bill for tithes certain customary payments were alleged, and some payments, which from their smallness appeared to be customary, were shown in evidence, without making out the moduses as laid the Court of Exchequer, without directing an issue to try the existence of

any customary payments, decreed for the Plaintiff, and the decree was affirmed by the Lords.]

[Veysie, clerk, Rector of the parish of Plymtree, brought his bill for tithes in kind against Blake and Harris, two of the parishioners. In the answer certain moduses were alleged as to several of the tithable articles, viz. seven-pence for every milch cow depastured in the parish, in lieu of her milk; one penny for every colt in the parish; four-pence for every hogshead of cider, made from apples growing [190] in the parish; two-pence for every acre of meadow land in the parish, in lieu of the grass made upon it; and one penny for every garden in the parish, in lieu of all tithable things therein produced: all payable on Easter-day in every year. The Plaintiff having taken issue upon the fact of the existence of the moduses, some evidence was given of payments which from their smallness appeared to be customary payments, but without making out the moduses as laid in the pleadings. The Court of Exchequer decreed for Plaintiff, and the Defendants appealed.]

It was contended for the Appellants that an issue ought to have been directed to try the existence of the moduses. On the other hand it was insisted that even the evidence for the Appellants, taken by itself, had not made out their moduses as laid; and that from the whole of the evidence taken together it was clear that no modus existed, and that no issue ought to be directed. It was also contended on the authority of *Coggan v. Lonsdale*, 1404-5, 6 Will. Tith. that the modus was badly laid, because it ought to have been stated to whom it was payable, and for what period, and what particular parts of the lands in the possession of Defendants were covered by it. (Lord Redesdale.—I doubt that objection would go to every parochial modus. In the case of *Coggan v. Lonsdale*, there were particular circumstances. If it is laid as a parochial modus, it will cover the whole parish.) They say two-pence for every acre of meadow land, but they don't state whether they mean ancient meadow, or what. They say it is payable at Easter, but for what period? (Lord Redesdale.—The true [191] way would have been to lay it as payable at Easter for a year from the preceding Easter. It is material, for in a case of modus, it must appear for what period it is paid.)

Sir S. Romilly for the Appellants; Mr. Dauncey for the Respondent.

Lord Redesdale. A Court of Equity would sometimes direct an issue where all the circumstances were not alleged with the strictness necessary at law. There appeared to be conflicting cases on this subject, and he proposed that the consideration of the matter should be adjourned, in order to give an opportunity for further examination.

Lord Eldon (C.). He concurred in that, more especially as the case had come on so late in the session that it had been utterly impossible to make the proper inquiries into the doctrine and practice of the Court of Exchequer as to the granting of issues in these cases.

Lord Eldon (C.). The question in this case is whether a decree of the Court of Exchequer in England—by which it was referred to the Deputy Remembrancer to take an account of tithes due to the Respondent as Rector of the parish of Plymtree, in the county of Devon, and payment thereof was ordered to be made to the Respondent by the Appellants—is justified by the pleadings and evidence in the cause.

The Respondent had filed his bill for payment of [192] tithes in kind, to which the Appellants answered, alleging moduses or customary payments with respect to several of the tithable articles, viz. 7d. for every milch cow, 1d. for every colt, 4d. for every hogshead of cider, 2d. for every acre of meadow land, and 1d. for every garden, payable at Easter, etc.

The Plaintiff took issue on the fact as to the existence of the moduses, and the Court was of opinion that they were not proved in such a way as either to warrant a decree that they existed, or even to call for an issue to try whether they did or not. It was not contended here, nor could it well be, that the evidence was such as fully proved the existence of the moduses as laid, but it was insisted that the matter was left in so much doubt that it was more fit to direct an issue to try whether there were such moduses or not. In that view the person who had now the honour to address their Lordships had directed his attention to the case. Now the Defendants could

succeed only *secundum allegata et probata*, according to what is alleged and proved. In this view it does not appear to me that the case as to the moduses is proved. But whether they might have sustained a defence, and established moduses, if laid in some other way, I do not undertake to say. But here there is no sufficient evidence to support the allegations, not even so much as according to the principles and practice of the Court called for an issue. It would give me satisfaction to hear whether my noble friend approves of the view which I have taken of the case.

Lord Redesdale. My view of the case is similar [193] to that which has been stated. The difficulty is to frame any issue upon the answer that accords with the evidence. The Defendants have not laid the moduses in the pleadings according to the case which appears upon the evidence. They may contest the Plaintiff's claim in another suit; but here there could be no issue directed, because if it were it must be something new arising out of the evidence, and not out of the answer or pleadings. There is certainly some evidence of payments which from their smallness appear to have been customary payments. The Court, however, did right with respect to the present case. But the Defendants may in another suit put the proper modus in issue.

Appeal dismissed, and decree affirmed.

Agent for Appellants, BLEASDALE, ALEXANDER, and HOLME.

Agent for Respondent, EDMUNDS.

[194] ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

ST. BARBE TREGONWELL,—*Appellant*: JOHN SYDENHAM, Elder, and JOHN SYDENHAM, Younger,—*Respondents* [May 2, July 27, 1814: July 7, 11, 1815].

[*Mews'* Dig. iv. 317; vii. 604; ix. 1039; x. 982, 1008, 1010; xv. 1626.]

[Wherever land, or any interest in land, which would descend to the heir at law, is devised for purposes which the law will not permit to take effect, the heir at law shall have the benefit of the interest so devised as undisposed of, whether the testator intended that he should have it or not; for there is this distinction between the case of a devisee and that of an heir at law, that the devisee takes by force of the intent of the testator, and can only take what is given him by the will; whereas the heir at law takes whatever is undisposed of, not by force of the intent, but by the rule of law. Therefore where A. devised lands to his son B. for life, remainder to the first and other sons of B. in tail male, remainder to the second, third, and other sons of A. successively in tail male; and in case there should be no such issue male of A.'s body, or the same should become extinct, then to trustees for a term of 60 years, to retain the rents, etc., and apply them in the purchase of lands to be conveyed to such person as should then be in possession by virtue of his will of certain other estates therein mentioned, for life, with such remainder as would continue the estates as long as possible in the testator's name and blood; and after the trusts should be executed or the term expired, the estate was limited to C. for life, with remainders over: and it happened that the person so in possession at the time when the conveyance could have been made of the lands to be purchased as above was one not in existence at the time of A., the testator's, death, and the uses were considered as in the event too remote and void.—It was held by the House of Lords, reversing a decree of the Court of Exchequer,

that the consequence of the failure of the intermediate devise was, not that the next devisee became entitled as if there [195] had been no such intermediate devise, which was the opinion of the Court of Exchequer, but that the trusts of the lands to be purchased as above resulted to the heir at law.]

[The Court of Exchequer appeared to consider the trusts of the term under the above circumstances as void in their creation. Lords Redesdale and Eldon seemed to consider them as only void in event.]

This was a bill by two devisees under the will after mentioned against the heir at law, and the executor of the survivor of the trustees named in the will, to have it declared that the trusts of a term of 60 years created by the will were void, as being too remote under the circumstances, and that the Plaintiffs, as next in interest, were entitled to the lands comprised in the term discharged of the trusts.

The bill stated in substance that Humphrey Sydenham by his will, dated February 25, 1737, devised and bequeathed his estates in the parish of Astington, in the county of Somerset, to trustees upon certain trusts and to certain uses; and amongst others, upon the determination of certain terms therein mentioned, to the use of his son, St. Barbe Sydenham, for life; and, after the usual remainder to preserve the contingent remainders, remainder to the first and other sons of St. Barbe Sydenham in tail male; remainder to the eldest daughter of St. Barbe Sydenham, and the heirs of her body; with like remainders to the second and other daughters of St. Barbe Sydenham; remainders over, with the ultimate remainder in fee to the testator's right heirs.

[196] The testator then devised his estates in the parishes of Dulverton and Brushford, in the said county, to the same trustees, to the use of several termors and persons who had estates for life given them by the will, and amongst others to the said St. Barbe Sydenham for life, with remainder to his first and other sons successively in tail male, remainder to the second and other sons of the testator in tail male; and in case there should be no such issue male of the testator's body, or the same should become extinct, then as to that part of these estates called Coombe, the Clawes, Andrews Bill, etc., to the use of the testator's brother, Floyer Sydenham, for life, remainder to his first and other sons in tail male; and, after several other remainders for life and in tail, remainder to the Plaintiff, John Sydenham the elder, for life, remainder to his first and other sons in tail male, with the ultimate remainder in fee to the right heirs of the testator.

" And as to all the rest of his manors of Dulverton and Brushford Sydenham, " and all other his estates in the parishes of Dulverton and Brushford, to retain the " same in their hands and custody, for and during the term of 60 years; and during " the said term to receive the rents and profits thereof; and to grant leases for one, " two, or three lives, until they should have received thereby the sum of £17,500, " which his will was they should apply to the uses following, viz.: when they should " have received £2500, to lay out the same, together with such interest as they should " have made therefrom, or from any part thereof, in some real estate in some or " other of the parishes and counties [197] therein mentioned; provided the same " be not in tithes appropriations, or tithe-free lands (from the purchasing or keeping " of which he thereby earnestly exhorted all his posterity and kindred that should " receive any estate by virtue of his will); and at the same time to settle the same estate, " so purchased, on such person for life, as, by virtue of his said will, should then be " in possession of his estate at Astington; or in case, by suffering a common recovery " or otherwise, his said Astington estate should be in no other hands, then on such " person as would, in case no such common recovery or other thing had been suffered " or done for the disinheriting such person, have been in possession of the same " by virtue and according to the intent of his will; and so, from time to time, as soon " and as often as the further sum of £2500 should be raised, as therein before directed, " until the whole sum of £17,500 should be so raised, should lay out the same, together " with its several interests as therein mentioned, in some or one of the parishes therein " before directed, to be settled on the several persons for life as should be, or should " have been, in case no such common recovery or other thing had been suffered or

"done, on each of the said times, in possession of his Astington estate in pursuance of that his will; with such remainder that on each of the said several settlements the said estates to be settled be so settled in pursuance of that his will as might continue the said estates, so long as it should please God, in the blood and name of the said St. Barbes. And after the said £17,500 should be so raised, then to raise [198] the further sum of £2500, to be laid out in some real estates in some or one of the parishes of Dulverton, Brushford, East Ansley, Baddleton, or Baddington; and at the same time to settle the said estate, so purchased, on such person for life as, by virtue of that his will, should then be in possession of the estate of Dulverton; or in case of suffering a common recovery, or otherwise, his said Dulverton estate should be in other hands, then, on such person as should, in case no such common recovery or other thing had been suffered or done for the disinheriting such person, have been in possession of the same by virtue and according to the intent of his will, with such remainder as might continue the same, as long as it should please God, in the name and blood of the Sydenhams. And after the said two sums, amounting to £20,000 and expenses, should be raised for the said uses, or determination of the said term of 60 years, then to the use of his said brother Floyer Sydenham for life, with the remainder to his eldest and other sons in tail male;" and, after such other remainders as he had limited with respect to the first part of the Dulverton estate, remainder to the elder Plaintiff for life, remainder to his first and other sons in tail male, etc., with the ultimate remainder in fee to the testator's right heirs.

The bill further stated that Humphrey Sydenham, the testator, died in 1757, without having altered his will, leaving only one son, the said St. Barbe Sydenham, and two daughters; that St. Barbe Sydenham entered on the estates so limited to him for life, and had two daughters, Ellery and Katherine, but no [199] male issue; that Ellery died unmarried in her father's life-time; and Katharine, who intermarried with Lewis Dymock (Grosvenor Tregonwell, also died, leaving only one son, St. Barbe Tregonwell (the Defendant); that St. Barbe Sydenham died in 1799, leaving the said St. Barbe Tregonwell his grandson and heir at law, and as such heir at law of the testator; that St. Barbe Sydenham, Floyer Sydenham, and the several intermediate devisees, having died in the testator's life-time, or without issue male, the Plaintiff, John Sydenham the elder, became entitled to an estate for life in possession in the premises of Coombe, the Clawes, Andrews Bill, etc.; and the Plaintiff, John Sydenham the younger, to an estate tail in remainder therein; that the said St. Barbe Tregonwell was tenant in tail of the Astington estate; and that as to the second part of the Dulverton estate, one of the trustees of the term had died, and the same had become vested in the other trustee, Lucas, alone, but that the trusts had not been executed. And the Plaintiffs insisted "that the limitations of the estates and premises, so directed to be purchased by the money to be raised by means of the said term of 60 years, were too remote, and were beyond the limits allowed by law for the limitations of estates by devise; and that the trusts declared by the said will of and concerning the said term of 60 years were contrary to the law and policy of this realm, and therefore wholly void and of no effect, as tending to create a perpetuity." And the said bill prayed "that the trusts declared and expressed in and by the said will, concerning the said term of 60 years, might be declared void, and [200] that the Defendant, Robert Tristram Lucas, executor of the surviving trustee named in the will, might be declared to be a trustee thereof, or of the remainder thereof, for the benefit of the Plaintiffs, according to their respective rights and interests as aforesaid; and might be decreed to transfer or assign the same for the remainder of the said term of 60 years to the complainants (Respondents); or as they should appoint for their use and benefit, according to their estates and interest in the premises."

To this bill St. Barbe Tregonwell, the heir at law, then an infant, answered by his father and guardian, submitting his interests to the protection of the Court. After issue joined, and proof by witnesses for the Plaintiffs of the material allegations in the bill, the cause came on to be heard: and on May 15, 1807, the Court "declared that the trusts of the 60 years' term were void, and that the Defendant Lucas was a trustee thereof for the benefit of the Plaintiffs according to their respective interests;" and decreed "that the said Lucas should convey and assign the estate

"and premises comprised in the 60 years' term to the Plaintiffs, or as they should appoint, for the remainder of the said term, to attend the inheritance of the said estate and premises, etc."

From this decree the Defendant, St. Barbe Tregonwell, the heir at law, appealed.

For the Appellant it was contended, 1st, That the trusts of the term might be executed by applying the doctrine in *Humberston v. Humberston*, 1 P. Wms. [201] 332 (2 Vern. 737.—Pre. Ch. 455.—Gibb. Eq. R. 128). 2d. If they could not, they resulted to the heir at law as undisposed of. *Arnold v. Chapman*, 1 Ves. 108.—*Grosvenor v. Hallam*, n. to *Wright v. Row*, 1 Bro. Ch. Ca. 61 (Amb. 642). In *Jackson v. Hurlock*, Amb. 487, a distinction was taken; but no such nicety existed here. How could the devisees take what never was devised to them, and what was never intended to be given them?

For the Respondents it was argued, with reference to the first point, that the person who was to take a vested interest must come into *esse* within a life or lives in being, and 21 years and some months after. Here he could not be ascertained till failure of issue male of the body of the testator, which might not happen for two centuries after. The case of *Humberston v. Humberston* had no application whatever where the object of the testator was to render the property unalienable as long as by the rules of law he could; and the Court, to effectuate the intention as far as possible, executed the will *cy pres*. But here the Court could not execute. The testator had left it undefined who should take. There will be some one in existence to take the interest, he says; but whether you find him a month after my death, or a century after, is uncertain. The longest period within which an executory interest must vest is for a life or lives in being, and 21 years and some months, allowing for the period of gestation. *Duke of Norfolk's Case*.—*Lamb v. Archer*.—*Phipps v. Kelynge*, etc. cited by *Fearne*, 6th Ed. 435, 468, 470, 532, 616, so that if the devise may transgress the limits [202] permitted by the rules of law, it is void. Here the limits might be transgressed before the trust could be executed, and it therefore fell within the objection as to perpetuities. (Lord Eldon (C)). Do you mean to contend that the mere circumstance of uncertainty who is to take after an estate tail, where a recovery may be suffered, and all behind it goes, renders the limitation void?—Though an executory devise might be shaped so as to make the devisee uncertain, till the instant appointed for the rising of the executory estate, yet it must be limited by the rules of law. (Vid. *Fearne*, 6th Ed. (n.)). Here before the interest could be vested, the trustees must enter, the money must be raised whatever might be the value of the estate, the purchase must be made, and the lands settled. Might not the vesting of the interest be thus suspended beyond the limited period? besides, how could the trust be executed? were they first to raise £2500 in the course of 20 years, and purchase and convey the lands to one person, and then wait for another 20 years, and purchase and convey the lands to quite a different person, who might come in *esse* after the proper time? This point was but little relied upon below by the other side.

Then as to the second question, which was chiefly relied on below, the distinction was well defined in the cases. If it be a devise of a certain portion, giving over another, and that other cannot take effect, it cannot go to the devisee, because the devise to him is so far limited, and it results to the heir at law; but if it be a devise burthened with a charge which cannot be executed, the charge sinks for the benefit of [203] the devisee. In *Arnold v. Chapman*, the devise was made minus a certain portion, and the devisee could only take what was given. The case of *Cruse v. Barley*, 3 P. Wms. 20, proceeded on the same distinction, being in unison with *Arnold v. Chapman*, where the devise was minus what had been previously taken out of it. The case of *Jackson v. Hurlock* was that of a devise coupled with a charge, which could not be executed, and it was held that the charge sunk for the benefit of the devisee. So in *Wright v. Row*, 1 Bro. Ch. Ca. 61, and *Barrington v. Hereford*, *ib. cit.*, proceeded on the same principle. If this distinction prevailed, it disposed of the argument as to the intention of the testator; in the cases stated, it was not the intention of the testator that the charge should go to the devisee, but the Court would not raise the charge for a purpose which he as little intended, viz. for the heir at law; but the testator had said that, after the money should be raised for the said uses, the estate should go to the next devisee, and the uses being void, the devisee became immediately

entitled. And where a term was created for certain purposes, when the Court said that these purposes could not be executed, it could not create other purposes. Here lands were devised subject to a charge of £20,000 for certain trusts, which could not be executed: and on the principle of *Jackson v. Hurlock*, and *Wright v. Row*, the charge was not to be raised at all, but must sink for the benefit of the next devisee. The term itself could not arise, unless the trusts could be executed. It must rise for this purpose, or not at all.

In reply it was insisted that the principle of the [204] case of *Humberston* was applicable. It was admitted in the decree that the term was well created. The only question was whether the trusts of it could be executed. As to the other point, this was not the case of a charge. The trustees had the legal estate till a certain period arrived, and if the trusts could not be executed, they must result to the heir at law as undisposed of. The cases cited on the other side were those cases where the whole was first devised, and then an exception made for an illegal purpose, which being void the devise became absolute. But this was a distinct interest.

Romilly and Leach for Appellant; Hart and Roupell for Respondents.

(July 27, 1814.) Lord Eldon (C.). If I were under the necessity of giving a decided opinion upon this cause now, I should be disposed to advise your Lordships to reverse this decree of the Court of Exchequer; but though I think I should be justified in that, yet, considering the great authority of the Court from which the cause came, and that we have had no opportunity of ascertaining with accuracy the grounds upon which its judgment proceeded, I think it my duty to advise your Lordships to allow this cause to stand over.

Lord Redesdale. I concur in that, and the more readily, because the cases cited in support of the decree have not satisfied my mind; and the result of the whole is an impression different from that which was produced on the Court below. But it is due particularly to the very able Judge at the head of that Court, to consider well the nature of the question, [205] and the result of all the cases, where the view entertained of them is different from his. This is, besides, a case of great importance with respect to other decisions; a very ruling case with respect to the rights of real property, and it is of great consequence, that whether reversed, or affirmed, it should be decided on very sufficient consideration.

Lord Redesdale (after stating the case).—The effect of this decree is to put the term of 60 years entirely out of the will, as if it had never been there, and to give up the lands to the next tenant for life, as if he had been the immediate devisee. I confess my mind does not in that respect accord with the decree of the Court of Exchequer; it appears to me impossible to hold with the Barons, that the trusts are void as to the term of 60 years; I do not apprehend that the trusts are altogether void, but only that the conveyances of the lands to be purchased are in certain events what the law will not permit to take effect, and so far only the trusts are void; but I do not see the reason why the trusts, as to the raising of the £17,500 and £2500 should be void. The raising of these sums, and the application of them in the purchase of lands were perfectly legal, and the only thing to be quarrelled with is, his having directed the lands when purchased to be conveyed to such uses. These are uses which, in certain events, the law would not perfect. The defect is in the disposition of the lands when purchased, and not in raising the money, and applying it in the purchase of lands when raised, or in the limitations made of the purchased lands in all events. But supposing the trusts to be [206] void, the decree admits, and it cannot be denied, that the term was well created; and the only question is, for whom Lucas is trustee. In the will the trust is said to be for raising certain sums, amounting together to £20,000, and after that should be raised, or the term determined, to the use of those to whom he had devised the other part of the Dulverton estate; so that he has expressly excluded them from taking any benefit from this devise till the money should be raised, or the term determined.

I take it to be perfectly clear that, where that is devised by will which would otherwise descend to the heir, whatever is not given to some devisee goes to the heir at law, and that what it is impossible for the devisee to take belongs to the heir; and the question always is, where a purpose pointed out by the testator fails, whether the interest is expressly, or by necessary implication, given to some devisee; if not, the

heir must take. Now in this case, there are no words by which the next devisees can take, till the £20,000 have been raised. It strikes me then, in that view of the case, that we cannot affirm this decree consistently with the law as decided in other cases, that where the testator has not pointed out another to whom the benefit is to go, the heir at law must have it.

But I do not see any ground upon which it can be maintained, that the trusts of the term were originally void. They are legal as far as the raising of this sum of £20,000. The laying out the money, when raised in the purchase of lands, is a perfectly legal trust. The directions for the conveyance of the lands so purchased are legal, as applicable to cer-[207]-tain persons. The point at which the illegality commences is where the testator limits for life to persons not in existence at the time of his death, as these could not be made tenants for life, at least not with remainders to their first and other sons, but must take a larger estate, so that I am strongly impressed with the idea that the trusts were not originally void, and that the directions to purchase were good.

Now the present case is to be considered in two ways ; first, the right of the heir to the land devised, so far as he is not disinherited. But he is not disinherited in favour of those, who, according to the decision of the Court of Exchequer would be entitled : for they cannot take, because the interest is not given them until the £20,000 be raised : the consequence necessarily is that, if there is a failure as to the whole of the devisees, the heir must take till the £20,000 is raised ; or if that cannot be raised within 60 years, then he must take the beneficial interest for the whole of the 60 years' term. The next consideration is, what is the effect of the disposition of the lands when purchased with the money raised, the manner of settlement not being what the law will permit to take effect. It has been established in many cases that, where land is directed to be turned into money, or money is directed to be laid out in land, both shall be considered as that species of property into which they are directed to be converted. This was distinctly stated by Sewell, M. R. in *Fletcher v. Ashburner*, and accordingly we find, in the several cases, that to be the clear and uniform decision (1 Bro. Ch. Ca. 497, 499). Then considering the £20,000 as land, the disposition not being capable of being carried into effect, who is to take ? the heir at law must take. If the testator had [208] directed £20,000 to be paid out of the personal estate, and lands to be purchased, these lands, on failure of the intended purpose, would go to the heir at law. The personal representative could not take, as the money was converted into land. Here the purpose intended by the testator was not capable of being carried into effect beyond the direction that the money should be laid out in land, and in the events which had happened, none but the heir at law could take. In a case where the ultimate remainder is to the testator's own right heirs, it is somewhat curious to say that he intended to disinherit his heir as to so much of his property as he left undisposed of ; for when his devisees should fail of effect, he himself has declared that his heir should take. The only case that appears materially to affect the question is that of *Jackson v. Hurlock*, Amb. 487, decided by Lord Northington. In that case the testator had given his real estate to a lady whom he intended to marry, and afterwards did marry, reserving to himself a power to charge the land with a sum not exceeding £10,000, and this power he afterwards executed to the amount of £6000, for the benefit of charities. This was void, and Lord Northington decided that the money sunk for the benefit of the devisee ; but there the whole interest had been previously given to the devisee. In *Grosvenor v. Hallam* (Amb. 643), Lord Camden held that a rent charge given to a charity, being void by the statute, went to the heir at law ; and the reason was, that though the gift to the charity was void, yet the rent charge was severed from the devise, and must therefore go to the heir. So here the interest in the term was severed from the devise, the devisee not being to take till after the £20,000 were raised, and [209] therefore it must go to the heir till then. That is conformable to the decisions in the other cases, where the Courts have constantly held that, when a disposition cannot take effect, and there are neither express words, nor necessary implication, to show the testators' intention that the interest should go to a devisee, there the heir must take. In the case of *Arnold v. Chapman* (1 Ves. 108), a copyhold estate was devised to Chapman, he causing £1000 to be paid to the executors, and then the testator gave all the residue of his estate, real and

personal, after payment of debts and legacies, to the Foundling Hospital. Lord Hardwicke there said that, in *Roper v. Ratcliffe* (9 Mod. 171), it was resolved that whatever is taken out of the real estate shall be considered as real; and this would be taking so much out of the real estate for the charity, which therefore shall not go to it. The legacy was well laid on the real estate, but not well disposed of, by reason of the Act, and it was decreed to the heir, and not to the devisee. So here the charge is well laid on the real estate, but in the events which happened not well disposed of, and therefore resulted to the heir at law, as not effectually disposed of by the will. I submit then that the benefit of the trusts of this term does not belong to the subsequent devisees, but must go to the heir-at-law, and that the decree of the Court of Exchequer ought therefore to be reversed.

(July 11, 1815.) Lord Eldon (C.). The way in which I consider the case, is this: Where land, or interest in land, such as would descend to the heir at law, is undisposed of by the will, the heir at law shall have [210] the benefit of all that is not disposed of; and if the testator has disposed of the legal interest, but not the beneficial, then the heir at law shall take by a resulting trust all the beneficial interest which is so undisposed of. I do not say that this is universally true, because particular circumstances in certain cases may make a distinction. But that is the general rule, and it amounts to this, that *pro tanto* the heir is not disinherited. It follows then that, when a devise fails, the interest goes to the heir at law, unless there appear in the will express words, or necessary implication, to the contrary. In case a devise fails, then the interest must generally go to the heir at law, as not being disposed of by the will, because, generally speaking, such an interest cannot pass from the heir except by express words, or necessary implication. The general principle is that an heir can only be disinherited by express words, or necessary implication; and if there is a doubt whether it is intended for the devisee or heir, or in case what is given by the will to another should not have effect, then it goes to the heir. But if a gift over is clearly expressed, or necessarily implied, then it goes as the testator intended it should go. As for instance, land is devised to A., charged with a legacy to B., provided B. attain the age of 21. There the devise is absolute as to A., unless B. attains the age of 21; if he does, then he is to have the legacy; but his attaining 21, is a condition upon which alone he is to have it, and if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in, because the whole is absolutely given to the devisee; but a gift which fails must be clearly [211] intended, upon the failure of the condition, to be for the benefit of the devisee, otherwise he cannot take advantage of that failure, as he being devisee can only take what is given him by the will. The case of *Arnold v. Chapman* (1 Ves. 108, 110), mentioned at the bar, proceeded on that principle. There one Emerson devised a Copyhold to Chapman, he causing £1000 to be paid to his executors, and then the residue of all his estates (after payment of debts and legacies), freehold, copyhold, leasehold, plate, rings, stock, etc., he gave to the Foundling Hospital. The land was prohibited to be given to such a charity, and the question was what was to become of the £1000. It was not made applicable to the payment of the debts and legacies, and then the next of kin claimed it, but the Court said No, it was not given to them. Then the devisee insisted that it should not be raised at all, and that it was the same as if the condition had been to pay it to the charity, which was an unlawful act, and therefore void, and the estate absolute. But to this it was answered that the testator had no intention to give it to him; that the estate was given to him, he causing £1000 to be paid out of it; that the £1000 could not go to the devisee, for his paying it was a condition upon which the estate was given him. And Lord Hardwicke said that, in as much as the heir might enter for breach of the condition, and in as much as the hospital could not by law take it, and the devisee could not take it because it was not given him, the £1000 must go to the heir; whether it was intended for him or not signified nothing, as he did not take by force of the intent, but by the rule of law.

[212] So in the case of *Grosvenor, or Gravenor v. Hallam* (Amb. 643), also mentioned at the bar, where one Goldsbury by his will gave a messuage in Ipswich to his executors, subject to a charge of £10 out of the same for ever, to certain charities, the estate to be sold, and after payment of debts residue to some persons named, the

question was, what was to become of the £10? Lord Camden said that the land was given to the devisees, subject to the payment of £10 a-year, that the £10 was severed from the devise, and being void as given to a charity, it went to the heir at law, as not effectually disposed of. There was no declaration of intention, express or implied, as to its going in a way permitted by law, and not being effectually disposed of *ex consequentia* it went to the heir at law (*vid.* also *Wright v. Row*, (n.) 1 Bro. Ch. Ca. 61).

The case of *Carriek v. Errington* (2 P. Wms. 361.—3 Bro. P. Ca. 412), was decided on the same principle. Edward Errington there, by lease and release, settled lands to himself for life, remainder to his first and other sons successively in tail male, remainder to Thomas Errington, a Papist, for life; remainder to trustees during the Papist's life, to preserve contingent remainders; remainder to the Papist's first and other sons in tail male; remainder to William Errington, a Protestant. The remainders were void as to the Papist, but the effect was held to be, not that the subsequent remainders were accelerated, but that the rents and profits belonged to the heir during the life of the Papist. Upon the same ground in the case of *Hopkins v. Hopkins* (Ca. Temp. Talbot, 44.—1 Atk. 597), where estates were limited by will to certain persons, on their attaining the age of 21, with an allowance for maintenance in the mean time, out [213] of the rents and profits; the surplus rents and profits, remaining undisposed of till they attained the age of 21, were decreed to the heir at law. So likewise in *Stonehouse v. Evelyn* (3 P. Wms. 251), the decision was upon the same ground in favour of the heir, and this shows how careful the Courts are, not to disinherit an heir at law, unless it is clearly the intention of the testator that the property should go in another direction. There one devised a rent charge to a trustee, to be sold to pay legacies, amounting to £800, and if the rent charge should sell for £1000, then to pay a further legacy of £200. The rent charge sold for less than £1000 but for more than £800, though not for £200 more. The question was, who should take the surplus above the £800. It was contended that the legatees should take in proportion to their legacies. But "no," said the Court, "for in that way we should be making the will instead of the testator," and it was held that the surplus resulted to the heir at law.

As to the charity cases where the gifts rendered void by the statute did not go to the heir, they all seem to have been decided on one or other of these grounds, that the heir at law was completely disinherited, or that his claim was barred under an intention of the testator, express or clearly implied.

The case of *Jackson v. Hurlock* (Amb. 487) appears to have been decided on the first of these principles. This was a devise of the whole estate, subject to the payment of such sums not exceeding £10,000 as the testator should appoint, not doubting the devisee's honour and integrity in the performance of the will. Several sums, amounting to £6000, were appointed to [214] charitable and superstitious uses. It was argued there that the heir at law ought to have this sum, as the estate was given to the devisee subject to the payment; but the Court said, and rightly said, "No." The testator gave the devisee the whole interest in the land, reserving only a power of appointment, and if he abstained from appointing, or made an appointment which was void, he did not diminish the whole interest which was given to the devisee, and the heir was altogether disinherited. That points to the very distinction noticed by Lord Camden, in the case of *Gravenor v. Hallam*, where the estate was given to the devisee, subject to certain rent charges which he created by his will, severing the rent charge from the devise, and thereby manifesting an intention that it should not go to the devisee, and the uses being void, the rent charges went to the heir at law (*vid.* *Cruse v. Barley*, 3 P. Wms. 20). That was Lord Northington's decision; and the decision in *Barrington v. Hereford* (1 Bro. Ch. Ca. 61 (n.)) proceeded upon the same principle.

Now see what this case is: and here I must distinguish between this and a case lately decided in the Court of Chancery, where a term was created for raising portions, and no portions were subsequently mentioned. It was there contended that the heir at law was entitled to the beneficial interest as undisposed of. But the Court, looking at the intention as collected from the whole of the will, was of opinion that, as the testator had not mentioned any portions, he had merely stated what he proposed in case he had chosen to express it: but as he had not mentioned any portions, the

will was so framed that that part could have no application : and it was de-[215]-cided that the principle was clear that the devisee should take, subject to these portions if they were to be raised ; if not, then absolutely ; and so the term was assigned to him to attend on the inheritance. But that was a different case from the present. If the term there, for instance, had been for 90 years, in order to raise £20,000 for charities, and after the sum had been raised, then the lands to go to certain devisees ; in that way of putting it, the question would be whether the devisees could take any thing till the money had been so raised. And according to the cases which I have mentioned, of intention manifested that the devisees should take short of that, they had no right to say that the interest was included in the devise to them, as they could only take according to the intention.

There could be no doubt but that in this case the term was well created. It was admitted to be so in the decree which directed that it should be assigned to attend the inheritance : and here I must intimate that though these trusts have been considered as too remote, it is difficult to say that they were so in all events ; but as the case had not happened in which they could be carried into effect, and as the money was to be raised out of land, and the devisee could not take it because it was not given to him, it must go to the real representative. It appears to me then that the question is narrowed to this :—suppose the trusts were too remote, was it the intention of the testator that in such circumstances the devisee should take the beneficial interest in the term ? A question which must be considered with reference to the fact, that there is an express direction to the trustees to [216] get together the rents, profits, and fines, for the purpose of raising £20,000, and that the lands were given over so and so expressly from and after the raising of the said sum of £20,000 for the said uses. Some stress was laid in argument on these last words, “ for the said uses,” the uses being void as too remote. But suppose it had been a devise to the use of a charity, which the law would not permit to take effect, the cases authorize me to say that the beneficial interest in the term would not go to the devisee, unless it clearly appeared that such was the intention of the testator. Here the interest is given minus in value £20,000, and only with a deduction of that sum. The testator then has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect ; and in such a case, in the absence of any expression of intention on the part of the testator with respect to a purpose which the law will allow, the doctrine of law is this, that he shall take the interest, who takes independent of all intention, and on whom the law casts it. On these grounds I agree with my noble friend that the money must be raised and applied for the benefit of the heir at law, and not of the devisees.

The judgment was in these terms :—

(July 11, 1815.) “ Ordered and adjudged that the decree complained of be reversed : and it is declared and adjudged that, on the failure of the issue male of the “ body of the testator Humphry Sydenham, the manors of Dulverton and Brushford “ Sydenham, and all [217] other the testator’s estates in the parishes of Dulverton and “ Brushford, except the capital farm at Brushford called Combe, and the Clowes, Andrew “ Bill, and the moiety of the church of Brushford, were by the testator vested in the “ trustees therein named, for the term of sixty years, upon trust, to raise the two sums of “ £17,500 and £2500, and to apply such two sums in the purchase of real estates, accord- “ ing to the directions contained in the said will ; and that no interest in the estates “ comprised in the said term was devised to the testator’s brother Floyer Sydenham, “ and the several persons to whom the said estates were limited in remainder, after “ the death of the said Floyer Sydenham, until the said two sums of £17,500 and “ £2500, amounting together to £20,000, and the expenses of the trust, should have “ been raised, unless the said term of sixty years should have expired before such “ sums should have been raised under the trusts of the said term. And it is hereby “ further declared and adjudged that, in the events which have happened at the time “ of failure of issue male of the body of the testator, such of the uses which the testator “ by his will directed, the estates so to be purchased should be conveyed, as would “ otherwise have been capable of taking effect, were too remote, and therefore void ; “ and that therefore the trusts of the real estates, directed by the testator’s will, to be “ purchased with the said two sums of £17,500 and £2500, resulted to the heir at

"law of the testator, as undisposed of by the testator's will. And with this declaration and judgment it is ordered that the cause be referred [218] back to the Court of Exchequer, to do what shall be fit to be done therein, according to such declaration and judgment."

Agents for Appellant, SANDYS, HORTON, and ROARKE.
Agent for Respondents, PARRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (1ST DIV.).

DAVIDSON,—*Appellant*; ROBERTSON, and Others,—*Respondents*
[April 19, July 4, 1815].

[3 Scots R. R. 282. Considered in *Yorkshire Banking Co. v. Beatson*, 1880, 5 C. P. D. 114.]

- [A. and B. are partners, and goods are purchased on the partnership account. A. gives one bill for the price, B. gives another, and each accepts for the firm. One of the bills comes into the hands of C., the other into the hands of D., and both raise their actions against A. and B. the acceptors.]
- [A. and B. raise a process of multiplepinding, and by the Court below are found liable in only once and single payment, and the matter is reduced to a competition between the holders of the two bills.]
- [C.'s bill has been endorsed by E., per procuration of F., and it being denied that E. had any power so to indorse, proof is offered of acts of agency by E. for F., which would lead the world in general to believe that E. had such power; but the evidence is not allowed by the Court below to be gone into, and D.'s bill is preferred.]
- [C. appeals from this last judgment; but there is no appeal from the judgment in the multiplepinding.]
- [It was said *arguendo* by Lord Eldon (Chancellor) and Lord Redesdale, that a power of indorsing per procuration did not require a special mandate, but might be proved by inference from facts and circumstances; and though there might be fraud by E. upon F., that was no answer to a *bonâ fide* holder for val. con.]
- [219] [And that where two or more bills were accepted by a firm, each of them for the whole price of an article furnished, and these bills got into the hands of *bonâ fide* holders for val. con. the firm was liable for them all, and therefore this was no case for multiplepinding.]
- [Judgment, that the cause be remitted with instructions to receive the evidence as to the procuration, etc. *sed qd.* if it should turn out, that both bills are perfectly and equally good, as the judgment that the acceptors are liable in only once and single payment is not appealed from, and is final in the cause; upon what principle is it to be determined that the one bill should be paid, and not the other? Per Lord Eldon (C.). "He must see clearer than I do, who can see the way out of this difficulty."]

Mason, Baird, and Co. merchants, in Aberdeen, acted as commission agents of George Lockwood and Co., in the disposal of goods for the latter. The agents had a commission of $7\frac{1}{2}$ per cent., and guaranteed the payment of the goods to the extent of one half of the price. The practice was for Mason, Baird, and Co. to draw bills on the purchasers of the goods, in their own name, and indorse them to G. Lockwood and Co.; and sometimes Mason, Baird, and Co. discounted the bills, and remitted the price of the goods in Bank of Scotland bills, or other unexceptionable paper. They

had no special mandate from Lockwood and Co. to indorse their bills to others per procuration. Baird, one of the partners in the house of Mason, Baird, and Co., engaged in an adventure to Quebec, along with John Robertson and William Carlier, under the firm of John Robertson and Co.; and this last company, upon the application of Baird, obtained goods from Lockwood and Co. to the amount of £1492 4s. 8d. for the ad-[220]-venture. The goods were furnished in April 1809, to be paid for in twelve months from that date. Three months previous to the time at which the goods were payable, Mason, Baird, and Co. according to Robertson's statement, drew a bill for the value, which Robertson (signing for the firm) accepted for the firm of Robertson and Co. This bill was dated January 22, 1810, for £1492 14s. 9d. purporting to be for value in cloth to Quebec, of G. Lockwood and Co. It was indorsed by Mason, Baird, and Co. to G. Lockwood and Co. or order, and again indorsed by Mason, Baird, and Co., per procuration of G. Lockwood and Co., to Andrew Davidson, or order, who indorsed it to his brother Robert Davidson, or order, by whom it was indorsed to Alexander Walker, who indorsed it to John Thomson, agent for the Bank of Scotland, who reindorsed the bill to Robert Davidson. The reason for this reindorsation, as stated by Robert Davidson, was that payment had been refused by the acceptors, and that he being liable to Walker and Thomson, paid the amount to the bank agent, who reindorsed to him that he might recover against the acceptors and prior indorsers. According to Lockwood's statement (no evidence was gone into), Andrew Davidson had become cautioner for the payment of certain bills granted by Mason, Baird, and Co. to Walker, and being apprehensive of the failure of the Co., which soon afterwards happened, he contrived the expedient of this bill, which through the medium of his brother Robert Davidson he delivered to Walker, and got up some of the bills for the payment of which he had so become bound.

[221] Another bill drawn by Mason, Baird, and Co., and accepted by John Robertson and Co. (Baird signing for the firm) for £1492 4s. 8d. purporting to be for value in woollen to Quebec, was given by Baird to G. Lockwood and Co. This bill, according to the statement of the Lockwoods, was tendered to them by Baird in November, 1809, for the goods furnished by them for the Quebec adventure, and to give it a negotiable appearance was dated February 12, 1810, and made payable sixty-five days after date, so as to make it fall due at the time the price of the goods was payable.

A charge was given to the acceptors on Lockwood's bill, and Robert Davidson having also given a charge to the acceptors and indorsers, they persented bills of suspension. Robertson in his suspension admitted his signature to Davidson's bill, but stated that he had received a charge on another bill, on account of the same matter. Carlier in his suspension stated that he was not a partner of the firm of Robertson and Co.; and the Lockwoods in their suspension stated the circumstances respecting the bills, as above.

A process of multiplepointing was also raised by Robertson, Carlier, and Baird, concluding to be found liable only in once and single payment.

In Robertson's suspension, the Lord Ordinary (Hermand) found that Mason, Baird, and Co., either had authority to indorse per procuration, or that they had not: that in the latter case they had no right to indorse Davidson's bill in the name of Lockwood and Co.; that in the former case the Lockwoods must relieve Robertson and Co. of [222] Davidson's bill: and then he found that an indorsation per procuration required a special mandate, and suspended the letters till the production of the bill in Lockwood's hands, with a discharge. In Carlier's suspension he found that, whatever might be the case in a proper partnership, one person concerned in a joint adventure was not entitled, by subscribing the firm, to bind another: and in the Lockwoods' suspension, that they could not by a circuit of indorsations, which had every appearance of being fraudulent, be made liable in the payment of a bill for goods, for the price of which they were not debtors, but creditors: and as to them and Carlier, suspended simpliciter. In the process of multiplepointing, his Lordship found the pursuers liable only in once and single payment, and afterwards conjoined the suspensions with the multiplepointing. In representations given in against these interlocutors, it was alleged that Mason, Baird, and Co., had been in the habit of indorsing, etc., bills per procuration of the Lockwoods, and a condescendence was ordered and given in for Davidson, stating circumstances which he offered to prove

on that head. The Lord Ordinary afterwards pronounced an interlocutor, finding that there was real evidence in the terms of the last indorsations on Davidson's bill; that he paid no value for it; that there was no evidence of the procuration, and that the letters and charge at the instance of the Lockwoods against Robertson were orderly proceeded in, and preferred them to the sum *in medio* in the multiplepounding; and as to Carlier, allowed them to state in a condescendence the facts which they offered to prove, in order [223] to show that he was bound by Robertson's subscription, if they chose. Davidson reclaimed to the first division of the Court of Session, which adhered to the Lord Ordinary's interlocutors; and thereupon Davidson appealed from all the interlocutors adverse to his claim, except the interlocutor in the multiplepounding, against which there was no appeal.

Leach and Adam for Appellants; Romilly, Brougham, and Horner, for Respondents.

(July 4, 1815.) Lord Redesdale. This question arose upon a bill of exchange for a sum of £1492 14s. 9d. dated January 22, 1810, signed Mason, Baird, and Co., and the bill was in these terms:—"Three months after date pay to us, or order, etc. value "in cloths to Quebec, of George Lockwood and Co." This bill was directed to, and accepted by, Robertson and Co. and was indorsed in this way:—Mason, Baird, and Co. indorsed it to George Lockwood and Co., and then Mason, B. and Co. indorsed it to Andrew Davidson per procuracion G. Lockwood and Co., A. Davidson indorsed it to Robert Davidson, R. D. to Alexander Walker, A. W. to John Thomson, for behoof of the Bank of Scotland, and Thomson indorsed it back again to Robert Davidson, without recourse, on Walker, or Thomson, or the Bank of Scotland. It was immaterial to consider the circumstances of the indorsements subsequent to that of A. to R. Davidson, as the effect of the reindorsation was to bring the bill back again to that. This bill was not paid by the acceptors; and a protest was taken, and charge given, to the acceptors and in-[224]-dorsers, for each of whom suspensions were offered; and Robertson, who had accepted the bill, in his suspension stated that he had accepted the bill, which was held by Davidson, and was ready to pay it, but that he had received a charge on another bill on the same account, and that one or other of the bills must be a fabrication; that he was liable only for one of them, and therefore raised his suspension, leaving it to the holders to make out which of them had the genuine bill. Carlier, another person sued, stated in his suspension that he was not a partner in the firm of Robertson and Co. and was not at all connected with the company, and never heard of the bill in question before. Lockwood and Co. in their suspension stated that Mason, Baird, and Co. had no authority to indorse for them. Then a process of multiplepounding was raised by Robertson, Carlier, and Baird, the acceptors of the bill, and partners in the joint adventure, stating the purchase and claim on the two bills, and concluding for being found liable only in once and single payment. Their Lordships would observe that it was perfectly immaterial to the holder whether there was a claim on another bill or not, if he had a right to sue on the first bill as a bill of exchange. But the Lord Ordinary had pronounced these interlocutors in the several suspensions (*vide ante*).—And finally in the multiplepounding "that the Pursuers were liable in only once and single payments." This interlocutor was not appealed from; and the consequence was that their Lordships could not discuss whether it was liable to the objection that this was not a subject of multiplepounding; and the only question was whe-[225]-ther the parties were liable for payment of this (Davidson's) bill. The Petitioner gave in a representation against the interlocutors; and, after answers, the Lord Ordinary appointed the parties to be heard as to whether the several processes of suspension and multiplepounding ought to be conjoined, and he afterwards conjoined these processes. And in respect it was alleged that Mason, Baird, and Co. were not only agents of Lockwood and Co. in selling goods, but, with their knowledge and approbation, had been in use of drawing, receipting, indorsing, and discounting bills per procuracion for them, he ordained the Representer to give in a special condescendence of what he would undertake to prove on that head, and Lockwood and Co. to answer the same. A condescendence was accordingly given in, stating circumstances to show that M. B. and Co. had a right to indorse per procuracion, and L. and Co. gave in one of a different tendency. The Lord Ordinary then, on June 13, 1811, pronounced this interlocutor

(*vide ante*), " finds real evidence in the terms of this last indorsation, that R. Davidson paid no value for it to the preceding indorsee, etc." That seemed to have arisen from a total mistake ; for when the bill became payable, the last indorsee had a right to call on the preceding indorser, and as Robert Davidson was bound to pay the subsequent Indorsees, he paid accordingly, and took a reindorsement to himself. And that the interlocutor proceeded (*vide ante*). Now their Lordships perceived that this interlocutor proceeded on the ground that there was no evidence of the existence of the procuration ; and no evidence as to [226] that fact had been gone into on the condescendances of the parties. Then the Lord Ordinary held that the other bill, as to which there was no evidence, was that which ought to be paid, and allowed L. and Co. to state, in a condescendance, if they thought proper, what they would undertake to prove to show that Carlier was bound. Then a reclaiming petition was presented to the Court by the Appellant, who contended, that a proof ought to have been allowed as to the authority to indorse by procuration. The Court, however, adhered to the interlocutor ; and a second reclaiming petition having been given in, the Court ordered a condescendance of what the Appellant averred and offered to prove as to the powers of M. B. and Co. to sign bills for L. and Co., and a condescendance was given in accordingly, upon advising which with answers the Court refused the prayer of the petition, and adhered. All these proceedings in the Court of Session, subsequent to the interlocutor in the multiplepinding, finding Robertson and Co. liable in only once and single payment, were appealed from, but there was no appeal from the multiplepinding. The consequence of not appealing from the interlocutor of November 29, 1810, finding R. and Co. liable only in once and single payment, or from that of February 22, 1812, and on the contrary, submitting to that of February 26 and 28, conjoining the processes, was that their Lordships could not say whether the multiplepinding was well raised or not. But with respect to Carlier, the proceedings in the multiplepinding were in direct contradiction to the suspension ; for in the multiplepinding, he represented himself as [227] one of the partners, and that being inconsistent with the suspension, and as the multiplepinding must be sustained, the Appellant ought to be assolvied in the suspension. As far as concerned Robertson's suspension, as the Appellant had not appealed from the multiplepinding, he had no demand, except subject to the question whether Lockwood's bill ought to be paid in preference. There was no evidence to support the judgment in favour of that bill as preferable. On the contrary, the Pursuers admitted that the first bill had been accepted by Robertson and Co. and that it was in payment of the goods purchased for the joint adventure, and in the suspension Robertson treats the other bill as a fabrication. The Court, therefore, had proceeded without proof as to that part, and in the other part the law on the subject was mistaken. He submitted, therefore, that these interlocutors should be reversed, and that the cause should be remitted to the Court to receive such evidence as might be produced as to these bills respectively ; and as to the authority of M. B. and Co. to indorse by procuration, either to make Lockwood liable, or to enable them, M. B. and Co. to transfer the bill to A. Davidson without the indorsement to Lockwood ; for it appeared that Mason, B. and Co. dealt with these bills as they thought fit, and generally remitted the amount of the goods sold, not in these bills, but in bills of the Bank of Scotland ; and the specific bills were not remitted for another reason, which was that Mason, B. and Co. received a commission of $7\frac{1}{2}$ per cent. and would deduct that out of the sums recovered.

Lord Eldon (C.). Having seen what the noble [228] Lord proposed to submit to their Lordships, he thought it the best proceeding that could be adopted in the very awkward circumstances in which this case stood. The case was no more than this :— Here were two bills on the same account, and suppose for the same sums. They who were to pay them had a right to complain that there were two, and yet they were bound to pay both, if the bills were in the hands of *boni fide* holders, and accepted by them, or by others for them, having authority so to accept. It might be a fraud in A. to send them both into the world, but it was no fraud in B. and C. if they were *boni fide* holders for valuable consideration, to demand payment, though this might be hard upon D. who would be bound to pay them. But here the parties who would be so liable to pay had raised a process of multiplepinding, saying " Here are two

"bills against us; we are liable to pay only one of them, and tell us which." The answer should have been, "I have nothing to do with your multiplepinding, nor is it material whether there may or may not be another bill, for that will not affect my bill." To say that this was a case for multiplepinding was altering the nature of the proceeding entirely. If B. had a bill in hand, and A. and C. were claiming the amount when it should be paid, that would be a case for multiplepinding. But such a proceeding on two bills was quite inextricable. It seemed, however, to have been taken for granted that Robertson and Co. were liable for one, though certainly not for both, and the Judges below having it in their heads that no demand could be maintained except for one [229] only, they thought the most questionable should be considered as a nullity, in order to favour the other, with respect to which they had no proof. But here a greater error occurred than he ever remembered to have met with, if the commercial law was the same in Scotland as in England. In the first interlocutor there was one finding which was indisputably true, and it was almost the only one which was correct, viz. "That Mason, Baird, and Co. either had a procurator from Lockwood and Co. or they had not." These were truisms which no one would dispute. And then there was a finding "that an indorsation per procurator requires a special mandate." His opinion was that no such thing was absolutely necessary; for if from the general nature of the acts permitted to be done the law would infer an authority, the law would say that such an authority might exist without a special mandate, and that an indorsement per procurator might be good, though there were no such mandate. The next interlocutor found "that, whatever may be the case in a proper partnership, one person concerned in a joint adventure is not entitled by subscribing a firm to bind the other."—Why, a joint adventure was as proper a partnership as any other, and one of the adventurers would be bound by the indorsement and acceptance of the other. A very remarkable case had come before their Lordships two or three years ago, (*Qr. Fleming v. M'Nair*, Dom. Proc. July 16, 1812), in which it appeared that the business of about half a dozen different firms was carried on under the same general name; and their Lordships had held that, unless they could fix the man who held any of their bills [230] with the knowledge that it was the bill of A. and Co. or any other of the separate firms, he had got paper which gave him recourse upon them all.—Then the third interlocutor found, "that the suspenders (Lockwood and Co.), being creditors for the price of the woollens sold by them to Mason, Baird, and Co., cannot, by a circuit of indorsations, which it does not appear they authorized, etc. be subjected in payment of a bill, in which they are substantially not debtors, but creditors;" and he agreed that, if Mason, Baird, and Co. were not legally authorized to indorse per procurator, Lockwood and Co. were not liable; but if it appeared that they were legally authorized, it did not signify a farthing to a *boni fide* holder for valuable consideration, whether they were debtors or creditors. Then came the interlocutor in the multiplepinding, finding Robertson and Co. liable in only once and single payment, and this was not appealed from. If it had been appealed from, he should say that this was no case of multiplepinding, but that the parties ought to go on upon each of these pieces of paper, called bills of exchange, having not the same but different demands in respect of them. If the holder proceeded on the bill as to which they had here no proof, if it was a good bill, that demand must be made effectual. If Davidson proceeded on his bill, all they could say was, "Show us that it was regularly transmitted to you;" and he might say, "I do so: Mason, Baird, and Co. indorsed it per procurator of Lockwood and Co. to Andrew Davidson, who indorsed it to me:" and then the single question would be whether Mason, Baird, and [231] Co. had any such authority. It might be a fraud to draw two bills in this way, on those who were to pay, but what signified that to a third person? Both, if they were good bills, must be paid, and there was no ground for a multiplepinding. Then, without any proof as to the second bill, they did go into an examination respecting this first bill indorsed by procurator, and another interlocutor was pronounced, which, for the sake of the general law of the country, he must notice; and it would be disrespectful, even to the Court below itself, to pass it without observation. It stated that, on January 22, 1810, a bill at three months date, drawn by Mason, Baird, and Co. and addressed to Robertson and Co. was ac-

cepted by Robertson, etc. indorsed thus—first, "Pay George Lockwood and Co."—next, "Pay Andrew Davidson;" and then Andrew Davidson said, "Pay Robert Davidson;" and R. Davidson said, "Pay Walker;" and Walker said, "Pay Thomson, for behoof of the Bank of Scotland;" and Thomson said, "Pay Robert Davidson, without recourse on Walker or me, or the Bank of Scotland." That brought back the bill to Davidson, but providing for the non-liability of Walker and Thomson, and the Bank. Then the Lord Ordinary found "that, on February 12, 1810, Mason, Baird, and Co. drew a bill, seemingly relative to the same transaction," etc., and then he gave the particulars of it. And then the Lord Ordinary found, with respect to the first bill, "that Andrew Davidson, the agent of Mason, Baird, and Co. having got "a blank indorsation from them, took upon him to make a new indorsation to his [232] brother, Robert Davidson," etc.; and an after indorsation, "Pay R. Davidson, without recourse on Walker or me, or the Bank of Scotland;" finds real evidence in the terms of this last indorsation, "that Robert Davidson paid no value to the "preceding indorsee;" and on that finding he decerned. Now see what was the transaction. Robert Davidson indorsed to Walker, and Walker to Thomson, for the behoof of the Bank, and Thomson re-indorsed to Robert Davidson, but saying, "You shall not have recourse on me, or on the person who is between us." Here were a great many words to little purpose; for the result of law would be that Thomson would have his action against Walker, and Walker against Davidson; and what possible proof of fraud could there be in a man doing that which he might be compelled by law to do, unless he did it without such compulsion? Then the matter went on through a great many interlocutors; and the question on the condescendence must have been whether, supposing the facts stated to have been proved, it would follow that the law would infer that he or they who had been allowed to do such acts had an authority to indorse; and it seemed to him to have appeared too clear to the Court of Session that the facts would not amount to such an authority. It might turn out that Davidson had a right to recover, and it might turn out that the holder of the other bill had likewise a right to recover; and what was to be done in that case? For the Court had decided, in the multiplepinding, that Robertson and Co. were liable for one only. Then, if it turned out that both had a right to re-[233]-cover, that person must see more clearly than he could, who could see the way out of the difficulty; and therefore it would be more satisfactory if the parties would consider whether they could settle this without further litigation; and if Davidson suffered by this, he must recollect that he had not put it in their Lordships' power to relieve him.

Interlocutors appealed from reversed, and the cause remitted, with instructions to receive such evidence as might be properly offered with respect to the two bills, and particularly of the facts alleged as to the procuration, or the power of Mason, B. and Co. to transfer the first bill to Andrew Davidson, without the indorsement to Lockwood, or by striking it out, or otherwise, without making the Lockwoods liable as indorsers.

Agent for Appellant, MUNDELL.
Agents for Respondents, DUTHIE, RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (2D DIV.).

BAYNE,—*Appellant*; WALKER,—*Respondent* [Feb. 27, Mar. 22, May 12, July 3, 1815].

[3 Scots R. R. 288. Followed in *Drummond v. Hunter*, 1869, 7 Macph. 347; *Duff v. Fleming*, 1870, 8 Macph. 769, 770. As to English law, cf. *Lofft v. Dennis*, 1859, 28 L. J. Q. B. 168.]

[Where a farm-house was burnt by accident, it was held by the House of Lords, reversing a judgment of the Court of Session, that the landlord was not bound to rebuild.]

[The Lord Chancellor seemed to doubt whether the having a bed with a wooden frame, and with straw in the bottom, [234] hanging down through the interstices of the spars below, placed within about 40 inches of the fire-place, where there was no fender, did not amount to culpable negligence : and if it was culpable negligence, the generality of the practice, he said, only made it the more necessary so to determine.]

Bayne was Proprietor of the Farm of New Miln, of which Walker was Tenant. In March 1806, the farm-house was consumed by fire ; Walker gave in a summary petition to the Sheriff-Depute of Fifeshire, setting forth " that on the morning of the " fourth current the dwelling-house on the farm of New Miln, possessed by the petitioner, " unfortunately took fire, and was burned to the ground, along with almost every " article in it belonging to him : that by this accident the petitioner and his family " are presently lodging in the house of a friend, at the distance of some miles : that " the petitioner applied to William Bayne, Esq. of New Miln, the proprietor, to rebuild " the house, which he refuses to do. The present application is therefore necessary." And the conclusion is as follows : " May it therefore please your Lordships, after " service of this petition on the said William Bayne, Esq. to find that he is liable to " rebuild the foresaid dwelling-house on the farm of New Miln, and to put it in the " situation it was before the said fire took place, and to decern him immediately to " do so ; and failing of his so doing, to grant warrant to the petitioner to rebuild and " repair the said house, and to find the said William Bayne liable in the expense thereof, " and to allow [235] the petitioner to retain his rent until the said expenses are paid : " and lastly, to find him liable in the damages and expenses."

Bayne, the landlord, stated two defences ; first, that the fire was occasioned by culpable mismanagement and negligence in the tenant : second, that suppose it had happened by accident, the landlord was not bound to rebuild. The Sheriff after proof decided that the fire was accidental, and that the landlord was bound to rebuild. Bayne then removed the cause by bill of advocacy into the Court of Session, where the case was argued at length, and the Court finally decided in favour of the tenant on both points. From this judgment the landlord appealed.

As to the first point, it appeared in evidence in the cause that there was a bed where the fire was supposed to have commenced, in a corner of the kitchen, within 45 inches of the fire-place. This bed had a wooden frame, and there was straw in the bottom of it, where there were openings between the boards so as to permit the straw to hang down. For the landlord it was contended that it was culpable negligence in the tenant to have a bed with such materials so near the fire-place, and it was insisted that the fire must have been occasioned by a live coal starting from the fire-place, where there was no fender, to the straw under the bed. For the tenant it was contended that the fire must, in all probability, have been occasioned by a live coal or cinder carried to the bed on the back of a cat, which was in the habit of lying among the ashes and in the bed, and that it was common in farm-houses in [236] Scotland, to have a bed in the kitchen of such materials, and in such a situation. The circumstances connected with this point are so far stated on account of an observation of the Lord Chancellor on the subject of negligence which deserves to be noted.

But the point chiefly to be attended to is the second, viz. whether when a farm-house is burnt by accident, the landlord is by the general law bound to rebuild. In the Court below, and at the bar of the House of Lords, the maxim of the Roman law, *res locata perit domino*, was much relied upon for the tenant, and the cases of *Swinton v. Macdougall*, Fac. Col. January 1810.—*York Building Company v. Adam*, C. Home, July 5, 1741.—*Sinclair v. Hutchinson*, Kilk. November, 1751.—*White v. Houston*, Fount. 1707.—*Clerk v. Baird*, Kilk. July 10, 1741, were cited. The cases where the decision was against the tenant, *Hardie v. Black*, March 1768.—*Maclellan v. Kerr*, July 5, 1797, and *Sutherland v. Robertson*, C. Home, December, 1736, proceeded upon the ground of *culpa* in the tenant. The case of a life-renter, it was argued, was altogether different from that of an ordinary tenant, and depended on different principles. In the argument for the landlord, the applicability of the maxim, *res locata perit domino*, was admitted ; but it was insisted that the meaning of it was that the subject perished both to tenant and landlord according to the interest of

each in the property, and Guthrie v. Lord Mackerston, Stair. 1672. and Adamson v. Nicholson, Fount. 1704. (cases of life-renters) were cited to show that such had been the construction of the maxim. The cases of Hamilton v. — [237] June 2. 1667.—Deans v. Abercrombie, Dict. vol. ii. p. 60.—Case of Edrington Mills, July 5. 1809, were also cited, to show that the landlord was not liable to rebuild; and it was said that the authorities referred to on the other side went no farther than to exonerate the tenant, to entitle him to renounce, or to have an abatement of rent, but that none of them went the length of finding the landlord liable *ex lege* to rebuild, which was the only object of the present action. There was some discussion about certain admissions and specialties in the contract, not necessary to be noticed here, as the decision turned on the dry point of law.

(Mar. 22, 1815.) Lord Redesdale. The questions for your Lordships' consideration in this case, which is one of great importance, are, first, whether the fire happened through the negligence of the tenant or of others in his employment, or by accident: second, whether if it happened by accident, the landlord is bound to rebuild. As to the question whether the fire had happened through the default of the tenant, or was merely accidental, there is a great deal of evidence, and there may, perhaps, be some doubt about it; but the sheriff found that the fire was accidental, and I do not think it necessary to discuss that part of the case. The important question is, whether the decision of the sheriff could be supported, supposing the fire to be accidental. Assuming then that the fire was accidental, I conceive that the tenant is not entitled to the remedy which he here seeks; for he does not here claim any abatement of the rent, nor permission to abandon his tack, but that [238] the landlord should rebuild the house, and put it in the same situation as before the fire, and if not, then that the tenant might be enabled to rebuild and repair, and compel the landlord to pay the expence. The reasoning on which this is founded proceeds on a mistaken view of the rule of law, that where a loss is accidental *res unaquæque perit suo domino*, and this is the rule upon which the decision appears to be founded. But that is a misapplication of the rule of the civil law, as applied to subjects in the occupation of a tenant and to a house, which is part of a larger tenement, such as a farm.

The meaning of the maxim, *res suo perit domino*, is that no person is bound to answer the consequences of the accident. As to all those who had an interest *res suo perit domino*, every one being *dominus* according to the nature of his interest. That appears to be the law in Scotland, and in other countries where they are guided by the civil law, and applies as much to tenant for years as to tenant for life, and others. It would be impossible otherwise that a proper line of distinction could be drawn. It would apply to leases for 1000 years, as much as to leases for 10, 15, or 19 years; and can it be conceived that if a lease were made for 1000, or for 95 years, and the farm-house were consumed by accidental fire, the maxim *res suo perit domino* could be applied so as to compel the reversioner to rebuild? And yet that must be the case unless the rule were qualified, which I do not see the means of doing so as to answer the purposes of complete justice. A case was stated where it was held that, in the case of a life-renter where the property ceased *vi majeure*, [239] the usufruct likewise ceased, and this applies as much in the present case. As the landlord's property ceased, so did the tenant's usufruct, no one being responsible, there being none by whose misconduct the loss had happened. Otherwise see what would be the consequence. If the tack is long, the interest of the tenant is so much the greater; if short, it is so much the less. If the rule that the landlord must rebuild applied to tacks of 19 years, and not to tacks beyond that length, though that appears to rest on no principle, in the first year the obligation would be one thing, in the last year quite another thing, and yet the landlord would be as much bound to rebuild in the last year of the term, as in the first; so if the tack were for 1, 2, or 3 years, the obligation would be the same as if it were for 19 years. It appears therefore, judging as far as the civil law is concerned, that the meaning of the maxim *res suo perit domino*, as applied to accidents, is this, that all should bear the loss according to their interests. This will be more clear when it is considered in what circumstances the property may often be placed. A life-renter might grant a lease for years, and it was unquestioned that a life-renter was not bound to rebuild for the reversioner, nor the reversioner for the life renter. What then becomes of the life-renter who lets for years?

The next question is whether, from the nature or terms of the instrument, or the nature of the contract, express or implied, the obligation is imposed on the landlord to rebuild in case of accidents by fire. A missive of tack had been granted to the tenant, but was consumed in the fire, and was not [240] forthcoming; but it was admitted that there was a contract by which the tenant was bound to uphold the houses on the farm as tenantable and habitable during the term, and to leave them so. This was according to what was implied between landlord and tenant, the landlord on his part covenanting that the tenant should enjoy during the term. Now the contract to uphold in this way bound the tenant, whatever might happen, to leave the buildings tenantable and habitable. But it was said, and truly said, that it had been held that this did not extend to losses by unavoidable accident; and why is it so in the law of Scotland? Because the interest of the tenant does not extend so far. Then why should the landlord's covenant that the tenant should enjoy extend to rebuilding houses destroyed by unavoidable accident during the term? It is certainly not more strong, perhaps less so, than the covenant on the part of the tenant. The landlord does not covenant for good seasons, or that the taking shall be prosperous for the tenant; and if the tenant's engagements can be qualified by legal presumption, there appears no good reason why the engagements of the landlord may not be so qualified. Another view of the subject is that the loss may be a very different thing as to the landlord and the tenant; for in case of accidental fire the landlord may have to consider whether the house was exactly suited to the farm, and whether it might not be more advantageous to throw that and another farm into one. The loss of the house does not entirely destroy the value of the farm, and the inconvenience would be entirely different according to the length of the term. The [241] loss might possibly be trifling to the tenant, but to the landlord it might be a great inconvenience to rebuild, and he might not have the means of so doing. There is no equal justice in supplying or qualifying in the one case and not in the other. If the principle that the landlord must rebuild were to be applied in its full extent, see what would be the effect in different situations. A life-renter might be 30 years of age, or he might be 80. He lives till 80, and lets for 10 or 12 years, and though he could only enjoy for a few years, he would be bound to rebuild. It would apply in the same way in other cases:—"Whoever lets is bound to rebuild in case of accidental fire." That is carrying the maxim to an extent which would render it altogether unjust and unequal, and it is not warranted by any authority that I can find. As far as I can find by reference to the laws of those countries where the civil law is applied, the rule amounts to this, that if a tenant is not bound by covenant to remain, notwithstanding loss by accidental fire, distress of enemies, etc. the consequence is that he may abandon, as he cannot enjoy the subject as before: he therefore has the right of migration as they express it. The justice of the matter amounts to no more than this, that the tenant should have an allowance equal to the diminution in value of the subject, by the loss of the house during the term. But the suit here is to compel the landlord to rebuild, or to pay the expense of rebuilding. Looking at the cases cited, it appears to me unquestionable that, in cases of accident, the Courts in Scotland have generally applied the rule as I conceive it ought to be applied. In *Guthrie v. Mackerston*, 1672, Stair, a jointure [242] house having been burnt *casu fortuito*, it was held that the heir was not liable to rebuild; and why? because it perished to all. Another case is reported by Fountainhall, (*Adamson v. Nicholson*, 1704,) where a house in possession of a life-renter was burned, and the heiritor was found liable only for the annual rent of the price of the waste ground during her (the life-renter's) life. That I take to be according to the provisions in the statute, (1594, c. 226,) that the reversioner might take the property and rebuild, giving the life-renter the value as it stood at the time of the accident; and Fountainhall says that the plea here sustained was "that it being consumed *vi majeure* without his fault, as the property "ceased during its lying in rubbish, so must her usufruct." That I take to be the true interpretation of the maxim: as the property ceased so did the usufruct. Another case was quoted from Stair, (*Hamilton v. —*, 1667,) where a place called the Tower of Babel, falling upon the roof of a neighbouring house, made it ruinous, and the reason was found relevant, not to relieve entirely, but to abate the duties in so far as the tenant was damnified, or to the extent of the injury suffered. The

next case (*Deans v. Abercrombie*, 2 Dict. p. 60.) depended on particular circumstances, but it appeared to be understood generally that the principle was that every one must bear the misfortune which falls on himself, without the fault of another. In the case of the Edrington Mills, (5 July 1809, F.C.) the tenant had become bankrupt, and the creditors surrendered the lease to the landlord upon his engagement to pay them £22 a year, for every year the tack had to run. The landlord let the mills to another tenant, and they were burnt. The question was, whether the landlord was bound to pay the £22. In that case, if this had been a rent, it would [243] upon the principle have perished to all according to their interest, and the rent would have gone with the subject. It was not however a rent, but the consideration for the surrender of the lease, and enabled the landlord to make a new lease with which the creditors had nothing to do, and he was therefore answerable, notwithstanding the destruction of the mills. None of the cases have gone much beyond what I have stated, except that of *Sinclair v. Hutchinsons* (Kilk. 1751.) But what was it that was decided in that case? That the landlord, where letting an urban tenement, was impliedly bound to repair, the tenant delivering the subject back entire at the expiration of the tack. The reverse, however, as to the obligation to repair, was the rule with respect to a farm-house. But in that case the tenants were found liable for the rent even during a time when they could have no enjoyment of the subject: and why? because they never applied to the landlord to repair, nor abandoned when they could not enjoy the property as before. These appear to me to be the only cases in point, and I do not think they afford sufficient authority for this decision; I do not find any authority to show that, in cases of loss of a farm-house by inevitable accident, the landlord is bound to rebuild, and there is no ground in reason for carrying the obligation of the landlord to this extent. There is no formal judgment to support that view of the subject, but the cases are rather the other way, and neither the reason of the thing, nor the maxim of the civil law, by any means warrant the decision. The question whether the tenant is entitled to satisfaction, or has a right to [244] abandon, is out of the present case. As to abandoning, he has not done so, and as to an abatement of rent because the subject could not be enjoyed as it was before, that is a distinct question, as the summons proceeds on a different ground. Under these circumstances it appears to me that the interlocutors ought to be so far reversed. As to the rule in future, if your Lordships were to decide as the Court of Session have done, the landlord must always have a special covenant in the contract of lease, and the principle would be productive of the greatest inconvenience to those letting lands or tenements, whether life-renters, or tenants for years underletting, or whatever might be their situation.

(May 12, 1815.) Lord Eldon (C.). In this case two different questions have been raised. The first was whether there had been negligence on the part of the tenant; and it has been made a question whether a red-hot cinder had started from the fire, there being no fender, into this straw bed which stood near the fire, or whether the cinder had been carried there by this cat. The Court below was of opinion that no negligence had been proved; but I should have found it difficult to concur with them, if I had been bound to give an opinion upon that point; and if the circumstances did amount to negligence, it would be only the more wholesome so to determine, if such negligence happened to be too general. But this is too narrow a view of the present case, which I am desirous rather of looking at on the general ground. It is not my intention, however, at this time to enter at large into the reasons which induce me to think [245] that in such cases the landlord is not bound to rebuild. But the landlord is placed in a perilous situation, if, to protect himself against rebuilding, he is bound to prove negligence in the tenant; for then, if your Lordships cannot make a distinction according to the nature and extent of the interest, if a man makes a lease for 999 years, and while the tenant is in possession the house should be destroyed, the landlord, though his interest should be worth nothing, would be bound to rebuild. So a tenant for life, making a lease in the last year of his life, if the house should be burnt down only six months before the termination of his life and interest, he would be bound to rebuild. And so if tenant for life of the best mansion-house in Scotland were to let the grounds about it, and happened also to let the house at little more than a nominal rent, merely for the purpose of keeping it in good order,

if the house were burnt, the tenant for life would be bound to rebuild it at an expense perhaps of £100,000. This decision proceeds on the maxim, *res suo perit domino*; but the noble Lord who before addressed himself to this question has explained that the meaning of this is that where there is no fault any where, the thing perishes to all concerned; that all who are interested constitute the *dominus* as to this purpose; and if there is no fault any where, then the loss must fall upon all, and neither the Scotch nor the Roman law would support a judgment that in all these cases the landlord is bound to rebuild. How the tenant is to be indemnified where there was no fault in him is a different question, and one with which in this case we have nothing to do; for the demand here is [246] that the landlord should rebuild, and if that demand cannot be supported there is an end of the case. I concur, then, in opinion with the noble Lord, and shall submit at a future day a formal judgment disaffirming the principle of the landlord's obligation to rebuild, being desirous that your Lordships should decide upon the general question of law, rather than confine your judgment merely to the point of negligence. They avoided all these questions in England by express covenants, and it is the fault of the parties themselves after this judgment, if they do not shut out all such questions. If the landlord is to be bound to rebuild, then let them say so in the lease. If there is a doubt about it, then why not remove that doubt, instead of inserting their general covenant as to keeping tenantable and habitable, and then disputing about who is to rebuild in case of fire. In the judgment in this case the general law will be laid down, and it will be the fault of the individuals themselves, if they do not so stipulate in their contracts as to make the judgment of law attach upon their cases, in such manner as they by their conventions may choose that it should attach. It will be better and more satisfactory, therefore, in this case to decide upon the general principle, because otherwise, where the Court of Session has differed from itself once at least, and the House of Lords gave no opinion, it would be impossible for the parties to know with certainty what really is the law upon the subject.

(July 3, 1815.) "The Lords Spiritual and Temporal in Parliament assembled, find that the Respondent by his petition to the Sheriff-depute of Fifeshire required that it [247] might be found that the Appellant was liable to rebuild the dwelling-house on the farm of Newmiln, and to put it in the situation in which it was before the fire in the proceedings mentioned; and that the Appellant might be decerned immediately to do so; and failing of his doing so, to grant warrant to the Respondent to rebuild and repair the said house, and to find the Appellant liable in the expense thereof, and to allow the Respondent to retain his rent until the said expenses should be paid: and the Lords are of opinion, and find, that the Appellant is not liable to rebuild the said dwelling-house, as prayed by the said petition, supposing there was no culpable negligence on the part of the Respondent; and, therefore, in as much as no other relief is sought by the said petition, the Lords find that it is not necessary for them to consider whether there was or was not evidence of culpable negligence, on the part of the Respondent, sufficient to subject him in the expense of rebuilding the said house; and it is, therefore, ordered and adjudged that the several interlocutors of the Sheriff-depute of Fife, and the several other interlocutors complained of in the said appeal, be, and the same are hereby, reversed; and that the Defender be assolizied in the process before the Sheriff, without prejudice to the question whether there was culpable negligence in the Respondent; and without prejudice to any question whether the Respondent is entitled to any other relief than the relief prayed in his said petition to the Sheriff-depute of Fifeshire."

Agent for Appellant, CAMPBELL.

Agent for Respondent, SPOTTISWOODE and ROBERTSON.

[248] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

KELLETT, and Another,—*Appellants* ; KELLETT,—*Respondent*

[March 13, July 4, 1815].

[Mews' Dig. iv. 315, 330 ; xv. 670, 1449. Considered and explained in *Singleton v. Tomlinson*, 1878, 3 A. C. 404, 424 ; and *In re Salter*, 1881, 44 L. T. 604.]

[Testator, seized of real and possessed of personal property, bequeaths various legacies "to be raised and levied from my properties by my executors," and then, after a specific devise of his interest in certain lands, says, "The remainder of my properties I devise to my executors to make good the above sums. And I also ordain, etc. and devise the said (naming the executors) executors to this my last will, etc. also my RESIDUARY LEGATEES, "share and share alike." Held by the Court below that there was a resulting trust as to the real estate for the heir at law, and the decree affirmed by the House of Lords—Lord Eldon (C.) and Lord Redesdale stating it as a case of infinite doubt ; but that where there was a doubt the heir ought not to be excluded, the rule of law being that the heir cannot be disinherited, except by express words or necessary implication.]

James Kellett, of Fordstown, in the county of Meath, being seized of considerable real estates, and possessed of a large personal estate, on May 19, 1809, made his will, which was executed and attested as is by law required to pass real estates, as follows :

"I, James Kellett, bequeath to my two daughters, by Elizabeth Regan, of Fords-town, in the county of Meath, viz. Ann Kellett and Jane Kellett, both now of said Fordstown, the sum of seven thousand [249] pounds to each ; that is to say, seven thousand pounds sterling to the said Ann Kellett, and seven thousand pounds sterling to the said Jane Kellett, to be raised and levied from my properties by my executors, to be hereafter in this will named and appointed, and paid to the said Ann Kellett, and to the said Jane Kellett, as soon as they shall attain the age of twenty-one years, with legal interest for their support until they shall have attained the age of twenty-one years. I bequeath to my son James Kellett, by Bridget Clarke, now about the age of two years old, the sum of five thousand pounds sterling, to be raised and levied by my executors from my properties, to be paid to him when he shall attain the age of twenty-one years, part of the interest of which to be expended on his maintenance and education, according to the discretion of my executors. I bequeath to my daughter Maria Kellett, by Catherine Maxwell of Newtown, now about six years old, the sum of five thousand pounds sterling, to be raised and levied from my properties by my executors, and paid to her when she shall attain the age of twenty-one years, with a proper allowance for her support and education, according to the discretion of my executors. I bequeath to the said Elizabeth Ryan, of Fords-town, the sum of five hundred pounds, to be paid to her immediately ; and the sum of five hundred pounds to be paid to the said Bridget Clarke, of Ballinadrimney ; and five hundred pounds to Catherine Maxwell, of Newtown, all in the county of Meath. I bequeath my interest in the lands of Barleyhill, in the county of Meath, to Richard Kellett, eldest son of my uncle [250] Laurence Kellett, now of Belturbet, in the county of Cavan. The remainder of my properties I devise to my executors, to make good the above sums ; and the following sums, that is to say, the sum of five hundred pounds sterling to each of the children of my uncle Laurence Kellett ; and five hundred pounds to each of the children of my late aunt Smith, that are unmarried or widows ; one hundred pounds to each of the children of my aunt Cripps ; five hundred pounds to each of the children of my aunt Holdercroft, by her present husband George Holdercroft ; two hundred pounds to each of the children

" of my late uncle Richard Kellett ; and five hundred pounds to each of the children
 " of my late uncle James Kellett. I also bequeath to my uncle Laurence Kellett,
 " to my aunt Cripps, and to my aunt Holderoft, one hundred pounds to each. I
 " likewise bequeath to Mary Fox, my faithful domestic, the sum of one hundred pounds
 " sterling. And I do hereby appoint the Reverend William Kellett, of Monalby Glebe,
 " in the county of Meath. Mr. George Holderoft, of the town of Kells, in the said county,
 " and Mr. Francis H. Holderoft, of the city of Dublin, to be my executors to this my
 " last will and testament, and guardians of the fortunes of my children. And I also
 " ordain, appoint, and devise the said Reverend William Kellett, Mr. George Holderoft,
 " and Mr. Francis Henry Holderoft, executors to this my last will and testament,
 " also my RESIDUARY LEGATEES, share and share alike."

The testator died the day after the execution of this will, leaving no legitimate children, and his exe-^[251]cutors entered into and took possession of all his real and personal estates. On June 16, 1810, Laurence Kellett, heir at law of the testator, filed his bill in the Irish Chancery, praying an account, and to be decreed entitled as such heir at law to the real estates, in case the personal estate should be sufficient to satisfy the debts, legacies, etc. or if not, then that he might be decreed entitled to such surplus of the real estates as should remain after satisfaction of such debts, legacies, etc. One of the executors, George Holderoft, died before the suit was instituted. The surviving executors, William Kellett, Clerk, and Francis Henry Holderoft, in their answer, submitted that the real estates were, by the will and for the purposes of it, turned into personal estate, to the residue of which they were entitled ; or that, if there was no such conversion, yet that by the manifest intention of the testator they were legally and beneficially entitled to such part of the real estates as should remain after payment of the debts, legacies, etc. except the Barleyhill estate, specifically devised to the eldest son of the plaintiff. Laurence Kellett having died, his eldest son and heir at law, Richard Graham Kellett, revived the suit. The cause was brought on for hearing on bill and answer, on May 29, 1811 ; and on June 17, 1811, the Court decreed that the heir at law was entitled to the real estates, subject to the making up whatever deficiency there might be in the personal property as to the payment of the debts, legacies, etc. and ordered an account accordingly. From this decree the executors appealed.

[252] Sir S. Romilly and — (for Appellants) contended that the real estates were well passed by the will, and that it was manifest on the face of it that the testator intended to give the residue of his whole property, real and personal, to his executors for their own benefit, and that the heir at law was disinherited.

Hart and Bell (for Respondent) relied upon the doctrine that there must be clear words, or necessary implication, to disinherit an heir at law, which here there were not ; and they cited *Shaw v. Bull*, 12 Mod. 593.—*Piggott v. Penrice*, Pre. Ch. 471. (Gilb. Eq. Rep. 137. Com. Rep. 250.)—*Timewell v. Perkins*, 2 Atk. 102.—*Camfield v. Gilbert*, 3 East. 516.—*Berry v. Usher*, 11 Ves. 87. 92.—*Roe d. Helling v. Yeud*, 2 Bos. Pull. 214. The word properties did not pass the real estate. Under the words, "The remainder of my properties I devise to my executors to make good the above sums." The executors could not sell for any purpose but to pay debts and legacies, and there was a clear resulting trust for the heir, according to the doctrine of resulting trusts as stated in *Hill v. Bishop of London*, 1 Atk. 618.—*King v. Dennison*, 1 Ves. Beam. 260.—*Robinson v. Taylor*, 2 Bro. Ch. Ca. 589. If the scales were balanced the heir at law turned them. The case of *Hardacre v. Nash*, 5 T. R. 716, and other cases of the same nature, were cases where the words legacy and legatee were held to relate to real estate, only in consequence of plain intention and particular circumstances appearing on the face of the will, furnishing irresistible evidence that the testator meant to disinherit the heir at law. The devise here to the ^[253]executors was merely for the purpose of executing the will, as far as related to the real estate.

Romilly (in reply). The only question was what was the intention of the testator, and whether it did not appear on the face of the will that it was his intention to disinherit the heir at law ; and were it not for the word legatees it would be quite plain. If it had been "Residuary devisees" the matter would be quite clear. When he says, "the remainder of my properties I devise, etc.," the word properties clearly applied to both real and personal ; and on the other side they must contend that, in the same

will, the remainder of my properties meant both, and that the residue applied only to the personal property. The words devise and devisee properly apply to real property; the words bequeath and legatee, to personal: but the question is, what was the intention. The cases cited for their purpose are very different from the present, and have no application.

It was discovered on the hearing in the House of Lords that neither the heir at law of the deceased executor, George Holderoft, nor the personal representative of Laurence Kellett, had been brought before the Court, and the cause stood over till these parties were brought forward. It appeared that Francis Henry Holderoft, who was before the House in his character of executor, was the heir at law of the deceased executor, but it was held necessary to bring him forward also in his character of such heir at law.

[254] Lord Eldon (C.). I should very much misrepresent the state of mind with respect to this question, if I did not say that it is a state of infinite doubt whether, according to the rules of law, and as collecting the intention of the testator from the whole of the will, the residue was intended by the testator to include the real estate. It is a whimsical way of putting it, but I feel a strong bias towards the opinion that he did mean to include it. I cannot say that the decision in this case is wrong, and I cannot say that it is right; but as I cannot say that it is wrong, it appears to me that the decree ought to be affirmed. I do not know what the state of my noble friend's (Redesdale's) mind is, as to the question of intention; but if he finds as much difficulty in it as I do, I feel for him. But the principle I take to be this, that if there is a doubt the heir cannot be excluded, because the rule is that he cannot be disinherited, except by express words or necessary implication.

Lord Redesdale. I confess the state of mind is very much the same as that of the noble Lord; but the way to consider the matter is this, is it a clear rule of law that the heir shall not be disinherited, unless the Court can discover an evident intention to do so? If there is a doubt, the opinion of the Court below ought to turn the balance, and it is because I do not feel a doubt strong enough to reverse this decree, that I agree in the opinion that it ought to be affirmed.

Decree accordingly affirmed.

Agent for Appellant, ———.
Agent for Respondent, BEETHAM.

[255] SCOTLAND.

APPEAL FROM THE COURT OF SESSION (2D DIV.).

NEWCASTLE FIRE INSURANCE CO.—*Appellants*; MACMORRAN AND CO.—*Respondents* [Feb. 15, July 8, 10, 1815].

[Mews' Dig. viii. 98; 3 Scots R. R. 294. Considered in *In re Forbes & Co.'s Claim*, 1874, L. R. 19 Eq. 494; and see *Thomson v. Weems*, 1884, 9 A. C. 671, 684.]

[It is a first principle of the law of insurance that, when a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be, otherwise the policy is void, and there is no contract. And therefore where a cotton and woollen mill was insured as being of one class, and turned out to have been of another class at the time, it was held by the House of Lords, reversing a judgment of the Court of Session, that an action on such a policy could not be sustained—Lord Eldon (C.) observing that whether the misrepresentation was in a material point or not, or whether the risk was equally great in the one class as in the

other, were questions which had nothing to do with the case; the only question being, is this, *de facto*, the building which I have insured?

Macmorran and Co., cotton and wool spinners, at Garschew, insured their premises with the Newcastle-upon-Tyne Fire Insurance Company. The policy was dated April 16, 1805, and contained a receipt for the premium, which was accounted for to the company by Hamilton, their agent at Glasgow, through whom the insurance had been effected. The policy was retained by Hamilton till Sept. 5, 1805, when it was delivered to the insured upon their paying the premium. The policy referred to certain printed proposals, a copy of which was, ac[256]-cording to the practice of the office, always delivered to the person transacting the insurance, in which proposals it was stated that, where the persons insuring gave a description of the subject in order to its being insured at a lower premium, and that where there should be fraud or false swearing in stating the amount of the loss, the policy was to be of no force. Certain classes of buildings were likewise specified, according to the particulars of which the premium was to be lower or higher, and the premises in question were warranted to be of the first class, for which the lower premium only was charged. On December 7, 1805, the mill was burnt, and the insurers refusing to pay the sum claimed for the loss, the insured brought an action, regularly preceded by an arrestment *ad Fund. Jur.* before the Court of Session, concluding for payment of £1647, and interest from December 7, 1805. A condescendence having been ordered, the insurers stated two charges as the ground of their refusal to pay: first, that there was fraud and false swearing as to the amount of the loss; second, that the fire was intentional. Upon proof it appeared that there was no foundation for this latter charge; but it also appeared that, at the time of the date of the policy, the premises were of the second class, contrary to the warranty. In answer to this it was alleged that Hamilton, the agent of the Newcastle Company, had taken it for granted that the premises were of the first class, and made out the policy accordingly, without any representation on the part of the insured, and that before the policy was delivered, and the loss happened, the premises had been altered so to bring them within [257] the first class. It did not appear very distinctly in proof, how the demand of £1647 was made up. The Court below decerned against the insurers in terms of the libel, and from this decision the Newcastle Company appealed.

Romilly and Richardson for Appellants: Park and Brougham for Respondents. (July 8, 1815.) Lord Eldon (C.). This is an appeal by the Newcastle-upon-Tyne Fire Insurance Company, from a judgment of the Court of Session by which they were held liable in the payment of a sum of £1647 upon a policy of insurance, and the question is whether this judgment was right or not. The summons, which is in the nature of our declaration, stated that the Newcastle Company were indebted to the Pursuers in a sum of £1647, in terms of a policy dated April 16, 1805 (your Lordships will note the date), and concluded for payment accordingly.

The policy itself was in these terms, "Whereas Mr. Hugh M'Morran and Co. etc. "have paid the Sum of £21 5s. 8d. to the society of the Newcastle-upon-Tyne Fire Office; "and do agree to pay or cause to be paid to the said society, at their office in Newcastle-upon-Tyne, the sum of £17 17s. on the 24th day of June, 1806, and the like sum "of £17 17s. yearly on the 24th day of June, during the continuance of this policy, "as a premium for the insurance from loss or damage by fire, of £50 on millwright's "work, including all the standing and going gear in their mill, which is used as a "cotton and woollen mill, situated at [258] Garschew as aforesaid, being in their own "occupation only, and stone built and slated: £550 on clockmaker's work, carding "and breaking engines, and all moveable utensils in the second floor, occupied as a "cotton mill; £160 on stock of cotton in the same; £600 on clockmaker's work, "carding and breaking engines, and all moveable utensils in the first floor, occupied "as a woollen mill; and £350 on stock of wool in the same;" then followed this very material passage, "warranted that the above mill is conformable to the first class of "cotton and woollen rates delivered herewith."

The materiality of it consisted in this (though in one view whether it was material or not did not signify, if it was a condition precedent), that if it was of the second class, and not of the first, a larger premium ought to have been given. And then it goes

on : " Now know all men by these presents, that from the day of the date hereof, until the said 24th day of June 1806, and so from year to year so long as the said Hugh M'Morran and Co. shall duly pay, etc. the sum of £17 17s. etc. and the same shall be accepted by the trustees or acting members of the said society for the time being, the stock and fund of the said society shall be subject and liable to pay, etc. all such damage and loss as the said Hugh M'Morran and Co. shall suffer by fire, not exceeding the sum of £1700, etc." And then followed at the bottom an entry of receipt of the government duty of £2 ; from April 16, 1805, up to June 24, 1806. Their Lordships would observe the materiality of that, as this instrument could never have been produced in [259] Court, if it were only on account of the revenue, save as a policy of April 16, 1805, on which as a policy so dated the demand could have been made. But whether that was so or not the demand was made on this policy. On June 24, 1806, the premium must again be paid, and the duty to government, and whether the demand was on the policy originally entered into, or on the renewed policy, it must be on a policy liable to such a duty, and of this date.

In the Appellants' case, it is stated that the printed proposals formed part of the contract, and that, besides being referred to, a copy is always delivered to the party insuring : and that it is there set out, among other things, that if any " person or persons shall insure his, her, or their houses, mills, etc., and shall cause the same to be described in the policy otherwise than as they really are, so as the same shall be insured at a lower premium than proposed in the table, such insurance shall be of no force." As to their so setting it out in their printed proposals, in the case of a warranty, it is unnecessary to consider that ; for if there is a warranty, the person warranting undertakes that the matter is such as he represents it ; and unless it be so, whether it arises from fraud, mistake, negligence of an agent, or otherwise, then the contract is not entered into ; there is in reality no contract.

Then they further state that, by another article of these proposals, it is provided " that all persons insured by this society sustaining any loss or damage by fire, are forthwith to give notice thereof at their office in Newcastle, and as soon as possible [260] after to deliver in as particular an account of their loss or damage as the nature of the case will admit, and make proof of the same, by their oath or affirmation, according to the form practised in the said office, and by their books of accounts, or other proper vouchers, as shall be reasonably required." That they shall also procure a certificate, under the hands of the minister, etc. and others, relative to the cause of the loss ; " and until such affidavit and certificate shall be made and produced, the loss-money shall not be payable ; and if there appear any fraud or false-swearing, such sufferers shall be excluded from all benefit by their policies."

They further represent that in the second set of proposals for the insurance of cotton mills, etc. certain classes of buildings were specified, according to the particulars of which the premium is at a lower or higher rate.

Thus, class 1. comprehends " buildings of brick or stone, and covered with slate, tile, or metal, having stoves fixed in arches of brick or stone on the lower floors, with upright metal pipes carried to the whole height of the building, through brick flues or chimneys, or having common grates, or close or open metal stoves or coakles, standing at a distance of not more than one foot from the wall, on brick or stone hearths, surrounded with fixed fenders." I request your Lordships particular attention to the following words, " and not having more than two feet of pipe leading therefrom into the chimney, and in which, or in any building adjoining thereto, although not communicating [261] therewith, no drying stove or singeing frame shall be placed."

Class 2. comprehends " buildings of brick or stone, and covered with slate, tile, or metal, which contain any singeing frame, or any stove or stoves, having metal pipes or flues, more than two feet in length, and in which, or in any building adjoining thereto, although not communicating therewith, no drying stove shall be placed."

As I understand this, very possibly mis understand it, but it is of no consequence in my view of the case whether I do so or not ; but as I understand it, the reason for requiring a higher premium for mills of the second class is that the greater length of the pipe increases the danger. If the pipe of the stove is a yard in length, for instance, the difference arises from this, that if the pipes be more than two feet, the

danger is increased beyond what belongs to pipes of that length. But it is immaterial whether I misunderstand this or not; for if the mill was warranted as being of the first class, it must be such as it is warranted to be, unless there is something to oust the warranty, otherwise there is no contract.

Then this mill was burnt; and, as generally happens in these cases, the insured were very anxious to get their money, and the others were not very ready to pay. An action was then brought to compel payment, to which defences were given in. As to that defence which was the most unwelcome to hear, viz. that the premises has been wilfully set on fire, it appeared that there was no ground for it; and the Court of Session seem to have thought that there was no ground for the imputation of fraud and [262] overvalue. It is not likely at any rate that the articles were undercharged; and it was extremely difficult to make out a case of overvalue where the books and papers were all destroyed, and when the amount of these improvements, and the value of spinning-jennies, and such articles, were to be calculated. But though one cannot help believing that enough was charged, yet it might be dangerous to say under the circumstances that that defence ought to be sustained.

But there was another very material point of defence stated, that this mill, which was warranted as being of the first class with a pipe of two feet, was in reality of the second class; and that being of the second class, whether there was fraud or not, whether the mis-statement on the part of the insured arose from fraud, or from mere error or inattention, or the mistake of an agent (unless they were misled by the agent of the Newcastle Company,) or from whatever other cause, the contract never had effect.

Then evidence was gone into as to whether the mill was of the first or second class. The Court of Session seems to have thought it immaterial whether it was or not. But if the mill was warranted as of the first class, and was really of the second class, the judgment of the Court below was clearly erroneous; for it is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies [263] nothing. The only question is as to the mere fact. It is proposed then that the matter should stand over for a day or two in order to examine the case again for the purpose of further inquiry as to that fact; but my present impression is that the mill was not such as it was warranted to be, and that therefore all consideration of fraud or overvalue is out of the question, unless it can be effectually answered that the insured were misled by the insurers, or their agent. Then they say that the mis-representation was owing to the agent of the Newcastle Fire Company. I cannot say however that they have made out that point, and it is denied on the other side, and may therefore be laid out of the question.

Then they say further that there was no effectual policy till the premium was paid, and refer to the terms of the 4th article of the printed proposals, which declares "that no insurance is considered by this office to take place till the premium be actually "paid by the insured, his, her, or their agent, or agents." The premium, they say, was not paid till a considerable time after the date of the policy, that the alteration was made which brought this mill within the description of the first class of mills before the premium was paid, and that the alteration had been communicated to the agent of the Company. The Company deny that any such communication was made, and even if it had been made it would have been still necessary to consider how far that circumstance could alter the law as applicable to the case. But as the fact was denied, and there was no proof of it, that point may be considered as out of the question. With respect to the effect of the [264] article referred to, the Appellants contend that it did not relate to the first policy, but to the renewals of policies. But in the present case it is not necessary to consider whether it related to the first policy or any renewals of it, as they say that as between the Respondents and them the premium had in point of fact been paid before the alteration took place, as the Scotch agent had accounted for it to his constituents the Newcastle Company before the period of the alteration, and it had therefore become a personal debt due to him from the Scotch Company. That may be considered as an answer to the argument raised

upon that ground. But suppose that were entirely out of the question, we must in this case as in all others proceed *secundum allegata et probata*, according to what is alleged and proved. If they could succeed at all on this summons it must be on a policy or contract dated April 16, 1805, and when they have founded upon that only, they cannot afterwards in that action turn round and say, though we cannot succeed on that policy, we are entitled to recover on a subsequent contract. See how the contract would be varied. This was a bilateral contract of the date of April 16, 1805, from which period to June 24, 1806, the premium was acknowledged to have been paid; and it was agreed that a certain premium should continue to be paid on June 24, *de anno in annum*. Can your Lordships convert that into a transaction commencing not in April, but in September, 1805?

Suppose the fire, after being smothered for some time in the mill, had burst out the day before the money was paid to the agent of the Newcastle Com-[265]-pany, could that Company say, "Though the premium has been paid us by our agent, and we own the receipt of the money, yet as you did not pay the agent we are not bound." Acquitting M'Morran and Co. then of all fraud in the business, the question is reduced to this; "Are you M'Morran and Co., looking to the facts and evidence as applicable only to the policy of April 1805, entitled to recover under the contract?"

I have said so much because I consider it as of the greatest importance that the mercantile law should be uniform all over the country, and because it is dangerous therefore to decide these questions of insurance without being sure what may be the effect of the decision and the nature of the doctrine which may result from it. If this is to be taken as a contract of April 1805, and the premises were not of the class of which they were warranted to be, it appears to me quite clear that the Respondents ought not to recover. If the Court of Session was of opinion that the danger and risk was not greater in mills of the second class than in those of the first class, though that were sworn to by five hundred witnesses, it would signify nothing. The only question is, "What is the building *de facto* that I have insured."

(July 10, 1815.) Lord Eldon (C.). Since I had the honour of addressing your Lordships the other day on this case, I have looked again at all the papers. I repeat what I before said, and what indeed the Appellants themselves have authorized me to say, that there is no ground whatever for the imputation that the mill [266] had been wilfully set on fire. As to the question of fraud and false swearing, on the best consideration I have been able to apply to the case, though there appears a tendency to state the loss as high as it can be fairly carried, I cannot say that there is any thing which amounts to fraud and falsehood. Another ground was that this Summons proceeded on a policy, dated April 16, 1805, and that it contained a warranty that the building belonged to the first class, described as having the stoves not more than one foot from the wall, with pipes or flues not more than two feet in length. I stated the doctrine of warranty, and on the best consideration I have been able to give the case, I do not think that the warranty was made good. The remaining question then was whether attending to the nature of the summons the Respondents could be considered as having insured of a date posterior to April 1805, and after the alteration had taken place in the description of the building. I stated my opinion that they could not on this summons. It appears to me then that the Appellants ought to be assolvied in this action, and if the Respondents have other special circumstances to allege, they may take advice whether they ought to proceed upon another summons. But I think they cannot succeed on this, and I am therefore of opinion that the judgment of the Court below ought to be reversed.

Judgment accordingly.

Agents for Appellants, CLAYTON and SCOTT.

Agent for Respondents, MUNDELL.

[267] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

COLCLOUGH, and Others,—*Appellants*; GAVEN, and Others,—*Respondents*
[April 21, 1815].

[Mews' Dig. xv. 1385.]

[Under the words in a will. "to pay to each of my said (younger) children (three daughters) as and for their respective portions, a sum equal to one fourth of what shall remain to my said (eldest) son William—payable to my said daughters respectively, at her or their respective ages of twenty-one, or marriage, etc." held that all the daughters were only entitled to a sum equal to a fourth of what remained to the eldest son, or each of them to one seventh, (such appearing to be the testator's intention), and that the time of the testator's death was that at which the amount of his property, and the proportions of the shares were to be completed and estimated.]

Luke Gaven, Esq. being possessed of personal property to the amount of about £5000, and seized of Freehold Estates in the Counties of Meath, Sligo, etc. of the value of about £1700 a year, on January 11, 1790, made his will, which was executed and attested, so as to pass real estates; and thereby, after directing payment of his just debts and funeral expences, he devised and bequeathed all his messuages, lands, tenements, hereditaments, and all the personal estates of which he should die possessed, to the [268] honourable Simon Butler (since deceased), and to Oliver Nugent and Henry Cope, and the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, to the use, intent, and purpose, that the several persons therein mentioned should receive and take the several Annuities thereby given: and the will then proceeded in the following words: "And to and for this further use, intent, and purpose, and subject to the aforesaid uses, intents, and purposes, that they the said Simon Butler, Oliver Nugent, and Henry Cope, and the survivors and survivor of them, and the heirs, executors, and administrators, of the survivor of them, do and shall, out of the rents, issues, and profits of my real, freehold, and personal estates, apply a reasonable sum to and for the maintenance of my children, William Gaven, Mary Gaven, Elizabeth Gaven, and Julia Gaven, and any other child or children my said wife Mary Gaven, otherwise Walsh, may have during my life, or be ensient with at my death; and that they do and shall place out at interest, in the funds of government, the remainder (if any) of my personal estate, and the remainder of the rents, issues, and profits of my real and freehold estate, until out of this fund there shall be raised a sum sufficient to pay to each of my said children, Mary, Elizabeth, and Julia, and any other child, or children, my said wife Mary Gaven, otherwise Walsh, may have during my life, or be ensient with at my death, as and for their respective portions, a sum equal to one fourth of what shall remain to my said son William, or such son [269] or sons becoming an eldest son, as my said wife Mary Gaven, otherwise Walsh, may have during my life, or be ensient with at my death, payable to my sons respectively, at his or their respective age or ages of twenty-one years, with power to the said Simon Butler, Oliver Nugent, and Henry Cope, and the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, during the respective minorities of my said sons, to pay the whole or part of their respective portions, in order to apprentice or otherwise advance them respectively in life, and payable to my said daughters respectively, at her or their respective ages of twenty-one years, or marriage with the consent in writing of the said Simon Butler, Oliver Nugent, and Henry Cope, or the survivors or survivor of them, which shall first happen. But if any

"such daughter or daughters shall happen to marry before the age of twenty-one years without such consent, then such daughter or daughters shall not receive her or their respective portion or portions, but only the respective legal interest of the same during her or their respective life or lives, to be paid to her or them by half-yearly payments, for her or their respective sole use, without the intermeddling of her or their respective husband or husbands; and after the respective death or deaths of such daughter or daughters, her and their respective portion or portions shall be equally divided among such of her or their respective children as shall attain the age of twenty-one years;" with directions respecting the interest of his said daughters' portions, and [270] with benefit of survivorship; and, subject to the aforesaid charges, the testator devised his said estates to the use of his said son William Gaven, his heirs, executors, administrators, and assigns, for ever.

The testator died on May 12, 1790, without having altered or revoked his will, leaving his widow and the four children named in the will, which was proved by the executor Butler, who took upon himself the management, and misapplied or embezzled a great part of the property, and died insolvent. The other executors were then prevailed upon to interfere, and act in the trusts of the will. Mary Gaven, one of the daughters of the testator, intermarried in 1802, with the Rev. Dudley Colclough; and on May 27, 1803, Colclough and his wife filed a bill in the Irish Chancery against William Gaven, the testator's son, and other proper parties, praying that the trusts of the will might be carried into execution, and the property of the plaintiff Colclough and his wife might be ascertained and paid. Answers having been put in, and the parties having submitted their rights under the will to the judgment of the Court, the cause was heard on bill and answer, on July 12, 1804, before the then Master of the Rolls, who decreed that the trusts of the will should be carried into execution, and that an account should be taken among other things of the whole amount of the value of the testator's estates at the time of his death, after deducting debts, etc.; and that Colclough and his wife were entitled to one fourth of such value, with interest from the time of the wife's attaining the age of twenty-one years.

After various proceedings under this decree, and [271] when the Master was about to sign his report, William Gaven, the son, on November 30, 1808, petitioned the Lord Chancellor for a re-hearing; submitting that, by the true construction of the will, Mary Colclough and the other daughters were all of them only entitled to a fourth, or each to a seventh of the testator's property; and that the loss by Butler ought to be rateably borne by the daughters or younger children, and the petitioner. On March 8, the cause was re-heard before the Lord Chancellor, and it was contended for the younger children that, supposing the decree of July 12, 1804, to be erroneous as to the proportion of one fourth given by it to Mary and her husband Colclough, it was also erroneous in fixing the period of the testator's death for the computation of the value of the property and amount of the shares, instead of the time of distribution. The Lord Chancellor on March 8, 1810, decreed that the decree of July 12, 1804, should be varied so far as respected the proportion to be paid to the younger children, and that, according to the true intent and meaning of the testator, each of the younger children was entitled to a proportion equal in point of value to one fourth of what remained of the testator's property to the eldest son, after providing for the several bequests, charges, and incumbrances upon the estates; and that, in order to ascertain the amount of the testator's property at the time of his death, it should be referred to the Master to take an account, etc., and that the younger children were each entitled to a sum equal to one seventh of the net value of the real estates, computed at the time of the testator's death. [272] the same to be paid out of a fund, to be formed, with the surplus, if any, of the personal estate, and the rents, issues, and profits, of the real estates. In effect, the decree was made according to the prayer of the petition, except as to the loss by Butler, with respect to which no opinion was then given. From this decree, Colclough and his wife, and Elizabeth and Julia Gaven, appealed, so far as it related to the time at which the amount of the testator's property and value of the shares were to be estimated, admitting the construction put upon the will by this latter decree to be in other respects correct.

Leach and Roupell (for the Appellants) contended that according to the intent of the testator, as it was to be collected from the whole will, the proportion and shares

were to be computed according to the amount of the property, not as it stood at the time of the testator's death, but as it stood at the time of distribution.

Romilly and Bell (for the Respondents) asked what was the time of distribution? The distribution was only to take place as each became entitled, and according to that construction they would take in different proportions; and as to the time of vesting and distribution, Mr. Bell cited *Roebuck v. Dean*, 4 Bro. Ch. Ca. 403. 2 Ves. 265.

Leach. The time is arbitrary, and there is no rule but the testator's intention.

[273] Appeal dismissed and decree affirmed.

Agent for Appellants, DEARE.

Agents for Respondents, SHAWE, LE BLANC, and SHAWE.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERTSON,—*Appellant*; GRAHAM,—*Respondent* [Nov. 18, 1814;

July 5, 1815].

[3 Scots R. R. 299.]

[In an action between General Robertson of Lude, and the Duke of Athol, General Robertson's Counsel introduced a charge of deception and fraud, or rather contended that such a charge must be implied from the reasoning on the other side, against a person nearly connected with the Duke of Athol; and Graham, the Duke's agent, supposing he was pointed at, complained to the Court, and the passage containing the charge was ordered to be expunged with costs to be paid by General Robertson. This being appealed from, the Lord Chancellor stated that, for the purposes of justice, great latitude of allegation must be allowed to counsel in pleading; and though a charge of fraud and deception might turn out to be unfounded, yet if it were pertinent, he doubted extremely whether it ought, merely because it might be unfounded, to be expunged as scandalous—and the judgment was remitted for review.]

In an action between the Duke of Athol, and General Robertson of Lude, relative to the division of the Common of Glentilt, a proof was taken, and in order to shorten the proof, the parties by a judicial minute dated April 28, 1806, admitted that [274] certain farms had their summer and winter pasture on the Common, and among these farms was one called Tomvouline, belonging to the Duke of Athol. In the course of the proof two missives, dated September 1788, were produced, by which the Duke of Athol agreed to give up to General Robertson's father a right of servitude, which his farm of Tomvouline had upon the lands of Struie belonging to the other party, in exchange for certain parts of the lands of Toldounie, belonging to Lude. In these missives the right of each party to the remainder of the common of Glentilt was reserved as broad as before.

In the division a share of the Common was allotted to Tomvouline, and this was objected to by General Robertson, on the ground that the right of Tomvouline to a share of the common, had been extinguished by the exchange of 1788; and it was contended that the farm of Tomvouline had been introduced into the judicial minute of 1806 by mistake, and that the error ought to be rectified.

The effect of the answer to this objection appeared to be that, besides the peculiar servitude on the lands of Struie, which alone was given up by the missives of 1788, Tomvouline had likewise a right in the Common like the Respondent's other farms, and that it was properly therefore inserted in the minute. The import of the answer however seemed to be differently understood by General Robertson's Counsel, whose second reclaiming petition contained the following passage. "This answer shows

" the Respondent is not disposed to yield any point whatever. With regard to the minute alluded to, [275] the object of it has been already explained. The petitioner was wearied out by the tedious examination of witnesses; and it being proposed to shorten the proof by a minute, he readily consented. It cannot be disputed that Tomvouline was introduced by the Respondent's agent, and permitted to remain, on the faith that he had introduced the names of no towns, excepting those that actually possessed the Common, and were entitled to possess it. In the last petition, it was said this must have arisen from an error in fact, of the Respondent's agent. But from the strain of the answers, this matter comes to have a more serious aspect. The import of the answer is, that although a town was introduced that had no interest in the Common, yet by the Petitioner's assenting to the minute, he is precluded from objecting to that town getting a share in the Common. The Petitioner is extremely unwilling to use any expression that may by possibility give offence. BUT YOUR LORDSHIPS WILL JUDGE IF THE RESULT OF THE ANSWER DOES NOT AMOUNT TO A CHARGE OF DECEPTION AGAINST AN INDIVIDUAL THE RESPONDENT IS NEARLY CONNEXED WITH. If such be the import of the answer, the Petitioner submits that he could not be circumvented, and his interest lessened by such means. If the Writing had been executed with every legal formality, deception would be a relevant ground of reduction, but as this minute is now explained, it asserted a falsehood, and this affords a stronger objection."

Mr. Graham, agent for the Duke of Athol, conceiving that this was a charge of deception and falsehood against him, presented a minute of complaint against General Robertson, in his own name, to the Court, complaining of this passage, and praying the Judges "to ordain the passages complained of as injurious to be struck out of the record, and to find the complainer (Graham) entitled to the expenses which he might incur in vindicating his character." After answer to this minute on the part of General Robertson, the Court, after refusing the prayer of the petition in the principal question, pronounced an interlocutor in the incidental question, "finding and declaring that the expressions complained of were improper and censurable, and ordaining them to be expunged from the record, and finding expenses due." General Robertson reclaimed against this interlocutor, alleging that the expressions were not injurious or censurable, or that if they were, the blame rested with his counsel, for whom he contended he was not answerable. The Court, however, after answer to this petition, adhered to the interlocutor. Another reclaiming petition, contending that the expressions were justifiable on the ground that Tomvouline had been improperly introduced into the judicial minute, and also complaining of certain alleged censurable passages in the Duke of Athol's answers, and praying that they too might be expunged from the record, was refused, and by another interlocutor Mr. Graham's expenses were modified to £34. From these judgments of the Court of Session in the incidental question, General Robertson appealed.

[277] In arguing for the Appellant Sir S. Romilly said that this was a point of great importance to the profession of a Counsel. A Counsel is protected in asserting whatever is material and relevant to the case, however it may bear upon individual character, and he has no right in duty to his client to retract it. But if a Counsel goes out of his way, he is not protected in justice or honour, though I know it has been imagined that he is protected in saying any thing. A Counsel with a family perhaps, is not obliged to risk his life for assertions relevant to the cause, against one who may be infamous, and whose life may be a burthen to him. What infamy would not escape if it were otherwise?

(July 5, 1815.) Lord Eldon (C.). (After stating the case.) It struck me that this was a matter of great importance for a few reasons which I shall state. I do not think that General Robertson, or his counsel, can sustain their defence, or claim with respect to Tomvouline, whether that word Tomvouline were in the minute or not, as what appeared to have been given up was merely its servitude on the lands of Struie. But if they thought they had a case fitting to be submitted to a Court of Justice, in which they must contend that the legal effect of that antecedent transaction (the exchange of 1788) was to destroy the right of Tomvouline on the Common of Glentilt, it appears to me that your Lordships would hesitate before you did any thing to prevent their submitting the question to the Court for decision. If they then

had that right, and if it happened that the right of Tomvouline to a share of the [278] Common was admitted in the judicial minute, of course Robertson must contend against the effect of that judicial minute, because if it stood untouched the Court must decide that the antecedent transaction did not destroy the right. It appeared to me then a very strong thing to say, that a party shall not be heard to lay before the Court the grounds of his case in contending, first, that this was introduced through error, and secondly, that it was introduced through deception. First, it was said to have been introduced through error, and answers were put in not admitting the error, but at the same time stating the judicial minute as a bar to the proceeding. Then the only allegation that can be made, is one which may affect an honest man, which the result may show to have been most undeservedly made against a man entitled to a fair and honest character in the world. But if General Robertson and his counsel did really believe that the antecedent transaction had put an end to the right of Tomvouline, and if after alleging that Tomvouline had crept into the judicial minute by error, they were met by an answer that it had not crept in by error, but had been studiously inserted; and if General Robertson intended to prove that it had been inserted without his knowledge, I do not know how it is possible to frame an issue upon this point, that it was improperly and—in that sense in which the word is used by lawyers—by deception or fraudulently introduced, without alleging that it was so introduced, and introduced by somebody. I believe it would be found difficult in our proceedings in this part of the island where there was a charge of fraud, to hold, because [279] that charge, supposing it pertinent, is not ultimately made out, that it is therefore scandalous, and ought to be expunged.

There is another circumstance which makes this of importance. There appears to have been a notion here, that there was nobody to answer this but General Robertson, a person in no degree guilty. Your Lordships know that in our proceedings in Chancery if scandal is introduced, those who really introduce it may be made answerable, not only in costs, but in a way which may affect them more. And it may be well worthy of consideration whether, if a counsel could so far mistake what is matter of pertinent allegation, and what is impertinent, as to introduce what is impertinent and scandalous, the expense of expunging is to fall on one who cannot act without advice and without an adviser. But for the sake of the general interests of justice, and the fair discussion of matters in dispute between man and man, great freedom of allegation must be allowed, and if that brings forward points which it appears there were fair grounds for litigating, I do not know, that because they bear hard in the first instance on A. or B., it being necessary that their names should be introduced, A. or B. can complain of that circumstance. For if justice cannot be done without bringing forward transactions and the agents in these transactions in this way, it necessarily belongs to the course of justice that the evil should be submitted to, till it can be seen whether the allegation is really wanton scandal, or whether it is pertinent matter bearing hard for the time, but no longer than till the case is inquired into.

[280] Judgment—that the interlocutors in this incidental question be remitted for review.

Agent for Appellant, CAMPBELL.
Agent for Respondents, FRASER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (1ST DIV.).

BURNET, and Another,—*Appellants*; KNOWLES,—*Respondent*

[March 13, July 5, 1815].

[3 Scots R. R. 301.]

[When Road Trustees under an act of parliament do not follow the terms of the act in entering upon the grounds of individuals, they have no right

to say that the compensation and damages shall be estimated by the jurisdiction created by the act, and the party injured has a right to insist upon having them ascertained by the ordinary tribunals.]

[And it seems that under such circumstances the trustees cannot insist upon the ground being estimated according to its value at the time of their wrongful entry, but that the estimate may be taken according to the improved value of the ground at the time when the valuation comes to be made, by the authority and under the direction of the ordinary tribunals, acting with the consent and at the suit of the injured individual; apparently on the principle that, as the trustees have not adopted the proper measures to acquire a right to the ground by force of the act, the right remains with the individual till the recompense or price is thus ascertained.]

William Knowles, of Kirkton of Skene in 1788, purchased a small landed property in the neighbourhood of Aberdeen, which had belonged to [281] the city, and in 1789 obtained a charter from the Dean of Guild, in whose name it had been held, in which there were clauses reserving to the magistrates of Aberdeen the right to make a new road through the property, to be marked and laid out within seven years from October 7, 1788. The right to make this road therefore expired in 1795. In 1801, an act of parliament was obtained for making new roads in the county of Aberdeen; and the trustees, instead of following up the steps required by the act, by attempting to come to an agreement with Knowles, or in case no agreement could be made, by applying to the Sheriff to summon a jury to value the ground, etc. proceeded in another manner. The Dean of Guild presented a petition to the other trustees, who acted as judges in their character of Justices of the Peace and Commissioners of Supply, praying authority to lay out a road in terms of the above-mentioned reserved power which had expired, and that when made it might be considered as the King's highway. This was granted, and the Dean and trustees proceeded to make the road. Interdicts were obtained from the Sheriff, but were disregarded, and the road was completed. The matter was then brought before the Court of Session by bill of suspension of the sentence of the justices, and by summons of damages against the trustees.

Knowles agreed to accept of compensation and damages, and therefore the Court found it unnecessary to give an opinion as to his right to obstruct the road and hold the ground. The Lord Ordinary (Armadales) on February 12, 1805, pronounced an [282] interlocutor, finding that the trustees had not proceeded according to the act, and that the compensation and damages must therefore be ascertained and determined by the Court, unless the parties consented to a remit to the Sheriff to summon a jury for that purpose. The parties agreed to the remit, and an order by consent to that effect was made by the Lord Ordinary. Knowles, however, afterwards insisted that this consent was given by him on the understanding that the verdict was to be reported to the Court, and the cause finally determined there; but the other parties insisted that the verdict of the jury must be final on the subject, and would not proceed with the remit on any other terms. The Lord Ordinary, therefore, recalled the consent order, and remitted to Dr. Coventry, professor of agriculture, to enquire and report upon the damages. The report found £708 due to Knowles, and the trustees objected to it, chiefly because the value had been taken according to the improved state of the ground, as it stood in 1807, instead of its being taken according to the state of the ground in 1802, to which it was answered that the trustees had no right at all to the ground till Dr. Coventry examined it. The Lord Ordinary and the Court (first division) finally decreed in favour of Knowles for the sum reported due with interest, and the trustees appealed.

For the Appellants it was argued that the damages ought to have been ascertained by a jury in terms of the act, and that the damages were vindictive, inasmuch as the value was estimated according to the [283] improved state of the ground in 1807. Knowles had consented to their being ascertained by a jury, and ought not to be permitted to resile

For the Respondent it was contended that the power of having the damage ascertained by verdict of a jury, depended solely on the act; and as the trustees had not proceeded according to the act, the damages were to be ascertained by the Court in

the ordinary manner as if the act had never been passed. As to the consent, it had not been sufficiently extensive to include the whole question; and as the parties differed about it, that came to nothing. As to the value being taken in 1807, the trustees, when they entered upon the ground in 1802, had acted without any legal authority, and had no right to the ground till 1807, which was therefore the proper time for estimating the value.

Judgment—that the appeal be dismissed, and the interlocutors complained of affirmed.

Agent for Appellant, MUNDELL.

Agent for Respondent, CHALMER.

VOLUME IV.

ENGLAND.

APPEAL FROM COURT OF EXCHEQUER.

MUCKLOW,—*Appellant* ; ATTORNEY-GENERAL. —*Respondent*

[Feb. 16, 25, 1816].

[See *Starpoole v. Starpoole*, 1816, 4 Dow, 209, *post*, p. 1140 and note.]

[The Commissioners of Accounts appointed under 20 Geo. 3. c. 54. having recommended the abolition of the office of the nineteen King's waiters in the Customs, the number from that period was not filled up, and the fees of the vacant offices were generally applied to the use of the Customs' Superannuation Fund (now abolished by 51 Geo. 3. c. 55.) though without any legislative authority. By 38 Geo. 3. c. 86. the vacant offices of waiters were abolished subject to regulation, and the fees for such offices received previous to July, 1798, were ordered to be applied to the fund. The Appellant was appointed receiver in 1799; but as the Act 38 Geo. 3. made no provision for the appropriation of the fees of the vacant offices subsequent to 1798, he retained them in his own hands. By 47 Geo. 3. sess. 1. c. 51. the fees of offices, vacant and abolished under 38 Geo. 3. c. 86. received since July, 1798, were directed to be applied to [2] the fund. An information was, in 1807, then filed in the Exchequer against the Appellant for the fees which he still refused to pay, alleging that they ought not to have been received at all, and might be reclaimed by the merchant, or that, if receivable, they belonged to the surviving King's waiters, etc. But it was held that the fees were consolidated, and properly received from the merchant in full, but that the offices were separate and distinct, and that the fees did not go to the surviving waiters—and the Court below decreed for the Crown for principal, interest, and costs. But, on appeal, though the Appellant had admitted in his answer below that he had mixed this money with his own and so derived profit from it, the Lords held that, as the money remained unappropriated till 47 Geo. 3. interest ought not to be demanded during the period between 1798 and 1807; and that, as it was a fair question whether the money did not belong to the surviving waiters, the Appellant ought not to be called upon to pay costs to the Crown.]

[The Lords were of opinion that this, being public money, might be sued for by the Attorney General in his own name alone; but that, as the managers of the fund had been added as Relators upon the suggestion of the Appellant himself in his answer below, whether the information was objectionable in a general view on that ground or not, he was precluded from availing himself of that objection.]

By the 12th Car. 2. c. 4., which was an act for granting certain duties of tonnage and poundage to his Majesty, it was enacted "that no officer, etc. belonging to any

“Custom House shall exact, require, or receive any other or greater fee of any merchant, etc. than such as are or shall be established by the Commons in Parliament assembled, etc.” In pursuance of this authority the House of Commons, by an order dated 17th May, 1662, signed by their Speaker, appointed and regulated the fees to be taken by different officers of the customs, and among others by certain officers called King’s [3] waiters. They are mentioned in the Order of the Commons in these terms: “To the King’s Majesty’s waiters, being in number eighteen,” and then followed the fees which they were authorized to demand. Another officer was afterwards added to the King’s waiters (it did not appear how nor when), making the number nineteen. This however was constantly acquiesced in, and the fees were divided into nineteen instead of eighteen shares.

By the act 20 Geo. 3. c. 54. a Commissioner of Accounts was appointed, and the Commissioners in their 14th Report, dated 30th Dec. 1785, recommended the abolition of certain offices in the Customs, including that of King’s waiters. In consequence of this the offices, as they became vacant, were not filled up, though the fees were still collected, the offices not being abolished. The fees of such vacant offices appeared to have been generally applied in augmentation of the Customs’ superannuation fund, though without any legislative authority for it. This fund had been established at the beginning of the last century by the parties concerned, with the approbation of the Treasury, and was formed at first by small deductions out of the salaries of the officers, and an allowance was made out of it to superannuated officers of the Customs without regard to the pecuniary circumstances of the object. There was no legislative enactment for the establishment or regulation of this fund, of which the Commissioners of the Customs took upon themselves the management. In August 1797, Mr. Long, Secretary of the Treasury, wrote a letter to the Board, desiring that the fees of the vacant [4] offices of King’s waiters might be paid over to the superannuation fund.

By the act 38 Geo. 3. c. 86. it was enacted that the offices of King’s waiters and others should not be filled up by patent or otherwise, save as thereafter mentioned; and that such of these offices as were vacant should be and were abolished, save as thereafter provided; and that the rest should be abolished as they became vacant, save as thereafter mentioned; and that the money which had been or might be received previous to the 1st of July, 1798, for fees of offices so abolished and vacant as aforesaid, should be applied in augmentation of the superannuation fund. By this act the Commissioners of the Customs were empowered to consolidate and abolish these offices, to appoint other officers to discharge the duties, etc. No further attendance was to be required of the existing officers than before. The abolition therefore appeared to be subject to the regulation of the offices by the Commissioners of the Customs.

Mucklow was appointed to the office of clerk of the rates in 1799, and received the fees, out of which he paid 1-19th to each surviving waiter, the number being then thirteen; the surplus he retained in his own hands, refusing to pay it for the use of the fund on the ground of the uncertainty to whom it was due.

By 47 Geo. 3. sess. 1. cap. 51. it was enacted that the money received since the 5th of July, 1798, or which might be at any time thereafter received for fees of offices in the Customs (without specifically mentioning the King’s waiters) so abolished [5] or vacant (viz. by the act 38 Geo. 3. c. 86.) should be applied in augmentation of the superannuation fund.

Mucklow still refusing to pay, the Attorney General in his own name alone, in M. T. 1807, filed an information against him in the Exchequer Chamber, praying an account and payment for the use of the superannuation fund. Mucklow in his answer insisted that the vacant offices were abolished by the act 38 Geo. 3. c. 86., and that the fees ought not to have been received at all, and that the receiving them was contrary to the act 6 and 7 William and Mary, c. 1. s. 2., and that if receivable they belonged to the surviving waiters; and he denied that he had derived any emolument or interest from the money, except as having at times mixed it with his own money and derived profit from it, but what amount of interest or profit he could not state. He also objected to the information for want of proper parties.

The information was, according to suggestion in the answer, amended by making the surviving waiters Defendants, and afterwards by adding the Commissioners of the Customs as Relators. In H. T. 1810, Mucklow paid into Court in obedience to an order to that effect, the principal sum of £9599 0s. 3d. arising out of those fees, and then

admitted to be in his hands. About this time the surviving waiters brought an action in K. B. against Mucklow for these surplus fees (*Hudson v. Mucklow*, 12 East. 273). The Court was of opinion that the officers held several and distinct offices, and that each could claim no more than his [6] nineteenth part or share of the fees, however the number of existing officers might be reduced.

The cause having come on to be heard, the Court on the 27th of June, 1811, decreed an account of the fees of these vacant offices received by Mucklow since the period of his appointment, and directed that interest at four per cent. should be computed on the sums received on account of such fees when and as often as they amounted to £100, and that the Defendant Mucklow should pay the Crown's costs to be taxed.

In a note of the grounds of judgment in the Exchequer annexed to the Appellant's case, it was stated that the Court in giving interest proceeded on the principle laid down by Lord Thurlow in *Perkins v. Baynton*, 1 Bro. Ch. Ca. 375. The cause was reheard, and on the 11th of June, 1812, the decree was affirmed; and from this decree and decretal order of affirmance Mucklow appealed.

Romilly and Brougham. 1st, The Attorney General could not sustain this suit. It was not a public, but a mere private fund, and therefore the Attorney General could not proceed by information in his own name alone. It was not a public charity, and was held not exempted as such from the income tax, and therefore the Attorney General could not proceed at the relation of others. And, if not a charity, even if it should be considered as a matter of public revenue, the Attorney General could not proceed as he had done in this case at the relation of others, but ought to have proceeded in his own [7] name; for in a question of revenue the Attorney General does not proceed at the relation of others. And at any rate not only the surviving waiters, but the representatives of such as had died since the offices were allowed to remain vacant, ought to have been parties, and likewise those who had paid the fees, as they might contend that they never ought to have been paid. 2d, The offices had been abolished as they became vacant, and therefore the fees ought never to have been received; so that neither the managers of this fund nor Mucklow had any title to them, and Mucklow was still liable to an action by the merchant for them, and an action had in fact been brought by the surviving waiters for them, in which however the question was decided against them. 3d, Though the claim for the fund should be held to be well founded, it did not arise till 1807, so that no interest ought to be charged for the sum previously received. They spoke of a trustee being liable for interest for sums improperly retained by him, but how could there be a trustee without a *cestui que trust*? 4th, Mucklow under these circumstances ought not to have been found liable in costs.

Solicitor General (Shepherd) and Mitford (contra). 1st, As to the objection for want of parties, Mucklow ought to have demurred in the first instance, or filed his bill of interpleader and paid the money into Court. This fund was in the nature of a public charity, of which the Commissioners of the Customs were trustees, and the Attorney General rightly sued by information at their relation. [8] If the Attorney General had sued in his own name they would say that this was not a matter of revenue. But even though he might have proceeded in his own name, it did not follow that he might not proceed at the relation of another. (Lord Redesdale. There have been instances where the Crown officer, though he might proceed in his own name, has required a relator; as where the right is doubtful it becomes the Crown to have a relator, that the Court may award costs if it thinks proper.) 2d, Mucklow could be liable to no action by the merchant, as the fees were indivisible as to him and rightly exacted in full, and it was impossible at any rate that they could be called back. Yet the fees were separate as to the waiters, and the survivors had no title to the surplus; and so it had been decided in *Hudson v. Mucklow*, 12 East. 273. Besides, the act 47 Geo. 3. c. 86. by appropriating these fees to this fund, destroyed all other claims, and would be Mucklow's indemnity. 3d, As to the question of interest, however Mucklow might be justifiable in resisting the Commissioners' claim under Mr. Long's letter, when the act 47 Geo. 3. passed he was glaringly a wrongful holder, and ought to pay interest. (Lord Eldon (C.). I see no difficulty in your way as to interest after 1807; but what becomes of your interest between 1798 and 1807, when the Commissioners had no title? Mr. Long's writing a letter could not bind Mucklow, and the act 38 Geo. 3. related only to fees previously received.) But he received the money not for himself but for others, and as he made

interest of it there could be no injustice in making him pay interest. 4th. Then as [9] to costs, this is a public officer keeping the public money in his own pocket, and he ought to pay costs.

Lord Eldon (C.) (Feb. 25, 1816). This was an information against Mucklow, by his Majesty's Attorney General, at the relation of the Commissioners of the Customs. And I mention that fact, as an objection was made in argument to the information on that ground. But I do not enter into any discussion on that point, because, whatever may be the value of that objection on the general ground, as the Appellant himself insisted below that the Commissioners ought to be parties, it does not in the present instance deserve much attention.

The judgment of the Court of Exchequer was to this effect—(his Lordship here read the Decree, and after noticing the Order of the House of Commons, the number of the waiters, eighteen, afterwards nineteen, and the provisions of the act 38 Geo. 3. c. 86. proceeded): I have only to observe on that act that it applies only to the fees received previous to 1798, and has no application whatever to what was received after 1798; and it might be questionable whether it was meant that any fees at all were to be received after that period. I think that was not the meaning. But if the matter was at all doubtful, it cannot be considered as vexatious to have agitated the question.

The Appellant was appointed Clerk of the Rates in 1799, and then the question might arise whether these offices could be filled up; and if not, whether the fees of the vacant offices ought to be collected at all; and if they could, whether they were divisible into [10] eighteen or nineteen shares, each surviving waiter to receive only his eighteenth or nineteenth share, and the surplus to be carried over to some other purpose, such as this fund; or whether the whole of the fees received ought not to be divided among the surviving waiters; and whether the receiver might not be liable to an action by the surviving waiters, or to an information by the Attorney General. It might be considered as difficult to say whether they should have been received at all, or to whom the receiver was accountable for them after he had received them; and this difficulty was countenanced even by the opinions and conduct of the law officers of the Crown themselves.

In 1807 an information was filed by the Attorney General to have the money thus received applied to the purposes of the superannuation fund, and to this information only himself and the Appellant were parties. To this information an answer was put in by the Appellant, and he insisted that the Commissioners of the Customs, etc. should be parties. I should have stated that, in the 47th of the King, an act (47 Geo. 3. st. 1. c. 51.) passed, by which the fees, etc. of offices in the Customs, abolished or vacant, under the act 38 Geo. 3. c. 86, which had been received since the 1st July, 1798, should be applied in augmentation of the superannuation fund, etc.; and it appeared to be considered that all claims were set aside, except that of the public, for the purposes of this fund, and that the money was now legally applicable in this manner. But though I think that correct, yet it is no very easy thing to say what is the meaning of the act altogether, which is not drawn with that precision which is desirable in [11] acts regulating transactions between the public and the individual.

Then the Attorney General amended his information and made the surviving waiters parties to it, but not any representatives of deceased waiters; and it appears that an action was brought by the surviving waiters, insisting upon their right to the whole of the fees (*Hudson v. Mucklow*, 12 East. 273). The Court of K. B. considered the offices and fees as separate and distinct, and that the fees of such as became vacant devolved to the public; and that was its decision. But it was that only which set at rest this question, and led to the decision in the Exchequer. Then the Attorney General again amended his information, by adding the Commissioners of the Customs as Relators, and the Court made the decree which I have mentioned.

First, as to whether this fund can be considered as a charity, I say nothing on that head, as I have no doubt, attending to these acts, that the fees were public money, and might be sued for as such by the Attorney General alone. But as to whether the Commissioners could properly be made parties, the Appellant, for the reason which I before stated, has no right to be heard on that question. Then taking this to be public money, and liable as such to be thus called for after the passing of the act 47 Geo. 3, it appears that there is no good objection to this decree, except in so far as it gives interest upon the money during the period between 1798 and 1807; and except likewise in as far as

it gives costs against the Appellant. I agree in the principle that, in the case of a trustee, whether *ex-ecutor*, administrator, etc., if he has received money in that capacity, and the mode of putting it out of his hands is ascertained, he ought so to put it out; and that if he derives profit from it, he ought to be charged with the profit or interest. But the case is very different here, where the money is in the hands of the receiver unappropriated between 1798 and 1807, the act 38 Geo. 3. having appropriated only such of the fees as had been received previous to 1798, and he being appointed in 1799, without knowing to whom he was accountable for it, until the act 47 Geo. 3. gave him a legislative authority to pay it for the use of this fund; and my humble opinion is that he ought not to be charged with interest for the period during which the money so remained unappropriated.

And I also think it reasonable that the decree should be altered so far as respects costs. Why was not the information filed sooner? If the Att. Gen. did not sooner make the demand, it must be because he doubted whether he could make it successfully before 1807. I do not say how far the doubt might be well founded: but even after he had filed the information, and during the pendency of the suit, the surviving waiters brought their action for this money, and a question at law was made, which cannot be said to have been unfit to be tried; and we are to consider whether, under these circumstances, the Appellant is so far wrong as to be visited with costs to the other party. I think, therefore, your Lordships may safely be advised to alter the decree to the extent which I have stated, [13] so far as relates to interest and costs, and subject to such alterations to affirm it.

Lord Redesdale. The act 38 Geo. 3. c. 86. has many clauses relating to this office and others, and it speaks of the offices of the nineteen waiters; so that it is clear that the act had in view nineteen officers of this description: and it enacts that none of these offices should be granted by patent or otherwise, save as thereafter mentioned. And that such of them as were vacant at the passing of the act, and the rest as they became vacant, should be abolished, save as thereafter provided, etc. Then we must look at what are the provisions of the act, and we find (sect. 4) that it gives power to the Commissioners of the Customs to provide for the exercise of the duties of the offices by appointing other officers, or consolidating the offices as they should think fit, it being clear that the duties of the nineteen waiters were to be performed somehow; but whether by deputies of the waiters, or others, is left to the Commissioners. Another clause (sect. 3) provides that the officers beforementioned should not be compelled to any other attendance on the duties of their several offices during the existing grants than before. From this it follows that the duties of the offices must be still executed; and yet that the existing officers should not be bound to more attendance and duty than before: so that it was the intent of the legislature that the surplus should not go to the surviving waiters. It is clear, therefore, that the decision of the Court of K. B. (12 East. 273) was right.

But it still remained in suspense what was to be done with the surplus fees received after 1798. It [14] could not be the intention to increase the allowance to the survivors, and these being consolidated fees were all paid to the receiver, and the surplus remained undisposed of. The act 38 Geo. 3. c. 86. was defective therefore in not providing for what might have been easily foreseen.

So the matter stood till 1807. In the mean time Mucklow, having been appointed receiver, was called upon for the surplus fees both by the waiters and by the Commissioners, as each thought they were entitled. The act gave no authority to the Commissioners, unless with reference to some regulation of the office, which did not take place. They had no right to direct these fees to the superannuation fund, and the act gave no such direction. The survivors claimed in opposition to the Board of Customs. And thus the receiver was called upon on the one side by the Commissioners and on the other by the surviving waiters, neither of them having any clear title to the money claimed.

Then the act 47 Geo. 3. sess. 1. c. 51. was passed to supply the defect, and it was unfortunate that the object had not been sooner attended to. Now the act 47 Geo. 3. is still a general act, whereas it should have provided for the particular cases. But it does enact that the several sums of money received since the 1st July, 1798, or which at any time thereafter ought to be received for fees or emoluments of offices in the Customs, abolished or vacant, etc. should be applied in augmentation of the superannua-

tion fund, etc.—What right then did this act give? It gave a right merely to the sums, but no right beyond that; and yet this information, which [15] is founded on the act, claims interest to which the act gives no title.

It has been objected to the information that the merchants from whom these fees had been taken might claim them. But no such claim has been made, nor could well be made with effect; and at any rate that signifies nothing now, as the act directs the money to be applied to this fund.

It was the receiver's duty to obey the act, and the act would be his indemnity. I therefore think the decree right as to the sums received, and as to the giving interest from the time when the receiver was in default in not paying, which could not be before the passing of the act 47 Geo. 3.

The information was then filed, and these fees were public money, for which the Attorney General might alone sue.—The fund is for the remuneration of public officers, and is therefore a public fund, though in the nature of a charity. There can be no objection therefore to the decree in principle, the only question being whether the act was to be obeyed or not.

As to the costs, that is a different question. The surviving waiters insisted upon what they conceived to be their rights. The receiver was in the nature of a stake-holder, and might fairly submit the question whether he ought to pay the surplus to them. The Court of K. B. decided that they had no right to them. The money had been paid into the Court of Exchequer, and the question at the hearing was chiefly as to the interest and costs. The information was several times amended, which was an admission that there was some foundation for the Ap-[16]-pellant's objections. But the Appellant was properly charged with interest for the time during which he kept the money in his hands after the filing of the information in 1807, because then by paying the money into Court he might certainly have indemnified himself. But where there had been so much doubt it was hard upon the Appellant to say that he should pay the costs of the Crown as well as his own, and even to his own he would be entitled according to the rules of Courts of Equity if he had at first paid the money into Court. I agree therefore that the decree ought to be affirmed, subject to the proposed alterations.

Decree accordingly affirmed, with these alterations as to interest and costs.

Agent for Appellant, PALMER.

Agent for Respondent, SUDLOW.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HICKES,—*Appellant*; COOKE,—*Respondent* [Feb. 23, March 14, 1816].

[Mews' Dig. xiv. 1084, 1718, 1772. Commented on in *Ford v. Olden*, 1867, L. R. 3 Eq. 461.]

[Length of time, or long acquiescence in a transaction, may be a bar to relief in cases where the transaction, if impeached within a reasonable time, would be set aside.]

[Therefore where a fee-farm grant or lease, at a fixed rent, was made of mortgaged premises by the mortgagor to the mort-[17]-gagee, in which there was an acquiescence for nearly fifty years—though the transaction was of a nature to be set aside if impeached within a reasonable time—the House of Lords, affirming the decree below, held that length of time was a bar to the relief.]

[*Dicente* Lord Eldon (C.) that the transaction was one of that description which Courts of Equity always regarded with a great deal of jealousy.]

[*Dicente* Lord Redesdale that the only proper principle was that no contract for a beneficial interest out of the mortgaged premises, from the mortgagor to the mortgagee, where the mortgage continued, if impeached within a reasonable time, ought to stand.]

The original bill, filed in June, 1781, by the Appellant George Hickes, stated that Francis Hickes, the Appellant's grandfather, being in 1708 seized in fee simple of the lands of Cloonora in the barony of Slaverdagh and county of Tipperary, computed to contain 299 acres of profitable land, but actually containing 700 acres of land of excellent quality, in the said year 1708 mortgaged the lands to Phaniel Cooke, then of Clonellan in the county of Tipperary, in fee, to secure the repayment, with interest at 8 per cent. of a sum of £280 then due from Hickes to Cooke:—that Francis Hickes soon after died, and his son and heir at law, John Hickes, became seized of the equity of redemption of the estate, and that the said John Hickes in 1721, previous to his marriage, executed articles, by which he agreed to apply his wife's portion in payment of the mortgage debt, and to settle the lands on himself and his wife for life, remainder to the issue male of their bodies:—that John Hickes neglected to register the articles, or to apply the portion in payment of the mortgage [18] debt, but suffered a large arrear of interest to accrue thereon to the amount, as was pretended, of £520, for which the said John Hickes gave bonds to the said Phaniel Cooke, making the whole debt £800:—that Phaniel Cooke died in 1733, leaving John Cooke his heir at law, and one of his executors: and that John Cooke, knowing that the debt was made up of interest and compound interest, and that John Hickes was a weak, indolent, and expensive man, and fearing that part of the debt might be disputed, in November, 1733, filed a bill of foreclosure against John Hickes, but wrote to him at the same time that if he would come and settle he would be at no expense by the bill:—that John Hickes immediately repaired to Cooke, and was prevailed upon to execute a mortgage in fee of the lands for the whole sum of £800:—that Cooke afterwards pressed for payment, and threatened to foreclose unless still further security were given; and that John Hickes, being an extravagant and necessitous person, and therefore greatly in the power of Cooke, was induced to execute, by deeds of lease and release of the 3d and 4th May, 1734, to one Otway (Cooke's brother-in-law and friend), since deceased, a fee-farm lease or grant of the mortgaged premises, at the yearly rent of £80 in trust for Cooke, as a security for the punctual payment of the interest as was pretended, and that Cooke had ever since been in possession and accounted for the £80 rent:—that at the time of executing this lease the lands were worth £300 a-year, and at the time of filing the bill £700 a-year:—that John Cooke had notice of the marriage articles of 1721 before the mortgage of 1733:—that John [19] Hickes afterwards paid the greater part of the £800 and died intestate, leaving three sons, Lewis, Francis, and George Hickes, the Appellant:—that Lewis Hickes, being ignorant of the marriage articles and of the payment of the mortgage debt, accepted the rent with deduction of the interest of the £800 till 1750, when Lewis discovered the articles, and that his father was only tenant for life, and that he himself was entitled to the premises subject only to the original mortgage of £280, and threatened to commence a suit to set aside the subsequent mortgage, etc. but was induced to desist, and to ratify the mortgage, and to acquiesce under the fee-farm lease by a loan or gift of £200 from Cooke:—that Lewis Hickes died intestate and without issue in 1769, and, Francis having died in the life-time of Lewis unmarried, the Appellant, George Hickes, became entitled, and, being ignorant of the marriage articles of 1721, and in distressed circumstances, received the rent with deduction of the interest of the £800:—that in 1774 John Cooke died, leaving the Respondent, William Cooke, his heir at law and executor, who became seized and possessed of the lands, and had never paid the rent. And the bill prayed that the fee-farm deeds might be set aside, or decreed to stand only as a security, that the lands might be reconveyed freed from the mortgages and fee-farm lease, etc. the marriage articles of 1721 established, and that Cooke might pay the arrear of rent without prejudice to the relief.

In the answer, filed June, 1782, it was stated that Francis Hickes was in 1708, seized, not of the [20] whole but of part only of the lands of Cloonora, and that Hickes's part did not consist of more than 299 acres, which were an undivided moiety, and intermixed with an estate called Butler's Cloonora, and that there never had been any

partition. The Respondent denied notice of the alleged marriage articles of 1721, except that he had been informed that a letter demanding money, and containing an allegation to that effect, had been sent to his grandfather in 1774, to which his grandfather, conceiving it to be a scheme fabricated in order to rob him of his property, paid no attention; and that it appeared by the family papers, that several sums had been advanced to John Hickes after the first mortgage, and previous to 1721, for which sums bonds were given, and that the Respondent believed the £520 was made up of principal sums and not of arrears of interest. The Respondent denied that the lands at the time of the execution of the fee-farm lease were worth more than was paid for them, and stated that he did not believe that his grandfather John Cooke, then or at the time of the execution of the second mortgage, knew any thing of the alleged marriage articles; that he knew nothing of the loan or gift of £200 to John Hickes, nor of the pretended distressed circumstances of any of the parties, and that he had refused to pay the rent to the Appellant only because the widow of John Hickes claimed dower out of the rent, and that the lands in question had been the subject of a family settlement in Cooke's family; and that he believed that the fee-farm lease to [21] Otway was not in trust for his grandfather John Cooke, but that his grandfather purchased the same from Otway.

The bill was amended in 1789, and stated the additional fact, that the Appellant had in 1770 filed a bill against John Cooke, to set aside the fee-farm lease, etc., and that Cook had answered, admitting the trust; but that from poverty the Appellant had been unable to prosecute that suit further.

The Respondent, in a further answer to the original bill, said that he did not believe that a paper which had been shown him purporting to be a receipt, dated July, 1744, from John Cooke for the £800 was really the receipt of John Cooke; and though it was printed with the evidence none of the witnesses spoke to it. The evidence as to the marriage articles of 1721 was very slight, being only that of an old woman, the Appellant's sister, who said her sight was so bad that she could not see the paper sufficiently to enable her to say whether she had seen it before, but that her husband had received £100 from her brother Lewis, which she believed to have been due to her under the settlement. There was some evidence of the distressed circumstances of John and Lewis Hickes, and the poverty of the Appellant was clearly proved. There was no satisfactory evidence to contradict the statement in the answer that £80 was a fair rent for the lands at the time of executing the grant or lease.

The cause was brought to a hearing only in December, 1807, when the bill was dismissed with [22] costs, the Respondent undertaking not to levy them. From this decree Hickes appealed.

Romilly and Horne (for Appellant). 1st. On the ground of oppression, and the advantage taken by the mortgagee of the distresses of the mortgagor, the decree is wrong. This appears from the nature of the transaction of the fee-farm lease. It is a conveyance of the mortgaged premises in perpetuity to the mortgagee, at an annual rent of £80; so that after deducting the interest of the £800 the mortgagor has only an annuity of £40, and loses all the benefit of improvements, increased value, and other advantages of land. It is clear that this, if it had been a recent transaction, would, as between mortgagor and mortgagee, have been *primi facie* evidence of fraud. 2d. The inadequacy of price is such as to amount to evidence of fraud. They admit that the other moiety is worth £500 a year. 3d. In the case of a lease for 999 years (*Qr. Webb v. Rorke*, 2 Scho. Lef. 661), the court said that if an advantage is taken by such a contrivance, beyond the legal interest of the money lent, this is contrary to public policy, and cannot stand; but this is worse, as it is a lease in perpetuity. 4th. Then as to the length of time that elapsed before the transaction was impeached, that is accounted for by the poverty of the parties. The acquiescence must be voluntary, but this was merely a submission from which the parties could not escape.

Leach and Wetherell (for Respondent). They rest now merely on the fee-farm lease of 1734. [23] The inadequacy of price is not proved, and it is denied in the answer. The Cloonoras, though not divided by metes and bound, are not undivided moieties, but different portions; so that though one part may now be worth £500 a year, it does not follow that the other is worth £100; and is the price now any criterion of what was a proper price then? The only ground on which the transaction can be impeached is that it is utterly impossible from its nature that it can be fair. But why could not

Hickes grant a fee-farm lease at that time when every prudent owner was granting them? And what difference does it make that the transaction is between mortgagor and mortgagee? The mortgagee may have it in his power to give more favourable terms, and therefore it may be more advantageous to the other party. And is this to be challenged after such a length of time and acquiescence? The bill in 1770 was dismissed for want of prosecution. The excuse is the distress of the parties; but are the rules of justice to be dispensed with on that ground?

Romilly (in reply). The transaction being between mortgagor and mortgagee does make a great difference; because a mortgagee, proceeding against a mortgagor who cannot pay, certainly has a great advantage in such a transaction as this. The rules of justice, it is true are the same for poor and rich. But where the question is why a claim was not prosecuted sooner, poverty is a good reason.

Lord Eldon (C.) (March 14, 1816). The bill in this case was in [24] Ireland dismissed with costs; and I shall content myself with stating in a few words why it appears to me that the decision ought not to be disturbed now, whatever might have been done at an earlier period of the transaction. The bill states—(states the case, particularly the fee-farm grant). A transaction of this sort ought certainly to be looked at with a great deal of jealousy, and a Court of Equity does regard such transactions with a great deal of jealousy; though, if they should appear to be perfectly fair, it will not set them aside merely because they are foolish. The transaction took place in 1734, when this mortgagor and this mortgagee were, as between each other, in a situation which your Lordships may judge of when you consider that the mortgage from £280 had accumulated to £800, which shows that the mortgagee had great opportunity for taking advantage of the distress of the mortgagor, a circumstance which makes Courts of Equity always look at such contracts with jealousy.

But it is not so expedient to rescind the contract when first impeached only in 1781, as it would have been if it had been impeached in 1734, after a lapse of nearly fifty years, during which the right to the remedy and the opportunity to complain existed.

And there is no possibility of denying that this is material evidence in a question whether a transaction was fair, which was not impeached when the value of the subject, and the whole circumstances of the case, might have been brought forward to show the court what was the real nature of the transac-[25]-tion. I would not therefore advise your Lordships to alter this decree in effect; but it may be proper to make some alteration in the language, so as to affirm it in such a way as to show the necessity of looking with a great deal of jealousy at such transactions, though in the present case your Lordships think that you are bound by length of time, and on that account prevented from applying that principle. Whether that degree of jealousy is largely applied in Ireland, where these perpetual annuities are so common, the House may receive some information from another noble Lord.

Lord Redesdale. This case involves a very important question. It was a very common practice with mortgagees in Ireland, by procuring a lease from the mortgagor to obtain a benefit beyond the legal interest of the money. Your Lordships observe that the mortgagor, from the circumstances of control under which he stands with respect to the mortgagee, cannot deal with him as he could with other persons, and as the mortgagee can make no effectual lease without the concurrence of the mortgagor, if the mortgagor refuses to accede to the terms of the mortgage the latter may distress him so as to make it better for him to consent to a lease on unreasonable conditions than refuse to comply.

There have been cases, one of which came before Lord Clare, and another before me (*Gr. Gubbins v. Creed*, 2 Scho. Lef. 218) when in Ireland, where advantage was taken of these circumstances, and the transaction was set aside.

In this case the transaction in 1734, for that was the date of the lease, took place very recently after [26] the mortgage had been increased and the mortgagor appeared to be distressed. The lease then (it was improperly so called, as it was a conveyance by lease and release) was made but a very short time after the increase of the mortgage from £280 to £800. The mortgage had been so increased in January, 1734, and the lease was made in May, 1734; so that there was only the interval of the months of February, March, and April, between the transactions. The reason for taking this lease was a plausible and a very common one, namely, to secure the punctual payment

of the interest ; for if the mortgagee had £80 rent to pay and £40 interest to receive, he retained the interest and the rent was reduced to £40.

A transaction of this sort, if recently impeached, should be set aside ; for it not only had the effect of procuring for the mortgagee an advantage beyond the legal interest of the mortgage money, but it also incumbered the equity of redemption ; for the mortgagor would have nothing to sell to redeem the mortgage but the fee-farm rent. A bill of foreclosure might be filed against him, the expenses of which he would have to pay, and unless he could sell the rent to as much advantage as he could the lands without that burthen, he suffered a loss by the transaction. Then if the transaction had been recently challenged it ought to have been rescinded, on the principle that the mortgagee by this means gained an advantage beyond the interest of his mortgage money. But though the transaction was in 1734, John Hickes remained several years without impeaching it ; and on the part of the Re-[27]-spondent there was evidence to show that he was not so distressed as he was represented to be, for the evidence in the letters to Cooke shows that he was in a situation with respect to other transactions which required money (reads a letter from John Hickes, dated May, 1736, where he spoke of having taken a new farm, etc.). Now this was two years after the transaction, and is evidence that he was not in very great distress ; and there are other letters affording similar evidence.

Then, on the death of John, Lewis succeeded, and he dealt with this as John had done, and Lewis died in 1769, so that neither John nor Lewis complained of this during a period of 35 years ; and thus the matter stood on the death of Lewis when the Appellant succeeded, Francis having previously died without issue.

It should seem that the rent had not been very regularly paid after the death of Lewis Hickes. But the transaction stood unimpeached till June, 1781, a period of nearly 50 years, during which it was suffered to rest. As I said before, if this transaction had been earlier challenged, it was one which ought not to have stood. But when I consider the lapse of time, and the prodigious change in the value of landed property which has in the interval taken place, I doubt whether that justice could now be done in rescinding the transaction which would have been done if it had been recently challenged. The family of Mr. Cooke must have considered this property as their own ; they must have dealt with it as such, and for any thing that appears might have improved it as such. It is besides, probably, [28] so mixed with Mr. Cooke's own part of Cloonora that it cannot be distinguished ; and it appears to have been the subject of a family settlement in Cooke's family.

I think then that the bill was properly dismissed. But it does appear fit that your Lordships should not be content with a bare affirmance of the decree, but that you should state the principles upon which that affirmance rests. The decree is rather of a particular nature ; for though it dismisses the bill with costs, it is with a sort of undertaking that the payment of the costs should not be enforced : so that it appears the Court below had considerable hesitation in dismissing the bill. Your Lordships, in affirming the decree, will be anxious not to injure the principle ; and the only proper principle is this, that, although a mortgagee may, without imputation, contract for the purchase or release of the equity of redemption, no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease) where the mortgage continues, ought to stand, if impeached within a reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction. If he purchases the equity of redemption, there can be no objection to that sort of contract. But the mortgagor holding it still, and the property being reduced in value to a fee-farm rent, so that by the incumbrance on the reversion he is disabled from redeeming so well as if that had not been done, and he being liable to have a bill of foreclosure filed against him the expenses of which he must pay, and to an action for the mortgage [29] money, such a transaction ought not to stand. Your Lordships therefore will show a strict adherence to the principle, and that nothing here but length of time and acquiescence for nearly fifty years by the father and his son Lewis Hickes, and also by the Appellant,—that nothing but this—induces you to affirm the decree.

Decree affirmed, solely on the ground of the long acquiescence.

Agent for Appellant, BEETHAM.

Agent for Respondent, LANE.

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MORGAN, and Others.—*Appellants*; LEWES (SIR WATKIN) and his Daughter,—*Respondents* [March 15, 18, 20; April 1, 1816].

[Mews' Dig. xiii. 1448, 1449, 1514. See *Cane v. Allen* (Lord), 2 Dow, 289; and *Hickson v. Aylward*, 3 Moll. 14.]

[Attorney and agent advances money to his client and principal in various sums and at different periods, from 1773 to 1778, taking securities and getting accounts settled. The transactions impeached in 1783, and decree of the Court below and orders of the Lords proceeding upon its principle, that the settled accounts should be opened and the whole transactions sifted; and that the securities should not be admitted as evidence of the demands, but that the attorney should only be allowed in account the money actually advanced and proved to be so by other evidence than the securities and settlement of accounts.]

[30] [But as in the case of accounts in some sense settled, and a considerable period elapsing before they were impeached, vouchers might have been delivered up or lost, the oath of the party admitted as evidence as to the existence and import of such vouchers.]

[Attorney procures money on mortgage for his client from other clients, and gives up to the client mortgagor a bond, obtained from that client in respect of separate transactions between themselves, as part consideration of the mortgage. A separate account ordered as to the mortgage transaction in order to clear the estates, the attorney being in possession as agent for the mortgagees, and the account confined to the money actually advanced by the clients the mortgagees, and the mortgage security cut down, as to the other alleged part of the consideration, which is referred to a general account between the attorney and the client the mortgagor.]

[The attorney not allowed to take timber felled on the mortgaged estates in execution for his private debt, the timber being part of the security of the mortgagees, and the produce goes in discharge of the mortgage account. (*Vide* 3 Anst. 769. *Vide* also *Cane v. Lord Allen*, *ante*, 2 Dow, 289. and *Vaughan v. Lloyd* cited in *Wharton v. May*, 5 Ves. 48.)]

This is a case depending on the principles on which Courts of Equity proceed in directing accounts between attorney and client, where the attorney has been dealing adversely with the client during the continuance of that relation.

Sir Watkin Lewes, being in 1773 seized of estates in right of his wife, in the counties of Glamorgan, Carmarthen, and Pembroke, became acquainted with John Morgan an attorney, who promised to procure for him money at four per cent. on mortgage of the estates, chiefly for the purpose of paying off a then existing mortgage at five per cent. to a Dr. Kent. With a view to this arrangement a new marriage settlement of the estates was made, in [31] which there was a term of 500 years to the use of trustees, George Morgan, and James Morgan, the latter the brother of John Morgan, in trust to raise £12,000 upon security of the estates, £5000 thereof to be applied in paying off Kent's mortgage, and the remainder to be paid to Sir W. Lewes. That project of mortgage however came to nothing; but John Morgan having married in 1775, he offered Sir W. Lewes on mortgage at four per cent. some money settled on his own marriage, in trust to pay the interest to himself for life, then to his wife if she survived, and after the death of both to pay the principal and interest among the children of the marriage, and in default of children to himself absolutely, and by the death of the wife without children he became in fact entitled absolutely. Farrer his father-in-law, and James Morgan his brother, were the trustees in that settlement, and at the suggestion of John Morgan, Lewes consented that James Morgan should be

removed from being a trustee of the 500 years' term under Lewes's settlement, and that Chardin Morgan, another brother of John Morgan, should be made trustee in his stead.

By an indenture dated June 2, 1775, the 500 years' term in the estates was assigned in mortgage to Farrer and James Morgan for £6610, and by another indenture of the same date, it having been agreed that a receiver should be appointed, the mortgaged premises were demised to John Morgan for sixty-one years, if he should so long live, without impeachment of waste, upon trust that the said John Morgan should, during the term, or until the [32] money should be paid, receive the rents, etc., and dispose of the same in payment of the interest of the sum borrowed, and of a salary of £40 to himself; the surplus to be paid to Sir Watkin Lewes or any who should be entitled, and the term of sixty-one years to be determined on payment of the £6610 and interest. And John Morgan was by this indenture empowered "to remove or put out all or any " of the tenants or occupiers of the said hereditaments and premises, and to let and " demise the said premises, or any part thereof, unto such persons, and upon such " terms and conditions, and in such manner as, with the consent and approbation of " the said William Farrer and James Morgan, etc. the said John Morgan should think " proper."

By a deed poll, April 2, 1776, indorsed on the indenture of assignment of June 2, 1775, the premises were mortgaged for a farther sum of £1390, alleged to have been advanced by Farrer and J. Morgan, making their alleged mortgage money £8000.

By another indenture of assignment of April 3, 1776, the estates were mortgaged during the residue of the term of 500 years to Henry Wilder, to secure a sum of £4000 advanced by the said Wilder; and by another deed of the same date, Lewes covenanted to allow Morgan a farther salary of £20 a year

In these transactions John Morgan acted as attorney for both mortgagor and mortgagees; and whatever money was actually paid by the mortgagees was paid into the hands of Morgan, as the confidential agent and banker (as he was called) of Sir [33] Watkin Lewes; and as there were distinct dealings between John Morgan himself individually and his client Lewes, these matters came to be the subject of two distinct accounts, the mortgage account and general account.

With respect to the first mortgage, the sum of £6610 stated as the consideration, was made up of a sum of £4209 7s. 1d. admitted to have been advanced by the trustees Farrer and James Morgan on the mortgage account, and of a bond for £2400 executed by Lewes to Chardin Morgan for moneys alleged to have been previously advanced. As to this sum of £2400, it was stated by John Morgan, in his answer to the bill hereinafter mentioned, that the several sums of £500, £220, £120, and £950, for each of which bonds were given to Chardin Morgan, had been advanced at different periods before the 18th November 1774, on which day the account relative to these sums was settled; and that other sums were subsequently advanced to Lewes through the hands of John Morgan before February 28, 1775, on which day the account relative to all these sums was again settled, and a bond given by Lewes to Chardin Morgan for the amount of the whole, being £2400. But it appeared that though Morgan had included that sum in the mortgage accounts, the sums composing it, or whatever part of them were actually advanced, had been advanced by Chardin or John Morgan to Lewes without reference to the mortgage, and that the whole of the moneys mentioned in the securities had not always been really advanced at the time when these securities were given and the accounts settled; for [34] instance, when the account was settled, and the bond given for this £2400 on February 28, 1775, a sum of £210 then remained to be paid to Lewes to make up that sum.

The consideration of £1300 for the mortgage deed April 2, 1776, was stated in John Morgan's answer to a bill afterwards filed in the Exchequer, to be so much money advanced to him as Agent or Attorney for Sir Watkin Lewes by Farrer and James Morgan, before the execution of the deed. But upon investigation it clearly appeared that £190 of this sum was advanced by John Morgan himself; and there was no sufficient evidence that any part of it had been advanced on the mortgage accounts.

The consideration (£4000) for the third mortgage April 3, 1776, appeared to have been actually advanced; so that the sums actually advanced on the mortgage account amounted together to £8209 and a fraction; and in the course of the exceptions and

proceedings below, it was urged as an objection to the allowance of the whole of that sum, that the whole had not been applied by Morgan to Lewes's use.

After the execution of these securities Morgan delivered an account to Lewes, giving him credit for the whole sum of £12,000 as advanced on the mortgages, and discharging himself by the payment of Kent's mortgage and of Chardin Morgan's bond for £2400, by bills of costs due to himself for business done for Lewes, amounting to upwards of £800, and by various other sums applied by him to the use of Lewes.

[35] This account was settled, and allowed by Lewes, on the 24th of February, 1777.

It is unnecessary for the purposes of the present appeal to state the particulars of the various other transactions between Morgan and Lewes, the sums advanced or alleged to have been advanced by Morgan to Lewes, and the securities taken. But it ought to be noticed, that it was hardly pretended by Morgan that the whole sums mentioned in those securities were actually advanced to Lewes at the time they were executed, but only that the whole had been applied then or afterwards to Lewes's use, and it became a question whether the settled accounts ought not to be opened and each of the items separately investigated, though the vouchers had been delivered up, or alleged to have been delivered at the time of settling; and whether the securities themselves ought to be admitted as evidence of the actual advance of the sums mentioned in them. Neither Morgan or Lewes, it should be observed, had kept regular accounts of the dealings and transactions between them.

In 1778 several proceedings at law and in equity were commenced, and judgments obtained, by Morgan against Lewes on his securities, and among others, actions of ejectment were brought on the several demises of William Farrer and James Morgan, the mortgagees, against the tenants of the Glamorgan and Carmarthen estates, in respect of the tenements comprised in the mortgages, and also of tenements not so comprised; and in 1779 John Morgan, as attorney for the mortgagees, was put in possession of the estates, and continued in the pos-[36]-session till 1798 when a receiver was appointed by the Court of Exchequer.

Sir W. Lewes had previously felled some timber on the estates for the purpose of raising money, which timber Morgan took in execution by virtue of writs of *Fi. Fa.* issuing upon judgments obtained for moneys due to himself personally and individually.

In the course of these proceedings two references to arbitrators took place, one to Messrs. Holt and Parry, and another to Mr. Blake, solicitors; and two awards were made (the first of them on the principle of settled accounts), which came to nothing. Lewes at length got another solicitor to undertake his cause and procure money to settle with Morgan, and applied to Morgan for an account. Morgan returned for answer that he calculated the money due on all the securities to amount to near £17,000, but that £16,000 would be accepted if paid as a gross sum to end disputes, after which he would furnish an account and abstract. Lewes refused to give a gross sum without an account, and required an account stated in the usual manner, which was refused.

Lewes therefore, in 1783, filed his bill in the Exchequer against the mortgagees, and all proper parties, of which the prayer was of this nature; that a general account might be taken of all dealings and transactions between Lewes and the defendants; and an account of the rents of Lewes's estates received by the defendants or any of them; that so much of the several mortgage sums of £6610, £1300, and £4000, as should appear to have come to the hands of George Morgan [37] might be answered by him accordingly, and so much of them as should appear to have come to the hands of the deceased Chardin Morgan in his life time might be answered out of his assets by his personal representative James Morgan, or that James Morgan should set out an account of Chardin's personal estate; that the award made by Parry and Holt might be declared void and set aside; that John Morgan might be compelled to make out a proper account of fees and disbursements, and that the same might be referred to the master to be taxed; and that Lewes on paying what should be found due to the said defendants on the said several accounts might be let in to redeem his estates; that a receiver might be appointed till redemption; and that an injunction might issue to stay proceedings at law, and restrain the selling of timber cut down, and the cutting down more, or committing waste; and that the remaining timber might be sold for Lewes's benefit.

The Court on 2d July, 1796, decreed an account of all dealings and transactions between Lewes and John Morgan:—and an account of moneys received by John

Morgan as agent for Lewes, and for the mortgagees, Farrer and James Morgan, and how the same had been applied; that Dep. Rem. should tax John Morgan's bill of costs; an account of rents and profits of the mortgaged estates, and of timber felled thereon, and on the estates not in mortgage received by John Morgan or any person or persons by his order or for his use, or which without his wilful default, etc.; an account of the rents and profits of Lewes's estates not in [38] mortgage received by John Morgan, etc.; that all parties should have just allowances, and be examined on interrogatories touching the said several accounts; that all parties should produce on oath, if required, all books, papers, deeds, evidences, and vouchers in their custody, etc.; and it was further, etc., decreed, that if, in taking the accounts and taxing the costs, it should appear to the Deputy Remembrancer that any one or more voucher or vouchers, in support of any one or more article or articles in the said accounts, and in the bills of costs of the said John Morgan, was then or were then lost, and could not be found, then John Morgan was required to make oath before one of the Barons, or a Commissioner duly authorised to take affidavits therein, that such voucher or vouchers did theretofore exist, and of the contents or purport of such voucher or vouchers, and that the same had been delivered up to Sir W. Lewes; and the Dep. Rem. was armed with a commission for the examination of these matters; and if any special matter should arise, the Dep. Rem. had liberty to state the same by special or separate report; and the consideration of interest and other directions were reserved until the Dep. Rem. should have made his general report; and parties to be at liberty to apply to the Court as there should be occasion.

After some proceedings before the Dep. Rem. Lewes applied to the Court for an order for a separate report as to the mortgage transactions. And by an order of June 20, 1801, the Dep. Rem. was directed to make a separate report of all dealings [39] and transactions between the said Sir W. Lewes and John Morgan as far as related to the moneys actually received and paid on account of the mortgages and judgments in the bill mentioned; and also of all and every the sum and sums of money received by Morgan as agent for Lewes, and for the Defendants the mortgagees, and when and how such sum and sums of money was or were applied to their account; and of the rents and profits of the mortgaged estates; and of the timber which had been felled thereon, and on the estates not in mortgage received by John Morgan, etc.; and also of the rents and profits of the estates not in mortgage of which John Morgan was or had been in possession, etc.; and the Dep. Rem. should tax the costs of the mortgagees in the ejectments, and also the costs of the judgments, and state the amount in his separate report.

It was represented on behalf of Lewes, that the Court must by its decree have meant that the securities themselves should not be admitted as evidence of the money actually advanced to Lewes, or Morgan as his agent, but the Deputy Remembrancer understanding it differently made his separate report on July 16, 1802, drawn upon the principle that the bonds and other securities were evidence of the money actually advanced and paid on account of the mortgages and of the judgments, and accordingly that the £2400 formed part of the consideration for the first mortgage, and that the £12,000 had been advanced on the mortgages, and that of the total sums for which judgment had been entered up, those [40] particular sums, for which bonds or other securities were given, had been actually paid.

To this report Lewes took several exceptions: five of them, which were the only exceptions connected with this appeal, proceeding on the principle that the securities were not evidence of the moneys actually advanced, and objecting to the report as to the £2400 on the ground that, the bonds being out of the question as evidence, the several sums mentioned as making up this sum of £2400 never were advanced at all to Lewes, or that if they were, they had been advanced by John Morgan himself on a general account, and ought to have made no part of the particular account directed by the decretal order of 20th June, 1801, which was confined to moneys actually advanced on the mortgage and judgment accounts. On the same principle the exceptions objected to the statement of the advance of the £1300 on the mortgage account, there being no evidence, except the existence of certain bonds for £1200, of the advance of that sum, which bonds ought not to be taken as evidence of actual advance. And it was insisted that the Dep. Rem. ought to have certified that only £8209 7s. 1d. had been received by Morgan, as Lewes's agent, on the mortgage account: and that Morgan had applied

only £7681 5s. 6d. to Lewes's use, and that the balance, £528 1s. 7d. ought to be carried to the general account.

The Court of Exchequer, by decretal order of the 9th February, 1804, overruled the exceptions and confirmed the report.

Lewes having appealed from this order to the [41] House of Lords, their Lordships by order 9th February, 1807, in substance reversed the order of the Court of Exchequer, over-ruling the exceptions and confirming the report: and then proceeding upon the principle of a separate account, and that the securities were not to be taken as evidence of the actual advance of the sums for which they were given, the order directed that the Dep. Rem. should review his report, and particularly inquire what sums of money were really advanced to Lewes, as and for the consideration of the several bonds alleged to be consolidated by the £2400 bond, and of the several other securities mentioned.

This order of the Lords being made an order of the Court of Exchequer, and the Dep. Rem. having been ordered to review his report accordingly, other reports and orders were made on the principle, of course, of the order of the Lords, that the securities were not to be taken as evidence of the demands mentioned in them, and that the accounts were not to be taken as settled accounts, the Dep. Rem. however, still finding upon other evidence, that the several sums mentioned in his schedules were actually advanced in whole or in part consideration of the several bonds consolidated by the bond for £2400, and that the £2400 was by consent, on delivering up the bond, made part of the consideration for the mortgage, and generally that the whole sum of £12,000 had been advanced on the mortgage account.

In consequence of an order and reference back of May 24, 1810, the Dep. Rem. by report of June 25, 1811, stated, that a sum of £500 had been actu-[42]-ally advanced in one gross sum as the consideration for a bond to that amount, and that the other sums mentioned in the schedules had been actually advanced, but not as the consideration for the other bonds consolidated by the bond for £2400, neither the sums nor dates of advance corresponding with the securities; that the £2400 was by consent made part of the consideration for the first mortgage; that John Morgan had out of his own moneys advanced 12s. 11d. to make up the consideration of the first mortgage, and £190 to make up the consideration for the second mortgage, and that the £2400 and these other small sums being deducted, the sum of £9409 7s. 1d. was the only money actually advanced by the mortgagees to Lewes or his agent.

To this report Lewes took five exceptions. The first was, that the Dep. Rem. had certified that, according to the evidence before him, the sum of £500 had been advanced as the consideration for the bond in the report mentioned, whereas he ought to have certified that there was no evidence before him that the money had ever been really advanced by Morgan to Lewes, out of Morgan's proper moneys, as and for the consideration of the bond. The second exception objected to the statement that the delivering up of the £2400 was by consent of Lewes admitted as part consideration of the first mortgage, the Dep. Rem. not having been directed to give any opinion as to that point. The third exception was, that the Dep. Rem. ought to have deducted the whole alleged consideration for the second mortgage, and to have found that £8209 7s. 1d. constituted the total amount of money advanced on the [43] mortgage account. The fourth exception objected to the report, inasmuch as it stated that the whole sum of £12,000 had been applied by Morgan to Lewes's use, whereas it ought to have stated, as alleged in the exception, that of the £8209 7s. 1d. mortgage moneys, only £7681 5s. 6d. had been applied by Morgan to Lewes's use, and that this latter sum was the only money due from Lewes on the mortgage account. The fifth exception related to certain alleged omissions in the report not necessary to be stated.

Three exceptions were also taken by Morgan to this report, insisting that the Dep. Rem. ought to have found that the several sums were advanced as the consideration for the bonds consolidated by the £2400 bond, and that farther evidence had been given that the £2400, and the delivering it up, was part of the consideration of the first mortgage.

The cause coming on to be heard on the report and exceptions, the Court by order of July 5, 1813, decreed that Lewes's four first exceptions be allowed, and the fifth overruled; and that all the Defendant's exceptions be overruled; and that the Dep. Rem. should review his report accordingly, and compute interest on the £8209 7s. 1d. principal mortgage money. And it was farther directed that he should take an account

of the rents and profits of Lewes's estates, in mortgage or not in mortgage, received by Morgan or the mortgagees, and also an account of money received by them, or any of them, for timber cut down on the estates, and set off these receipts against the principal and interest of the mortgage money. And the usual directions in [44] taking such accounts were given. And it was ordered that the Dep. Rem. should be at liberty to proceed *de die in diem*, and that the cause should be continued in the paper of causes till the coming in of the report, until which time farther directions were reserved. From this decretal order the Defendants appealed.

It was contended for the Appellants, John Morgan and the mortgagees, that it was manifest from the prayer of the bill, that Lewes's claim to relief, by being let into possession of his estates, was founded on his paying the whole of the money due to John Morgan personally, as well as the money due to the mortgagees, or to John Morgan as their agent, and that such was the meaning of the original decree: and that the Court by that decree did not mean to exclude the admission of the securities as evidence of the advance of money stated as the consideration for them, and that the settled accounts ought to be taken as such: and that the whole of the £12,000 ought to be taken as having been advanced on the mortgages. An objection was also taken to the last decretal order on the point of form, that, on a hearing on exceptions, farther and distinct directions had been given.

On the other hand it was contended that it was clearly meant by the Court, that two separate accounts, the mortgage account and general account, should be taken; and that the order for a separate report on the mortgage account proceeded on that ground; that it was also manifestly meant that the securities themselves should not be taken as evidence of the advance of the moneys stated as the [45] consideration for them, and that the accounts purporting to be settled should not be taken as settled accounts. And that as to the point of form, the directions were conformable to the practice of the Court of Exchequer.

Mr. Leach and Mr. Roupell for the Appellants; Sir S. Romilly and Mr. Garrett for the Respondents.

In the course of the hearing the Lord Chancellor said: The Court of Exchequer, in the decree of 1796, seems to have proceeded on the principle in the case of Vaughan and Lloyd (5 Ves. 48), and to have thought that as Morgan took securities as he chose, and advanced money as he chose, the transactions ought to be fully sifted. But at the same time, as the transactions were rather late in being impeached, and as the accounts had been in some sense settled, they allowed Morgan's affidavit of the existence and import of such vouchers as he had delivered up. The principle in Vaughan and Lloyd is this, that where one acts as agent for another on the one side, and for himself on the other, on account of the control which a man of business may have over his client, the Court requires that he should make the transaction extremely clear, and throws upon him that burthen of proof, which, in ordinary cases, would be on the other party. (*Vid. Cane v. Lord Allen*, 2 Dow, 289.)

Lord Eldon (April 1, 1816). The recollection I have of this cause, in which I was Counsel, enables me to represent in substance that Morgan was a middle man between the mortgagor and the mortgagees, [46] and also the separate agent of Sir W. Lewes; and I remember also that there were two distinct accounts to be taken, and your Lordships will perceive that the prayer of the bill is adapted not to settled accounts, but goes to all dealings and transactions between the parties; and this accounts for the decree of the Court of Exchequer, and the order made in this House in my absence. In making this decree, though it is not expressed in the most accurate language, it could never have been the object that, in taking the accounts, the sums stated in the mortgage securities should be considered as having been actually advanced, or that the sums stated in the bonds as the consideration for them were to be taken as having been actually advanced, and as actually due: or that, looking upon these as settled accounts, so much was due as appeared to be due upon these accounts. Such of your Lordships as are familiar with proceedings in Courts of Equity must know, that if that had been the meaning of the Court, the decree would have been framed in a different manner, and you would have heard of liberty to surcharge and falsify, and of an account under such a mortgage and such a bond, to such an amount, and of such a date, etc. And I know that it was the object of Sir W. Lewes to have the whole of these accounts opened up and investigated, relying on the principle in the case of Vaughan and Lloyd (Cor. Thurlow,

1781, cited in 5 Ves. 48), where the Court of Chancery, and with great justice in my opinion, acted on the principle that, where an attorney advances money to his client, tendering it of his own accord, and exacting security, he [47] may be called upon to show the actual advance of the money by other evidence than the securities themselves. I do not wish to reflect harshly on Morgan; but it is a principle of justice that an Attorney so dealing with his client, and acting both for himself and his client, should be bound to show that he acted as well for his client as he did for himself.

The decree was in these terms:—"that it should be referred, etc. to take an account of all dealings and transactions between the said Sir Watkin Lewes and John Morgan." That is one account. But that is not taken, and still remains to be taken. "And also an account of all, etc. sums of money received by the said John Morgan as agent to the said Sir Watkin Lewes, and also the Defendants, the mortgagees; and when and how such sum or sums was or were paid, or applied to their account respectively;" and then it was ordered that Morgan's costs should be taxed, and that an account should be taken of the rents and profits of the mortgaged estates, and of the timber felled thereon, and on the estates not in mortgage received by Morgan, etc.; and of the rents and profits of Lewes's estates, not in mortgage, of which Morgan was in possession, received by Morgan, etc. etc. Directions were given for the production of books, papers, and vouchers; and then, from the length of time that had elapsed, and many of the accounts being in some sense of the word settled, I recollect it was pressed on the Court on Morgan's behalf, that the vouchers for many of the articles in the accounts had been given up or lost, and the [48] Court therefore ordered, "that if it should appear to the Deputy Remembrancer that any one or more voucher or vouchers, in support of any one or more article or articles in the said accounts, and in the said bill of costs of the said John Morgan, was then or were then lost, and could not be found; then the said Morgan was thereby required to make oath before one of the Barons, or a commissioner duly authorized to take affidavits therein, that such voucher or vouchers did theretofore exist, and of the contents or purport of such voucher or vouchers, and that the same had been delivered up to the said Sir Watkin Lewes, etc."

Now whatever may be said as to the language of the decree, the order subsequently made in this House made it mean this; that a general account should be taken of all dealings and transactions between Morgan and Lewes; and another account as to the mortgages where Morgan was acting as Solicitor for mortgagor and mortgagees. The decree is not at all adapted to the ordinary relief in cases of redemption, but goes to all dealings and transactions between the parties. What may be disallowed, however, in the account between the mortgagor and mortgagees may yet be allowed in the account between John Morgan and Sir W. Lewes. It is important in the first place to clear the mortgage accounts, and then the general accounts may be taken; and I cannot help thinking that this must have been the object of the Court of Exchequer in calling for this separate report, which does not appear to me to go to the general account, [49] but only orders a separate report of all dealings and transactions, so far as relates to this subject of the mortgage account, and that the general account therefore still remains to be taken. The separate report goes also to the judgments, and there is no exception to it in that respect.

Then this House made this order (reads it, *vide ante*). Now on this I have to observe, that it is an order which has no reference to the general account, and whatever becomes of this £2400, this order merely relates to whatever part of it is to be carried to the account under the separate report, and not to what might be due under the account of the general dealings and transactions. Then the order proceeded on the ground that the securities were not to be taken as evidence of the actual advance of the money stated as the consideration for them, and such an order could not have been made unless the matter had been so understood; for if the accounts were to be taken upon these bonds as bonds, it would have been so directed. But there is hardly one of the accounts that do not falsify the bonds, and the instruments being so falsified cannot be admitted as evidence of the demand.

Your Lordships will recollect that it was argued, that this last decretal order of the Court of Exchequer was wrong in giving the directions. But I do not think that objection well founded, the hearing being on exceptions to the separate report, and the directions relating to that only. There is no direction as to the judgments; but I do not think that they form a necessary part of this account.

Let it be observed that all we are doing now is, [50] disallowing these sums as items in the mortgage account ; and it does not follow that the sums may not still be found due, though not on this account. The Court of Exchequer and this House have said that, as it was pretended that this £2400 was a charge on the estates, there ought to be an inquiry as to how and when it was paid ; and if it was not paid as represented, this House was of opinion that, though it might be brought into the general account of all dealings and transactions, it was not to be considered as one of the items in this separate mortgage account. Then I say that no prejudice is done to Morgan as to this £2400, or as to the judgments ; for if the money was advanced at any time, justice may be done in the general account.

With respect to the timber, if the mortgagee is in possession he must account for the timber felled on the estates. The mortgagor cannot cut timber, as he thereby lessens the security of the mortgagee ; and Sir W. Lewes could not enter without being a trespasser. Then Morgan being solicitor for mortgagor and mortgagee, and a sort of middle man between the two, is he to turn himself into a creditor of Sir W. Lewes so as to take the timber for his own private debt ? It is not to be endured. In my judgment, therefore, the decretal order is in substance right, and may be affirmed with some alterations in the exceptions and directions, which will be easily made, if we agree in the general view of the case.

Lord Redesdale. The understanding which the House had of the case, when it made the order of 1807, was clearly what the noble Lord has ex-[51]-pressed ; and this is conformable to the principles of equity recognised in a similar case. Morgan acted in two characters, being employed by Lewes both as solicitor and general agent : and the chief question arose upon a principle particularly applicable to attorney and client. If A. lends to B. £1000 for instance, actually advancing the money, and takes a bond, there is an end of the transaction so far, and the bond is the security for and evidence of the debt. If A. advances money to the agent of B. and takes the security of B., his security is the evidence of his debt, and he has no concern with the transactions between B. and his agent. If a banker advances to one £1000 on bond in this way, that he carries it to the credit of the borrower instantly to be drawn for as money which is his cash as much as any other part of his cash, the bond is evidence of the debt, the subsequent payments being items in the general accounts. But if an agent obtains a bond from his principal by a misrepresentation, then, as the nature of the dealings are not the same, the bond cannot be produced as evidence of the debt. Then in the case of an attorney who is both agent and adviser he is liable to a more strict rule, and every shilling must be proved, or the client is bound for nothing. That was the situation in which Morgan and Lewes stood.

The mortgagees having advanced the money to John Morgan as agent for Lewes, they had nothing to do with the subsequent application of the money, whether it was applied to the use of Lewes or not ; and I say that, because in the language of one of the exceptions some doubt is expressed whether it [52] was all applied to the use of Lewes. That may be the fact, and it may be a material question as between Morgan and Lewes. But the trustees are entitled to have £8209 accounted for to them as principal mortgage moneys. The object of the order for the separate report was to deal with the trustees as far as they were mortgagees, because it was a great point with Lewes to get possession of his estates, of which the mortgagees had been in possession since 1779, and they had nothing to do with the general account.

Then what are the sums secured by the mortgages ? Where one is attorney and agent he is bound to keep regular accounts, and if Morgan had done so, some credit might under the circumstances of this case have been given to the books. But he did not keep such accounts ; and if he suffers any loss, it is owing to his own neglect in not keeping such accounts and vouchers as every prudent man ought to do ; and it is impossible to put the man who does not deal regularly upon the same footing with him who does. In the case of *Vaughan v. Lloyd* (5 Ves. 48), the Attorney dealt exactly in the same way, Vaughan being in Lloyd's hands, exactly as Sir W. Lewes was in the hands of Morgan. I was counsel for Lloyd, and I really believe he did suffer some loss : but that was owing to his own neglect in not keeping regular accounts ; but I believe he suffered no great loss on an account which was cut down from about £30,000 to £9000. There can be no safety in the common transactions

between man and man, if the fact, that I have not kept regular accounts, is to enable me on my own assertion to charge another.

[53] The settled accounts in this case confute themselves. So we cannot presume that any sums were advanced, except such as appear to have been so by receipts and evidence, independent of the instruments. The decree of the Court of Exchequer therefore proceeded on a right view of the subject, and the order of 1807 was also right; and this last order of the Court of Exchequer proceeds generally on a right view of the case, though the Court overlooked some circumstances. Then as to the question of regularity, the cause standing in their paper, and the order being made on the ground of the separate report, and of the exceptions to that report, it appears to me to be generally a proper order. The timber account might discharge the mortgage account. As to the judgments, they seem to have been included in the order for the separate report only, because, in case it had been necessary to resort to that, the mortgagees might have an equity upon them to stand in John Morgan's place in his account against Lewes.

Lord Eldon (C.). What do you think of Morgan's taking the timber in execution?

Lord Redesdale. I clearly think the produce of the timber must be applied in discharge of the mortgage account, and never can be taken by Morgan for his own private account.

Lord Eldon (C.). I repeat that this record appears to me to open and establish this principle, that when an attorney takes it upon him to take securities from his client which do not express the real nature of the transaction it is incumbent on him, by other evidence than the securities them-[54]-selves, to prove what was the real nature of the transaction, and what sums were really advanced.

Decretal order of the Court of Exchequer of July 5, 1813, affirmed as to the allowing of the first exception in so far as it went to the certification that the £500 was actually advanced as the consideration for the bond; reversed as to the allowance of the rest of the first exception, which was over-ruled without prejudice to any question that might arise on the general account; affirmed as to the allowance of the second and third exceptions; affirmed also as to the allowance of the fourth exception with a variation, so as to bring it within the principle that Lewes should pay to the mortgagees whatever should appear due on the mortgage account, without prejudice to any question that might arise on the general account; and so far as not reversed or varied, affirmed generally. [S.C. 5 Price, 42 (1817); 3 Y. & J. 230 (1829); 3 Cl. & F. 159; 8 Bli. N.S. 777 (1834), *sub. nom.* *Morgan v. Evans.*]

Agent for Appellants, ———

Agent for Respondents, HUBERTY.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

COLCLOUGH,—*Appellant*; BOLGER, and Others,—*Respondents*

[March 20, 22; June 28, 1816].

[Mews' Dig. vii. 361.]

- [A. tenant for life under a marriage settlement, remainder to his first and other sons in tail, with power to A. to lease [55] at the best rent for thirty-one years or three lives in possession, without taking fines, etc. makes leases at an under-value, taking fines, etc. and grants annuities for lives of the grantees in violation of the power. Suit in 1772 by incumbancers, and the usual decree made; the son, remainder-man in tail, being then an infant eleven years of age. Master reports amount of the incumbances, without stating yearly value of the estates, or the parts proper to be sold, though directed to do so by decree, and no exception taken by A. or any person for the infant. Sale before Master of part of the lands to B. at an under-value, by collusion and mismanagement between B. and A. and A.'s agent, each of whom take some advantage from the transaction to the prejudice of the infant entitled to the inheritance: B. being cognizant of the leases and

annuities in violation of the power and of the whole circumstances. A. dies in 1794, when the son was prisoner in France. Bill by the son in 1800, to set aside the sale as fraudulent as against him, and the above circumstances in evidence. Bill dismissed in 1808, in Ireland; but the decree reversed by the House of Lords, and the sale set aside as fraudulent as against the son.]

The appellant's father, Sir Vesey Colclough, on the death of his (Sir Vesey's) grandfather, Cæsar Colclough, in 1766, became entitled to an estate tail in the estates of the Colclough family, in Ireland, comprising the manor, town, and lands of Tintern, and town and lands of the Mocurry or Duffrey estate, with their several sub-denominations and appurtenances in the county of Wexford; and also in the impropriate tithes of several parishes in the manor of Tintern, and other parishes in the counties of Wexford and Carlow, subject to certain portions for daughters of Cæsar, the grandfather, and other incumbrances, amounting altogether to £14,000.

[56] Sir Vesey intermarried, in 1767, with Catherine, the daughter of John Grogan, of John's Town, in the county of Wexford; and in consideration of the marriage, and £4000 portion with the wife, the abovementioned lands and tithes were, by deeds of lease and re-lease of June 12 and 13, 1767, strictly settled to the use of Sir Vesey for life, and to his first and other sons in tail male in the usual course of family settlements, Sir Vesey covenanting that the incumbrances did not exceed £14,000.

The settlement contained a power to Sir Vesey to demise the lands and tithes, etc. comprised in it, for any term not exceeding three lives, or thirty-one years in possession, and not in reversion, remainder, or expectancy, provided there should be reserved on every such lease the best and most improved rent that could be reasonably obtained for the same, without taking money or any thing by way of fine for, or in respect of, such leases.

This settlement was registered July 7, 1767, pursuant to the statute 6 Anne, and in Trinity term in the same year a fine was levied, and a recovery suffered of the hereditaments mentioned, to the uses of the settlement pursuant to a covenant contained in it.

There were two children of this marriage, Cæsar Colclough, the Appellant, and John, his younger brother.

Sir Vesey neglected to keep down the interest of the incumbrances, or any part of it; and it was in evidence, and stated by the Lord Chancellor (whose statement of the case is here followed), to be indisputably clear on that evidence, that Sir Vesey Colclough after his marriage became improvident and extravagant, and gave himself up to excessive dissipation, and thereby became extremely embarrassed and distressed in his circumstances.

Amongst other denominations of land within the manor of Tintern, were the lands of Nash, Cloonagh, and Garryduffe, which were contiguous to the demesne and residence of the family, and were from their local situation and good quality very valuable.

It was alleged, and, as observed by the Lord Chancellor, established in evidence that Sir Vesey had, subsequent to the settlement, executed leases of the lands of Nash and Cloonagh, and of the impropriate tithes of several parishes at an under-value, and had taken fines for some of the leases; and amongst others Sir Vesey executed two leases to one John Hill, a person who had been employed by Sir Vesey as his agent, one dated September 18, 1779, of the entire lands of Cloonagh for three lives, at £80 per annum, which lands were at that time in possession of tenants under old leases at £104 per annum, and in 1779 were worth £200 a year; and the other in 1781, of 112 acres of the lands of Nash at £50 a year, which was not half the value, and which lands had been let by Sir Vesey in 1776 at £72 13s. a year, of which lease Hill was assignee when he obtained the lease of 1781.

Sir Vesey had besides granted several other leases at an under-value, and being merely tenant for life had granted annuities or rent-charges, one of them [58] for a trifling consideration, and the other for the life of the person to whom it was granted.

In or about the year 1779, and from that to 1789, Sir Vesey employed a person of the name of Garrett Kavanagh as receiver of his rents, and in some sense as manager and steward of his property; and this person was much concerned in the transactions which formed the subject of complaint in this cause.

On July 24, 1772, a bill was filed in the Court of Chancery, in Ireland, by Joseph Johnson, who had intermarried with one of the daughters of Sir Vesey's grandfather, and by other incumbrancers upon the lands comprised in the settlement of 1767, praying an account and payment by sale of a competent part of the estates or otherwise. By decree made in that cause in 1778, it was referred to the Master to take an account of the debts and incumbrances affecting the estates comprised in the settlement, and to report what was the yearly value of the estates, and what the most proper parts to sell. To this suit the Appellant, eldest son of Sir Vesey, was a necessary party, but being then an infant of only eleven years of age, the care of his interests fell into the hands of other persons.

The Master reported the amount of the debts and incumbrances, but not the yearly value of the estates, nor the parts most proper to be sold; and in June, 1780, a final decree was made by which the debts and incumbrances mentioned in the report, then amounting to £25,680, a considerable part of which was made up of accumulation of interest, [59] were decreed charges on the estates; and it was decreed that the same should be paid in three months, or otherwise that a competent part of the estates should be sold to pay off the incumbrances.

Under this decree certain purchases were made of the lands of Nash, Cloonagh, and Garryduffe, by a gentleman of the name of Henry Houghton, which purchases it was the object of the Appellant in this suit to set aside as fraudulent against him. Besides these, the tithes of certain parishes were purchased for Houghton, and the tithes of one parish in such a manner as that Houghton became entitled to a moiety, and a person of the name of Philip Roche to the other half.

Sir Vesey died in 1794, when the Appellant, his eldest son, was a prisoner in France. Upon discovering the manner in which his interest had been neglected in this transaction, and what he conceived to be the fraud in the proceedings, he in 1800 filed his bill in the Court of Chancery, in Ireland, to set aside the sales as fraudulent against him. In this suit Mary Bolger, widow, devisee and sole executrix of the above-mentioned Henry Houghton, deceased, and also widow of Richard Bolger, deceased, whom she married after Houghton's death, Margaret Rossitor, widow and representative of James Rossitor, who had some concern in the transaction, Philip Roche, and Thomas Richard Houghton, heir at law of the said Henry Houghton, were made parties defendants.

It was in evidence for the Appellant, by admission in Mary Bolger's answer, and by deposition of witnesses, that Sir Vesey had, soon after his marriage, [60] and till the time of his death, been a dissipated man, and embarrassed in his circumstances. It was also in evidence that he made many improvident and unjustifiable dispositions and conveyances of the family property; and that the trustees under the settlement had not been sufficiently attentive to the interests of the Appellant; that Sir Vesey took fines on making leases, and made them at an under-value; that Garrett Kavanagh, Sir Vesey's agent and manager, had great influence over Sir Vesey, and was a dissipated, extravagant, and necessitous man, and not of very respectable character; and had, soon after 1767, obtained a lease from Sir Vesey at an under-value; that Kavanagh corresponded with Houghton on the subject of the purchases in question, and, soon after they were completed, obtained from Houghton a valuable lease of part of the property, which interest Kavanagh sold for £1100, and that Kavanagh also soon after obtained loans of considerable sums of money from Houghton, which Houghton never attempted to recover during Kavanagh's life time; and also that Sir Vesey was to receive, and did receive, money for himself for permitting the sales at an under-value; and that Sir Vesey was at the time of the sales in a state of particular embarrassment and distress in his circumstances.

For the Respondents it appeared in evidence that Henry Houghton had, soon after his purchase, applied to the Court to set aside the sales, or some of them, on the ground of misrepresentation on the part of Sir Vesey and Kavanagh; and it appeared that the biddings were opened, Houghton engaging [61] to offer as much as before, and he again became the purchaser at the former price. It was in evidence also that Henry Houghton was a man of respectable character, and one not likely to be concerned in a fraud. There was some evidence also that the price was a fair one, especially as to the tithes, which, from the combinations in Ireland in 1784-5-6, against the payment of tithes, were then of low value.

The cause having come on for hearing before Lord Chancellor Manners in Hil. Term,

1808, the bill was dismissed without costs; and from that decree of dismissal the Plaintiff appealed.

It was contended for the Appellant that Henry Houghton could not but know that the leases had been made at an under-value by Sir Vesey, and were therefore a fraud on the son; and that a purchaser was as much bound to examine his title in a sale before the Master, as in the case of a sale elsewhere, and that a sale before the Master gave no particular authenticity to the title; and that it was clearly a case of fraud and collusion, where all the parties derived some benefit from the transaction at the expense of the remainder-man.

On the other side, it was urged that the proceedings in the Court below had been perfectly regular, and that it would be dangerous to disturb purchases made under decrees of Courts of Equity; that the price was not inadequate, and that Cornelius Grogan, the maternal uncle of the Appellant, and a party to the settlement, having been made a party to the suit of 1772, the interests of the infant remainder-man had not been neglected.

[62] Lord Eldon (C.). Is it the practice in Ireland in these cases to give the infant when he comes of age an opportunity of showing cause against the decree?

Lord Redesdale. I believe that is a point to which they have paid little attention. There have been decrees where that was not done, and I remember I observed on that circumstance, and gave the opportunity. In this cause Sir Vesey was tenant for life, and the Appellant was the remainder-man in tail; and in such a case in this country, the remainder-man in tail having been an infant at the time of the decree, he would, when he came of age, have been called upon to convey, and might show for cause against the decree that his interest had not been sufficiently attended to, and he might, if he thought proper, file a fresh answer to the bill.

Sir S. Romilly and Mr. Leach for Appellant; Mr. Hart and Mr. Wetherell for Respondents.

Lord Eldon (C.) (June 28, 1816) (after stating the case as above). The question below in this cause was whether the purchases were effected under such circumstances of undue management, as to induce the Court at the instance of this Appellant, whose inheritance was injured, to consider the sale as against him, as—in that sense in which a Court of Equity attaches to the word—fraudulent. The Lord Chancellor of Ireland thought that they were not, and the bill was dismissed, I believe, without costs. And the question now is whether that decree of dismissal was right.

A great deal has been said, and justly said, re-[63]-specting the danger and hazard of setting aside purchases made under decrees of Courts of Equity; and nobody can be more ready than I am to accede to that doctrine, or could be more ready to act upon that principle, provided the circumstances were such as would enable us to consider the transactions in question as really and fairly proceeding upon the decree of the Court, and not upon the mere management of the parties themselves. But after looking at this case minutely, and examining all its circumstances, the conduct of Houghton, of Kavanagh, and Sir Vesey Colclough, I find it impossible not to conclude that the interests of this Appellant, which some of them were bound to take care of, were in the course of these proceedings sacrificed.

In the first place, the Master's report did not give the information which the Court required, viz. what was the yearly value of the estates, and what were the most proper parts to be sold. But this is not all; for before that suit of 1772 was commenced, Sir Vesey had granted annuities which he had no right to grant, and which would affect the price of the estates sold subject to them; and he gave leases which he had no power to make, and which being made at an under-value must have brought the property to market under such circumstances, that it was impossible the infant entitled to the inheritance could have had his fair share of the consideration. But even that is not all; for I think it clear from the evidence that Sir Vesey was paid for his concurrence, that Garrett Kavanagh was paid for his management, by the benefit which he derived from the transaction, and that Henry Houghton was perfectly [64] cognizant of the leases, annuities, and all the circumstances which affected the sales.

It is under these circumstances, and for these reasons, of which I have given a general statement, that I think this a case in which I may safely say that, as against this Appellant, the sales ought not to be held valid, though they have the colour of the protection of a decree of a Court of Equity. Though they might be valid as between

Sir Vesey and the other parties, yet they cannot be so held as against the infant entitled to the inheritance. I should propose, therefore, to your Lordships to reverse this decree, and to direct the proper accounts to be taken of the rents and profits of the hereditaments which formed the subject of sale, and of the principal and interest of the purchase money, and to declare that the sales were fraudulent as against the Appellant, and ought to be set aside, the lands, etc. standing as a security for the money actually advanced; I believe I may state that my noble friend (Lord Redesdale, present) concurs with me in this view of the case.

Decree reversed, with directions as above.

Agents for Appellant, SETON and PLOMER.

Agents for Respondents, FOULKES, LANGFORD, and WALFORD.

[65] ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

DOE, *d.* OXENDEN, — *Plaintiff* (in Error); SIR ARTHUR CHICHESTER, — *Defendant* (in Error) [Feb. 22, 25; June 12, 1816].

[Commented on in *Miller v. Travers*, 1832, 8 Bing. 244, 254; *Grant v. Grant*, 1870, L. R. 5 C. P. 736; *Homer v. Homer*, 1878, 8 Ch. D. 774.]

[Where lands at or of any particular place are devised, parol or extrinsic evidence is not admissible, to show that the deviser included under the description, and intended to pass, other lands not at that particular place.]

[And therefore where one having lands in the manor of Ashton, in Ashton parish, and also other lands in several of the neighbouring parishes, made his will, and devised lands under the description and name of "my estate of Ashton,"—and parol or extrinsic evidence was offered to show that the testator in his life-time was accustomed to designate the whole of the lands derived from his mother, including not only the estate at Ashton but also the lands in the neighbouring parishes, by the general name of his "Ashton estate,"—the House of Lords, concurring in the unanimous opinion of the Judges, held that the evidence had been properly rejected.]

This was an action of ejectment brought in the Court of King's Bench to recover possession of certain lands and hereditaments in the parishes of Crediton, Sandford, Netherex, and Cadbury, in the county of Devon, which the lessor of the Plaintiff claimed under the will of the late Sir John Chichester, as constituting part of the premises devised to him, under the description and by the name of [66] the deviser's "estate of Ashton," in the county of Devon; and the question turned upon this, whether parol or extrinsic evidence was admissible to show that the deviser, under the description "my estate of Ashton," intended to include other lands, etc. not in Ashton.

The cause was tried at the Assizes for the county of Devon in August, 1811, before Baron Graham, who rejected the extrinsic evidence, and a verdict was given for the Defendant. Whereupon a bill of exceptions was tendered, and duly sealed and signed. The evidence, as appearing on the bill of exceptions, was as follows:

It was proved for the Plaintiff, that "Sir John Chichester, Baronet (since deceased), was seized in his demesne as of fee, as well as of the tenements in the declaration mentioned, and of the manor of Ashton, and certain other tenements and hereditaments, situate in the parish of Ashton, in the said county of Devon, all which he derived from his mother, as of divers other lands and tenements which he derived from his father, called the Youlston estate, that the said Sir John Chichester being so seized on the third day of September, in the year 1808, made and published his last will and testament, in writing, duly executed so as to pass real estates, in the terms following: 'I give my estate of Ashton, in the county of Devonshire, to George

“Chichester Oxenden, second son of Sir Henry Oxenden, Baronet, of Broome, in the
 “county of Kent; I give my house in Seymour Place (for which I have given a memo-
 “ [67]-randum of agreement to purchase, and which is to be paid for out of timber
 “ which I have ordered to be cut down) to the Reverend John Sanford, of Sherwell, in
 “ Devonshire;’ and that the said Sir John Chichester afterwards, and before the said
 “ time when, etc. died so seized, without altering or revoking his said will. And it
 “ was further proved that the said tenements, in the said declaration mentioned, consist
 “ of the manor of Stowford, in the county of Devon, and of the tithes impropriate of
 “ the parish of Netherex, in the county of Devon, and two estates called Great and
 “ Little Bowley, in the parish of Cadbury, in the said county of Devon; that of the
 “ manor of Stowford one part lies in the parish of Crediton, in the said county of
 “ Devon, and the other part in the parish of Sandford, in the same county, the manor
 “ itself being distant from the parish of Ashton about twelve or thirteen miles; that
 “ the parish of Netherex is also eleven or twelve miles, and the parish of Cadbury
 “ fifteen miles, distant from the parish of Ashton. And it was also proved that the
 “ estate which the said Sir John Chichester so derived from his mother, and of which
 “ he was so seized at the time of making his said will, consisted as well of the tene-
 “ ments above particularly described, as of the manor of Ashton, the barton of Ashton,
 “ and other lands, lying within the parish of Ashton, and also of the manor of George
 “ Teign, which is situate in the said parish of Ashton. And it was further proved, (lease
 “ entry and ouster).—And in order to show that by [68] the words ‘my estate of
 “ Ashton,’ used in the said will of the said Sir John Chichester, the said Sir John
 “ intended to dispose of the whole of the estate which he derived from his mother,
 “ hereinbefore described, the counsel for the plaintiff proposed and offered to prove and
 “ give in evidence, by John Sanford, who wrote the said will of the said Sir John
 “ Chichester, that at the time of making the same, the said Sir John directed him to
 “ make a memorandum, to guard against accidents, to give George Oxenden (meaning
 “ the said George Chichester Oxenden) his, the said Sir John’s, Ashton estate; and
 “ also to prove and give in evidence, by the said John Sanford and Thomas Hole,
 “ Clerk, who had occasionally audited the accounts of the said Sir John, for twenty-four
 “ or twenty-five years previous to his decease, that the said Sir John, in his life-time,
 “ used, in speaking of his property which he had derived from his father, to call it his
 “ Youlston estate; and that in describing the estate derived by him from his mother,
 “ he used to designate that by the general name of his Ashton estate, or Ashton
 “ property; and particularly, on one occasion, directed that the timber should not be
 “ cut down on his mother’s property, the Ashton estate, but on his father’s property.
 “ And the counsel for the Plaintiff, for the purpose last aforesaid, produced, and
 “ offered to give in evidence, a series of annual accounts, delivered to the said Sir John
 “ Chichester by John Cleave and John Smith, who were successively two of his
 “ stewards. These accounts commenced [69] with the year 1785, and the form of each
 “ of them was very nearly the same. The following is a description of the form of one
 “ of the said accounts. On the outside was endorsed, ‘J. Cleave’s account for Ashton
 “ estate, from January the 1st, 1799, to January the 1st, 1800.’ The first page thereof
 “ was thus headed, ‘J. Cleave’s account for Sir John Chichester, Baronet, for Ashton
 “ estate, from January the 1st, 1799, to January the 1st, 1800.’ In the first page was
 “ contained a list of various payments made by the said John Cleave, among which
 “ was the following: ‘Paid a year’s annuity to Broad Clist poor, to Christmas 1799,
 “ £23 11s.’ which said parish of Broad Clist was wholly distinct from the estates
 “ derived by the said Sir John from his mother, but the annuity was charged on part
 “ of the said estate. The second and third pages were entitled, ‘Receipt of rack rents,’
 “ and contained an account of the rents of the several premises composing the estate,
 “ derived by the said Sir John Chichester from his mother, except the conventional
 “ rents of the three manors in separate sums, but added up at the end in one general
 “ total. The fourth page contained a list of rents, entitled ‘Conventional rents of
 “ the manor of Ashton.’ The fifth page contained a list of two other sets of conven-
 “ tional rents, the one entitled ‘Conventional rents of the manor of George Teign,’
 “ and the other entitled ‘Conventional rents of the manor of Stowford.’ The last
 “ page of the said account was entitled ‘Account stated,’ and is as follows:

ACCOUNT STATED.

[70] " <i>J. Cleave</i> , Dr.	£	s.	d.	" <i>J. Cleave</i> , Cr.	£	s.	d.
" To receipt of rack rents . . .	1042	12	2½	" By payment . . .	708	7	0
" To receipt of conveyancy				" By balance due from <i>J.</i>			
" rents of Ashton Manor . . .	18	15	2	" Cleave . . .	470	0	4½
" To receipt of George Teign							
" Manor . . .	5	6	0				
" To receipt of Stowford							
" Manor . . .	9	11	6				
" To balance of last account	102	2	6				
	£1178	7	4½		£1178	7	4½

" And underneath is the following receipt, the signature to which is in the handwriting of said Sir John Chichester.

" April 1, 1800. examined this account and received the vouchers thereof : and due from the said John Cleave, on the balance thereof, the sum of £470 Os. 4½d.

" JOHN CHICHESTER."

Judgment having been given for the Defendant, the Plaintiff brought his Writ of Error returnable in the House of Lords, and assigned for error, in addition to the common errors, the rejection of the evidence set out in the bill of exceptions, to show the intent of the testator to pass the whole of his maternal property under the description of his Ashton Estate ; and the Defendant rejoined *in nullo est erratum*.

The cause came on for hearing in the House of Lords, on February 22, 1816 (the Judges attending).

Heywood, Sergt. (for Plt. in Error). If it had [71] not been for a case decided in C. B., there would be little difficulty here. The rule in Bacon's Maxims (Rule 23), *Ambiguitas verborum latens verificatione suppletur*, etc., "a latent ambiguity may be explained by evidence," never appeared to have been trenched upon till that case in C. B. The only restriction is that no parol evidence can be admitted to contradict what appears on the face of the instrument. If it does not contradict it, it may be received. The evidence here is merely to show what is comprised in the words. There is no apparent ambiguity in the words Ashton Estate, and it may include lands connected with it, though not lying in Ashton parish. The words are my estate of Ashton in the county of Devon, etc. Estate may mean the interest in the land, or the land itself, or both : so that the word, when used, must be subject to explanation. There is no particular locality annexed to the word or in Johnson's *Dictionary* : it is stated as meaning concerning, belonging to, etc. ; nor does the word Ashton imply any particular locality : suppose it had been purchased from a person of the name of Ashton. The words themselves here are clear : the only question is on what they attach. An estate may be devised by a nickname, *Tuttlesham v. Roberts*, Cro. Jac. 21.—*Wyndham v. Wyndham*, Ander. 58. Godbolt 16. But there is another case, which carries the doctrine for which we contend much further than the present case ; that of *Dormer v. Dormer*, Finch 432, where a testator seized of real estates in Hampshire and Sussex, formerly called the Banisters, Idsworth in Hampshire being the ancient seat of the [72] family, usually comprehended the estates in both counties under that name, and devised his estate at Idsworth for payment of debts and portions. The Court held that the whole estates in Hampshire and Sussex were liable for payment of the debts and portions. This was so much stronger than the present case that I might rest here ; but then in C. B. there has been a decision contrary to what we contend for, and which seems to be the first of the kind. In *Doe, d. Oxenden, v. Chichester*, 3 Taunt. 147, the Chief Justice of C. B. laid down a new rule of law. In giving his opinion he said : " On the whole I think we should go further in receiving this evidence than any case has yet done." If *Dormer v. Dormer* had been there cited, he would have thought differently. (Lord Eldon (C.) Has any one looked at the Register Book to see how far this report corresponds with it ?) No. The rule he says is, "that evidence cannot be received if the will has an effective operation without it." I say there is no such rule, and I could cite thirty cases against it. There is hardly a volume of

Vesey without a dozen of them. The Chief Justice said:—"I need not particularize the cases of devises, where there were two persons of the same name, and where the name by which the property was devised applied equally to two estates. Such was the case in *P. Williams*, of a devise to Gertrude Yardley, by the name of Catherine Earnley (*Beaumont v. Fell*, 2 P. Wms. 140). And the case in *Ambler*, of legacies to John and Benedict, sons of John Sweet, who had two sons, the name of the one Benedict, but the name of the other [73] James (*Dowsett v. Sweet*, Amb. 175). The evidence was received. It is not expressly said in any of these cases, that it was necessary to receive the evidence in order to give effect to the will, which could not operate without such evidence. But although this is not said, yet the rule seems to hold." I do not dispute that there are two classes of cases, and that in one of them parol evidence is not admissible, where the will has an effective operation without it. But then, where the words are capable of two meanings, both of them giving effect to the will, the question is which meaning is to take place; and what I complain of is the application of the rule to these cases. The present case is quite clear of locality. Though there were lands in four different parishes, if he used to call them the Ashton estate, the whole would pass. They may perhaps say that of is equivalent to at: suppose so for the sake of argument; yet after the case of *Dormer in Finch*, even the word at does not exclude evidence to show that lands in different counties were comprised. And see whether at is always a word of locality; for if it has two meanings, that must be given to it which best corresponds with the intent. Now suppose the testator had looked at Johnson's *Dictionary*, he would have found that at meant near, and using it in that sense the whole would be included. But, however, that point is decided by the case in *Finch*. The next case is that of *Whitbread v. May*, 2 Bos. Pull. 593, where one devised his estate at Lushill, in Wilts, and Hearne, in Kent. The testator had lands in other parishes in Kent, as well as in the parish of Hearne, all which he had purchased by [74] one contract from one person, and was accustomed to call his "Hearne estate," or "Hearne Bay estate;" and the question was whether these facts should be admitted in evidence, to show that he intended to pass the lands in the other parishes, as well as those in Hearne. There was a great deal of doubt about it, and the Court was equally divided, though judgment was *pro forma* given for the Plaintiff. The matter went no further, and seems to have been compromised. But the Court was at any rate equally divided, and if the case of *Dormer* had been cited, the judgment would have been for us. There is a class of cases where such evidence has been admitted, because necessary to give effect to the will, as in a case in which *Sawyer* was written for *Swopper* (*Sawyer* instead of *Swopper*, *Masters v. Masters*, 1 P. Wms. 420, 425), where it was referred to the Master to inquire who was meant. So in *Day v. Trigg*, 1 P. Wms. 286, where a testator devised his freehold houses in a particular place, and had no freehold but some leasehold houses there; and upon evidence that he meant the leasehold houses, they were held to pass. But if the testator had had freehold houses there, no evidence of intention to pass the leasehold would have been admitted. In *Doe, d. Cook et Ux. v. Danvers*, 7 East. 299, Lord Ellenborough said, that it must be taken that the testator meant her customary land, having no other description of land in the manor. And so in *Lane v. Earl Stanhope*, 6 T. R. 345, 352.—And *Turner v. Husler*, 1 Bro. Ch. Ca. 78. But what we combat is the generality of the rule, and we are ready to point out a series of cases where evidence was admitted, when the question was whether the [75] will should operate in one way or in another, as in *Doe, d. Freeland, v. Burt*, 1 T. R. 701. and *Doe, d. Clement, v. Collings*, 2 T. R. 498. and (anonymous), 1 P. Wms. 267. There is a long series of Chancery cases of election, where such evidence has been admitted; as in *Pulteney v. Lord Darlington*, 1 Bro. Ch. Ca. 224, cited in *Druce v. Denison*, 6 Ves. 385. So in a case of devise of real estate, where the will might have effect without the evidence, it was still admitted, to show that a certain estate tail was included, *Finch v. Finch*, 4 Bro. Ch. Ca. 48. And see also *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. (Lord Eldon (C.) A case came before Lord Kenyon, when *M. R. (Gr. Andrews v. Lemon)* where one having, besides personal property strictly his own, other personal property which he had a power to dispose of by deed or will, bequeathed all his personal estate, etc. Evidence was at first admitted that by all he meant both his own, and that which was the subject of the power. But it was afterwards rejected.) That was in the execution of a power, which is a different thing.

(Lord Eldon (C.) It would affect you in this way, when you speak of a latent ambiguity that is raised by the evidence which removes the doubt. Now there the evidence was that he considered his own property only as his personal estate; and Lord Kenyon said that this was not ambiguous, and in common parlance it perhaps was not, but the words might be understood in another sense, and were clearer than "my estate of Ashton.") But there the property was not held in his own right, but in right of his wife, and at any rate the subsequent cases overturned the authority of that case. [76] In *Druce v. Denison*, 6 Ves. 385, Lord Eldon says, p. 402: "Parol

"evidence is admissible upon a latent not a patent ambiguity, to rebut equities grounded on presumption, and perhaps to support the presumption to oust an implication, and to explain what is parcel of the premises granted or conveyed." After that case and that of *Pulteney v. Lord Darlington*, we conceived that the matter had been settled, and that these must outweigh the authority of that one decision. It was stated before that, in all cases of election, evidence was admitted to show what subjects the words were to operate upon, though they might operate without such evidence. (Lord Eldon (C.) I thought our rules as to election had been settled. It must appear on the face of the will that the testator proposes that there should be an election, and as to what subjects.) In cases of election, a latent ambiguity in the will may be explained, even when the will might take effect without, as in *Finch v. Finch*, 4 Bro. Ch. Ca. 48 (1 Ves. 534); and *Rutter v. Maclean*, 4 Ves. 531. Almost half of the volumes of Vesey were cases of wills, where no such rule ever appeared, as that no evidence could be admitted unless the will was inoperative without it. No such rule was ever heard of till the case of *Doe, d. Chichester, v. Oxenden*, in C. B.

The same rules applied as well to persons as to things, *Dowset or Dorset v. Sweet*, Amb. 175.—*Harris v. Bishop of Lincoln*, 2 P. Wms. 125. In the former case, legacies were given to John and Benedict, sons of John Sweet. There was no John, but James, and evidence was admitted to show that [77] James was meant. This is in point; though it is true if there were two Johns the bequest would have been void for the uncertainty, unless the evidence were admitted. So where there is a devise to R. B. and the father and son are so named, the elder shall take; but evidence may be given to show that the son was meant: *Lepiot v. Brown*, 8 Vin. 197 (1 Salk. 7. 6 Mod. 199). So in *Hampshire v. Pearce*, 2 Ves. 216, where there was a bequest to Sir John Strange's four children, etc.: the four might take, and yet evidence was admitted to show that all the children were meant. Then the rule is that, where there is a latent ambiguity, evidence will be admitted to explain it, and the question is not whether the will can have any operation without the evidence.

Gaselee (for Plt. in Error). In every case of latent ambiguity, you must have the evidence before the ambiguity appears. Where a testator bequeathed "the house "I live in," *Doe, d. Clements, v. Collings*, 2 T. R. 498, evidence was admitted to show what he occupied along with it: and the stables, coal-pen, etc. were held to pass, though he used these premises for the purposes of his trade, as well as the convenience of his house, and they stood over the way; and an indictment for burglary could not be sustained upon the ground of their forming part of the dwelling house; and see also the case of *Pole v. Lord Somers*, 6 Ves. 309. Now what is the evidence here? The declaration of the testator to the person who made his will, as to what he wished to have done. There is no question of locality, and it seems clear that the evidence may [78] be let in to show what is or is not Ashton. Declarations at the time of making the will may be given in evidence, though declarations made before cannot be admitted, and so it is allowed by Lord Kenyon and Lawrence, J. in *Thomas, d. Evans, v. Thomas*, 6 T. R. 671, 677, 678. There are many Equity cases in answer to the one mentioned by one of your Lordships, and among others, *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. and *Pole v. Somers*, 6 Ves. 309, in both which the evidence was admitted. To these may be added the case of *Druce v. Denison*, 6 Ves. 385, in which two points were established: 1st, That papers in testator's own handwriting relative to the estates devised may be given in evidence: 2d, That his declarations and actions may be admitted in evidence, to show that in bequeathing all his personal property he meant to dispose of what was not strictly his own. What may be the effect of the evidence is another question, as there are cases to show that a power cannot be bequeathed without distinct reference to it in the will. The only case to impugn that of *Dormer v. Dormer* (Finch. 432), is *Doe, d. Chichester, v. Oxenden*, in C. B. We shall hear of others, but

they are all built on that, such as *Doe v. Greening*, 3 Maul. Sel. 171, and a subsequent case decided on the same ground: but *Dormer's* case was not cited to the Court. It was there said that no evidence of this description had ever been admitted, where the word was at. But the case of *Dormer* shows the contrary, and at any rate the word here is not at but of. Suppose the testator had devised his *Youlston* estate to A. and his *Ashton* estate to B. which [79] in his view constituted the whole property, would evidence not be admitted to prevent an intestacy as to what was strictly in neither *Youlston* nor *Ashton*? The term of may mean any thing, and parol evidence must be admitted to show its particular application. It is conceded that lands in the manor of *Ashton* would be comprised, but how can the line be drawn between manor and parish without parol evidence? It is too narrow a rule to say that no evidence shall be admitted unless the will be inoperative without it. Suppose a devise to *John Thomas*, and testator has two sons of that name, one natural, the other legitimate. The legitimate son might take, yet evidence would be let in to show that testator meant the other.

Mr. Sergeant Pell (for Deft. in Error). The question ultimately will be whether under the word *Ashton* estate, the manor of *Stowford*, etc. in other parishes passed. I do not impugn the rule stated from Lord Bacon's maxims; but before that can be brought in aid, your Lordships must be satisfied that there is a latent ambiguity, and when parol evidence is offered to show a doubt, there must be further parol evidence to clear up the doubt which has been raised. They offer to show that, besides the property in *Ashton* parish, the testator had other property which he sometimes included under the denomination of his *Ashton* estate, and they said that it necessarily followed that such other property passed under this devise. That however is by no means a necessary consequence, and therefore the collateral evidence, if admitted, would not clear [80] up the doubt (*Wyndham v. Wyndham*, And. 58. Godbolt 16). A great part of the cases cited relative to questions of presumption, fraud, satisfaction, and election, do not appear to touch the point. But one or two of them make for us. In the case from Godbolt, it is remarkable that *Anderson*, in giving judgment, states as the reason why the words were extended in that case, that otherwise the will would not be operative as to that portion. The case of *Dormer* was that of an entire estate called the *Banisters*. The testator changed that name, and called it *Idsworth*. The present however is not a case of an entire estate. There are cases in which Courts have looked at the state of the testator's property to see what passed by the will, such as *Pole v. Somers* (6 Ves. 309).—*Druce v. Denison* (6 Ves. 385), and others, and I do not controvert them. But the moment the nature of the property is ascertained, there is an end of surmise; and to admit evidence that something else was meant, would be to do away the effect of the statute under which property of this description passes. A great deal may be found for us in *Cheney's* case, 5 Rep. 68.—Suppose the heir at law wished to dispose of the manor of *Stowford*, would he have any more to do than to show this will to prove that it did not pass under it? Even the word all is not to be found here. In *Doe v. Greening* (3 Maul. Sel. 171), the word was at—here it is of. But that case is of importance for us, in as much as Justice Dampier there expressed his concurrence in the judgment of the Court of C. B. in *Doe v. Oxenden* (3 Taunt. 147). Justice Lawrence at first received the evidence, but there was a motion for a new trial, on the ground that it ought not to have been received, or that if to be received [81] it did not prove the point. Lawrence, (J.) then changed his opinion; and the Chief Justice (Mansfield), eminently distinguished for his knowledge of law and equity, delivered the unanimous opinion of the Court that the evidence ought not to be admitted, and the greatest inconvenience would follow if the principle of that decision were overturned.

Casberd (for Def. in Error). The property is described as consisting of different estates in four different parishes. The paternal property had an appropriate designation of its own; the maternal had no particular designation of its own; and the question is, whether evidence shall be admitted to show that the whole passed by a new designation affixed to it by the testator himself. This does not purport to be a devise of the whole maternal property, and it is submitted that it is not competent by evidence so to enlarge it. If it had been "my estate at," instead of "my estate of" *Ashton*, by the modern decisions it is clear the whole would not pass. But we are pressed by the case in *Finch* (*Dormer v. Dormer*, *Finch* 432). Taking it for granted that it is accurately reported, I submit it is not now law. If it is, then *Doe v. Greening* is not law. It was

held there that, as the words had a precise meaning and were sufficient to satisfy the will, it should only operate on the particular subject of the devise; so that the case of *Dormer* is not law. But then it is said that this is distinguishable from *Doe v. Greening* (3 Maul. Sel. 171), as the word here is not *at*, but *of*; and that therefore this is not a local description. But it is admitted, on the authority of Johnson's *Dictionary*, that *of* means concerning, belonging to. Then suppose the words here had been [82] "*belonging to Ashton*," that would be as complete a local description as if it were *at Ashton*. There is then a property designated in the will itself by which the terms of the will are satisfied. There is no ambiguity on the face of the will, because then the ambiguity would be patent and not latent, and where the ambiguity in the will is patent, no evidence can be admitted: *Cheney's case*, 5 Rep. 68. The case might be rested here. If there is a patent ambiguity the evidence cannot be received, and if there is no patent ambiguity there is a property to satisfy the terms of the will. The evidence is offered to raise the ambiguity, and then to get rid of it; but I am in doubt whether it is to explain a latent ambiguity, or to enlarge what is expressed. I submit, however, that where there is property to answer the terms of the will it is not competent by evidence to enlarge it. Against this they cite *Doe, d. Clements, v. Collings*, 2 T. R. 498.—But that case when examined does not bear them out. The Court there said that there was a distinction between house and messuage, so that it appears to have been a question of construction on the face of the will. I submit then, on two grounds, that this evidence ought not to be received: 1st, unless it be absolutely necessary to receive it in order to make the will operative at all; 2d, because, if received, the intention of the testator would be collected, not from the will, but from evidence *dehors*. As to the first ground, the principle was recognised in *Pyot v. Pyot*, 1 Ves. 355, and in *Ulrich v. Litchfield*, 2 Atk. 373, and in *Beaumont v. Fell*, 2 P. Wms. 140, where there was a bequest to "*Catherine [83] Earnly*," and it being clear that there was no such person as *Catherine Earnley*, evidence was received that the testator meant *Gertrude Yardley*, and the reason was stated at the end of the report, that the will would be so far inoperative without it. So in *Day v. Trigg*, 1 P. Wms. 286, where one devised his freehold houses, etc., having some leasehold but not freehold houses, the word freehold was rejected rather than the will should be void. That is the principle on which the cases proceed: and *Rose v. Bartlett*, Cro. Car. 292.—*Dowsett v. Sweet*, Amb. 175.—and *Wyndham v. Wyndham*, Ander. 58, were all decided on this principle. The conclusion then is that, if there are any lands capable of passing by the terms of the will itself, it is not competent by parol evidence to enlarge the words; as there is no necessity in the case, which is the only ground for the admission of parol evidence. As to the other ground, in *Cheney's case*, 5 Rep. 68, the object was to introduce extraneous matter, but the Court expressed itself decidedly against it. There is another case which has not been as yet referred to, *Doe, d. Brown, v. Brown*, 11 East. 441, where it was contended that extrinsic evidence ought to be admitted to prove the intent of a testator to include freehold property under a description of all his copyhold estates. Lord Ellenborough said (p. 450), "It would be going further than any case which we are aware of has yet gone, in admitting evidence of intent from extraneous circumstances to extend plain and unequivocal words in a will." *Brown v. Selwyn*, Ca. Temp. Talb. 240, was decided on the same principle. [84] These cases establish the principle that, where the words are clear, and there is property to answer the description, it is not competent to enlarge them by parol evidence. The cases cited on the other side on questions of election, presumption, and satisfaction, are all inapplicable. The inconvenience that would result from a contrary rule has been already mentioned. The maternal property had no joint or definite name by which the whole was known, and under these circumstances the will was made. Suppose then that all the maternal property, except the estate at *Ashton*, went to the heir at law as undisposed of, and there had been no question about it, and suppose the heir at law were desirous to sell it, no conveyancer would venture a doubt that more than the property at *Ashton* passed by the devise. The present case differs from the cases of latent ambiguity, such as two sons named *John*, or two estates of the same name. But here I do not see how the phantom is to be raised before it is destroyed. There are no two estates at *Ashton* here. Besides, this is a question between an heir at law and devisee; and it is a rule of law that an heir at law shall not be disinherited except by express words or necessary implication.

Heywood, Sergt. (in reply). If subjects were known under one general name, they would all pass under that name though in different parts of the kingdom, and however distant from each other. I do not know that I cited any cases as to fraud, presumption, and satisfaction; but I did cite several cases of election to prove that there was no such [85] restriction as that now contended for, as to the admissibility of parol evidence where there is a latent ambiguity, even in a Court of Equity. The case from Godbolt (*Wyndham v. Wyndham*, Godbolt 16. And. 58) shows that estates may pass under any general name; and as to the remark on the case of *Dormer*, that it was a case of an entire estate, this too is the case of an entire estate. But Mr. C. says that the case of *Dormer*, which appears to be the same in the Register's book as in the report, is not law, having been over-ruled in *Doe v. Greening* (3 Maul. Sel. 171). That was not a case of latent ambiguity but of construction, and has nothing to do with the present case. The word *Ashton* is not a specific description of any property. There is a manor, a barton, and a parish of *Ashton*, and there is nothing specific till the evidence is admitted. In *Cheney's case* (5 Rep. 68) the general doctrine is well stated, but it does not make for their argument. Mr. C. says that this was not a devise of the whole of the maternal property, but I do not see why the whole may not pass under the name of the *Ashton* estate. Such was the testator's intention, which cannot be carried into effect unless the decision is for us. I do not admit that it has the same meaning as of, because it is local; but, even if it were at here, the question has never been fully decided. The Court were equally divided in *Whitbread v. May* (2 Bos. Pul. 593), and the case of *Dormer* would bear me out even if the word were at. The question in *Doe v. Collings* (2 T. R. 498) was not merely a question of construction. Mr. C. contends for the rule that no evidence can be admitted where the will can have any operation without it. But I have cited cases [86] to show that there is no such restriction. The case of *Pyot v. Pyot*, 1 Ves. 335, does not at all affect the point, and the case of *Ulrich v. Litchfield* has been often over-ruled. I do not quarrel with the rule that evidence shall not be admitted to contradict the instrument. The object in the case of *Beaumont and Fell*, 2 P. Wms. 140, was to get rid of the Christian and surname; that case was a great deal stronger than the present, and the principle must have been that, if the testator did not err in the person but in the name only, the person shall take. But I have found no rule that evidence shall not be admitted where the will can possibly operate without it, except in the case of *Doe v. Oxenden* (3 Taunt. 147). I cited the cases of *Harris v. Bishop of Lincoln*, and *Day v. Trigg*, and admitted that where part of the description must be rejected the rule takes place, as the admission would be to contradict the will. The case of *Wyndham v. Wyndham* falls within that exception. As to the observation that the effect of our doctrine would be that the intent of the testator would be collected not from the will but from evidence *dehors*, I do not contend that where there are legal technical words evidence is to be admitted to alter their meaning. But *Ashton* is no technical, but a popular description; and Lord Kenyon in the case of *Lane v. Earl Stanhope*, 6 T. R. 345-352, says, "Where certain words have obtained a precise technical meaning we ought not to give them a different meaning; but if there be no such appropriate meaning, etc., we ought to construe the words so as to give effect to the intent." The case of *Brown v. Selwyn*, Ca. Temp. Talb. 240, has no [87] application here, as the evidence was there offered to contradict the will. Is it clear, if the evidence should not be received, that the will may not be void for uncertainty? And if so, it ought to be received even on the rule in *Doe v. Oxenden*. The intent to devise the whole is clear, and if one may give his estate any name he pleases and devise it by that name, the judgment must be for us.

Lord Eldon (C.) The case which your Lordships have just heard is of too much importance for you to proceed to judgment upon without the deliberate advice of the Judges; and I mean to conclude the few words which I now offer with a question, the answer to which will, I trust, bring that advice fully before you. In the mean time I shall endeavour to clear the question of such cases as one hears most of, not at law but in equity; and to begin with the case of *Dormer* (Finch, 432), I have now before me all that is necessary to prove what was the meaning of that case; not only a copy of the Register's book relative to that case, but also Lord Nottingham's manuscript notes of what he himself conceived his decision to be.

The report of that case stated that *Dormer*, the testator, was possessed of personal

estate of considerable value, and entitled to a considerable real estate in Bucks, and also of estates in Hampshire and Sussex, formerly the Banisters. But Idsworth in Hampshire, being the ancient seat of the family, he usually comprehended the whole of the Hampshire and Sussex estates under that name. He made his will in these words:—after some expressions of [88] piety, he says: “as to my temporal estate it is my will “that after my mother’s decease the interest of my estate at Idsworth”—and then in a parenthesis “(intending the whole Banisters) shall go towards payment of my debts, “and afterwards towards raising my children’s portions in manner following. First, I “bequeath my eldest daughter Mary, £1500, *item* to my two daughters, Margaret “and Elizabeth, £1500 to be divided between them. And if it shall please God that “one of them die (meaning before twenty-one years or marriage) then the survivor to “have £1000, and if both die (meaning as aforesaid) then it is my desire that £500, “part of the said £1500, be given to my said daughter; £500 to my son Robert; £500 “to my son William, and if it please God my daughter Mary die (meaning before “twenty-one or marriage) then her portion to be equally divided amongst my surviving “children.” And then followed the material words, which were wanting in the printed Report, by which he devised the whole Banisters, or the estates in Hampshire and Sussex, to his son Robert, the debts and portions being first paid. The decree states “upon reading the depositions, etc. ;” these were merely that the testator was of sound mind, memory, and understanding, and no other depositions were mentioned; and then it was held that the whole of the Banisters were by the will made liable to the debts and portions. Lord Northlingham [Nottingham], in his notes written for his own use, states the points ruled in the case; and, as far as concerns the present case, the decision is—that where a testator devises his estate at H. for payment of debts and [89] portions, and devises Blackacre to his son Robert, his debts and portions being first paid, Blackacre is made liable to the debts and portions, though not in H., and that was the circumstance which made it liable; so that this case of *Dormer v. Finch*, 432, is no authority at all for the plaintiff.

Your Lordships have heard cases cited as to presumption, satisfaction, and election, and so forth. It is true that it is a rule that where a testator gives a legacy to his creditor equal to, or greater than, the debt, the presumption is that it is meant as a satisfaction of the debt. So where a person is bound by settlement to give a portion, and gives such a portion by will, it shall be presumed *prima facie* to be intended in satisfaction of the obligation. But evidence is admissible to rebut the presumption. That however is not admitted to alter the legal effect of the terms of the will, but only to show whether what is given by the will is not a satisfaction of that which is claimed by some other title. With respect to election, I decided the case of *Druce and Denison* (6 Ves. 385), and stated that the subject as to which the election is to be made must be clearly described in the will. I there too stated my opinion of the decision in *Pulteney v. Lord Darlington* (2 Ves. Junr. 544). But, with that case and the other authorities before me, I thought it right to decide as I did, subject to any review in case it should be deemed fit to attempt to shake these authorities, unless the parties felt that there was some weight in another observation, that the paper there in dispute was of such a testamentary species that it would be received in the proper Court as part of the will; and if so, there would be [90] an end of all question. The parties seem to have thought that there was some weight in this last observation, and the matter was no more heard of. But as to that decision of Lord Thurlow (*Pulteney v. Lord Darlington*, 2 Ves. Junr. 544), speaking with the utmost deference, I doubted its soundness, and I have Lord Loughborough with me. And as to the case before Lord Kenyon, the name of which, I think, was *Andrews and Lemon*, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had a power to dispose of by deed or will) for purposes for which his own was insufficient, Lord Kenyon sent it to the Master to inquire whether by personal property he meant his own strictly, or intended to include both. But when the evidence was taken, he was so much struck with his own decision that he said, “though the evidence has been taken I shall not “now admit one word of it:” it being necessary for the general interests of mankind that persons should in their wills state clearly what they mean. So far as to cases in equity. No doubt where there is a latent ambiguity it may be explained by evidence, as where a testator gives to his son John £20 for instance. There is no apparent

ambiguity there. But if he has two sons of the name of John, that ambiguity may be taken away by verification of the fact. But here it is "my estate of Ashton;" whether of is equivalent to at will be for your Lordships to determine. But suppose this to be "my estate of Devon," would it be competent to admit evidence to show that the testator meant to include lands in Dorset on the one [91] side, and Cornwall on the other? If then a devise of my estate of Devon would not let in evidence to show that lands in the counties of Dorset and Cornwall were included, why should a devise of "my estate of Ashton" let in evidence to show that lands were included which were not in the parish of Ashton? But the difficulty is how far, where there is a local description of lands, you can extend that to what the description naturally comprehends. I say nothing on the evidence itself—only that the effect of it may be looked at thus far, to see how far it may be dangerous to admit such evidence. But that is not now the question. The question which I submit to your Lordships, as proper to be put to the Judges, is this: "whether the evidence tendered is such as according to law ought "to be admitted for the purpose for which it is offered."

Gibbs (Ch. J.) (delivering the opinion of all the Judges, June 12, 1816). This case arose upon an action of ejectment, brought to recover possession of lands and hereditaments, claimed under the will of the late Sir John Chichester, as devised, under the name and description of the devisors "estate of Ashton." The ejectment was tried before Baron Graham, when certain evidence was offered on the part of the plaintiff which the Judge thought inadmissible; and thereupon a bill of exceptions was tendered, and sealed and signed by Baron Graham; and in that bill of exceptions the evidence is stated upon which the question arises.

The will of Sir Arthur Chichester runs in these words: "I give my estate of Ashton, in the county [92] of Devonshire, to George Chichester Oxenden, second son of Sir Henry Oxenden, Baronet, of Broome, in the County of Kent: I give my house in Seymour Place, for which I have given a memorandum of agreement to purchase, and which is to be paid for out of timber which I have ordered to be cut down, to the Rev. John Sanford, of Sherwell, in Devonshire."

The ejectment was brought to recover lands situate in the county of Devon, but not in Ashton; and it was insisted that under these words, "my estate of Ashton," the testator intended to comprehend these lands, though not in Ashton, and that they passed under the will of the devisor. And evidence was tendered to show that the testator, in conversation and otherwise, comprehended under the name and description of his estate of Ashton, not only his lands in Ashton, but other lands, or the whole of the estate which he derived from his mother, and that he spoke of his paternal estate as his Youlston estate. And the question submitted was, whether extrinsic evidence could be received to explain the devise, and to show that it included lands not situate at Ashton; for we are all agreed that there is no distinction between of and at, and that it makes no difference whether the words are "my estate of Ashton," or "my estate at Ashton."

I do not state the particulars of the evidence, as the question is, whether any evidence at all can be admitted to explain the bequest. We are all agreed, as I have stated, that "my estate of Ashton" and "my estate at Ashton," are words of the same import, and the question then is, when lands at a par-[93]-ticular place are devised, whether extrinsic evidence may be received to show that the devisor included lands out of that place; and we are all of opinion that such evidence is inadmissible.

The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to show which of them the testator intended. And so also if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will, and it is only in such a

case that extrinsic evidence can be received. It is of great importance that the admission of such extrinsic evidence should be avoided where it can be done, that a purchaser or an heir at law may be able to judge from the instrument itself what lands are or are not affected by it.

Here the devise is of all the devisor's estate at Ashton; for there is no difference between of and [94] at, and he has an estate at Ashton which satisfies the description. It is true he has other lands which came to him along with his estate of Ashton; but they are not therefore comprised in the words "my estate of Ashton." If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of these counties; and for the same reason, when the testator here describes the lands as his estate of Ashton, you cannot receive extrinsic evidence to extend this to other lands not of Ashton.

We were pressed a good deal by the case of *Dormer in Finch, 432*, where it was stated to have been determined that by a devise of lands at Idesworth, lands out of Idesworth were also intended and included in the devise. There is some obscurity in the case as reported. The statement appears to have been transcribed from the bill, and the reporter has confounded the surmise of the parties with the facts of the case. The facts in substance are these; Dormer died possessed of personal estate of considerable value, and seized of real estate in Buckinghamshire, and also, of real estates in Hampshire and Sussex, formerly called the Banisters, and Idesworth, the family-seat in Hampshire, was part of the Banisters estate. By his will he directed that the rents of his estate at Idesworth should go to pay debts and raise children's portions. In *Finch* it is stated thus: "It is my will, that after my mother's decease, the interest of "my estate at Idesworth (intending the whole Banisters) shall go towards payment of "my debts, and afterwards towards [95] raising my children's portions, etc." The words intending the whole Banisters, the statement being taken from the bill, are only the suggestion of the party. The fact is merely that he directed that the interest of his estate at Idesworth should go towards payment of debts and portions. In a subsequent part of the will he directs that his son Robert shall have the Banisters, the debts and portions being first paid. It was certainly a question in that case, whether the whole Banisters estates were affected by the debts and portions; and the object of the bill was so to charge them. The answer was, that, under the will, the estate at Idesworth only could be affected by the debts and portions, while on the other hand it was insisted that it was the testator's intention to include the whole Banisters. To make that case applicable to the present however, it must appear that extrinsic evidence was received to show the intention. But, instead of that, the contrary appears; for the evidence of the only two witnesses examined in that case was confined to the sanity of the testator at the time of making his will. The Lord Chancellor does indeed determine that the whole Banisters were affected; not because of evidence admitted to show that it was the testator's intention, nor because it appeared in any way to be his meaning to include the whole under these words "my estate at Idesworth," but because in another part of the will the testator gives the whole of the Banisters to Robert his son, or brother, after the payment of the debts and portions, which showed the intention of the testator, that the whole Banisters should be charged. So far then as that case is an authority, it amounts [96] merely to this, that if one part of a will charges one estate with payment of debts and portions, and another part charges another estate, then both are charged. The testator there by one clause charged his estate at Idesworth, and by another clause charged the whole of the Banisters.

Having removed that case out of the way, we are all of opinion, that there is nothing to impugn the general rule, that, unless in cases where there is a latent ambiguity, parol or extrinsic evidence is not admissible to explain a will.

Lord Eldon (C.). When this case was argued at your Lordships' bar it was contended for the plaintiff, that the extrinsic evidence ought to have been received; and that if it had been received the verdict would have been clearly for him; and for the defendant it was contended that the evidence ought not to have been received, and was properly rejected; and that, though it had been received, it did not follow that the verdict ought to have been against him.

Whether in case the evidence had been received the verdict ought to have been the one way, or whether it ought to have been the other way, are questions with which

your Lordships need not trouble yourselves, provided you concur in the opinion delivered by the Judges. Speaking for myself, I have only to say that such is clearly my individual opinion, and that, upon the question that this judgment be reversed, I shall vote that it be affirmed.

Judgment affirmed.

Agents for Plaintiff in error, HARMAN and NEWBY.

Agents for Defendant in error, ANSTICE and Cox.

[97] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

REID AND Co.—*Appellants*; HARVEY, and Others,—*Respondents*

[June 19, 24, 1816].

[Mews' Dig. xiii. 1193. 3 Scots R. R. 303.]

[Insurance “on goods per Nancy, Captain Johnson, from Lisbon to Clyde, “premium ten guineas per cent., to return five per cent. for convoy and “arrival.”]

[By instructions to make insurance, and a representation in these terms, the underwriter is made to believe that there is a chance of the vessel's sailing with convoy, and that he undertakes an alternative risk. And the contract is not an insurance at the higher premium against all hazards, independent of the chance of the diminished risk, though at a lower premium; but the alternative is a constituent part of the contract, and a material part, because, though the underwriter undertakes the entire risk at the higher premium, combined with the chance of diminished risk with a lower premium, the entire risk, standing alone without the chance or alternative, might be one which he would not undertake at the higher premium, or would not undertake at all. And therefore, where parties procured insurances to be effected upon a representation as above, knowing at the time that the vessel was to be a running ship, and, before the last insurance was effected, that she had, in fact, sailed without convoy, but not communicating these facts to the underwriters, it was held to be a concealment of fact material to the risk, and that the policies were void.]

Reid and Co., merchants, Glasgow, having ordered a cargo of fruit from Lisbon, their correspondents at that place, Slack and Co., wrote them a letter, dated December 22, 1798, which, as far [98] as it related to the matter in question, is in these terms:—

“Small vessels in general are become so scarce that we really began to despair of “finding an opportunity to comply with your orders: particularly as no foreigner would “venture going so far to the north at this time of the year. We were, indeed, most “shamefully disappointed per last convoy, when we had engaged room for sixty chests, “we meant on joint account; but, fortunately, when we least expected it, we have had “the good luck of meeting with a charming little schooner, the Nancy, Johnson, (a “prize, going home for condemnation) we calculate will carry, etc.

“Two or three days fine weather will put this vessel ready for sea, her cargo being “all made up. This for your government regarding insurance, with or without convoy, “for which she shall not wait a single day.

“P.S.—We have determined on running with the Nancy.—To-morrow you may “calculate will sail about the 30th at farthest.”

On the same day, a letter was addressed to the Appellants, by Mac Andrew and Gill, another house at Lisbon, with which they corresponded, in the following terms: “Gentlemen, We had this honour the 7th instant, and have now to advise, that we

"have procured freight for 100 chests china oranges, and 150 frails figs, on board the British vessel, Nancy, Captain Robert Johnson, which we expect will sail in all this month, and will carry for your account the above goods. [99] The amount of invoice for your government in insurance may be about 530 000. There being no convoy at present appointed for Britain, the Nancy intends to run it. However, should any partial convoy offer, she will naturally benefit of it."

Reid and Co. received these letters on January 7, 1799, and on the 16th gave their broker an order for insurance in the following terms: quoting some words from the first letter of advice, but omitting the information that she was a prize going home for condemnation: "Sir, Please make insurance for £200 sterling on fruit, by the Nancy, Captain Johnson, of and from Lisbon for Clyde, premium ten guineas, to return five per cent. for convoy and arrival. The Nancy is a charming little schooner, and our friends advise, would be ready for sea by 31st ultimo."

A policy was accordingly opened, and underwritten by the Respondent Harvey and another. The terms of the policy, as far as concerns the present question were: "The fruit and goods on board the said ship or schooner, Nancy, Robert Johnson master, are insured in a voyage from Lisbon to Clyde, the adventure to begin, etc.: the premium being at the rate of ten guineas per cent., to return five per cent. for convoy and arrival." The words in the first letter, "with or without convoy," not being in the policy.

On January 5, 1799, Messrs. Robert Slack and Co. again wrote to the Appellants, informing them, that "the Nancy only finished loading the day before yesterday, when she immediately dropped [100] down to Bellim, and, we hope, got over the bar this morning. She is a nice little schooner, and we doubt not will have a safe and very short run."

Messrs. McAndrew and Gill wrote them also on the same day: "We have now the pleasure to enclose your bill of lading for your 100 chests China oranges, and 150 frails figs, shipped for your account on board the Nancy, Captain Johnson, which we expect will sail to-morrow for Greenock direct. The detention we did not expect, when wrote you last, would have been so great, but could not be avoided, from the intervention of our holidays, and indifferent weather."

These letters were received on January 22, 1799, and on that day instructions were given for another insurance "on goods per Nancy, Johnson, from Lisbon to Clyde, premium ten guineas per cent., to return five per cent. for convoy and arrival;" and on this representation another policy was opened and underwritten by McCulloch and Millar; but they, on the next day, insisted on having the policy cancelled, as they had understood, when they underwrote it, that the vessel was to sail with convoy, whereas they had since learned that she was a running ship: and they were liberated.

On January 24, the broker obtained instructions to procure insurance on goods "per Nancy, Johnson, from Lisbon to Clyde; premium ten guineas per cent., to return five per cent. for convoy and arrival. The Nancy finished loading on 3d instant, when she dropped down to Bellim, and was expected to get over the bar on the 5th in-[101]-stant." Another policy, in the same terms as before, was underwritten upon this by others of the Respondents.

A letter from Lisbon, to Reid and Co. dated January 12, and received on the 27th, stated:—"The Nancy, Johnson, sailed early on the 7th. The vessel we supposed would follow is now to wait convoy." Reid and Co. got a third policy in the same terms, underwritten on the 28th, by Harvey and others, under similar instructions as before, with this addition:—"By letter of the 12th instant, advice is had that the Nancy sailed the 7th instant."

The vessel was taken on January 12, by a Spanish Privateer. On February 14, whether before or after advice of the loss did not appear, the underwriters took a formal protest against the assured, and demanded to be relieved from the policies, on account of concealment of material facts and circumstances. The assured then commenced an action in the Court of Session against the underwriters, for payment of the sums insured; but, after several proceedings and a proof taken, this action was dismissed, as the cause ought to have originated in the Admiralty Court. Reid and Co. accordingly brought an action in the Admiralty Court, and obtained decree in absence against the underwriters, who then brought an action of reduction of this decree in the Court of Session. The cause then was allowed to fall asleep, but was awakened in

1808. Though in this last action the underwriters must have been the pursuers, yet, in the subsequent proceedings in the Court of Session, [102] the assured were described as the pursuers, and the underwriters as the Defenders, as in the original action. The circumstance was mentioned at the bar on appeal, but did not seem to be considered as material.

In the memorials and proceedings below there was much discussion as to the general principle of the law of insurance relative to communications by the assured to the underwriter, and, in addition to various passages quoted according to their practice from writers on insurance, the observations of Lord Mansfield, in *Carter v. Boehm* (3 Burr. 1905-9, and 1 Blacks. Rep. 593), were relied upon on both sides; and for the underwriters, the cases of *Fellows v. Schneiders*, before Lord Kenyon; and *McAdam v. McEvoy*, before Lord Ellenborough; and the cases of *Keay v. Young*, in the Court of Session, November 1783, were also cited. And with respect to this particular case, the question was whether there was a wrong representation or a concealment of circumstances material to the risk, and in the knowledge of the assured at the time when the insurance was effected.

As to the matter of concealment, Macullock and Millar, whose insurance had been cancelled, were examined as witnesses, and stated that they had understood from the nature of the representation made to them that the vessel was to sail with convoy; and Macullock stated that after having seen the letters, he was confident no one would undertake the risk for less than twenty guineas.

The Lord Ordinary, and Court of Session (first division) by its first interlocutor found for the underwriters. By another interlocutor, the Court [103] found for the assured—but ultimately by interlocutors, June 27, 1812, and June 25, 1813, decided for the underwriters, and the assured appealed.

The question on the appeal was whether there was a wrong representation, or a concealment of facts and circumstances material to the risk, and in the knowledge of the assured at the time the insurance was effected by the suppression of these two particulars: 1st, That the vessel was a prize coming home for condemnation, and therefore not within the provisions of the convoy act, 38 Geo. III. cap. 76.—2d, That the vessel was intended to be a running ship.

Mr. Leach and Mr. Horner (for the Appellants) argued, as to the 1st point, that the circumstance whether the vessel was British or foreign, within or without the provisions of the convoy act, was one of those of which the underwriter took the knowledge upon himself; of which he might have informed himself by making proper inquiry, and as to which if he did not inquire, he must be considered as having waived any information. It was therefore a circumstance which, though within the knowledge of the assured, he was not bound to communicate, and the cases of *Long v. Duff* (2 Bos. Pull. 209), and *Long v. Bolton*, were cited. As to the 2d point—whether the assured were bound to communicate the probability that the vessel would sail without convoy when they effected an insurance with these words in the policy after the long premium: “to return five per cent. for convoy and arrival,” there appeared to be no decided case [104] applying exactly to that point in the present case, as the question in the case of *Simond v. Boydell* (Doug. 255) turned upon the point of arrival. That appeared to have been the first case in which this form of words in a policy were brought particularly under the notice of the Court, and the case was spoken of as one of great authority by Lord Kenyon and Sir James Mansfield.—Lord Mansfield there said, “dangers of the sea are the same in time of peace and of war. But war introduces hazards of another sort depending on a variety of circumstances, some known, others not known, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case, the underwriter says if it turn out that the ship departs with convoy, I will return part of the premium.”—Now suppose the assured did know in this case that the vessel was to run without convoy, the question was whether it was material to the risk here insured. The contract was in its terms an insurance against all hazards of sea and war, with a proviso that in case the war risk should be diminished, there should be a diminution of the war premium. Then how could the concealment of the fact be material to the risk since there was a distinct contract on the face of the instrument

applicable to the event of sailing without convoy? But the assured were apprized that if convoy offered, the vessel would naturally take the advantage of it, and there-[105]-fore provided for that alternative. Then looking at the case, on the principle, where they had no decisions to guide them, this was a contract of indemnity against all hazards, where the parties looked at the whole risk, and distinctly provided against it; with the addition that if the whole risk did not take place, the premium should be proportionably diminished.

Sir Samuel Romilly and Mr. Adam (for the Respondents, the underwriters) argued as to the 1st point, that the fact of the vessel being a prize ship coming home for condemnation, was clearly material, and the case in *C. P.*, *Long v. Duff* (2 Bos. Pul. 209), did not touch upon the present case, because there it did not appear that the assured knew that it was a foreign ship—and though they had known it, the vessel was British owned, and the proper information might be procured at Lloyd's by the underwriter. There was a wide difference between that and a prize ship coming home for condemnation, which had never been in a British port—and by the words “from Lisbon to Clyde,” in the representation and policy they gave the underwriters reason to think that she was a British trader coming home to the Clyde. As to the 2d point, the inference from the words “premium ten guineas per cent. to return five per cent. for “convoy and arrival,” must have been that there was a strong probability that she would sail with convoy, though there was a possibility that she might not. The observations of Lord Mansfield, in *Simond and Boydell* (Doug. 253), did not apply here. The meaning of his Lordship's words [106] was this—if the assured will not warrant a departure with convoy, he must pay the full premium; but though the assured will not warrant, yet as there is a strong probability that she will sail with convoy, if she does in fact so depart, then the underwriter engages to return part of the premium.—The words “to return 5 per cent. for convoy and arrival,” were not mere words of style, but carried an intimation that the vessel would probably sail with convoy; and there was a representation too that the vessel had dropped down to Bellin, the place where vessels usually joined convoy. The assured knew all along, however that she was intended to be a running ship, and by the letter received previous to effecting the last insurance, they knew that she had actually so sailed, but did not communicate the circumstance. Now every circumstance which might affect the judgment of a prudent man, as to undertaking the risk, ought to be communicated, unless it was one of those which the underwriter himself might equally know, and must be presumed to know, or to have waived the information. The circumstance of her being a prize ship coming home for condemnation, would clearly vary the risk, on account both of her not being within the provisions of the convoy act, and the state of the vessel as to seaworthiness. The circumstance of her being intended to be a running ship would also clearly vary the risk—and therefore both circumstances ought to have been communicated; for though the underwriter, under the impression that the vessel was British, and that she would probably sail with convoy, undertook the alternative risk: it [107] did not follow that if he had known she was foreign, and was intended to be a running ship, that he would have undertaken the risk at the same premium, or that he would have undertaken it at all.

Mr. Leach (in reply) still contended that the contract was in its nature an insurance against all hazards, with a note in favour of the insured, in case the hazard happened to be diminished.

Lord Eldon (C.) (June 24, 1816). This is a case of insurance on goods “by the Nancy, Captain Johnson, from Lisbon to Clyde at a premium of ten guineas per cent., to return five per cent. for convoy and arrival.” The appeal is brought against a judgment of the Court of Session, finally sustaining the defences and assoilzieing the defenders (the underwriters), holding in effect that there was a want of good faith on the part of the assured, and that the representation was wrong.

Two objections were made to that representation: 1st, because it was not mentioned that the vessel was a prize ship coming home to be condemned. I would not be bound by any opinion I might state on that point, but as to the other objection I have no doubt that it is a good one, and that the Court of Session is right.

The information received by the Appellants was, that this was to be a running ship: they however did not effect an insurance of that nature, but got two or three policies underwritten, by instructions to their broker to make insurance on fruit or goods “by

“the Nancy, Captain Johnson, from Lisbon to [108] Clyde, premium ten guineas, to return five per cent. for convoy and arrival.” It is remarkable that in all the letters to the Appellants the vessel was described as a running ship. Yet after the Appellants knew that she had actually sailed without convoy one of the policies was effected on this sort of representation “premium ten guineas, to return five per cent. for convoy and arrival,” and it was impossible that these last words should not be considered as having some meaning.

Now I think the general understanding would be that vessels so insured would sail with convoy, though some might possibly sail without, and the underwriter says “I take the risk altogether, with the chance of the vessel sailing with convoy.” But if he had not this alternative and knew that she was to sail or had sailed without convoy, he might not take the risk at ten guineas, as he only took it at ten guineas with the chance of her sailing with convoy, though in that case and on arrival he was to return five per cent. So that he takes the risk altogether, upon an understanding that there may be a sailing with convoy, whereas without that alternative he might not take the risk at ten guineas, or might not take it at all.

Appeal dismissed, and Judgment affirmed.

Agent for Appellants, CAMPBELL.

Agent for Respondents, SPOTTISWOODE and ROBERTSON.

[109] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MONTGOMERIE (LORD and LADY),—*Appellants*; WAUCHOPE,—*Respondent*
[March 27, 29; April 1, 1816].

[3 Scots R. R. 308. See *Home v. Pringle*, 1841, 2 Rob. App. 384, 438; *Aitken v. Hunter*, 1871, 9 M. 756, 758, 760.]

[A trustee, tutor, and curator, appointed cashier and agent to the trust by co-trustees, and when called upon to account, produces accounts made up by accountants from his own instructions. Lord Ordinary appoints objections of a general and preliminary nature to be stated to the accounts, reserving the examination of particulars and vouchers till these should be disposed of. Objections given in that the accounts were not annually balanced, that interest was allowed only at $3\frac{1}{2}$ per cent., whereas interest ought to have been calculated at three per cent. *de die in diem* from time of receipt till three months after the annual balance, and then on the balance at five per cent. and the right to demand all the profits stated but not insisted on, that a charge was made for the service of the accountants which ought to be paid by the trustee and agent as it was by his negligence in not keeping the accounts himself that their services became necessary, that his charge for his own trouble in the management was excessive, and that a charge made for making up titles to certain lands by adjudications in implement, without general service and decree of constitution, ought not to be allowed, as the titles were improperly completed and therefore useless. After several proceedings, final interlocutor below approving the accounts *in toto* without any examination of particulars. This last interlocutor reversed as inconsistent with the reservation in the Lord Ordinary's interlocutor which was not appealed from, and the case remitted for review as to the rest, so that the claim for all the profits might be insisted upon if that question was still open.]

[The Lord Chancellor observing that he could not conceive how it came to be imagined that the accounts ought not to be annually balanced, that it was new in principle to take [110] accounts made up under the directions of one alone of the parties as a ground for judicial proceeding, that the

appointment of a trustee by co-trustees to be cashier and agent to the trust to be paid as cashier and agent could hardly be supported in England, that a trustee ought to keep his accounts so regularly at least as to enable the Court to judge how far the assistance of professional accountants might be necessary in the particular case, but that a trustee acting *bonâ fide* with a view to the interest of the *cestui que* trust ought not to suffer for mistake unless he very grossly miscarried.]

This was a question as to the principle and mode of accounting by a tutor, curator, and trustee, who was also agent and cashier for his colleagues in the guardianship and trust, with the pupil and truster.

Archibald, late Earl of Eglinton, died in 1796, leaving two daughters. Before and at the time of his death he was entitled to and possessed of a very large estate real and personal of his own acquisition, besides two entailed estates, one of which by the destination went to his cousin the succeeding Earl of Eglinton, the other to his elder daughter Lady Mary Montgomery. By a deed of nomination of Feb. 8, 1788, and a disposition and settlement of Jan. 18, 1791, Earl Archibald had appointed Sir James Montgomery the Chief Baron of the Exchequer in Scotland, Sir Archibald Macdonald, then Solicitor General, afterwards Lord Chief Baron of the Exchequer in England, and others, amongst whom was John Wauchope writer to the signet, to be tutors and curators of his daughters, and trustees of his fortune for their benefit.

Wauchope had in the Earl's life time been his [111] cashier and agent and had made up his accounts, and regularly struck a balance annually. It was thought proper by the other tutors and trustees that Wauchope should continue to take the active management of the property as agent and cashier, and his powers as such were renewed by them with a recommendation to keep his accounts in the same regular manner as in the Earl's life time.

Lady Mary the elder daughter, who was only ten years of age in 1796 when her father died, was in 1803 at the age of sixteen or seventeen years married to her cousin Lord Montgomerie, son of the present Earl of Eglinton: her father's wishes expressed in his last illness being in that respect complied with. Lady Susan, the other daughter, died in 1805, in minority. In 1806 Lord and Lady Montgomerie determined to settle with the trustees, and for the purposes of that settlement an action of multiple-pounding was in 1807 instituted in the names of the trustees, in which all proper parties were called, that the trustees might account and be judicially exonerated.

Wauchope, by appointment of the Lord Ordinary, then produced an account of his intromissions as cashier and agent, prepared under his own instructions, by Messrs. Keith and Wilson, professional accountants. Wauchope, it appeared, had not made up his accounts annually, and had rendered none to the tutors and trustees till 1806, and in the accounts prepared by Keith and Wilson no annual rests had been made, nor annual balances struck.

The Lord Ordinary by interlocutor of Jan. 25, [112] 1811, ordered Lord and Lady Montgomerie to give into process any objections of a preliminary and general nature which they might have to these accounts, before entering upon an examination of particulars and vouchers. This interlocutor was not objected to nor appealed from, and in compliance with it four preliminary objections were stated—1st, that the accounts were not annually balanced:—2d, that Wauchope had, instead of stocking out the savings, kept immense balances in his hands, for which there was no occasion in the ordinary administration, and allowed only 3½ per cent. interest on these balances instead of 5 per cent.:—3d, that the charge for trouble and commission was extravagant, and that £420 charged by Keith and Wilson for making up the accounts ought not to be allowed, as it was the neglect of Wauchope to make up his accounts annually that rendered their assistance necessary:—4th, that the charge for making up certain titles ought not to be allowed, as they were improperly completed and thereby useless.

The Lord Ordinary by interlocutor, Nov. 12, 1811, first in part appealed from, found that the accounts ought to be annually balanced: and that interest on the balances ought to be charged at the rate of 4 per cent. and repelled the other objections.

Representations having been given in by both parties against this interlocutor, the Lord Ordinary made *avizandum* with the cause to the Lords of the first division, and

informations having been lodged, the Court, by interlocutor, July 2, 1812, (second in part appealed from,) found that the accounts must [113] be brought to an annual balance; and that, as to the balances, after allowing certain periods for stocking them out, interest should be charged at 5 per cent.; but that no interest should be charged *de die in diem* till the expiration of these periods, and the Court repelled the other objections.

Both parties reclaimed, and the Court, Nov. 12, 1812, ordered the petition for Lord and Lady Montgomerie to be answered, with the exception of the point of the expense of making up the titles as to which they adhered, and this part of the interlocutor was appealed from.

After answers put in, the Court by interlocutor, Feb. 2, 1813, (fourth appealed from) approved of the whole accounts of Keith and Wilson, as they stood without examination of particulars or vouchers, and Lord and Lady Montgomerie appealed.

The point chiefly contended for below on the part of the Appellants, after the matter of annual balance, was that interest should be charged on the sums received at the rate of 3 per cent, *de die in diem*, from the time of receipt until three months after the annual balance should be struck, and from that time at the rate of 5 per cent.—There were some passages in the pleadings below, touching upon the right of the Appellants to an account of all the profits made by the Respondent of the trust money; but this appeared to be stated rather as a right which might be, than as one which actually was, insisted upon.

When the cause, however, came to be heard upon appeal, the point chiefly insisted upon for the Appellants was, that the Respondent ought to account [114] for all the profits he had made of the infant's money. It was a principle of universal law, that a tutor, curator, or trustee, should not make a profit of the infant's or truster's money; and in no country in Europe was it ever heard of before, that when a trustee laid out the money, he should be allowed to retain the profits. The rule was essential in the character of a trustee, and no express institution was necessary. But in the civil law there was a prohibition against taking interest without accounting for it. Cod. lib. 5. tit. 56. *De usuris pupillaribus*.—Whatever interest the trustee made ought to be paid, and even though it should be proper to keep the money in deposit, if he did in fact make interest of it, he ought to pay it. A trustee cannot bargain, so as to gain an advantage for himself, out of the trust fund; and therefore where executors were directed to lay out the fund at the best interest, and they agreed that one of them should take it at 4 per cent. the executor was charged by the Court with 5 per cent. (*Forbes v. Ross*, 2 Bro. Ch. Ca. 430.) So here no authority of the co-trustees, if given, could protect Wauchope from accounting for the utmost interest. No principle could be more clear, than that a guardian ought to charge nothing for care and trouble, but only the money out of pocket. The principle of the office was, that it was a moral and honourary, and not a stipendiary office, and so it was clearly considered in Chancery, in this country, and in the civil law. There was a case, where a person, employed by a testator as a collector of rents, being made executor of his will, claimed an allowance for collecting the rents subsequent to the testator's death, on the ground that it [115] was so meant; but the Master disallowed the claim, as no intention could be implied so far to take away the character of executor; and so here the character of cashier and agent ought not to be allowed to extinguish that of trustee. These are propositions of universal law, and as true at Edinburgh as at London; and if there was any doubt about the matter, it was of vast importance to have the point settled. Trustees might be proceeded against with more or less severity as to the charge of interest in particular cases; but this was the first time it was ever heard of, that a trustee should not be bound to account for the profits actually made by him of the trust fund. But it was a general and paramount principle of the law of Scotland, that a tutor, curator, guardian, or trustee, could make no profit whatever for himself of the trust fund. There was another subordinate principle, by which trustees, etc. were bound to use a certain degree of diligence, and this varied in its effects and consequences according to the change of times and circumstances. But the principle that the office of guardian and trustee was gratuitous, and that a person in that situation ought to derive no profit to himself from the trust fund, was universal and invariable. The authorities on the other side related merely to the different modes of acting on the subordinate principle without affecting the general and universal principle. The mode of dealing with the trust fund, and of

accounting, laid down by these old regulations, however proper in other times and under other circumstances, was totally inapplicable to the present period, and present state and circumstances of Scotland. And then [116] Stair. b. 1. t. 6. s. 17, 21.—Ersk. b. 1. t. 7. s. 19.—Bankton, b. 1. t. 7. s. 36.—Scott (of Rossie) v. Strahan (of Balgenny) Elchies.—Murray v. Murray, June, 1710 :—and other cases stated in Diet. under title, *Pactum illicitum*.—Lord Macdonald v. Mackenzie, 1780, were cited. By the principles of the law of Scotland then, the Respondent was bound to account for all the profits he made of the trust fund, and in accounting to bring his accounts to an annual balance, and pay interest, according to the course and practice of the country at the present time. Wauchope was liable to the penalties of stat. of 1672. cap. 2. for neglect of its regulations : but no penalties for the omission were insisted on, but only the profits which he actually made, or ought to have made. As the charge by the accountants for their services was occasioned by Wauchope's own negligence in not keeping his accounts so as to render their assistance unnecessary, he and not the Appellants ought to pay it.—His charge for his own remuneration was extravagant, (£230 per ann.) and he was at any rate precluded, by the terms of his appointment as cashier and agent, from charging more than was allowed him in the late Earl's lifetime, (£100 per ann.)—Then in making up the titles to certain lands by adjudications in implement, the general charge and decree of constitution were omitted, and the titles were unavailable, and the Appellants ought not to be charged with the expense.

For the Respondent it was argued, that the account of all the profits made, had never been asked below, and the Appellants had even made a merit [117] of not insisting upon it : and now they called upon their Lordships to decide a point which they had excluded from the consideration of the Court below. The question was as to the rate of interest to be paid, and the annual balances : and that was to be decided, not by universal and moral law, but by the law of Scotland : and the rules as to balancing the accounts, and stocking out the receipts, and the interest to be paid, were stated in the authorities, Campbell v. Lord Galloway, Fac. Col. March, 1802. Ersk. B. 1. T. 7. S. 25.—Spalding v. Farquharson, Fac. Coll. May, 1809. But Wauchope consented to pay interest according to the rate at which a prudent man would have made interest of his own money. Mr. Wauchope, as a medium between the interest allowed by the private and chartered banks, accounting at the rate of $3\frac{1}{2}$ per cent. *de die in diem*. It was not the duty of Wauchope to lay out the receipts on landed security, at 5 per cent. as then he might not be able to answer the exigencies which might occur. As to annual rests, even the law of England did not allow interest on interest except in special cases. At law it was only allowed where a judgment was had for a sum composed of principal and interest, and then instead of execution an action was brought on the judgment : interest was then given on the whole in the shape of damages. Equity did not go so far, as the decree only directed interest to be computed on the principal, and it was no settled principle that a trustee should account with annual rests. He paid the profits which he made, or interest, but not on annual rests. The case of Raphael v. Be-[118]-elm (11 Ves. 92), depended an special circumstances. In this respect, generally, the law of Scotland appeared to run on all fours with the law of England, Ersk. B. 3. T. 3. S. 81. In the law of Scotland there were special provisions as to tutors and curators, but no distinction as to annual rests. As to the charge for trouble and commission it was no point in dispute here whether any thing at all ought to be allowed : the only objection was to the amount, and the charge was not unreasonable in its amount. As to the accountants they were properly employed, as they had no Masters in Scotland. Their charge for their services was not unreasonable, and credit was due to their accounts. (Lord Eldon. (C.) Were they attended by both parties?) No : but credit was due to their accounts independent of that. As to the charge for making up the titles, the judges below were clear that it ought to be allowed.

In reply it was contended that the Appellants had made an offer to account on a certain principle, which was not accepted, and not having been accepted, it was no waiver of the right to insist on the whole profits made. (Lord Eldon. (C.) Then what had the judges to do with it?) Merely to say whether this was not a fair principle. (Lord Eldon. (C.) I do not understand this : Wauchope brings in his account : the Lord Ordinary orders you to state any preliminary and general objections you may have to it. You might then say—"We will have nothing to do with this account, and insist "on the general principle, and all the profits made." But instead of that, you pro-

ceeded to take the opinion [119] of the Court on these four objections, and that opinion being against you, it is, as you say, to go for nothing at all. Suppose in such a case, in the Court of Chancery here, a person offered you terms, and you refused to say whether you accepted them or not, but proceeded to take the opinion of the Court on them, and that being against you, could you then maintain that you were entitled to the larger account, and that the opinion of the Court was to go for nothing? I think you would not be heard in our Courts. But if it be otherwise in the Court of Session, why comes this appeal here? Your argument is, that we ought to send back the case to the Court to proceed as if these objections had never been put in. But if we send it back to them to take the larger account, they may say that they never refused it.

Mr. Wetherell and Mr. A. Murray for Appellants: Sir S. Romilly and Mr. Leach for Respondents.

Lord Eldon (C.) (April 8, 1816.) This is a singular proceeding, and one which, according to my notions of legal proceedings, I am as little able clearly to comprehend, as any that ever came before me in the course of my judicial experience.

The case was originally brought into Court by action of multiple-poining, and your Lordships have heard passages read at the bar from the books (Ersk. Mor. Lib. 4. T. 3. S. 23), from which it appears that the nature of that action in general proceedings is well understood.

The summons states:—"Whereas, it is humbly meant and shown to us by our lovite, Sir William [120] Augustus Cunynghame, of Livingstone, Baronet; Sir Archibald Macdonald, Lord Chief Baron of his Majesty's Court of Exchequer, in England; Sir James Montgomery, of Stanhope, Baronet; William Fullarton, of Fullarton, Esquire; and John Wauchope, writer to the signet;—that where the pursuers as trustees under two trust dispositions and deeds of settlement, executed by the now deceased Archibald, Earl of Eglinton, the one dated January 18, 1791, and the other dated November 5, 1795; and likewise as tutors appointed by the said Archibald, Earl of Eglinton, to his daughter, stand vested in, and are possessed of, certain lands and sums of money and effects, the extent and amount whereof will be specified, and condescended upon, in the course of the action to follow hereon; that the pursuers are willing and desirous to account for their management, intrusions, and transactions, as trustees, and tutors, and curators, and to pay over and convey to the person or persons who may be found to have best right thereto the sums of money and lands, etc.; but they are distressed, and threatened to be pursued for the same, not only at the instance of the Right Hon. Lady Mary Montgomery, the only surviving daughter of the said deceased Archibald, Earl of Eglinton, and spouse of the Right Hon. Archibald, Lord Montgomerie, and the said Archibald, Lord Montgomerie, for his interest, who pretend to have right to the said lands and other funds in virtue of the foresaid trust, dispositions, and settlements, or otherwise; and also by Hugh, now Earl of Eglinton, Archibald Montgomery, Es-[121]-quire, late of Stair, and the pursuers, the saids Sir Archibald McDonald, Sir James Montgomery, and John Wauchope, who pretend to have right to the said trust funds and estate, or part thereof, in virtue of the contract of marriage entered into between the saids Archibald, Lord Montgomerie, and Lady Mary Montgomerie; therefore the saids, etc. etc. ought, and should be convened before the Lords of our Council and Session, and it ought, and should be found, and declared by decree, etc. that the pursuers are only liable in once and single payment, etc.; and that to such of the said defenders or to the pursuers, etc. as shall be found to have best right thereto at discussing their preferences, etc.; and the pursuers as trustees, and tutors, and curators, appointed by the said Archibald, Earl of Eglinton, etc. ought to be decerned and ordained to make payment, etc. to such of the defenders, or others, as shall be so found to have best right thereto, and in like manner to denude of and convey to, etc. such of the said defenders, or others, as may be found to have best right thereto, the whole lands, etc. or other funds or effects vested in their persons or in their possession, as trustees, or tutors, or curators foresaid: and upon the pursuers accounting for their said intrusions, and lodging in process a conveyance in favour of the person or persons so preferred, of the lands and others foresaid, they ought and should by decree foresaid, be exonerated and discharged of the offices of trustees, and tutors, and curators foresaid, and their whole of management and intrusions in virtue thereof, etc. etc." [122]

Stripping this of the technical form, I take the object and meaning to be, that all who had any claims should be called into Court, that the claims should be there stated, and discussed, and decided upon, and that the trustees should be decreed to pay the trust moneys, and to convey the trust lands according as the rights should be established.

One circumstance is material—that, in the life time of the late Earl of Eglinton, Mr. Wauchope acted as his cashier and agent; and, after the Earl's death, the trustees, who attended their first meeting, November 29, 1796, resolved, "that Mr. Wauchope's powers, as cashier and agent, ought to be renewed, but they delayed giving directions about making out the commissions till their colleagues were advised, and their opinion "of the measure known,"—and then they recommended to him, in case his powers should be so renewed, "to continue to keep his accounts in the same regular manner as before." All the trustees afterwards agreed that the powers held by Mr. Wauchope from the late Earl should be renewed, and commissions, appointing him cashier and agent, were accordingly made out and executed. Mr. Wauchope himself was one of these trustees, and I am too well aware of the distinction between the law of Scotland and that of England to take upon myself confidently to say that this was an appointment which ought not to have taken place, though I cannot but observe that it is a sort of proceeding at which, in this country, we should look with very great jealousy, when we came to consider that it must be his duty, in his character of trustee, to overlook, check, and control his own management [123] and accounts, as agent and cashier, and there would certainly be a difficulty in permitting a transaction of that sort to take effect here. Such, however, is the fact in the present case.

In April, 1806, Mr. Wauchope communicated to the then Lord Chief Baron, Macdonald, a state of his intromissions from the time of the late Earl Eglinton's death, to October 1805, and this, according to the paper now before me, appears to have consisted of the following accounts, viz. 1st. Account, charge, and discharge of Mr. Wauchope's intromissions as cashier for the late Earl, from May 21, 1796, to May 21, 1797. 2d. Mr. Wauchope's account as cashier for the trustees, comprising accounts from October 30, 1796, to March 13, 1801, with a continuation from March 13, 1801, to February 16, 1805. 3d. Mr. Wauchope's account as cashier for the tutors and curators of Lady Mary Montgomery, from February 11, 1797, to April 7, 1801, with a continuation from April 7, 1801, to March 31, 1803. 4th. Mr. Wauchope's accounts as cashier for Lord and Lady Montgomery, from March 31, 1803, to February 16, 1805. These were the accounts delivered on that occasion. When the action came into Court, Mr. Wauchope produced a continuation of his accounts down to February 3, 1807, and the Lord Ordinary ordered the trustees in the mean time to make over to the Appellants securities belonging to the trust estate, to the amount of £20,000.

It is farther stated in the Appellants' case that the Appellants, by their marriage contract, had become bound to provide a certain sum for the younger children of the marriage, and that the trustees, before [124] they denuded, thought it their duty to have this provision properly secured. This was accordingly done under the sanction of the Lord Ordinary, who, by an interlocutor of the date June 23, 1807, found that the trustees were bound to account for, and denude of the trust fund, and that, upon their so accounting, the Appellants should be bound to discharge them of all their management and intromissions, whether as trustees or as tutors and curators. The Appellants then represented that nothing now remained to be done in order to bring the whole business to a close, except the settling of Mr. Wauchope's accounts, as cashier; and, in obedience to an appointment of the Lord Ordinary, Mr. Wauchope produced a final account of his intromissions, by which it was admitted that there was a balance of £1981 and a fraction in favour of the trust estate, subject to a charge as for trouble and commission. Of this balance Mr. Wauchope, pursuant to an *interim* decree or order of the Lord Ordinary, paid £1000 to account, but objected to the payment of the remainder until the accounts should be finally settled, and the Appellants ready to discharge the trustees, and tutors, and curators of their intromissions and management,—which was sufficiently reasonable.

Then some proposition was made by the Appellants to have the different objections which they had to state to Mr. Wauchope's accounts determined by arbitration, and they proposed a reference to counsel for that purpose. Mr. Wauchope proposed a reference to accountants; but, there being certain points of law to be settled, and it appearing

that accountants would not be the most [125] proper persons to decide, where it was not very clear what the law was, the Appellants thought it right that the matter should be settled by persons more particularly conversant with the law, and the proposition having come to nothing, they proceeded with the process, and on January 25, 1811, the Lord Ordinary pronounced this interlocutor, against which, your Lordships will please to observe, there is no appeal. "The Lord Ordinary having heard parties procurators, appoints Lady Montgomerie and her husband to give into process any objections of a preliminary and general nature, which she may have to state to the accounts produced by the pursuers, and upon which it may be wished to obtain the judgment of the Lord Ordinary before entering on an examination of the particular articles of the said accounts and the vouchers thereof."

If that had been a proceeding in the Courts of this country, it is difficult to conceive how it could be supported. The mode here would be to call upon all who considered themselves interested to state their claims; and I think it obvious, that we could not call upon them to state their claims, till the Court had before it some such authentic accounts in a judicial form, as might properly be taken as the recorded statement of such accounts. In this case, however, the accounts mentioned in the Lord Ordinary's interlocutor are accounts drawn up by the accountants Keith and Wilson, for and at the instance of Mr. Wauchope; and the Court, by its final judgment, adopts the whole of these accounts so prepared by Keith and Wilson, although, in drawing up such accounts they acted, not under a [126] reference from the Court, but by the directions, and under the instructions of Wauchope alone. I know that matters of account are often referred by the Court of Session to accountants; they having no Masters to perform the necessary duties of that description, and, no doubt, the Court may, after the cause has been heard, refer matters of this kind to accountants, and then the accounts prepared under such a reference become part of the judicial proceedings in the cause. But it is new to me, and I am sure that it is perfectly new in principle, that a Court of Justice should take an account, made up at the instance, and under the instructions, of an agent, one of the parties in the cause, as an account of equal efficacy and equal judicial effect, as if the matter had been referred by the Court itself to an accountant, taking the account as between both parties, in the presence of both parties, and each having the opportunity of checking the other throughout the whole course of that operation.

The words of the interlocutor, your Lordships will observe, are, "appoints Lady Montgomerie and her husband to give into process any objections of a preliminary and general nature, which she may have to state to the accounts produced by the pursuers, and upon which it may be wished to obtain the judgment of the Lord Ordinary before entering upon an examination of the particular articles of the said accounts and the vouchers thereof." Now, suppose this to be in all respects a perfectly regular and proper proceeding, the interlocutor calls for nothing more than objections of a preliminary and general nature before entering upon an examination of the particulars [127] and vouchers. Then when these objections of a general and preliminary nature should be given in, and judgment pronounced upon them, it is quite obvious that it would still remain to enter upon an examination of the particular articles of the accounts, and the vouchers thereof. Now the result, as expressed in the last interlocutor of the Court, is,—not that the preliminary and general objections being disposed of, the examination of the particular articles of the accounts and the vouchers thereof ought to be entered upon; but that the whole of the accounts prepared by the accountants Keith and Wilson were throughout right and proper in every particular, without any examination at all! If the commencement startles one a little, the conclusion is, to me at least, absolutely unintelligible.

Then four preliminary objections were stated, and on these preliminary objections the Lord Ordinary and the Court of Session pronounced several interlocutors; one of which is wholly, and some are partly, appealed from. But the result is that the accounts, prepared by the accountants Keith and Wilson, are right upon the whole matter without any examination of particulars.

Thus then we have the judgment of the Court below upon the points of law arising out of these four preliminary objections. But now we are told that all this is to go for nothing; and so told to my no small astonishment; for it is saying neither more nor less than this; "If you, the Judges of the Court of Session, should be for us upon these points, all is well; but if not, then your opinion goes for nothing at all." This may

be consistent with their practice, but it bears no analogy to any [128] thing I know. The proposition is, "if your opinion is not in our favour, then your opinion must go for nothing, and we shall be at liberty to open up the whole matter *ab initio*, and you shall hear the cause over again, as if the Lord Ordinary had never called upon us for these objections, and we had never given them in." But, if that be consistent with their practice, why comes this appeal here? For, if they have a right to say to the Court of Session: "Your opinion, being against us, is to go for nothing at all," why bring the cause before us? We cannot act on that principle, and give them an opinion which, if against them, is to go for nothing. And I do not know very well how to deal with the cause in that view of it, unless we were to dismiss the proceedings altogether, and allow them to begin again. But lest we should risk too much in doing that, I shall state these objections.

First then, they say that it was the duty of the Respondent, as cashier and manager for the trustees, and tutors, and curators, to have rendered his account annually, in order that the large balances in his hands might have been ascertained: and that the interest against him might have been annually calculated: and then they state that his account, as cashier for the trustees, is balanced only twice in nine years, and his account as cashier for the tutors and curators only thrice in the same period.—2d, they say that the cashier, instead of stocking out the savings of the estate (by stocking out they mean putting out at interest) had kept in his hands immense balances, for which there was no occasion in the ordinary administration of the estate, and of [129] the actual employment of which he refused to give any account: and then they state that upon these balances, which were very great, he had allowed the appellants interest only at the rate of 3½ per cent. while, as they contended, he was bound to account to them either for the profits actually made of their money (there they speak of the profits actually made); or as least for the legal rate of interest.—3d, The appellants objected to the amount of the charges made by the Respondent, for his trouble in managing these affairs, and they stated that they were willing to allow a fair, and even a liberal gratification for his trouble; but they thought the Respondent asked a great deal too much (not objecting therefore to pay him something for his trouble, and not bringing into dispute how a demand for any allowance at all for trouble could be supported by a trustee converting himself into an agent for managing the trust property, and requiring to be paid as an agent for his trouble) but objecting only to the amount of the demand, and insisting that it ought to be less than it was. Before the cause can be finally decided that will be a question to be considered: and, if the matter be open to him on the *quantum meruit*, then it will be for him to prove that he deserved more than they are willing to allow: and if the question depends upon the contract, it will be to be considered what is the meaning of his being continued in the situation of cashier and agent to act in that situation, as he did in the late Earl's life time. And, without presuming at present to say what, according to the Scotch law, ought to be the construction of such a contract, I may say that the Courts here would consider the [130] meaning to be that he should act for the same reward, as in the late Earl's life time. But I do not presume to say what the Scotch law may be on this head, as I see doctrines laid down not at all reconcileable with the law, which I am in the habit of administering. The Appellants also objected to a charge of £420 stated to have been paid to Messrs. Keith and Wilson, for making up the first set of accounts, because had the Respondent kept the accounts of this estate separately from his other concerns, and rendered and balanced them annually, as it was his duty to have done, and which had been his practice, while acting under the late Lord Eglinton, the assistance of professional accountants would have been unnecessary: and then they objected, 4thly, to payment of Mr. Wauchope's account of the expense of making up titles to certain parcels of land, on the ground that these titles were improperly completed. As to this last point, I do say that there would be no doubt here that, if a trustee proceeds *bona fide*, unless there be *crassa ignorantia*—unless he has grossly miscarried, he is not to suffer, by having the expense thrown upon himself, for whatever error he may fall into, acting under advice, or from the general notions of law prevalent at the time. But it is difficult to decide this question at present.

Then, as to the 2d objection—I do not mean to say, but that some words may be found *sparsim* in these formal papers, which may open the question whether a trustee is bound to account for all the profits which he has actually made of the trust fund, if

pushed to the full extent which the terms would bear. But, although the argument chiefly [131] insisted upon at the bar here for the Appellants was that the trustee was bound to account for all the profits, which he actually made of the trust money, the argument below turned upon the rate of interest with which he ought to be charged. In looking at the doctrines stated in the books, I find very great difficulty in collecting what the Scotch law is upon this point, and I think we should be running a great deal too fast to venture to decide the question in this state of the proceedings. In England there would be no difficulty. Here a trustee can make no profits for himself of the trust money—and, if he offered to pay a certain rate of interest, the *cestui que* trust might say; “No. You must account to me for all the profits you have made of my money, and I have a right to know from you what profits you have actually made of it, and, if you have made 10 per cent., I am entitled to it. If the use you made of it was to make any particular rate of interest, then you must pay me that interest. If you have mixed my money with your own, so that you cannot distinguish what is yours, and what is mine, and cannot tell what profit you have made of my money, less than the legal interest, you shall pay me interest at 5 per cent.” But, when we come to these doctrines about stocking out, and when it ought to be done, and when interest ought to commence, according to the law of Scotland, I feel a difficulty. And yet it may be worth while to consider whether, when a trustee has made use of the trust money for his own benefit, these doctrines apply to the question as to profits actually made, and whether on that point the [132] rule of law is not the same as that of the law of England.

Then the Lord Ordinary pronounced this interlocutor: “Having considered the accounts given in by Mr. Wauchope, with the objections thereto for Lord and Lady Montgomerie, answers, replies, and duplies, and writings produced, and whole process, finds that, though from various circumstances stated in the answers, it may have been difficult for Mr. Wauchope to make up a complete balance at the end of every year, yet the actual balance at the end of every year may still be ascertained, and that each balance, when ascertained, will be the sum on which the interest ought to be charged.—2d, Considering the rules laid down in law for the employment of the money of minors, by their tutors and curators, on the one hand, and the eventual demands for sums of money which might be made, though not to the extent of the balances now in question, on the other, finds that interest ought to be charged at the rate of 4 per cent., instead of 3½ per cent. as stated in the accounts; finds nothing so explicitly stated on the part of the objectors, as should induce the Lord Ordinary to reduce the allowances for trouble below the rate which was fixed by Messrs. Keith and Wilson; finds that in accounts of such magnitude, it was proper and necessary to take the assistance of professional accountants—repels the third objection accordingly. On the fourth objection, finds it at least doubtful, whether a general charge and decree of constitution were necessary in deducing ad-[133]-judication in implement; repels this objection, etc.”

As it is my intention to propose that this cause should be remitted for review, I shall say nothing as to the necessity of having recourse to the assistance of professional accountants in the present case, and as to certain propositions, as if trustees were at liberty to act so as never to keep regular accounts themselves—except this, that I think that to be a matter well worth reconsideration: as I apprehend that a trustee, and especially if he be also an agent, ought to keep his accounts at least so regularly, as to enable the Court, upon inspection of these accounts, to judge whether in that case it is necessary to employ professional accountants.

Both parties were out of humour with this interlocutor, and represented against it; but the Lord Ordinary saw no ground to alter it in any respect. He, however, makes avizandum with the cause to the Lords of the first division, and on July 2, 1812, the Court pronounced the following interlocutor, which is partly appealed from:—“Upon report of Lord Hermand, and having advised informations for the parties, the Lords find that Mr. Wauchope’s accounts must still be brought to an annual balance.”—I would just say, that I cannot conceive how it ever entered into any person’s head that they ought not.—“And that, in striking such balance, the allowances to Mr. Wauchope for commission, trouble, and correspondence, as cashier and agent, under the trust and for the tutors and curators, and for Lord and Lady Montgomerie, are to be placed to his credit.”—So that it states, not merely that an allowance for commission, trou-

[134]-ble, etc. is to be made to Mr. Wauchope, but that this particular allowance is to be made to him,—which deserves reconsideration:—“find that upon the said annual balance Mr. Wauchope is chargeable with interest, at the rate of 5 per cent. after allowance of a year for stocking out the same, so far as consisting of rents payable in victual; and of six months, so far as consisting of rents payable in money; and of the like period of six months, so far as consisting of other payments of money.”—On looking at the doctrines in the books, your Lordships will there find an explanation of that part of the interlocutor:—“and find that Mr. Wauchope is not chargeable with interest on his receipts *de die in diem*, or until the expiration of the said periods.”—This goes by the question as to all the profits, which was not the great point argued below, though it was the point chiefly insisted upon here.—“Repels the objections to the allowances proposed by Messrs. Keith and Wilson for Mr. Wauchope as agent and cashier aforesaid,—as also repels the objection to the proposed allowance to Messrs. Keith and Wilson for auditing the accounts:—and further repel the objection to the charge for the expense of the adjudications in implement, relative to the lands of Bogside, Dreghorn, Duggan, and others.—And remit to Mr. Claud Russel, accountant, to prepare a report of the state of accounts between the parties, and remit to the Lord Ordinary to receive such report when prepared, and to do further thereon as he shall see just.”

This, therefore, contains the opinion of the Court on those four preliminary objections, which the Appellants gave in under the appointment of the Lord [135] Ordinary, who had called upon them to state any objections of a preliminary and general nature which they might have to state to Mr. Wauchope's accounts, and upon which they might wish for the Lord Ordinary's opinion, before entering upon an examination of the particulars.—And the Court then remits to an accountant to prepare a report of the state of accounts between the parties; thereby making the accountant an officer of its own.

Both parties petitioned against this interlocutor:—Mr. Wauchope, though he would have been contented with it, if the other party had been contented, petitioning *pro forma*, so as to have the whole matter open, and their way of shutting up the business is this:—“They refuse the prayer of the petition for Lord and Lady Montgomerie, and on the petition of Mr. Wauchope they alter their former interlocutor, and repel the whole objections to the report of Messrs. Keith and Wilson, and approve of the said report in the whole heads and articles of the same, etc.”—Thereby putting an entire extinguisher on the Lord Ordinary's reservation as to the examination of the particular articles of the accounts and the vouchers thereof: so that the result is, that there shall be no examination at all of the particular articles and vouchers: a result, which appears no less singular to an English lawyer than the principle contended for in behalf of the Appellants. They (the Appellants) acceded to the proposition of the Lord Ordinary to give in preliminary objections to Mr. Wauchope's accounts, upon which they might wish to have the Lord Ordinary's opinion. They accordingly gave in preliminary objections, and on these they have the Lord Ordinary's opinion. They [136] then go to the Court, and take the opinion of the Court of Session on their objections, and the principle now contended for at the bar here is this, that, if they are not satisfied with the opinion of the Court, they are entitled to turn round, and say, very civilly and respectfully, “If these are your opinions, we don't like them, and have a right to begin again, as if we had never acceded to the Lord Ordinary's proposition to give in these objections.” It is not less singular, however, that this should be considered as a proper mode of settling accounts:—Wauchope, one of the parties, bringing his accounts into Court, prepared by accountants, as intelligent, if you please, as any that ever existed in that profession, but not acting under a reference from the Court, prepared in an *ex parte* way, not checked by any principles of law laid down by the Court, and not checked by all those who had an interest in the subject; and the Court approving of these accounts, so prepared, and brought in, in the whole heads and articles thereof, without any further examination! But it ends where it begins,—“Here are Mr. Wauchope's accounts, we are satisfied, without any examination of particulars, that they are right, and you, the other parties, shall know no more about the matter.” How to support that interlocutor I cannot tell.

With respect to the other interlocutors, the Lord Ordinary's interlocutor appointing the Appellants to give in objections is not appealed from, and some are partly appealed

from, and some not at all. But seeing what is so strenuously asserted in regard to the principles of the law of Scotland as applying to questions of this description, I should be sorry [137] to deal more strongly with these interlocutors than to submit them to the Court below for review. If it be open to the Appellants to insist upon knowing what profits Mr. Wauchope actually made of their money, and upon payment to them of all these profits; and if that be the law of Scotland as contradistinguished from the question of interest, they will have an opportunity of submitting that claim to the Court. And I think it of great importance to minors, tutors, curators, and trustees, not merely with reference to the interest of the parties, but also on account of the difficulties connected with the subject, that the whole matter should be thoroughly investigated, and the law distinctly and finally settled.

As to the case of *Raphael v. Boehm* (11 Ves. 92), it does not apply. In that case the executors as trustees were bound by the very words of the trust reposed in them, by the very words of the instrument which created the trust, to accumulate the trust fund, by laying out the interest of it from time to time to form capital.

I propose to your Lordships to reverse the last interlocutor, and to send back the rest for review, so far as they are complained of. And in a case of so much importance, I think we ought to avail ourselves of the clause in the act of parliament, inserted with that view by which we are authorized to require that the division, to which the cause is remitted, shall take the opinion of the other division, that we may know what the accumulated wisdom of the Court of Session will produce on this important subject.

Last interlocutor reversed, and the others remitted for review, so far as complained of.

[138] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

YOUNG AND CO.,—*Appellants*; LEVEN,—*Respondent* [March 27, 28, 1816].

[See *Andrew v. Murdoch*, 1814, 2 Dow, 401.]

[Where a public officer of excise, etc. suffers the duties to be in arrear and exacts interest on the arrear from the private party, the interest belongs to the officer or to the public, and the question is between them; and the private party has no reason to complain, and cannot recover the interest back again.]

[The Lord Chancellor observing that where a decision is clearly right, the House of Lords will not remit, merely because the ground of decision below has been different from the ground of its own decision.]

In June, 1810, the Appellants (Distillers) brought an action against the Respondent, who had been a collector of excise, concluding for repayment to them of two sums of money with which, as they alleged, they had been overcharged by him for duties of excise; and also for repayment of a sum of £500 more or less, for interest charged against them upon arrears of duties.

The last is the point for which the cause is here noticed. It was contended for the pursuers in the action that the charge of interest on arrears of duty was illegal, and the Scotch acts—1693, c. 3; 1695, c. 29; and 1696, c. 2, and the British statute, 1 Wm. and Mary, sess. 1. c. 24, were referred to. On the other hand it was contended, that till 1807 (prior to which time the transactions [139] in question took place) it had been the practice of the collectors of Scotland to receive interest for themselves upon balances of public money allowed to remain in their hands; and that this was universally understood to constitute their chief source of emolument, as their salary was altogether inadequate; that it had been thought expedient at one period to allow the duties to remain in arrear, but that the distillers were bound to pay interest on these arrears, and that as the loss from the duties being in arrear fell on the collectors, they had been authorised by general letter, 1797, of the Board of Excise to take the interest, and that

it had been the general practice to do so: and at any rate the private party had no right to demand it back again.

The proceedings in an investigation into the conduct of the defender, by order of the treasury, upon a charge against him by the pursuers, were referred to, though they had nothing to do with the cause. The result was that the defender was dismissed from his office, but all the Judges below concurred in the opinion that the Lords of the Treasury had been misled.

The Court sustained the defences, assolizied the defender and decerned, and from this judgment the pursuers appealed.

Lord Eldon (C.) (March 28, 1816). This action was raised upon a summons which states that the Respondent, Leven, received from the Appellants the sums of £400 and £823, upon the pretence that these moneys were due by them for duties to the Excise, and would be placed to their credit in Mr. Leven's accounts as collector; but which moneys were nei-[140]-ther due to the Excise nor placed to the credit of the Appellants. The summons likewise states that the Respondent had exacted from the Appellants various sums amounting to £500 more or less, in name of interest, contrary to law; and it concludes for repetition of these sums £400, £823, and £500 more or less, as it is expressed.

The Lord Ordinary pronounced the following interlocutor: "Having considered, etc. finds, that no regard can be paid in this action, to the proceedings alleged to have taken place before the Lords of the Treasury, or Board of Excise;" and then he states the reason why no regard can be paid to them. "Seeing these proceedings have not been produced in process, and as little to the report of Messrs. Bonar and Grant for a similar reason." I should here state that the Appellants had prayed in aid these proceedings and this report, upon which I have nothing to observe, except that they have been the subject of much argument and statement on both sides, though if produced the Court could have taken no notice of them whatever. "Finds that the oath said to be emitted by the pursuer, William Young, in the course of these proceedings, cannot be received in evidence against the defender in the present question, while the other parts of the proof, of which only an authenticated copy is produced, going in a great measure to an alleged interference of the defender in a Burgh election, whatever effect it might have with the Revenue Board, can have none in this cause." It appears to me that this finding is altogether unnecessary, as the proof, though it had been produced, could clearly have been no [141] ground for any proceeding in a Court of Justice. "Finds that the general letter of 1st May, 1797, addressed by the Board of Excise to the collectors, implies that at that period they were entitled to charge interest on arrears, and that the receipt of interest was not prohibited till the year 1807, after the date of the transactions now in question." On this finding I have to observe that there was a good deal of argument as to the meaning of this letter, of 1st May, 1797. But it does not appear to me that such a letter can affect the question, as a question of law. If the Board gave directions agreeable to law, they would be sustained at law: and if not agreeable to law, they could not be legal merely because they were the directions of the Board. "Finds, that the alleged over-payments of £400 and £823 10s. are not made out by the statement in the condescendence, and disproved by the comparison of the various receipts in the answers. Sustains the defences, etc."

As to the last finding, it has not been alleged here on the part of the Appellants that they have a case, which calls upon us to reverse the judgment in as far as it finds that they have not been overcharged in the sums of £400 and £823. But it has been argued that the Court below ought to have employed an accountant of excise to ascertain whether they had or not been so over charged. As to that, on the most attentive consideration which I have been able to give the case, it appears to me that this part of the interlocutor is right, and that the Appellants have not been double charged in these sums. And if such be your Lordships' opinion, you would feel great reluctance in sending the case with orders [142] to the Court below to send the matter to an accountant.

Then it has been insisted, that the Appellants are entitled to a return of interest charged for duties in arrear: and to make out that claim they allege that, whatever might be the case with respect to the public money when received, the collector ought not to receive interest from the private party for duties in arrear. With regard to that,

if a public accountant has public money in his hands, and employs it so as to make interest of before it is called for, the interest made in that intermediate time, belongs either to himself, or to the public. Whether it was his own in this instance, or belonged to the public, I give no opinion. But it must belong to him or to the public. There is a difference here however, for this is not a case where the collector made interest of money actually received before it was called for on behalf of the public, but a case where the money was not paid by the party, and the officer charged interest on the arrears. In one view, that case is not substantially different from the other. But as far as respects the policy of the law there may be a very wide difference between the officer receiving the money and deriving interest from it, leaving open the question whether it belongs to himself or to the public, and his suffering it to remain in the hands of the party, he (the officer) receiving interest upon the arrear. But still the trader cannot keep it, for it belongs to the public or to the officer. Suppose an information were filed and it proceeded for interest, it would not be necessary to proceed against the trader. It would be enough to charge the collector as if he had re-[143]-ceived the money and made interest of it. Then if the interest did not belong to Leven it was the property of the public; and if the duties were not paid at the time they were payable and interest was charged, whether that interest belonged to the officer or to the public, as issuing from the *corpus* of that fund which belonged to the public, the trader had no reason to complain. And as to exaction within the acts here mentioned, the claim upon that ground, I think, cannot be at all maintained. I therefore still think that the party has no right to recover. But as to the question, whether the interest belongs to the officer or the public, I avoid giving any opinion.

Then it was said that this was not the ground upon which the Court below decided. But I apprehended it is not our duty, merely for that reason, to send a case back again to the Court below; where it is perfectly clear that if the Court below were to decide differently, the judgment must here be reversed.

Then the best mode of proceeding, as it appears to me, will be, not adopting the reason in the Lord Ordinary's judgment, to affirm it as far as it sustains the defences, assoilzies the defender, and decerns, and then to affirm the other interlocutors. This seems to me, likewise, a case in which £50 costs may be properly given.

Lord Redesdale. As to the question whether Leven had improperly overcharged the Appellants, it is manifest on the evidence that he did not; for the only reason given for that allegation is founded on the receipts, and in looking at these, it appears [144] almost impossible that overcharges could have been made, unknown to Young; and so far I am clearly of opinion that the judgment is right.

As to the interest, that is a very serious question in one view. But it is clear the Appellants have no right to recover it back. The duty of the officer is to call for payment as the money becomes due, and at stated times to remit it to the proper hands. But Leven takes sums as interest of arrears of money not paid, when it ought to be paid. The effect of this, if made out, would be that he would be chargeable with, and responsible for, both the gross sum and the interest. But the trader has no right to complain of the indulgence which he has received, however improper; and I concur likewise in the opinion which has been given as to that point. I agree also that the reason alleged for sending back the case is not sufficient, and that the Lord Ordinary's interlocutor ought to be affirmed, so far as it sustains the defences, assoilzies the defender, and decerns; and that the other interlocutors ought to be affirmed. As to the costs, I should be inclined to concur if a larger sum had been mentioned.

Lord Eldon (C.) Then let it be £70.

Appeal dismissed, and judgment (with alterations as above), affirmed, with £70 costs.

Agent for Appellant, CAMPBELL.

Agent for Respondent, SPOTTISWOODE and ROBERTSON.

[145] IRELAND.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

JONES, d. JOSEPH HENRY,—*Plaintiff* (in Error): WILLIAM HANCOCK, and ANN his Wife, and Others,—*Defendants* (in Error): and LONG, d. JOHN JOSEPH HENRY,—*Plaintiff* (in Error): WILLIAM HANCOCK, and ANN his Wife, etc.,—*Defendants* (in Error). [May 1, 5, 10, 1815. June 12, 19, 1816].

[See Mews' Dig. v. 339; *Richards v. Richards*, 1843, 2 Y. & C. C. 419; also *Milward v. Thatcher*, 1787, 2 T. R. at p. 84.]

[Testator devises his estates to his eldest daughter A. for life, remainder to her first and other sons in tail male—remainder to his daughter F. for life, remainder to her first and other sons in tail male—remainder to the first and every daughter of A., remainder to the first and every daughter of F., and then annexes this proviso or condition.]

["But I give, devise, and bequeath all my said estates, above-mentioned, to my eldest daughter A. on this proviso, and express condition, that she marry a man really and *bonâ fide* possessed of a property at least equal to, if not greater than the one I leave her—and if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries, and all the remainder of my property shall immediately pass over, and be given up to my second daughter F., to whom in that case I bequeath it."]]

[Held by the House of Lords, concurring in the unanimous opinion of the Judges, that the devise over was void for the uncertainty—the specific portion or share so given over not appearing on the face of, or from the instrument itself.]

John Henry, Esq., being seized in fee of an estate in the County of Galway, of considerable [146] value, on the 4th day of May in the year 1786 duly made and published his last will and testament, in writing, in the presence of three credible witnesses, who attested the same, which, so far as is material to the present case, was as follows: "I give and bequeath unto Hugh Henry, Esq. my brother, for civilities shewn me, the sum of £200 sterling, besides £500 and the reversion hereinafter mentioned for the trouble he will have in the executorship to which I appoint him. I bequeath unto Mrs. Ann Magan my sister, for civilities shewn me, the sum of £200 sterling; and I bequeath unto Daniel McGusty of Ship Street, Esq. the sum of £50 sterling, and chargeable with said legacies. I give, devise, and bequeath all my estates in the Kingdom of Ireland to my eldest daughter, Ann Henry, begotten by me on the body of Susannah Egar, the said Ann being born on the 23d of September, 1783, for and during her natural life; and after her death I bequeath the said estates to her first and every other son in tail male, the elder to take before the younger; and in default of such issue male, I give and bequeath all my said estates above mentioned to my second daughter Frances Henry, begotten by me on the body of the said Susannah Egar aforesaid, the said Frances being born on the 6th of December, 1785, for her natural life; and after her death, I bequeath my said estates to her first and every son in tail male, the elder to take before the younger; and in failure of such issue male, I bequeath all my said estates to the first and every daughter of my eldest daughter Ann Henry above mentioned, [147] the elder to take before the younger; and in failure of such issue, I bequeath all my said estates to the first and every daughter of my second daughter Frances Henry above mentioned, the elder to take before the younger.

"But I give, devise, and bequeath all my said estates above mentioned to my eldest daughter Ann Henry aforesaid, on this proviso and express condition, that she marries a man really and *bonâ fide* possessed of a property at least equal, if not greater, than the one I leave her; and if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she

“marries, and all the remainder of my property shall immediately pass over and be given up to my second daughter, Frances Henry, to whom in that case I bequeath it.

“And it shall also be necessary for the man my eldest daughter Ann marries, in order to be entitled to the aforesaid property, to take the name and arms of Henry, unless he be a Lord, or possessed of property of more than double the value of mine.

“I devise and bequeath to my second daughter, Frances aforesaid, an annuity of £300 sterling, chargeable out of all my estates, to be paid her every year out of my said estates, in two equal and even payments to her and her issue; in failure of such issue, at her death said annuity shall revert back again and return to my eldest daughter, Ann Henry and her issue. All I have said in regard to my eldest daughter and her marriage as above mentioned, I mean and intend shall stand [148] good in regard also of my second daughter Frances Henry, in case by the death of her eldest sister Ann she shall before she marries come to be possessed of my estates as aforesaid, and also the rents, issues, and profits of all my aforesaid estates, except such parts as shall be necessary for a genteel maintenance and education of my two daughters above-mentioned, shall be put out at interest till a proper sum be collected for a purchase, and advantageous opportunity of purchasing land with it shall be found, which land shall be added to my other estates, to the use of my eldest daughter Ann Henry, which purchased estates shall be considered as a property I leave her, in regard to the marriage she shall make as before mentioned.

“And I will and devise, that in case my two daughters die without issue, that my estates shall then go to my brother Hugh Henry, Esq. whom I nominate and appoint as guardian to my children and executor of my will.”

After the making of the said will, the said Frances Henry, one of the devisees therein named, died on the 1st day of May, 1789, in the lifetime of the said testator; and the said John Henry died on the 17th day of September, 1790, without having altered or revoked the said will, and without leaving any lawful issue; but leaving two brothers, namely, Joseph Henry his heir, and Hugh Henry his second brother, and the said Defendant Ann, his illegitimate daughter.

The said Joseph Henry, the testator's eldest brother, died on the 7th of November, 1796, [149] leaving John Joseph Henry his eldest son and heir at law, who is also heir at law of the testator.

Hugh Henry, the younger brother of the testator, died on the 10th February, 1802, leaving Joseph Henry his eldest son and heir at law.

The said Ann Henry, after the death of the said John Henry, entered into the possession of the said estates, and was thereof seized under and by virtue of the said will, and being so seized on the 4th day of April, in the year 1803, intermarried with the Defendant William Hancock, at which time the said Ann was of the age of nineteen years and six months.

At the time of the marriage of the said Ann Henry, with the said William Hancock, he was possessed of a personal property of the value of £6400 sterling in the whole, and of no other property.

With respect to the value of testator's estates, and the comparative value of Mr. Hancock's property, the special verdict hereinafter mentioned finds as follows, namely, that the estates devised by the testator were, at the time of the said marriage, of the yearly value of £1638 19s. 4d. and the fee simple of the said lands was of the gross value of £38,856.

That an estate in the whole of the said lands for life of the said Ann Henry, was of the value of £12,952 sterling, at the time of the marriage, and that an estate in one-sixth part of the fee simple of the said lands was equal in value to the whole of the property of the said William Hancock, at the time of the said marriage, and an estate for the life [150] of the said Ann Henry, in one-half of the said lands, was equal in value, at the time of the said marriage, to the whole of the said property of the said William.

Upon the said marriage taking effect, on the 4th day of April, in the year 1803, the said John Joseph Henry, the heir of the said Joseph and of the said testator, as of Easter term 1807, brought his ejectment upon the title, in the Court of King's Bench, for the recovery of all the estate of the said John Henry; to which ejectment defence was taken in the name of the said William Hancock, Ann his wife, the Honourable Robert Day, John Pratt, and John Sealy Townsend, Esquires, and the cause came on

to be tried at the summer assize 1807, when the Jury, under the direction of the Judge, found a special verdict, submitting the law arising from the facts to the judgment of the Court of King's Bench, in which cause, upon the argument of the special verdict, judgment was given as of Hilary term 1809, for the Plaintiff; from which judgment a writ of error was brought by the Defendants to the Court of Exchequer Chamber, upon which, after the cause had been argued at great length, the judgment was reversed. The Plaintiff then brought their writ of error in the House of Lords.

FIRST CAUSE.

Mr. Holroyd (now Justice Holroyd, for Plaintiff in Error, Lessee of Heir of Hugh Henry). Consider what would be the effect of the will if the [151] testator had died immediately after making it, or if things had been in the same state at the time of his death, as they were at the time of making his will. In *Doe v. Underwood*, Willes, 293, it was held that this was one of the rules for ascertaining the intention of a testator, and the effect of a will. In the first place then, the intent is to prevail, unless it be contrary to the rules of law; and next, in endeavouring to ascertain the intent, we are to consider how things stood at the time when the will was made. Then how would matters stand if there had been no proviso? Ann would have a life estate with remainder to her first and other sons successively, in tail male; remainder to Frances for life, with remainders to her first and other sons successively, in tail male; remainder to the first and every other daughter of Ann, without limitation: so that they would take an estate for life, or, in consequence of some future words, an estate tail, it is not material which; but there would be a vested remainder in Hugh Henry in fee. What then has the testator done? He has devised the whole away. No part is vested in the heir at law, but the whole, from first to last, is given away from him. Then, suppose the estate for life ends by nature, or by the surrender of tenant for life to the remainder man in fee, the latter becomes immediately entitled, and the heir cannot step in here; nor, if it ends by forfeiture, as the whole fee is parted among them, does the heir at law step in during the residue of the estate of tenant for life. So it is in the case of the issue. Suppose it to be given on the death of the heirs male, and there are no heirs male, yet, in-[152]-asmuch as the whole fee is divided among them, the heir does not step in, but the remainder man. Now, what difference does the death of Frances in the life-time of the testator make? Every devise to her is lapsed, and to her children, as she died unmarried. Then the estates would go to Hugh on failure of issue of Ann. It may be said, that she takes an estate tail by implication. But speaking of it without the condition; whether Ann took an estate for life, or in tail, still the fee is parted among them. The whole fee is given to the devisees; and, where there are no objects to take by the intermediate devise, the next remainder man takes, and here takes the whole fee. As to the question of entry or claim, there could be none on the death of Frances in the testator's life-time, and none since, as Ann is alive. Then what is the effect of the provision in restraint of marriage. This is not a general restraint of marriage; and a partial restraint is legal, *Perryn v. Lyon*, 9 East. 170. And in the Court of Chancery, lately, a case was decided on the same ground. The proviso is—"But I give, devise, and bequeath, all my said estates abovementioned, to my eldest daughter, Ann Henry, aforesaid," (this goes to whatever is given by the will, whether she took an estate for life or in tail, it is all my estates), "on this proviso and express consideration only, that she marry a man, who is really and *boni fide* possessed of a property at least equal, if not greater, than the one I leave her. And if she marries a man with less property than that, I, in that case, leave her only as much of mine, as shall be equal [153] to the property of the man she marries: and all the remainder" (this is material) "of my property shall immediately pass over and be given up to my second daughter Frances Henry, to whom, in that case, I give, devise, and bequeath it." So that Ann had a life estate in the whole of the testator's property, if she married a man of equal or greater fortune, and, if not, then she had an estate for life in so much of the testator's property as would be equal to that of her husband; and the rest was to go to the second daughter for life, with remainder to her sons successively in tail male as before. Ann took an estate, not on condition, but with a conditional limitation over in the whole property till she married; and on her marriage with a person not of equal fortune, the surplus was gone as if she were dead.

By her marrying one of inferior fortune, there was an end of her life estate in the surplus, which went over, as if there had been a regular termination of the life estate; and the heir could not step in. This being an estate with a conditional limitation over, there is no difference whether the life estate ends by regular surrender, or forfeiture, or by the act of the party herself in breach of the condition: the heir does not step in, but the other estate. So I say that, as to the surplus, there is an end of the estates given to Ann and her issue by the will, and Frances being dead without issue, and the whole fee being divided between Ann and Hugh Henry, he steps in immediately. The law was so considered in one or two cases, which I shall cite. In Lady Ann Fry's case, 1 Vent. 199 (2 Lev. 21.—3 Keb. 19.—1 Ch. Ca. 142.—1 Mod. 86, 300), a testator de-[154]-vised to his wife for life, and, after her death, to his grandchild in tail, provided she married with the consent of certain persons in the will named; and if she married without such consent, or died without issue, then over. It was held that this was not a condition on the breach of which the heir might enter; but that the marriage of the grand-daughter, without such consent, determined her estate tail, and cast the possession immediately over. Therefore, though an estate tail was given to the grand-daughter, with a conditional limitation over, in case she married without consent, or died without issue, it was held that she had an estate tail, *quandiu* she remained unmarried, and on her marriage without the appointed consent, the remainder over directly took effect. This is very applicable to the present case. Whether Ann had an estate for life, or in tail, is equally the same to my purpose. She had only an estate in the surplus till her marriage, and then Hugh Henry takes the whole, according to the reason of this case. So in a case (*Shuttleworth v. Barber*, 2 Mod. 7.), where one devised lands to A. his heir at law, and other lands to B. in fee; and that if A. molested B. by suit or otherwise, he should lose what was devised to him, and it should go to B. After the testator's death A. entered on the lands devised to B. and claimed them; and this was held to be a limitation, which, by the breach of the condition, determined the heir's estate, and cast the possession on B. without entry. Here, likewise, Ann's estate in the surplus being determined by her marriage, the possession was immediately cast on Hugh Henry, the ultimate re-[155]-mainder man. The case of *Goodright v. Cornish* (1 Salk. 226.—4 Mod. 256.—12 Mod. 52.—1 Ld. Raym. 3, etc.), too, is material. That was a devise to A. for fifty years, if he should so long live, remainder to the heirs male of the body of A., remainder over. A. died without issue, and it was held that the estate went immediately over to Richard, the next devisee. The cases in *Cruise's Digest*, 505-6, and *Evelyn, or Avelyn v. Ward*, 1 Ves. 420, proceeded on the same principle. In the present case, though the proviso was that the surplus should go immediately over to the second daughter, it was not meant that, in case she should not be living, it should not go over at all. They argue that it was given over to Frances personally; that it was personal to her as if Ann had been bound to pay her £5000, and that, they said, would not go to Hugh Henry. I admit that, for nothing in that case would be given to Hugh Henry. But this is a very different case. The intent was that, on failure of the preceding estates in any way, Hugh, the ultimate devisee in fee, should immediately take; especially, when the rule in *Willes* (*Doe v. Underwood*, *Willes*, 293) is applied, of considering, with a view to the intent, the state of things as they stood when the will was made. Your Lordships will observe then what is material in this will against their argument. The proviso does not extend merely to Ann's marriage, but also to that of Frances; and Frances, in case she lived, would be subject to it, and the remainder to Hugh Henry would take place under the same clause as before; which shows that the testator did not mean to exclude Hugh Henry. If it should be argued that the subsequent limitation over, in case of the daughters dying without issue, [156] gave an estate tail by implication to Ann, still I submit that it could never be the intent of the testator in the event which happened, that the issue of Ann should have the surplus, and that by the default of issue is meant such issue as could inherit, that is, inherit the surplus. The words are large and strong, "all my estates," and extend to the subsequent estate tail, as well as to the life estate. And the effect of the whole is this, that the estate tail as to the surplus is gone by her marriage. In *Loddington v. Kime*, 1 Salk. 224 (1 Lord Raym. 203.—3 Lev. 431) where there was a devise to one for life, and if he had issue male, then to such issue and his heirs; and in several other cases, it was held that the subsequent devise to the issue did not give an estate tail to the ancestor. So here the

subsequent words did not give Ann an estate tail, or if they did, it was subject to the proviso. The contingent remainders were destroyed as to the surplus by her marriage. Then the surplus is to be taken in proportion to the value of the fee simple, or of the estate given to Ann. Suppose she had an estate for life, with the remainder in tail eventually, and, Frances dying, an estate tail immediately; this is nearly equal to the fee simple, as she might have barred the entail, and it would be in effect a fee simple, and if she died it would go to her family. Then supposing the value of the fee simple, or of the estate which Ann would have taken, to be about £36,000, the heir at law of Hugh Henry would take what would be equal in value to five-sixths of that sum. If the proportion is to be taken according to the value of the life estate only, then he would take rather better [157] than half, or as twenty-five to twenty-four. The lessor of the plaintiff, the heir at law of Hugh Henry, ought therefore to recover five-sixths of the whole, or at least, an undivided moiety.

Lord Eldon (C.). The rule of the House is, that the defendant in error must go on, as the plaintiff has been heard, unless the parties consent to a different arrangement.

Mr. Hart (for Defts. in error). The question is whether, as Ann married a man of inferior fortune, Hugh Henry shall be permitted to shut out the limitations to the issue of the two daughters. I apprehend that on the face of the will there appears a specific contingency on which it must depend whether Hugh Henry could take. Under the previous limitations the daughters would only take life estates. But then the testator adds a clause, which by necessary implication gives the daughters themselves estates tail. The words, "in case my two daughters die without issue," must be construed so as to give estates in tail general to the daughters, because if they took only estates for life, the devise over on a general failure of issue would be too remote. By necessary implication then, estates tail are interposed between the daughters and Hugh Henry. Taking that to be the case, the testator intended that Hugh should take only on failure of issue of his two daughters. The benefit of the penalty to which Ann was subjected by the proviso was confined to Frances personally, and the gift over to her is as if it had not been on the face of the will, she having [158] died in the testator's lifetime. Suppose this case, that Frances were living, and that Ann had married a man of equal fortune; her issue male would then inherit, but her issue female would not till after failure of issue male of Frances. Then suppose Frances to have married a man of inferior fortune, and prevented her issue male from taking an estate in the surplus—Would it then go to Hugh Henry? No; but to the issue female of Ann; and the condition as far as regards Hugh Henry might be defeated by a common recovery. Frances died in the testator's lifetime without issue; but the estates are given to Hugh Henry only in one event, viz., the death of both daughters without issue; and, Ann being alive, that event has not happened upon which he could take. Unless then, new words should be introduced into the bill, so as to convert a condition of two dying without issue into a condition of one dying without issue, the heir of Hugh cannot take. There is a difficulty too in the form of the proceeding. It is an ejectment to recover one does not know what. When parties go into equity that difficulty must be dealt with; but a person bringing an ejectment must predicate what proportion he claims, and where are the words in the will which show the precise proportion? But if that difficulty could be got rid of, the devise over could carry only a proportion of Ann's life interest, for even, if Frances had survived, she could take nothing in prejudice of Ann's issue male. But as Frances did not live to claim even that interest in the surplus, the devise failed for want of an object.

[159] Mr. Richardson (for Defts. in Error). In *Foster v. Lord Romney*, 11 East. 594, and in the cases there cited (*Denn v. Briddon*, 1 Page (ib. 603), and *Hay v. Lord Coventry* (3 T. R. 83)), it was admitted that, "in default of issue" generally, the Court would imply an estate tail, though it would not in these particular cases where the words were "in default of such issue." Hugh Henry was to take only upon a general failure of issue of the two daughters, as it was plainly the object of the testator that he should be postponed until the families of the two daughters were discussed. That failure had not yet happened, and therefore he could not take. But in order to effectuate the intent of the testator in the limitation over to Hugh, it was necessary that Ann and Frances should take estates tail, and a conditional limitation over after an estate tail was nugatory and could not take effect as it might be so easily defeated, *Gulliver v. Shuckburgh Ashby*, 4 Bur. 1929. In the devise over on breach of the con-

dition Hugh was not even named, and the surplus was given only to Frances who was not alive to take advantage of the devise. Though Ann should lose part of the estates by an inconsiderate marriage, it was not the intent of the testator that the estates to the innocent issue should be defeated, and no such intent can be implied, as appeared in the above cited case of *Gulliver v. Shuckburgh Ashby*, 4 Bur. 1929.—Hugh could only take by excluding the innocent issue of Ann, and though such a proviso as this may not be contrary to law yet it is not to be favoured, and they ought to come strictly within its words who claim by it. Mr. Holroyd argues that [160] this is a case of a series of limitations in which when one fails another is let in. But not one of the cases which he cites show that a person shall take who is not named. The cases of *Goodright v. Cornish* (1 Salk. 226), and *Avelyn v. Ward* (1 Ves. 420), were quite different. Suppose Ann married a man of competent estate and had only issue female, Frances if alive would then take on her death. Then suppose Frances married a man of inferior fortune, it could not be intended that Hugh Henry should come in to the exclusion of Ann's daughters. This shows the contradiction to the testator's intent which would take place in case the construction contended for by Mr. H. were to prevail. The fact is that the testator never contemplated any thing further than that Ann might marry so as to make the estates go over to Frances. The rest is only conjecture.—As to the point of form—under a claim of the entirety, a fractional part at least, as appears from the old real actions, may be recovered. But then it must be shown what is the entirety and what the fraction. The husband may have personal estate to meet the real estate of the wife, and how can it be ascertained in ejectment how much of the real is to be taken? It is such an undivided interest as was never heard of before in a Court of law. At any rate the Jury have not given the materials on which to found a judgment. Mr. H. says that Hugh may take five-sixths, as the fee and the estate tail were convertible. But there would be a wide difference in the market between a clear fee simple and such an interest as this. The extreme difficulty of dealing with this at law shows that the jurisdiction belongs [161] to another Court, to ascertain how much land is equivalent to a given sum of money.

Mr. Holroyd (in reply). *Denn v. Purvis*, 1 Bur. 326, was a case where the Plaintiff in ejectment demanded a half and recovered a third, and in *Doe v. Wippell*, 1 Esp. N. P. Rep. 360, Lord Kenyon held that an undivided moiety might be recovered in a suit for the entirety. Then suppose I am right in that, sufficient is found on the special verdict to enable me to recover some proportion. Suppose Ann took an estate tail, and that estate should be considered as equal to the fee simple, then I recover five-sixths of the whole; if she took only a life estate, the Jury have found that value. But whether she took an estate for life or in tail, I am at all events entitled to recover a moiety, with liberty in another action to recover what I may be entitled to beyond that. Then putting that out of the case I proceed to the question on the will. If Ann took an estate tail, still I submit it was one in possession immediately on the death of the testator, because the matter stood in this way—(the lapsed devise to Frances being as if it had never been)—an estate tail in Ann with a subsequent vested limitation to Hugh in fee in case she died without issue. An estate for life was given to Ann; but where there is a life estate and remainder over in default of issue, that is an estate tail. But if Ann had had a son before breach of the condition, it would have been an estate for life in her, and an estate tail in her first son, with remainder in tail to Ann. But as it happened, the matter stood as if there had [162] been a default of issue of Ann; and the limitation to Hugh took place. So, suppose Ann took an estate tail liable to be opened by the contingencies as they arose, then, upon breach of the condition what estate would Frances have taken if alive? It must be the estate forfeited, and that (the estate tail) was the estate forfeited. But it is alleged that this was a devise to Frances personally, and that by her death it was gone. I submit however, that it was the testator's intention that, on breach of the condition, it should go to whoever had the next estate in remainder, and that Frances being out of the question, it went to Hugh. See the consequence if not. Did the testator mean to put it in the power of Ann by a prohibited marriage, to deprive Hugh of the ultimate remainder? Then all the preceding estates as to the surplus, Ann's estate tail and the contingent remainders depending upon it, being gone, the surplus went to Hugh. It was expressly given from Ann. A case is put that if after the breach Ann had had a daughter, she would have inherited as heir of entail of Ann, notwithstanding the

breach. No: for as appears in the case already cited of *Gulliver v. Shuckburgh Ashby*, 4 Bur. 1929, and *Jermyn v. Arscot* (4 Leon. 83.—1 And. 186.—2 And. 7.—Moore, 364), cited 1 Rep. 85 b. an estate tail cannot be forfeited in part and continued as to the residue. It was an estate tail then in Ann, and on the breach must be gone *in toto*, and Frances being out of the way, it passed to the next, as if it had been spent in the natural way, and both daughters had died without issue before the breach. I submit then that whoever was entitled to the next vested remainder was the one to take advantage of the [163] breach. As to Frances it is clear, and she being out of the way the estate goes to Hugh Henry, as manifestly appears from the clause making the same condition as to Frances, on breach of which by Frances, Hugh would take; and so in the events which happened he must take it on the breach of the condition by Ann, otherwise she would have the power to deprive him of it, which was never intended to be given her. They say the ultimate remainder cannot take effect after an estate tail; I submit it by no means follows. The very moment the estate tail or life estate is gone the remainder takes place. Suppose Ann had died in the testator's lifetime, leaving issue: still the estate tail would be lapsed, and then the ultimate remainder takes place immediately, and on this principle that the whole was given away from the heir at law, otherwise there would be two different fees. It has been stated that the devise to Frances was not a revocation of the estate to Ann, but a method of preserving it to be enjoyed by Frances. That is directly contrary to the words of the will. The life estate to Ann, being given on condition, cannot be considered on breach of that condition as still existing in Frances. Suppose that after the breach it had gone to Frances and she had died, would it revert to Ann? No.—But it is said that a conditional limitation over cannot take effect after an estate tail, and *Gulliver v. Shuckburgh Ashby* (4 Bur. 1929), is cited. I say it may be limited so as to go over before the natural end of an estate tail, as in *Lady Ann Fry's case* (1 Vent. 199, etc.) and the case *Suttleworth v. Barber* in 2 Mod. 7, before cited. What was the case of *Gulliver v. Ashby*, as applied to [164] this? In that case lands were devised to several persons successively in tail “provided always and this devise is expressly upon this condition, that whenever it shall happen that the said estates shall descend or come to “any of the persons hereinbefore named, that he or they do and shall change their “surname, and take upon them and their heirs the surname of W. only, and not “otherwise:” but there was no limitation over on breach of that condition. The question there was whether it was to be considered as a conditional limitation, and the Court held that it was not, for it was not so expressly, the estate not being made to cease or go over upon breach of it, and it was not necessary to effectuate the testator's intention that such a limitation should be implied: for that would strip the issue of the tenant in tail, which could not be the testator's intention, and it was held to be a condition collateral and subsequent which was destroyed by common recovery. In the present case had Frances lived, Ann would only have had an estate for life with a remainder in tail, and could not have destroyed the condition, and here it must be considered as a conditional limitation, as there is an express devise over on breach of it. (Lord Eldon (C.) Suppose Ann and Frances had outlived the testator, and Ann had made an imprudent marriage, what estate would Frances have taken?) She would have taken an estate for life with contingent remainders to her first and other sons in tail male. But I submit the operation of this proviso is changed by the change of circumstances. In consequence of the death of Frances [165] the estate which Ann took was an estate tail, which was forfeited by breach of the condition, otherwise she would keep it contrary to the intent of the testator. She had not a remainder in tail but an immediate estate tail, so that no estate tail stood between her estate and that of Hugh Henry; and her whole estate was forfeited, for an estate tail cannot go over in part and subsist in part.

SECOND CAUSE.

Sir S. Romilly (for Plaintiff in error, heir at law of testator). This is a question purely of intention.—1st, What was the intent of testator?—2d, Whether his intent can take effect by the rules of law? The intent must be collected by looking at the circumstances as they stood when he made his will, and as if both daughters were alive. It is admitted that the condition is not against law, but it is said, that it is not one to be favoured. I cannot allow that: if it be consistent with law and the intent

is clear, the Court has merely to see how the object can best be carried into execution. But I cannot conceive why it should not be favoured, the object being to guard the daughters against persons who would marry them merely for their fortunes—an object which, as the testator thought, would be best secured in this way.—Now whether this is to be considered as a condition, or a conditional limitation, the heir at law of the testator is entitled. I submit, however, it is to be considered as a conditional limitation, or if it be a condition, that it is one subsequent and not precedent. The objections [166] to the claim of the heir I take to be of this kind,—that Ann took an estate tail in remainder, by implication, which in the events which happened was immediately vested in possession. If they cannot succeed in that, then I must show that Hugh did not take.—1st, Ann did not take estate tail by implication but an estate for life, etc. with the ultimate remainder to Hugh, after an indefinite failure of issue of Ann and Frances, and the effect of the marriage was to give the surplus over to Frances in fee.—If Ann and Frances took estates tail, it must be by implication, and that is only permitted where it is necessary to effectuate the general intent of the testator, and never where there is a doubt to whom the estate is intended to go, and in what order. In the case of *Bamfield v. Popham*, 1 P. Wms. 54 (2 Vern. 427. Colles. P. C. 1, 8), there was a devise to A. for life, remainder to his first and other sons in tail male, and for want of issue male of A., remainder over; and it was contended that the tenant for life took an estate tail by implication, and that the codicil removed all doubt on the subject; but the Court held, that A. did not take an estate tail by implication, as it was not necessary to effectuate the intent of the testator. In the case of the *Attorney General v. Sutton*, 1 P. Wms. 754 (2 Bro. P. C. 382. 8 Mod. 257), a testator gave an estate for life to Sutton, remainder to his first and second sons (without going further) in tail male, and in case of Sutton's death without issue male, then over; and it was held, that Sutton took an estate tail by implication, on the principle that it was necessary to effectuate the testator's intention.

But in the present case, the implying an estate tail, instead of effectuating the manifest general [167] intention of the testator, would disappoint his favourite object. If, however, such an estate is given, to whom and in what order is it given? and who takes first? If the breach took place before Ann's estate tail, then Frances would take first, and afterwards Ann. Can there be any case of more serious difficulty in this respect? But I say it is against the intent of the testator. In the other cause it was said that Ann had an estate tail which was forfeited. Then consider the intent of the testator; when he made his will he could not mean to give an estate tail at first to Ann. But it was argued that, in the event, as Frances was out of the way without issue, Ann took an estate tail on the death of the testator; but the intent clearly was, that they should take estates for life successively. The consequence of implying an estate tail in Ann would be this, an estate for life is given to Ann and then to Frances, then an estate tail to Ann. If Ann, during the life of Frances, married a man worth nothing against the condition, all the estates would go over to Frances; and if Frances were out of the way, Ann would take an estate tail, that is, the absolute dominion over the whole property. So that the effect would be, not that Ann would be punished for breach of the condition, but that she would take a larger estate, with power to defeat all the provisions made for her own children. This, then, is not a case where an estate tail can be implied.—2d, It was contended that Hugh took a vested remainder in fee in the events which happened. But if there was a fee before, the subsequent devise must be a contingent fee. The words of the will are, that the estates are to go to [168] Hugh in case the daughters die without issue. Now the testator says, "I bequeath "all my estates to the first and every daughter of my eldest daughter, Ann Henry, the "elder to take before the younger." I submit they cannot take estates tail as the interest is not described. Then it may be said that they take for life; that would answer our purpose. But why for life? The words, "I give all my estates," are sufficient to pass a fee; and if this is a fee, Hugh could not make a vested remainder.—3d, In the event of Ann marrying a person of less fortune, the surplus passed over to the other daughter in fee.—Stronger words could not be used to pass a fee except the word—heirs.—"All "the remainder of my property shall immediately pass over," that is, all the remaining interest in the property, all that was not disposed of. There are a variety of cases in which such words have been held to pass a fee. But it may be said that, though the words would be sufficient to pass a fee, it was the testator's intention to give the surplus

to Frances in the same manner as he had given her the estate before, in case of the death of Ann without issue. That is not the case, for then he would have annexed the same condition. But he has expressly given it to her in a different manner; so that there is nothing in the will to show that she would have taken an estate for life only in the surplus. The improbability of his intending that the property should pass over to Frances in fee is not such as the Courts will allow to outweigh the express words. He has in other respects expressed what nobody would ascribe to him, unless he had so expressed himself; and yet the Courts would not [169] meddle in opposition to the expression, though one cannot see the object of it. Then he directs that the rents, etc. shall be suffered to accumulate, without saying for what period, and estates to be purchased, "to the use of my eldest daughter, Ann Henry, which purchased "estates shall be considered as a property I leave her in regard to the marriage she "shall make as before mentioned."—Probably he intended that they should go according to the course of disposition with respect to his other estates; but he did not so express himself, and it would be too much for the Courts to say that he so intended. I apprehend the estates to be purchased with the accumulations would, upon breach of the condition, be considered as not disposed of at all. These, however, are not now in question, and I only mention them to show the difficulty of construing this will. And if the Courts do not adhere to the words, or manifest intention of the testator, but decide on the ground of probable intention, they will go farther than any Court has ever yet done.—Suppose then, Frances would have taken the surplus in fee if now living, that devise is lapsed, and the heir at law must take, not because he alone can take advantage of the condition broken, but because the fee is given to one who cannot take, and therefore he must take.—They say that, on failure of issue of Ann, or breach of the condition, Frances being out of the way, it must go over to him who has the next vested remainder, and for that they cite Lady Ann Fry's case, 1 Vent. 199. But that case has no resemblance to the present, for there it is so given over in exact words, and that is no authority for an in-[170]ference that it shall so go over where no such thing is expressed. So in the case *Shuttleworth v. Barber*, 2 Mod. 7, the estate is expressly devised over in the event which happened, and I apprehend these do not at all make out the proposition. I do not trouble your Lordships on the question argued below, whether this is a condition, on breach of which the heir alone could enter, or a conditional limitation. (*Vid.* Dr. Butt's case (cited), 10 Rep. 41 b.—Dyer, 127.—Scholastica's case, Plowd.) The reason why I do not trouble your Lordships with that is, that in the present case, it is clearly a conditional limitation. But the heir at law is not here attempting to avail himself of a condition broken, but says that he must take because the fee is devised to one whose devise is lapsed.

Mr. Leach (for Plt. in Error—the heir at law of the testator). The heir claims all that is not given from him by plain expression, or necessary implication, as the Courts will not conjecture an heir at law out of his rights. The express intent always prevails with some qualification, and an expression is to be taken according to its plain import, unless on the whole instrument, it appears to be inconsistent with the general intent. So that there are cases where the plain import of an expression may give way to the general intent, but then it is only in one sense—that is, because the testator has not used the expression in its ordinary acceptation, but has manifestly attached to it a meaning of his own. I beg leave then to lead your Lordships, attending to these general rules, through the words of the will, and I hope that no particular difficulty will be found in the construction of it, having regard to the [171] principle, that the heir at law is not to be conjectured out of his rights. The testator begins etc. (Reads the will down to the words immediately following, inclusive) "And all the remainder of "my property shall immediately pass over, and be given up to my second daughter, "Frances Henry, to whom in that case I bequeath it." It is to this that I wish first to call your Lordship's attention. Suppose the will had finished here, what estate would Frances have taken in this property? The plain import of the words is that she took an estate in fee. Property is a word of quantity and interest, and may carry a fee. (Lord Eldon (C.). Then what interest had Ann in the property she was to keep?) She of course would take what interest she would have at any rate. The devise of the surplus is substantive. Then why is not the plain import of the words to prevail? Is it to be said that Frances takes it, subject to the same limitations, as if the eldest daughter had died in the life time of the testator? Why conjecture this? The part

that was to pass over might be the bulk of the testator's property, and it might be only a shilling; and can it be contended that he intended to subject this uncertain part of his property to the same limitations? Is it to be said that Frances would only take an estate for life, in this property, and that her life was substituted instead of Ann's life? Who then is the next in remainder? Is it Ann, or her son? Is he to take before Frances's son? If we depart from the plain import of the words, we are involved in difficulties which we cannot get rid of. It is singular, if the testator meant to prefer the son [172] of a prohibited marriage. Suppose then Frances's son takes—who is next, if he fails? The next is the daughter of Ann, and is the property to go to the daughter of a prohibited marriage, in preference to the daughter of Frances? Still difficulties. Then suppose the will does not finish here, for the import of the expression may be affected by what comes after, as well as by what goes before. "And it shall also be necessary for the man my eldest daughter marries, etc. and to take the name and arms of Henry, etc. I devise and bequeath to Frances, an annuity, etc. to be paid every year, out of my estates, in two equal and even payments, to her and her issue; in failure of such issue, at her death, the said annuity shall revert back again, and return to my eldest daughter, Ann Henry, and her issue." Now we come to an important part of the will: "All I have said in regard to my eldest daughter, and her marriage, as above mentioned, I mean and intend shall stand good in regard also of my second daughter, Frances Henry." In what event is it so to stand good? "In case, by the death of her eldest sister Ann, she shall, before she marries, come to be possessed of my estate as aforesaid:" the plain meaning of which is, that if Frances, by the death of Ann, should stand in Ann's place, and enjoy the whole, then she was to be subject to the same condition as Ann. But suppose she does not take the whole, but only a portion, not by the death of Ann, but by Ann's prohibited marriage—is that portion subjected to this marriage prohibition? Then we must add the words, "or a portion of my estates." But the [173] testator has expressly said that it is only if she takes the whole of his estates that she is to be subject to the condition, and has left her entirely unfettered as to the portion; so that this is strongly confirmatory of the plain import of the expression, which must prevail, otherwise the heir at law will be conjectured out of his right. Then let us see the rest: "And also the rents, issues, and profits of all my aforesaid estates, except such parts as shall be necessary for a genteel maintenance and education of my two daughters above mentioned, shall be put out at interest, etc." Now we come to a most important part of the will: "And it is my will and desire that in case my two daughters die without issue, that my estates shall then go to my brother Hugh Henry." All my estates—and in what event? "In case my two daughters die without issue." Why so? Because the bulk of his property was to pass to the issue of his daughters, according to the first series of limitations. Then is it not plain that what he gives to Hugh is not a surplus or portion, but that he looks only to the event in which the whole would continue united? So that whether Hugh's remainder is contingent, or vested, the testator looks only to this course, and to the whole coming to Hugh. He is not here looking at all to a divided estate, once separated from Ann, but to the whole going over in the event of the failure of issue of his daughters. Has he given any remainder to Hugh Henry of a broken part? No. Then is the plain import of the words passing a fee in the surplus to Frances, contradicted by any part of the will? No; but confirmed. Then if this [174] construction is to prevail, the effect is clear. The estate is given to Ann for life, with a conditional limitation over to Frances in fee. That is a devise in a particular form. The devise fails; but the death of Frances cannot alter it, in this respect. The surplus passed from Ann, and would go to Frances; but she is dead, and then it is a common case that it vests in the heir at law. But suppose I cannot rest with confidence in this view of the case, and that I may be mistaken, when I say that the surplus passed to Frances in fee. Ann cannot keep the surplus after the prohibited marriage—that is clear. The words are "if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries, and all the remainder of my property shall immediately pass over, etc." If she says that she takes the whole, then she must contend that it shall not pass over—and how does she reason this? In her printed case she says nothing about an estate tail by implication. That is a new reason urged at the bar here. That however may be the result of more consideration. But on the general

principle, this part of the case is clear. An estate tail can only be implied to effectuate the general intent of the testator. Is it then to be implied that she has an estate tail, notwithstanding her prohibited marriage? Is that according to the general intent of the testator? This as to the principle. But how is it on the particular form of expression in the will? Is it an estate for life or in fee that is given to Ann's daughters? If it is a fee, then no remainder can be limited after it, though a [175] contingent fee may. The words are large enough for a fee. But they say it was not so intended. Is that clear? The words are: "In failure of such issue male, I bequeath all my said estates "to the first, and every daughter of my eldest daughter, Ann Henry, above mentioned." Suppose he had rested there, would not this be a joint tenancy in fee to all the daughters? Then follows the words: "the elder to take before the younger;" which show that he did not intend a joint tenancy, but that the eldest should take the whole. The words are sufficient to carry a fee. But suppose there were some doubt here, the next consideration is, whether they took a larger estate than an estate for life. It could not be an estate tail, for mere words of taking in succession could never have that effect. Assume then that it is a life estate "to the first and every daughter of my "eldest daughter, etc., and in failure of such issue"—that is, in failure of such daughters, "I bequeath all my said estates to the first and every daughter of my second "daughter, Frances, etc." What estates do the daughters of Frances take, vested or contingent remainders? Does he mean that if Ann has no daughters, the daughters of Frances shall take—or that if she has, and all of them should die? He must mean—if there be no daughters of Ann, and in that event, these are contingent remainders to the daughters of Frances. Then what if Frances's daughters fail also? We must look to him who is the object of the testator's bounty after his daughters and their issue; "it is my will and desire, in case my two daughters die without issue, that all my "estates shall then go to [176] my brother, Hugh Henry." We bring up these words to the last failure of issue, and then they mean not a general failure of issue, but a failure of such issue; that is, of daughters, and then this is a contingent fee to take effect on failure of daughters of Ann and Frances. There cannot be a limitation after a general failure of issue, without implying an estate tail in testator's daughters. But an estate tail cannot be implied, except to effectuate the testator's intention, and here it would not effectuate, but defeat it, as it would give the daughter and her issue a larger estate, in the event of a prohibited marriage, than she had before.

The effect of the defendant's construction would be this, that if Frances had been alive, Ann would have only an estate for life, but that Frances being dead, she took an estate tail immediately by implication. But did the testator mean to give Ann a bounty on the death of Frances, contrary to the penal consequences of the prohibited marriage? (Lord Eldon (C.). What estate did Ann take in the part to which she remained entitled, and with what remainders over?) If there were no breach, the remainders would apply to the whole, and if part is excepted from the consequences of the breach, it of course remains subject to the remainders. (Lord Eldon (C.). What were the remainders after those to Ann's first and other sons?) I submit that the daughters took a fee. A gift to the first and every daughter would make them joint tenants; but the further words, "the elder to take before the younger," show that the eldest was to take the [177] whole in fee. If your Lordships do not follow that construction, it cannot be an estate tail, as these words cannot have that effect. Then they must be life estates, and the next remainder is contingent, "in case my two daughters die without issue, "etc." The words are contingent; and a devise over, after a general failure of issue, is too remote and void, unless an estate tail can be implied. But it is enough that the remainder is contingent. I was about noticing an argument in the Court below, founded upon Dr. Butt's case (cited, 10 Rep. 41), that the condition was destroyed by the remainder; but I feel a difficulty in understanding what the proposition is. The devise to Frances was not a remainder, but a conditional limitation; and if she took in fee there could be no remainder over. That then is not the way in which Ann points her argument. But suppose that the devise is not spent in Frances but applies to the whole series, then all the remainders must be conditional limitations, and so I do not understand how the doctrine in Dr. Butt's case applies. There was another point relied on below, and it is rather remarkable that it is not in the printed papers; that the condition is a condition subsequent, and that it does not take effect unless there is a devise over, and there is none here after the death of Frances. One cannot readily admit that

no condition subsequent can be effectual except there be a devise over. But if that were the case, it does not apply here, because there is a devise over to Frances. The case of *Gulliver v. Ashby* (4 Bur. 1929), has been cited, and Lord Mansfield, in saying that the condition is *in terrorem* where there is no de-[178]-vise over, does seem to lean to such a ground of decision. I cannot help thinking, however, that in a Court of law that could never be a proper ground of decision, though in equity it might. In that case there was a much better ground, viz. that it was an estate tail, and that the condition as to marriage was collateral and destroyed by the common recovery. But suppose the Judge below right, that a condition subsequent cannot be enforced unless there is a devise over. For what reason? Because it is considered as a desire and recommendation, unless there is a devise over. But the intention of the testator must be collected with reference to the circumstances as they stood when he made his will, as a devise is in the nature of a conveyance. Has he then merely recommended it to Ann not to marry a man of less property? "And if she marries, etc., I leave to her only as much of mine as shall be equal to the property of the man she marries." That is no recommendation, but the interest is made to cease so far. But it is not enough for the heir at law of the testator to show that Ann is not entitled; he must show that he is, and therefore I must notice the case of *Hugh Henry*. They say that the effect of the breach and events is merely to accelerate the remainders. The first answer is that this is a conditional limitation in fee to Frances, and that the testator, in limiting these remainders, was looking to an undivided estate. But suppose the remainders were only accelerated, and that they apply to the separate property, the question is whether they are vested remainders. If the daughters of Ann took a fee, there cannot be remainders over. [179] If they took only a life estate, the subsequent remainders were contingent. But the main argument is that from the words, "in case my two daughters die without issue," the remainder to Hugh must be contingent, unless previous estates were given to all the issue, as it depends on a circumstance which may or may not happen. The only way to give it effect is to imply an estate tail in testator's daughters, which cannot be done consistently with his intention. (Lord Eldon (C). Suppose Ann had not disparaged herself, and Frances had lived.) There would be much more reason to imply an estate tail in that case, as there would not be a clear intent to the contrary. But we say that none of the limitations apply to the separate estate. If they do, and an estate tail is implied, then a bounty is given on the breach of the condition. We cannot look at the case now as if it stood without breach of the condition.

Mr. Hart (for Defts. in Error). The testator himself never contemplated the events which happened, and could have no intention respecting them. Then the only way of collecting the intention is to consider what he would have prescribed if the whole circumstances had been before him; and that is what is meant when we speak of the general intent of a will, and reject the particular where it is inconsistent with the general intent. Then let us look at the whole series of anterior limitations, and see who are the chief objects of the testator's bounty. His object seems to have been to create a family, and to perpetuate his name, and to limit the estate so as to [180] render it inalienable as far as the rules of law would permit. He gives his daughter Ann an estate for life, remainder to her first and other sons in tail male, so as to take by purchase from him, with a contingent limitation over till they came *in esse*: but the male issue was in no event to be disappointed. The next object of his bounty is Frances, to whom he gives an estate for life, with a vested remainder to her first and other sons in tail male as before. The female issue is the secondary object of his bounty; and it is asked what estates the daughters of Ann and Frances would take. That requires exposition from the context, for the terms render it doubtful. It is clear that Ann's daughters take in preference to Frances's daughters.

Then see what he has done with a view to prevent intestacy. After the provisions respecting accumulation, etc., he comes to this devise; "my will and desire is, in case my two daughters die without issue, that all my estates shall then go to my brother Hugh Henry." The Courts are bound by the intent where it can take effect consistently with the rules of law; and the law has said that a limitation over on a general failure of issue is too remote and void. But there is no difficulty now in such cases, as the Courts will imply estates tail in the anterior devisees; and if not implied here the general intent and scheme must fail, as the heir will come in where the testator has said in express terms that he should not. I am here arguing as if there

had been no conditional clause in the will. In no event could Hugh Henry take till failure of issue of the two daughters, and by necessary implication, [181] to render the devise to him of any avail, the life estates of the daughters must be enlarged to estates tail. So that on failure of issue there are general estates tail in the two daughters successively. True, there is no expression of intent as to the series in which the estates tail are to take effect, and Sir S. Romilly says that, in that case, estates tail cannot be implied. But the intent as to the series may be collected from the context. If an estate tail could be implied in one only daughter to whom an estate for life is first given, why not imply the same preference as before expressed between the two daughters with respect to the estates for life? Ann has an estate for life, remainder to her issue male in tail male, remainder to Frances for life, remainder to her issue male in tail male, remainder to Ann's issue female for life, remainder to Frances's issue female for life, and then the only next thing he could do in order to effectuate his general intent, was to give estates tail to his daughters in the same order and succession as before. Then by this means the general intent is perfected. The testator had as much attachment to the estate, as to the individuals who were the objects of his bounty. The daughters were less the objects of his bounty than their sons, to whom a larger estate was given. Then it is stated in argument, that the effect of this would be, that the breach of the condition would destroy Ann's life estate, and give her an estate tail. If the necessary effect of this construction were, that the testator intended that the forfeiture of Ann should extend to her issue male, etc., and vest an estate tail immediately in Ann, there would be a difficulty. But [182] it was an event which he never foresaw, and he did not consider that the younger daughter might go to the grave before the elder. But when they argue in this manner to show that there was no estate tail in Ann, they themselves argue that an estate in fee was given to Frances, destroying all the limitations to the male issue of Ann and the rest. So that if the matter depends on incongruity, that would be a strong argument against Frances taking the entire fee. On what principle is it that Ann's issue male should take a less estate for breach of the condition by Ann? And why should Frances take in fee? If the language were more strong than it is, that absurdity would be rejected. But when we look at the language here, we must be convinced that it never could be the testator's intention that Frances should take the surplus in fee in the event which happened. The words are "and all the remainder of my property shall pass over and be given up to my second daughter Frances, etc." It is said that, though there are no technical words of inheritance, all my estates apply to quantity of interest as well as to quantity of property, and I do not deny that, if not qualified by any other expressions, they might carry a fee in a will. But we must look at other words to see whether this means quantity of property or of interest in law. Your Lordships see that he is apportioning his property. The words in which he leaves to Ann as much of his property as should be equal to that of the man she married, might as well be considered as giving the absolute fee. But could it be contended with success that Ann took a fee in that? And yet the word property must [183] be understood in the same sense as when the estate is given to Frances. But if the words are to be controlled with respect to Ann, they must be also controlled with respect to Frances, who therefore has not the absolute interest. If these words carry a fee, a still greater absurdity might be the consequence; for then, if Ann married a man worth within £100 of the whole of the testator's property, she would have the fee in the whole except that £100, and cut off all the subsequent limitations. This bequest over I consider as a penalty on Ann, and a bounty to Frances. The testator, leaving the general frame and scale of his devises untouched, meant to impose a particular obligation on Ann, and not on her issue. The limitation over then depended on the double contingency that Ann should commit a breach of the condition, and that Frances should be alive. And then if Frances was not alive, that provision could not take effect. Without that, every object of it was defeated. Where is the inconsistency in supposing Frances more the object of the testator's bounty in certain events than Ann? He takes from Ann, on breach by her of the condition, a particular proportion of his property, and gives it to Frances. But the gift to Frances was personal; and there is nothing in the will to show that it was the intent of the testator, if Frances did not live, to take the property from Ann. Frances had no immediate benefit under the will beyond £300 a-year. But if Ann, to whom the bulk of his property was given, disparaged herself by her marriage, then a proportion was given

over to her sister for life. The purpose of its going over was subor-[184]-dinate to that of Ann marrying a man of great property, and as Frances to whom it was to go was dead, that purpose failed. And as he had not passed it over to any other person in case of Frances's death, his intent was that, in that event, it should not go over at all. It was argued below that there was a devise over: but I conceive upon this ground the rule of law is that, on a condition broken, the heir alone shall enter. But the heir cannot enter on a partial interest; and the Courts adopted another rule, that of a conditional limitation: for if it should be considered as a condition for which the heir could enter, that would destroy the remainders over; but if it is a conditional limitation, who is to enter? There is no rule for that. But the heir can only enter on two principles; on a condition broken so as to have the old estate, or on failure of a devise. Then he cannot enter on the conditional limitation, Hugh remaining capable of taking. In no sense can the heir at law take, unless Frances took the entire fee; a construction which would defeat the whole intent of the testator. There is an end then of the heir at law's case. So I submit that the penalty depended on a double contingency, and, that not happening, the provision failed. I do not deny that we do not thus complete the partial intent of the testator; but that must yield to the general intention.

Mr. Richardson (for Defts. in Error.) In the first place, how do the estates stand independent of the proviso, "I give, devise, and bequeath all my estates," which is a phrase continued throughout, whether he gives for life, in tail, or in fee. The effect [185] is to give Ann an estate for life, with contingent remainders to her first and other sons; then to Frances for life, with contingent remainders to her first and other sons; then there are contingent remainders to the daughters of Ann in succession, which is material to show that they did not take a fee; and then he says, "I give, etc. all my said estates to the first and every daughter of Frances, etc.," which last words show that life estates were meant, as these words, applied to estates in succession, are not so strong as if applied to a singular estate, which might be a fee. And why give a fee to the daughters more than to the sons? and why in succession, as the elder would have a fee, and so might defeat the rest? I take the words, "failure of such issue," to mean failure of daughters of Ann, as in *Foster v. Lord Romney* (11 East. 594), where estates were given to sons, and "in default of such issue," then over; the words "such issue," were considered as meaning such son or sons. But I think it immaterial whether the daughters of Ann took for life or in tail, provided they did not take a fee, and they cannot take a fee. The testator clearly intended that his younger brother, Hugh, should take in preference to the heir; and, Hugh not taking till an indefinite failure of issue of A. and F., he cannot take at all, except estates tail are implied in A. and F. Sir S. Romilly says estates tail can only be implied to effectuate the testator's intention. True, but they have been implied in such cases as this. *Bamfield v. Popham* in 1 P. Wms. 54 was quite distinct; and the point was not raised there, as the estate was given over on failure of the issue male. In *Att. Gen. v. Sut[186]-ton* (1 P. Wms. 754), an estate tail was implied, except as to the trust property; so, also, in *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185, pl. 29. But the case I would particularly cite, is *Doe d. Bean v. Halley*, 8 T. R. 5, where Lord Kenyon particularly relied upon *Robinson v. Robinson*, 1 Bur. 38, which had been discussed for 50 years in all the Courts. Though the expressions in that case of *Doe v. Halley* strongly favoured an estate for life, they were extended in order to effectuate the general intent of the testator, and the reason given by Lord Kenyon was, that the general intent was to exhaust one branch of the family before the estate should go over; and such is the case here. Then consider what is the effect of all this in the events which happened. The words of the proviso are—(reads them). Now the principal point of their argument is, that these words pass a fee, and that F. took the residue in fee. I am surprised at this, as it was not suggested below, nor is it in the printed cases. But possibly the words might carry a fee, if that were necessary to effectuate the intention of the testator. Effects and property may carry a fee; and it was said, by Lord Thurlow I think, that all I am worth would carry a fee. In *Doe d. Andrew v. Lainchbury*, 11 East. 290, property and effects were applied to real estate, such appearing to be the testator's intention; and a great number of other cases were there cited, to show that effects would, when necessary to effectuate the intention, carry the realty. But so to construe property here, would defeat the general intent. He did not mean that A. or F. should have the power to disinherit their issue. "And all the remainder, etc., shall

“pass [187] over, and be given up, etc.” It could not pass over and be given up, unless previously vested in Ann. Now Ann had not the fee, and so a fee could not be given up. (Lord Eldon (C.). In one of your printed cases the finding is this: that the lands and tenements in the within written declaration mentioned were, at the time of the said marriage, of the yearly value of £1683 19s. 4d.; and that the fee simple of the said lands was of the gross value of £38,856. In the other printed case, and the difference is material, it is stated that the lands and tenements devised were of the yearly value, etc., without the words “in the within written declaration.” The difference is material in this way. The verdict finds that John Henry was seized of the lands and tenements in the within declaration mentioned, amongst others, in his demesne, as of fee, etc. In one way of putting the case, Ann would take as much of these lands, etc. as would be equal to £6400; and this is represented as a sixth in two ways. In the one way it was a sixth of the lands in the declaration mentioned. In the other way, it was a sixth in the lands devised by the testator; that is, not merely in the lands in the declaration, but in the whole real estate devised. And then the value was not to be calculated according to the value of the premises in the declaration, but according to the value of the whole.) That is a repugnancy in one point, for they intend to include the whole. (Lord Eldon (C.). Do you mean to say, that any judgment of this House can be given except on the record as it stands?) I do not allow that an ejectment can be sustained on this [188] vague sort of interest. Sir S. Romilly. It is consented that no such objection is to be taken, as the parties wish for a decision on the merits. The value can be ascertained afterwards. (Lord Eldon (C.). We cannot admit that on our record.) Mr. Holroyd. Enough appears on this special verdict to show that a certain proportion is recoverable. If the value of other lands is to be taken, the Plaintiff will have a larger proportion. But, under the verdict as it stands, he may recover a certain proportion; and it is no answer to say that he ought to recover a larger. Mr. Richardson. The answer of Mr. H. is not satisfactory, for, unless the whole is before the Court, I cannot conceive how a proportion is to be recovered. But, however, I do not press the point of form. Returning, then, to the merits, I say the testator could not mean to give a fee to Frances, as his object was to settle his property according to the course and scheme of succession mentioned in the will. Mr. Leach admitted that what remained was so settled; and why should not that which was given over to Frances? The effect of the proviso is merely to make a conditional limitation over to Frances. Now, where there can be no conditional limitation over, the previous estate is not displaced; and *Gulliver v. Ashby* (4 Bur. 1929) is an authority for that proposition. It was held there that, for want of a limitation over, the previous estate was not displaced; but continued in the tenant in tail, who was capable of suffering a recovery; and the grounds upon which the previous estate was not displaced was the want of a limitation over. So I argue here that, if there is no person to take under [189] the limitation over, the previous estate is not displaced. The devise over was personal to Frances, and the heir at law cannot take advantage of it, unless he can make out that this was a condition for breach of which the heir might enter; and so it was contended below to be. But, when they were pressed with the limitation over to Frances, they said it would be a conditional limitation if Frances were alive; but that, she being dead, it was a condition. It must be construed, however, as if she were alive; and, at any rate, the limitation to Hugh would be enough to prevent the entry of the heir as for a condition broken: and so it was decided in *Dr. Butt's* case (10 Rep. 41 (*Mary Portington's* case)). But even if the heir could enter for the condition broken, he cannot succeed, as he has not stated a sufficiently precise interest for a recovery by ejectment; and the judgment of the Court of K. B. below could not be sustained, even if your Lordships should on the other grounds be against us.

Sir S. Romilly (in reply) particularly insisted that no estates tail could be implied in the daughters Ann and Frances, because the order in which they were to take did not appear; and because such an implication would frustrate the intention of the testator; that Frances took a fee in the surplus; and that it was only in the event of her succeeding to the whole, that she was made subject to the conditions; and that, the devise to Frances having lapsed, the heir at law took the surplus as undisposed of. (Lord Eldon (C.). Whether the interest given over is an interest of which possession could be de-[190]livered under an ejectment, or whether the devise over is not void for uncertainty? That is a conclusion which the House never comes to, if it can

be avoided. Lord Redesdale. There is certainly a difficulty in that respect, as I find no distinct portion expressed in the will itself; and there is no writ by which a portion can be delivered, without mentioning the portion. If an ejectment is brought to recover two tenements, A. and B., there may be Guilty as to the one, and not Guilty as to the other; and the judgment to recover the one may be good. But I know of no instance of such a proceeding held good, without the portion's being mentioned.)

Lord Eldon (C.) stated the will and facts found on the special verdicts, again adverting to the difficulty that appeared to arise from the facts not being found with sufficient precision in the special verdict to enable the Court to give judgment upon them; and then observing, with reference to the proviso in the will, that the first consideration was, whether the subject of the devise over was described so clearly that the possession of it could be delivered under an ejectment, either as an entirety to be fixed by the proportion which the husband's property bore to that of the testator, or as some undivided aliquot part of the whole to be settled by a similar proportion, and to be held, by the person entitled, as tenant in common with Ann. And he proposed that the following questions should be put to the Judges.

1st. Whether, having regard to the facts and circumstances of the case and to the true intent and [191] construction of the testator's will, Ann, and her husband in her right, or Joseph Henry, the heir of Hugh Henry, or John Joseph Henry, the heir at law of the testator, are or is entitled to any and what estates or interests, estate or interest, in the lands and premises devised by the said will, or in any and what parts or portions, part or portion, thereof?

The second question was whether, having regard to the facts in the special verdicts, if either of the Plaintiffs was entitled to any part or portion of the lands and premises, he could support the ejectment; and what judgment ought to be given in such ejectment?

The case was this day (June 12, 1816) argued again by one counsel on each side, upon the point whether the subject of the devise over, in case of Ann's marriage with a man of inferior fortune, was stated or described in the will with sufficient certainty.

Lord Eldon (C.) The Counsel will begin, who contends that it is given over with sufficient certainty.

Mr. Leach (for the heir at law). The Jury have made it sufficiently certain, and Ann will be entitled to an undivided sixth part or moiety of the whole, as tenant in common with the person entitled to the surplus. There is no physical impossibility as to making the devise certain, and, if it is void for uncertainty, that must depend on legal and technical principles. But it is difficult to conceive how legal and technical principles should be applied to pre-[192]-vent the intention of the testator from being followed, which is the great guide in the construction of wills; though in a conveyance such legal and technical principles must govern. These gifts of undistinguished portions are of two classes. They may be described by quantity or value. One seized of 500 acres may give 100 of them, without describing which. One having £500 a year rent out of lands may give £100 a year out of these lands without describing out of which of the lands in particular. First as to the undistinguished portions described by quantity, the result of all the authorities is this,—that it is no such uncertainty as in itself avoids the devise, but that it is in its nature sufficiently certain, the person to whom the gift is made having a right to elect. Where such gifts have been held void for uncertainty, the uncertainty has been in the manner of the gift. For example in *Vin. Abr. Tit. Election*, I find this first article: "If A., seized in fee of 100 acres, "enfeoffs B. of eighteen acres of the 100 acres, without assigning which of the 100 "acres he enfeoffs him of, to hold to B. and his heirs, at the election of B. and his heirs "when he pleases, this is a void feoffment, so that this cannot be made good by any "election, because a livery cannot operate *IN FUTURO* but ought to pass the freehold "presently or never, and therefore the feoffment void" (*Bullock v. Burdett*, *Dyer*, 281, A.—*Moore* (Sir F.) 81, 2, pl. 215).

The principle then is plain; a feoffment is nothing without livery, which must operate immediately, and there cannot be an election to make the gift good. The same doctrine appears in the notes to *Dyer*, Rep. (8vo Ed.) 281, a.—in *Moore* (Sir F.) 82, and in [193] *Vin. Abr. Tit. Fine*, and also in *Vin. Abr. Tit. Grants*, 91, R. "If a man "seized of forty acres makes a feoffment of twenty acres to the use of his son and wife "for a jointure, this is good. So a fine of twenty acres where the conusor had 100 "acres is good, and the conusee shall choose; and if a man levy a fine of fifteen

"acres of the manor of D. it is good by election" (Arg. Moore, 82). Why is the conusee to have his election? Because the use need not be immediately executed. The subject might be made certain, and then the use arises (12 Rep. 86, Stockdale's case). So in the case of a devise, (Grace Marshall's case in a note to Bullock v. Burdett, Dyer, 281, A). "A devise of two acres out of four is good, and the devisee shall elect." Those authorities prove that there is no objection to the nature of the gift; the objection is to the mode, not to the substance.

2d. So it is when the subject of the gift is described not by quantity but by value; where it is described by quantity the certainty is effected by election; where it is described by value, the certainty is effected not by election but by valuation; and then the same consequences follow. Where the gifts are void, it is on account of the manner and not the substance, and so the authorities stand. The first authority Woodhouse v. Futter, is found in Dyer, 281, A. in a note to the case of Bullock v. Burdett, and also in 1 Roll. R. 187, "A man seized of lands of £500 value, covenants "by indenture to assure lands of £100 value for a jointure, and makes feoffment of all "the lands to the use of the inden-[194]-ture. This is void for the uncertainty." And *per* Cook and Dodderidge, "If a man covenant by indenture to make a feoffment to the "use of the indenture generally of lands of the value of fifty marks, and does not "particularly assign the land, more shall not pass than the place itself where livery "was made." How could the land pass by feoffment and livery unless it was certain what was to be delivered? And in the case of a feoffment it could not be made good by subsequent valuation. In the several cases referred to in Vin. Abr. Tit. Grants, the same distinction was taken. So it was also in the case of Thomas v. Kenn or Morgan (Arg. Litt. Rep. 217), Hetley, 67. Dyer, 281, A. where "a fine was levied to the use of "the conusees to be seized of so much land as should be worth £30 per annum, to be "assigned and set out in several by J. S. adjudged, as no assignment was made, that it "was void; otherwise if the assignment or valuation had been made." The next case, Gibbon v. Warner, was in the note in Dyer, 281, A. and in 2 Roll. R. 425. "Sir T. F. "devised his manor of — to his executors, in trust that they should be seized of 100 "marks of that manor to the use of one, and of another part of the value of £20 to the "use of another, and that a division should be made by the executors, and that the "whole manor should be valued at £100 and no more. Adjudged that this was sufficiently certain, and that the *cestui-que-uses* shall be tenants in common immediately "without division. But this case was put by Richardson in the argument in Thomas v. Morgan (Flet. 67, 97), and agreed to be law, that it is to be taken that the value of "the [195] manor was expressed in the will, and that he said was the reason of the "judgment." True, the value of the manor was expressed in the will, but the particular portions must be rendered certain by valuation. If Richardson was right there, all the other authorities are wrong. The result of the whole is, that the portion here may be set out, or that the lands may be held in common, and that in either way the devisee may be made certain, though the latter is the more convenient.

The case was argued on the same grounds for the heir of Hugh Henry, the ultimate devisee; and Sir Walter Hungerford's case, Leon. 30, pl. 36, and Calthorpe's case, Dyer, 334, B., Moore 101, 247, were cited. (Lord Eldon (C.). If the remainder man had the election here, could he support the ejectment?) Yes, because the election may be made at any time, and he may elect the whole and recover *pro tanto*.

Mr. Hart (for Defts. in error.) The ejector must make out to what he is entitled as a distinct and definite proportion, though to be held in common. They have produced a great deal of ancient learning as to grants and devises; but they pass very cursorily over the point as to what distinct portion they claim. These are authorities to show that what is indefinite may be made definite. That is quite a common maxim, *id certum est quod certum reddi potest*. But how do they bear upon this case? Cases of this kind must be determined on the language of the instrument. The whole of their principle is to be found in Bullock v. Burdett, [196] Dyer, 281, A. and in the notes of Ch. J. Treby, which are authorities themselves, independent of the authorities there referred to. A grant is to be taken most strongly against the grantor, but if uncertain it is void. It is admitted that in Gibbon v. Warner (2 Roll. R. 425), the proportion was pointed out; all the ratios were there ascertained, and in these the devisees were tenants in common. The case of

Bullock v. Burdett does not depend on the livery, but on the wide principle that the feoffment was void for the uncertainty. But it has no bearing on this case. Who is to elect here? The question here is merely whether the testator has described with sufficient certainty what he meant to pass. The testator gave Ann the rents and profits of the estates from the time of his death, and he describes her as having been born in 1783, and at the time of making his will she was an infant of three years of age. Then he gave her a life estate, and then there was a minority of about fifteen years after the death of the testator before she could be capable of contracting. He goes on to Frances, and presuming a failure of issue, he gives, as we say, an estate to Ann after failure of the intermediate male issue. Of such a species of property, depending on so many contingencies, it is difficult to ascertain the value. The testator has not in the devise over expressed whether he meant the value of the life estate and its contingencies, or included the benefits before given to the issue of Ann. Is the value to be estimated at the time of the marriage? or is the Court to have a retrospect to the hour of the testator's death, and include the rents and pro-[197]-fits from that time? The testator has given over, one cannot conjecture what. The portion cannot be found by quantity or value if left to be ascertained by the will, so that the devise is in its terms uncertain and cannot have effect.

Leach (in reply.) If I understand the argument of Mr. Hart, he says, that it is difficult, and even impossible here to ascertain the portion, though, in general, it may be done. I submit it may be done in this case; and there I must leave it.

(June 12, 1816.) Gibbs (Ch. J. C. B., delivering the opinion of all the Judges.) The first question put to us is, whether, having regard to the facts and circumstances of the case, and to the true intent and construction of the testator's will, Ann and her husband in her right, or Joseph Henry the heir of Hugh Henry, or John Joseph Henry the heir at law of the testator, are or is entitled to any and what estates or interests, estate or interest, in the lands and premises devised by the said will, or in any and what parts or portions, part or portion thereof. It will not be necessary to state the record of the case, as the whole has been so recently before your Lordships. But we are all of opinion, upon the facts and circumstances stated in this record, that Ann is entitled to all the lands, during the term of her natural life; and that neither Joseph Henry, nor John Joseph Henry, have or has any estate or interest in the lands and premises mentioned, nor in any part or portion thereof. This being our opinion on the first [198] question, it is unnecessary to give any opinion on the second.

The point on which the first question turns, arises on the proviso giving over some part of the estates, in the event of the marriage of Ann Henry to a man with a fortune inferior to that which was left her by the testator. The proviso is in these terms:—"But I give, devise, and bequeath all my said estates abovementioned to my eldest daughter Ann Henry aforesaid, on this proviso and express condition, that she marries a man really and *bonâ fide* possessed of a property, at least equal, if not greater, than the one I leave her. And if she marries a man with less property than that, in that case, I leave her only as much of mine as shall be equal to the property of the man she marries; and all the remainder of my property shall immediately pass over and be given up to my second daughter Frances Henry." This aims at creating a conditional limitation over, on the event of Ann's marrying a person of inferior fortune; but we think the devise over is void for uncertainty, and that the proviso cannot have effect, though the event in which it was to operate has taken place.

The uncertainty is this. The will gives over an uncertain part, not specifying the lands if to be held in severalty; or, if this should be considered as an undivided portion in the whole, it cannot be discovered from the will what that portion is. It has hardly been contended, that any thing was given over in severalty; but it was contended, with more colour, that the person to take the excess, beyond the husband's property, would be tenant in com-[199]-mon with Ann, of a moiety or some other given share.

It is impossible to put the case upon any other ground than this. A portion is given over, and it cannot be a portion to be held in severalty. The only way then is, that the person to take the excess shall have some undivided portion of the whole; and if the devise defines what that interest is, it will be sufficient to give its objects

the benefit of it. But we think that the devise does not define any specific interest which the objects of it can take.

The only ground upon which this can be contended to be a tenancy in common, which supposes some specific share, is, that it may be left to a jury to decide according to the values. The inconvenience and confusion which would result from this is obvious; different juries would set different values on the respective properties of the husband and wife; and the valuation must be made too at the period of the marriage, and at any distance of time, a jury might be called upon to say what was the value of the property. It would not only be difficult, but in some cases impossible, to ascertain the value in this way.

Our opinion, however, does not rest on the inconvenience and confusion, but on the principle of law, that such a devise is not sufficient to create a tenancy in common. If it were so, it must be upon the marriage of Ann; and all the consequences of a tenancy in common must then have taken place. The parties must at that point of time be tenants in common, and then they would be so without the possibility of saying what is the share [200] of each. It has been said that this is no objection; but I wish that a case had been mentioned of a tenancy in common, without the possibility of knowing from the instrument creating it of what specific share or portion each was tenant in common. Great industry has been evinced on the part of the Gentlemen at the Bar, but no such case has been produced.

I have stated that if this be a tenancy in common it must be on the marriage of Ann; and then they must have been subject to all the calls and consequences to which tenants in common are legally liable; they must have been capable of being separately sued in all real actions, and in actions of ejectment, a modern proceeding, which has come in the place of real actions. Now, in every real action, though we do not know from the writ, it must appear in the declaration what is the specific interest in question, how the title is derived, and what the precise interest is; but here there is no such thing. At the time of Ann's marriage it could not be collected from the will what the specific interest was.

If they were in the situation of tenants in common, see how they could answer. A creditor, who has a demand against one of them, institutes his suit, and proceeds to get the lands by *elegit*. He has judgment for a moiety of the share, and the sheriff is directed to deliver a moiety. But the share must appear in order to enable the sheriff to deliver the moiety; and no case has ever occurred, where the difficulty has been cast on the sheriff to ascertain the share. And there is no instance of a [201] tenancy in common, where the extent of the interest could not be ascertained from the instrument creating it.

This difficulty too presents itself. Tenants in common have each a right to a writ of partition. The writ does not state the share, but in the declaration the precise interest is stated. I have looked at a great number of such declarations, and I have found none which does not state the title; and which does not state in precise terms what the specific interest is, and does not state the interest as so specifically appearing on the face of the instrument creating the tenancy in common.

With these conveniences then, and upon these principles, we are of opinion, that this will does not sufficiently point out what each is to take; and that the specific interest, or share of each, does not appear from the will or instrument which aims at creating the tenancy in common.

We have bestowed some industry upon this case, and we have found some authorities, but not many. Thomas and Kenn, or Morgan's case, is referred to in a note in Dyer (8vo ed.), 281, A. and the argument is given in Hetley, 67, 97, and more at length in Littleton's Reports, 217. The roll has been searched, and it appears that on a special verdict the judgment was for the Defendant. It was argued for the Defendant in this way: "If they are tenants in common they might have partition, which they cannot have here. "for it is impossible to declare the fifth part in certain, and the jury cannot make it "certain; for one jury may value at one rate, and another at another." I do not mention that as [202] authority, but refer to the report merely for the facts of the case. It was a deed to lead the uses of a fine, the comusees to be seized of so much land as should be worth £30 per annum. It was insisted, on the one side, that this was sufficient to create a tenancy in common, and for the Defendant it was contended that it could not be a tenancy in common, because no certain specific share appeared. Neither in Hetley

nor in Littleton is the judgment mentioned; but on searching the roll, it appears to have been for the Defendant on a special verdict. There were other points in the case, and it does not appear what the particular ground of the judgment was; but how it was understood appears from the history of another case which I shall mention.

Without considering the principal case of *Bullock v. Burdett* (Dyer, 281, a.), I refer to the marginal notes, which are always to be regarded with deference, coming from an authority so considerable as Ch. J. Treby, where the cases of *Gibbon and Warner*, and *Thomas and Kenn*, or *Morgan*, are stated and compared.—“Sir Thomas Fulmerston devised a manor to his executors, in trust that they should be seized of 100 marks, “part of that manor to the use of one, and of another part, to the value of 20 marks, to “the use of another; and of another part, to the value of £20, to the use of another:— “and that a division should be made by the executors, and that the whole manor should “be valued at £100, and no more. Adjudged, that this was sufficiently certain, and “that the *cestui-que-uses* shall be tenants in common immediately without division. “But this case was put by Richardson in the [203] argument in *Thomas and Morgan*, “and agreed to be law; that it is to be taken, that the value of the manor was expressed “in the will, and that, he said, was the ground of the judgment. *Thomas and Morgan* “was the case of a fine levied to uses, the conusees to be seized of so much land as “should be worth £30 per annum to be assigned, and set out in several by J. S. “Adjudged, as no assignment was made that this was void for the uncertainty; “and that the conusees should not enter, nor be tenants in common with others, to “whom the residue was limited.”

What is the fair result then from these two cases? that if a man seized of lands devises part of the lands to the value of £30 in money, and the whole is valued at £60, no doubt the devisee takes a moiety as tenant in common, as the proportion is clear; that is the case of *Gibbon v. Warner*. But suppose it had been a part to the value of £30, without mentioning the value of the whole land, it would be impossible to say what precise interest or share he takes till the value is ascertained.

The principle of our decision then is, that the interest or share must appear on the instrument itself. In the case of *Gibbon and Warner* it did so appear, and that was held good. In the other case it did not so appear, and that was adjudged to be void for the uncertainty.

Apply that principle to the present case. What is here given over is the difference between the fortune of the husband and that of the testator. We cannot find from the instrument what that interest or [204] share is, and so we are of opinion, that the devise is void for uncertainty.

Lord Eldon (C.). In the very particular circumstances of this case, I should propose to allow a few days for consideration before the final decision. It is a very important case in principle, and very important to the parties in point of value, and it has been argued below principally upon grounds other than those upon which the opinion of the Judges has now been delivered. That point, indeed, hardly occurred to them at all below, but was suggested here. The House has heard the argument at the bar, and I have to say, that I have received a great deal of information from the bar and from the Judges. But I cannot state that I am so fully satisfied in my own mind upon the whole of the case as to advise your Lordships to proceed immediately to final judgment.

(June 19, 1816) Lord Redesdale. (After mentioning the parties and stating proceedings), the question is, whether the devise over in the will of John Henry can take effect in favour of the ultimate devisee or heir at law.

The testator gave the estates in this way: after bequeathing some legacies, he gave and devised the estates in question to his elder illegitimate daughter, Ann Henry, for life, and after her death to her first and other sons in tail male; and in failure of such issue male, to his second illegitimate daughter, Frances Henry, for life, and after her death to her first and other sons in tail male; and on failure of [205] such issue male, to the first and every daughter of Ann, and then to the first and every daughter of Frances.—And then came the clause on which the question turns:—“I give and devise, “etc. all my estates above-mentioned to my eldest daughter, Ann Henry, aforesaid, on “this proviso and express condition only, viz. that she marry a man who is really and “*bonâ fide* possessed of a property, at least equal, if not greater, than the one I leave her: “and if she marries a man with less property than that, I in that case leave her only as

"much of mine as shall be equal to the property of the man she marries; and all the remainder of my property shall immediately pass over, and be given up to my second daughter, Frances Henry, etc." And then he gave an annuity of £300 a-year, charged on the estates, to Frances and her issue, etc. — (States the remainder of the will *prout ante*.)

The facts were, that Ann survived the testator, and that Frances died in his life time without issue; and he died seized of the estates in question, leaving his daughter, Ann Henry, his heir at law; Joseph Henry, and the ultimate devisee, Hugh Henry, him surviving. Joseph Henry died, leaving John Joseph Henry his heir at law; and Hugh died, leaving Joseph Henry his heir at law.

Ann married Hancock, whose fortune was inferior in amount to that which was left her by the testator, and the excess or surplus was claimed by the respective heirs of Joseph Henry, the heir at law, and of Hugh Henry, the ultimate devisee. John Joseph Henry insisted that the disposition to [206] Hugh did not carry the fee, or that if it did, it was only in case both the daughters died without issue.

The facts were found by special verdicts in these two ejectments, and it was stated in the verdicts that at the time of the marriage of Ann Henry with Hancock he was possessed of a personal property of the value of £6400 in the whole, and of no other property; that the estates devised were at the time of the yearly value of £1638 19s. 4d. and that the fee simple was of the gross value of £38,856. The verdict also found that an estate in one-sixth part of the fee simple of the whole lands was equal in value to the whole of Hancock's property at the time of the marriage; and that an estate for life of Ann Henry in one-half of the said lands was equal in value, at the time of the said marriage, to the whole of Hancock's property, intimating, that if the fee simple was to be the subject of calculation, then one-sixth of the whole was to be retained by Ann and her husband; and if the estate for life was to be the subject of calculation, then one-half was to be retained. The verdict further found, that at the time of the marriage, John Joseph Henry, the heir at law of the testator, entered upon and became seized of the lands, and demised them to Long, and that Long entered and took possession of the lands until ejected by Hancock and Ann his wife, and the other parties mentioned; and then they submitted the questions arising in the cause to the Court.

The case was argued in the Court of King's Bench, and judgment was given for Long, the lessee of the heir at law, for the excess above the [207] fortune of Hancock at the time of the marriage; and the Court was of opinion, that judgment ought to be entered for the Defendants, as to one undivided sixth part of the lands, and the Plaintiff for the other five-sixths. Upon error brought in the Exchequer Chamber, the judgment of the Court of K. B. was reversed, and thereupon the Plaintiff brought his writ of error in this House.

The question in both the ejectments is the same in derogation of the title of Ann. The disposition made by this will gives the legal estate in the whole lands to Ann for life, and the first question arose upon the operation of the clause, giving over the excess beyond her husband's property from Ann in case she married a man of inferior fortune.

After argument, two questions were put to the Judges; and the answer given by the Judges was, that Ann was entitled to all the lands for her life at least, and that neither John Joseph nor John Henry are entitled to any estate or interest in the same; and that it was not necessary to give any opinion on the second question. The effect of this is, that as Ann is entitled for life to all the lands, neither of the ejectments can be supported, and that the judgment of the Exchequer Chamber ought to be affirmed. The ground of this opinion was, that, by the disposition over, in case Ann married a man of inferior fortune, which, as was contended, created a tenancy in common, Ann, and the person to take along with her, must from the nature of a tenancy in common each have in certainty their respective portions, and that the portions were not distinguished with sufficient certainty in the will; and [208] that the will did not offer a ground on which to determine with sufficient certainty what should go over. And the law not admitting that uncertainty in the disposition of property, the will must be considered as, so far, void for uncertainty. That is sufficient to determine the ejectments.

It seems, however, that this point hardly came under the view of the Courts below, and they decided upon the construction of the whole will. And the Court of

Exchequer Chamber was of opinion that John Henry could not support his claim, as the event of the daughter's dying without issue had not happened, and John Joseph could not support his claim, as, if Ann's issue failed, the next estate must take effect, and the next estate was an implied estate tail in Ann.

It is not necessary for us to go farther than the Judges have done, that is, farther than to say, that the devise over did not affect the devise to Ann for her life, without saying any thing as to what may be the effect of the will after her death. No ejectment then can be sustained during her life, whatever may be the effect after her death; and Ann being entitled to hold the whole estate during her life, the ejectments cannot be sustained, and therefore the judgment must be affirmed in both cases.

Lord Eldon (C.). It had occurred to me at first that the facts as found upon the special verdict were not sufficient to enable the Court to give judgment on the ejectments; but on further consideration I thought they were sufficient. I was anxious to take full time to consider the case, as the point upon [209] which the Judges have given their opinion hardly occurred to them at all in the Courts below. I think, however, that the opinion of the Judges is well considered, and well founded, and that the judgment ought to be affirmed. And I should be disposed, independent of the opinion of the Judges as to this point, to consider, upon the whole of the case, the judgment of the Court of Exchequer Chamber as the better judgment. And I say further, suppose it were not the better judgment on the principles stated in the Court below, that yet under the very particular words of this will it would be very difficult to support either of the ejectments.

Judgment of the Court of Exchequer Chamber in both cases affirmed.

Agent for Plaintiff in error, PINKETT.

Agent for Defendant in error, LANE.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

STACPOOLE (WILLIAM),—*Appellant*; STACPOOLE (GEORGE), and Others—*Respondents*: and STACPOOLE (GEORGE),—*Appellant*; STACPOOLE (WILLIAM), and Others,—*Respondents* [March 4, 6, 8; June 26, 1816].

[Mews' Dig. vi. 1373, 1635. As to payment of interest see *Heathcote v. Hulme*, 1819; 1 Jac. & W. 122; *Holgate v. Haworth*, 17 Beav. 259; *In re Stevens*, [1898] 1 Ch. 162; also *Mucklow v. A.-G.*, 1816, 4 Dow, 1.]

[Administration taken out in 1771. Distribution to a certain extent made, but a large sum retained on unfounded pre-[210]-tences. No effectual suit against the administrator till 1792, and that protracted, in a great measure, by the administrator's fault, in the Court below till 1810; held by the House of Lords, reversing in that respect decrees of the Irish Chancery, that, notwithstanding the lapse of twenty years before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed, about £16,000 or £17,000, during the whole period of retention; and that the account should be taken with annual rests, and that interest be charged on the annual balances; and also that the administrator should pay to the Plaintiff his costs of suit incurred subsequent to the original decree, etc. etc.]

This case arose upon the distribution of the personal estate of John Stacpoole, of Craighbrien, who, being seised and possessed of very considerable real and personal estates, died in 1771 intestate, a widower, and without issue. John, the intestate, had a brother and three sisters, who died in John's life time leaving a child or children, in all ten in number. Francis the brother left two children, George and Frances. Upon

the death of John, therefore, George Stacpoole became entitled to the real estate as heir at law, and the personal property became divisible among the ten next of kin: and George the heir at law having the largest fortune, it appeared to most of the next of kin that the administration should be confided to him, and he took out administration accordingly.

When John died, an inventory was taken of his personal property; part of which, it is material to observe, consisted of a large arrear of rents, and of a bond and mortgage dated July 1763, for a prin-[211]cipal sum of £2000, with the interest thereon, due to John from a relation of the name of Philip Stacpoole. The expenses of John's funeral amounted to £1200; and George was encouraged in going to this expense by two of the next of kin, for the purpose of deriving a profit from it to themselves as tradesmen.

In 1772 George Stacpoole left Ireland, and from that time resided in England, leaving the care of collecting the assets and of the administration to one Croasdale Malouy, an attorney. No distribution having been immediately made, the next of kin became clamorous; and one of them of the name of Arthur filed a bill in 1772 for an account and distribution; to which George, in M. term 1772, and February 1773, put in answers setting out an account of the personal property: but that suit was not further prosecuted, and is only mentioned as it was a point disputed whether George had then rendered a full and fair account, that account differing from what the Master afterwards in another suit found to be the true account of the intestate's personal property, though nothing seems to have turned upon that ground in the ultimate judgment. In 1772 and from that to 1776, several sums and securities for money, were divided among the next of kin, but in very unequal proportions, amounting to about £11,000 in the whole, though considerably short of the real amount of the personal estate. No steps, however, were taken in a Court of Justice to enforce distribution for twenty years from the time of the commencement of the suit in 1772.

At length the Appellant in the original appeal, [212] William Stacpoole, as administrator and only child of Barbara Stacpoole, one of the next of kin of John Stacpoole, the intestate, in 1792 filed a bill in the Court of Chancery against George Stacpoole, for an account and distribution, making the other next of kin parties Defendants, and stating the matters aforesaid, and that George had possessed himself of personal assets of the intestate to the amount of £36,000. George in March 1793, put in an answer which was found insufficient; and then, after standing out process to a sequestration, he, in May 1794, put in a further answer, and insisted on the length of time as fully as if he had pleaded it in bar. The bill was then amended, and to this amended bill George put in his answer in May 1795 insisting upon various claims against the assets; and stating that he was advised that the arrears of rent due at the death of John Stacpoole were not assets, but incident to the reversion, and that they belonged to him, George Stacpoole, as heir at law; and that the household furniture, implements of husbandry, cattle, and other articles, were heir-looms, and belonged to him as heir to the mansion.

The cause came on to be heard in 1800, before Lord Clare, who decreed an account to be taken by the Master of the personal estate of the intestate, debts, legacies, and funeral expenses; the reference being merely to ascertain the amount of the personal estate. It was stated in the printed papers that the Master afterwards applied to Lord Redesdale, when his Lordship was Lord Chancellor of Ireland, for directions whether he might, though [213] not directed so to do by the decree, charge George Stacpoole with interest on the balance due from him, and make distribution among the next of kin; and that his Lordship directed him to do it. This however was denied by Lord Redesdale.

The Master in 1805 made his report, stating that the amount of the intestate's personal estate at the time of his death was £31,473, which with interest at five per cent. amounted to £89,582 and a fraction; that George Stacpoole had paid debts, funeral expenses, etc. amounting to £4906 and a fraction, and had besides distributed to the next of kin sums which with interest amounted to £27,277 and a fraction, making together a sum of £32,184 and a fraction, for which he gave George Stacpoole credit; and this being deducted from the above £89,582, left a balance, including interest, of £57,398 and a fraction to be accounted for; and then the Master found the several distributive shares out of this last sum, giving George credit for £16,935 and a fraction, as the shares of himself and his deceased sister.

To this report George Stacpoole took fourteen exceptions:—1st, For that the Master

had without authority from the decree made distribution:—2d, That the Master had without authority charged the administrator with interest:—3d, That he had refused G. Stacpoole credit for several considerable sums, alleged to have come to the hands of John Stacpoole, out of the personal estate of Francis Stacpoole, George's father. The 4th related to the same matter:—5th, That the Master had refused G. Stacpoole credit for £500 poundage al-[214]-lowed to Croasdaile Malony for agency in the administration:—6th, That he had refused G. S. credit for a sum of £235 paid by G. S. for rent, repairs, servants' wages, etc. on account of an estate called Violet Hill, which John Stacpoole the intestate had in his lifetime given up to G. Stacpoole. (In order to explain this exception it is necessary to state that John Stacpoole, for fifteen or sixteen years before his death considering George Stacpoole as his heir, had made him large and liberal allowances corresponding to his fortune, and among other things had given him this estate of Violet Hill; and George insisted that the charges connected with that estate incurred in John's lifetime, ought to be paid out of the intestate's assets; but the Master was of opinion that John meant that George should pay these charges.) 7th, Not material:—8th, That the Master had only allowed £200 for the funeral expenses though the expence was £1237:—9th and 10th, Not material:—11th, That the Master had debited G. Stacpoole with a sum of £5900 principal and interest, due on a bond and mortgage of Philip Stacpoole, dated July 1763, and the exception also applied to a sum of £265 charged against G. Stacpoole in respect of a principal sum of £100 arrear of rent of the lands of Dunbegg, which more properly related to the subject of the 14th exception. (As to the £2000 bond, it appeared that Philip Stacpoole was a nephew of the intestate John Stacpoole, and his tenant of the lands of Cahirafinick, under a lease for his own life at £90 rent, of which a considerable arrear had accrued due. Philip [215] Stacpoole was also indebted to John in this sum of £2000 and interest, and applied to John Stacpoole to release from the debt and arrear, upon his surrendering his lease. John, it appeared, did not consent; but Philip executed an assignment of his interest in the lands to a William Considine, as trustee for John Stacpoole, in consideration of surrendering the lease, in the hope that at a more favourable opportunity John would be induced to consent; but there was no evidence that John accepted of it.) 12th, That the Master had charged G. S. with a sum of £1500 due on bond from one Hogan to John Stacpoole the intestate, though it was alleged to be part of a sum borrowed by John Stacpoole from Francis the father of George:—13th, That the Master had charged George with a sum of £68 due to the intestate, on a note of Patrick Lysaght, though it was part of another sum of £88 afterwards secured by bond, also charged against George, so that, as George contended, he was charged double:—14th, That the Master had charged George with £870 as arrears of rent of the lands of Dunbegg, and with £822 as a deficiency in credit given by George for other arrears of rent, and for sums due on securities, though, as was alleged, these arrears had been released by John Stacpoole in his lifetime, and were not due at his death, and had not been received, and though the securities had been unproductive without any wilful default or neglect of the administrator.

The cause came on for hearing on the report, exceptions, and merits, in 1807, before Lord Chan-[216]-cellor Ponsonby; the parties having agreed in open Court that the cause should be heard as if the Master had been directed by the original decree to take the account both ways, with and without interest charged, and the Lord Chancellor being of opinion that interest ought to be charged, and that the sum of £5900 was properly charged against G. Stacpoole, which were the two chief points of the original appeal, decreed that the 2d and 11th exceptions should be overruled, and also the 1st, 3d, 4th, 6th, 12th, and 13th, and as to the other exceptions some inquiries were directed which it is not material to state.

The cause again came on for hearing in May 1808, when it was ordered that the Master should inquire whether George Stacpoole had rendered a true account of the assets in 1772 (with reference probably to the question whether interest ought or ought not to be charged). And it was also ordered, as to the third exception, that George Stacpoole should be allowed a sum of £2600 with interest from the intestate's death, said to have been paid by him in 1775 to his sister Frances, as part of his father's personal property received by the intestate; and it was also ordered as to the eleventh exception that George should be allowed the claim of £5900. The Master altered his report accordingly, and reported that G. Stacpoole had not rendered a full account of

the personal estate in 1772, as the amount, as then stated in his answer, was £27,137, and according to the altered report the gross amount was £29,078. To this report George took ten exceptions.

[217] In July 1810, the cause came on for hearing on the reports, exceptions, and merits; when the Court decreed that these ten last exceptions should be overruled, and the Master's report confirmed without prejudice to the question of interest; that the second exception to the report of 1805 should be allowed, as under the circumstances of the case George ought not to be charged with interest, and the Master was directed to rectify his report accordingly, and it was ordered that plaintiff and defendants should abide their own costs until further order. The Master having made his report finding that a principal sum of £17,910 still remained to be distributed, the charge of interest being disallowed, the report was confirmed by order of Dec. 6, 1810, by consent of the parties, without prejudice to the right of appealing. On December 17, 1810, the cause was finally heard, when it was decreed that the costs of the parties, except those of George Stacpoole the administrator should be paid out of the fund, and the several shares should be distributed to the next of kin or their representatives.

From these decrees the plaintiff, William Stacpoole appealed, in as far as they decided that interest was not to be charged on the balance found due and distributable: 2d, In as far as they decided that George Stacpoole ought not to be charged with the £5900: 3d, In as far as they directed that the costs should be paid out of the fund, because, under the circumstances, George, the administrator, ought to pay the costs. George lodged his cross appeal against the decrees in so far as they over-ruled his exceptions and demands against the intestate's es-[218]-tate; and also as to the matter of costs, insisting that his costs also ought to be paid out of the fund. To these appeals the other next of kin or representatives were not made parties.

The cause came on for hearing in the House of Lords in March, 1815, when it appeared to their Lordships that the other next of kin or their representatives ought to be before the House, and the cause stood over until they were brought forward. On petition therefore of the Appellant in the original appeal amended by making the other next of kin, or their representatives, parties, an order was made on the 25th of April, 1815, whereby they were ordered to put in their answers in writing on or before the 30th of May following, and they put in their answers accordingly. On the first of the said month of May, 1815, an order was made on petition of the Appellant in the cross appeal, also amended so as to make these next of kin, or their representatives parties, that they should put in their answers in writing on or before the 5th of June then next; but this order was not served till the end of July 1815, so that the hearing was prevented for that session. They were thus made Respondents in both appeals, and, in the printed case prepared for them, claimed the benefit of the appeal by William Stacpoole, the Appellant in the original appeal; and further insisted that the demand of George Stacpoole against the intestate's assets, for the sum of £2600 alleged by him to have been paid to his sister Frances in 1775, on account of her alleged proportion of their father Francis's assets ought not to be allowed, as there was no evidence [219] of any such payment except the assertion of George Stacpoole, in one of his answers filed in May 1795, against which there were circumstances of strong presumption; Francis having died in 1741, and George having come of age in 1756, and administered to his father without ever having made any demand of this kind against the intestate, who expended very large sums for him and his sister previous to his death in 1771, being thirty years after the death of Francis. And they also urged the circumstance that John Stacpoole was not the guardian of the fortune of George and his sister, but only of their persons, and that George Stacpoole had got possession of all the intestate's letters, vouchers, and receipts, and had mutilated his books of account of his money transactions, producing only some leaves torn out of them which had a very suspicious appearance.

No notice however was taken in the ultimate judgment of the objection as to the allowance to G. Stacpoole of this sum of £2600.

1st, With respect to the question as to the £5900, and whether John the intestate had released the bond and mortgage for £2000 to Philip Stacpoole, it was contended for George Stacpoole the administrator, that there had been such a contract as Philip could have enforced against John, had John been alive.

(Lord Eldon (C.). If John himself was not bound to release, then, nothing done after his death by George Stacpoole could bind the rest of the personal representa-

tives. If John was bound, then it signifies nothing what was done after his death, [220] because his agreement would have altered the nature of the property, though no subsequent act had been done.)

It was argued that the inference from the circumstances was, that the surrender had been made to Considine with the consent of John, especially as no inquiry had been made about the rent for twenty years. The inadequacy of price was to be noticed only as a presumption of fraud, but where it appeared that one partly intended a bounty, the presumption of fraud was rebutted, and he was bound. On the other hand it was contended that the inference was the other way, as the mortgage was in John's possession at the time of his death, and there was no evidence of any agreement by John to release.

2d, As to the question of interest, it was contended for George Stacpoole that, as there had been great delay in calling for the account, and as the balance was that of a contested account where there were good grounds to contest it, the administrator ought not to be charged with interest in the present case. Lord Hardwicke had said (Qr. Wilkins v. Hunt, 2 Atk. 151) that it was not of course to charge an administrator with interest, and as George Stacpoole had been allowed to go on for so long a time dealing with this money, and considering, and spending it as his own, without any suit effectually prosecuted against him, it was unreasonable now to charge him with interest. On the ground of acquiescence for a great length of time, Courts of Justice had dispensed with the ordinary rules of evidence, and admitted items in account on [221] the oath of the party without vouchers, as in Morgan v. Lewes. On the other side it was contended, that it was strange reasoning to say that because one spent his neighbour's property in ignorance, he was therefore not to be held bound to restore it. Whether it was ignorance or fraud, he was bound to restore it. Under one of the decrees, George was bound to show that he had given an accurate statement of the account in 1772, and it appeared that he had not given an accurate statement. If he had fallen into a fair mistake, and given a fair representation, then it would have been a case for 5 per cent. interest. But it was not fair, and therefore, the full legal rate of Irish interest, 6 per cent. ought to be charged. And as to the delay, the bill was filed in 1792, and from that time at any rate there was an end of the argument as to spending the money in ignorance.

3d, It was made a question in the course of the hearing whether, as the other next of kin had not appealed from the decree below, they would be entitled to the benefit of the appeal by William Stacpoole, they not having disclaimed, though they now came forward and prayed the benefit of the appeal. And a case was put by the Lord Chancellor; suppose, after the decree had made them all actors, the £2000 bond in question had been disallowed in the report, and William Stacpoole had excepted, and the exception had been allowed; would the other next of kin be entitled to the benefit of the exception? Nothing however was said upon this point in the ultimate judgment.

4th, It appeared that John Stacpoole had made [222] an agreement voluntary on the face of it, but which was, notwithstanding, alleged to be for valuable consideration, to invest a sum of £1000, part of a sum of £3000 due to John on mortgage, in the purchase of land, to be settled on his brother Francis for life, and his first and other sons in tail male. This not having been done, George claimed the £1000 and interest against the assets. But John had purchased the mortgaged premises and suffered them to descend to George, and it was contended that, supposing the agreement to be for valuable consideration, this was sufficient performance on the authority of Sowden v. Sowden, 1 Bro. Ch. Cas. 582, and that class of cases.

5th, With reference to a practice of the Irish Chancery, Lord Redesdale observed; "the sequestration was the first effectual process in Ireland until I reformed the practice, and a very abominable practice it was. The delay was the same; all previous processes were issued and the time run out, and then on *non est inventus* to the attachment, they moved for the sequestration."

6th, Objections were made at the bar to the reading of evidence not printed, and to the printing of observations without signature of counsel. (Lord Eldon (C.). The rule of the House as to the printing of evidence is made for the purpose of guarding itself; but it is competent to the House to hear other evidence not printed, if it thinks proper. The parties are to print what they think material, but in such a case as this, it is rather too much to suppose that any one can infallibly say what is and is not material. As

to the other point in a case under [223] the names of Eamer v. Fisher, or some such names, the noble Lord then on the woolsack called the agent to the bar, and censured him for printing observations without signature of counsel.)

[Particulars as to this case—*Fisher v. Eamer*—will be found in Macqueen's *Practice of the House of Lords*, pp. 187–8. See St. O. II., V. as to signature of counsel. As to printed evidence, see *Dillon v. Parker*, 1833, 1 Cl. & F. 304; *Beaufort (Duke of) v. Neeld*, 1845, 12 Cl. & F. 267; *Lopdell v. Creagh*, 1827, 1 Bli. N. S. 259.]

Mr. Leach and Mr. Horner for Appellant in original, and Respondent in cross appeal.

Sir S. Romilly, Mr. Hart, and Mr. Wetherall for Respondent in original, and Appellant in cross appeal.

Mr. Blake for the other next of kin.

Lord Redesdale, June 26, 1816 (after stating the case).—On these two appeals the questions in their order are these: 1st, as to the £5900, that the principal sum was due on mortgage to the intestate from Philip Stacpoole is unquestionable. But George insisted that John Stacpoole had agreed that this sum of £2500 should be liquidated by a transaction with Philip. There was a good deal of evidence on this point, but nothing to show that John Stacpoole had in his life-time given up this mortgage to Philip, and if he had not relinquished it effectually, it was then still a debt to be demanded by George Stacpoole as administrator. George, however, had thought proper to release this debt, taking to himself the benefit of the consideration which was not adequate, so that it would have been in some measure voluntary on the part of John. But it does not appear that he ever did abandon the mortgage: and as there is no evidence that he accepted the surrender of the lease as the consideration, it must be held to be a debt due to John Stacpoole at the [224] time of his death, which George Stacpoole had no right to release. As to that sum therefore, the Master's report appears to have been right, and the Lord Chancellor's decree wrong.

The original appeal then complains that interest was not allowed on the balances. Now I must confess, I cannot conceive, on what ground the Court refused to allow interest. John Stacpoole died in 1771, and near forty years after, in 1810, a great part of his property remains undistributed in the hands of George Stacpoole the administrator. Some payments were made long ago to the several next of kin, but in very unequal proportions: and, from that inequality, those who received the larger payments would have an undue advantage over the rest, unless those who received the smaller payments were allowed interest. But there are other grounds upon which the claim for interest may be sustained; for all the embarrassments and delays in the distribution of this property have been occasioned by George Stacpoole himself. The different items and particulars in the account of John Stacpoole's property were not complicated, and it was the duty of the administrator to distribute as soon as he could. As to the £5900, composed of a principal sum of £2500, and interest thereon, surely, interest ought to be allowed on that as it was a sum which, if allowed to remain as it was, would have produced interest.

Another demand made by the administrator was of this nature. Francis Stacpoole, the brother of John, and father of George Stacpoole, the admi-[225]-nistrator, died in 1741, leaving a widow and two children: namely, George Stacpoole and Frances his sister. George insisted that, some how or other, John had possessed himself of the personal estate of Francis, and evidence was gone into on that head, and the result was this—that it was true that John had interfered to secure the property for the children of Francis, and that he had in his hands a sum of £2600 belonging to the sister Frances. As to the other demands upon this ground, it appeared that George had been living with his uncle, John Stacpoole, the intestate, for fifteen or sixteen years, and had received from his uncle the estate of Violet Hill, where he resided; and yet, during all that time, George never made any such demands against his uncle, the intestate, in his life-time: so that it is clearly to be presumed, as the Court below did, that all demands of that sort had been satisfied: but as to the £2600 belonging to the sister, and which George alleged he paid to her, that was allowed by the Court, and no exception was taken to that allowance. Sums of between £5000 and £6000 were thus cut off from these demands on this ground. These, however, were

the grounds on which George Stacpoole insisted upon being allowed these payments, and kept £10,000 in his hands to answer such demands; and it seems clear that he ought to pay interest on the sum which, on the result of the accounts, appeared to remain due to the next of kin.

As to the matter of costs, the decree appears not to be perfectly correct, as all the embarrassment and expense, and the delay, by avoiding, as long [226] as possible, the taking and settling the accounts, were owing to George Stacpoole. On every proceeding, before answer, before examination put in, before evidence produced, he stood out to the issuing of sequestrations, in order to keep in his own hands property which, as administrator, he was bound to account for and distribute fully and fairly, and as soon as possible. All the next of kin had an equal right to the administration; but had trusted it to him on account of his ample fortune. I think, therefore, that, from the time of the original decree, the costs of the Plaintiff in the cause ought to be borne by George Stacpoole, as they were all occasioned by him, except merely the costs of taking the account, which were comparatively small: and it would have been much better for them to have paid this expense, if they could have got the matter settled at once, as then they would have had the property much sooner.

The cross appeal applies first to the disallowance of the demands of George Stacpoole against the assets of the intestate, in respect of his father's property, except as to the sum of £2600; and so far I have already stated the Court below was right in overruling the exception. So with respect to the matter of the fifth exception, which relates to the claim of poundage; that seems an extraordinary charge, and one of which it is difficult to comprehend the ground. I cannot judge on what ground such a charge was made by Malony, and I do not see how the decree can in this respect be altered, as the Court below had more assistance and better means of judging of the propriety of such a charge than we have, and [227] they have decided that it ought not to be allowed; and whether it was really paid to Malony or not is doubtful.

The sixth exception relates to the disallowance of the demand in respect of the rents, servants' wages, and repairs connected with the estate of Violet Hill; and certainly this is a very extraordinary charge. John had permitted George Stacpoole to have the full enjoyment of that estate, leaving it to George to pay the rents due out of it, and connected with his own enjoyment; and John could have had no conception that he was to be charged with any of these expenses.

The eighth exception related to the funeral expenses, which amounted to an enormous sum for such an occasion, and two of the next of kin appear to have had some concern in these expenses, for the purpose of gaining some benefit by it as tradesmen. But George Stacpoole was bound to control this; and the other next of kin could not be charged for the acts of these two; and the two could have had no notion that they were to pay their proportion of the expense, otherwise they could have had no profit as tradesmen. The Master and the Court thought that £200 was a sufficient sum for the funeral, and it would be too much to overturn the decision as to that point.

Then comes the eleventh exception, as to the £5900, which I have already mentioned; and the arrears of rent of the lands of Dunbegg, which will come more properly when we consider the fourteenth exception. The twelfth exception related to a sum of £1500, with which G. Stacpoole [228] was debited by the Master, as received upon a bond executed by Edmond Hogan to John Stacpoole, which George Stacpoole held out to be part of a sum of £3000, borrowed by John Stacpoole from Francis Stacpoole, George's father; but on the evidence it appeared that the two demands were altogether distinct, and the Court did right in disallowing the claim and charging the administrator.

As to the thirteenth exception as to Lysaght's note and bond, the matters appeared to be distinct, and the Court did right in overruling that exception. The fourteenth exception applies to the arrears of rent of Dunbegg. As to this matter, of arrears of rent of Dunbegg, there does seem reason for George Stacpoole's having some relief, as it appears from the evidence that part of the sums charged on this account could not have been received; and therefore it seems proper to send that back to the Master for review. As to the £100 mentioned in the eleventh exception, and charged as having been received as part of the arrears of rent of Dunbegg, it should seem that the Master was wrong in taking that as so much received by G. Stacpoole for arrears; for it seems rather to have been the consideration for some future interest in the lands.

Then nothing can be done for George Stacpoole, except in this respect ; that is, to remit the subject of the arrears of rent for review : 1st, as to the arrears generally, and 2d, as to this particular arrear. The charge of £265 upon the footing of this £100 seems to be a mistake ; and as to the £870 10s. 8d., the Master will have to consider, [229] whether the whole ought to be charged, or whether only part ought to be charged ; the rest having failed, without any wilful neglect or default of the administrator.

As to the order to be made, the subject is somewhat intricate ; but this is the general way it should be disposed of, viz. : that on the original appeal George ought to be charged with the £5900 principal and interest of the sum which he released to Philip Stacpoole. And as to interest upon the balances, there is no ground to refuse that ; and the costs, subsequent to the original hearing, ought to be borne by George Stacpoole, as it was chiefly by his unwarrantable demands after the decree, and the delays and embarrassments which were thereby occasioned, that these costs were incurred. And as to the costs of the Appellant, William Stacpoole, in the original appeal, care must be taken, that no more be given to him than he ought to receive out of the shares ; as if he receives so much of his costs from George Stacpoole, that is to be deducted from what he would otherwise be entitled to receive out of the shares. And as to the cross appeal, George Stacpoole ought to have some relief in the matter which I have mentioned.

By order reciting the hearing of counsel for the parties, including the several next of kin, etc. the decrees complained of in the original appeal were accordingly reversed as to the charge of £5900 and the decretal order of 18th February, 1807, over-ruling the exception as to that sum was affirmed, subject to directions as to the arrears of rent. The decrees complained of in the original appeal were [230] also reversed as to the question of interest, and it was ordered that the full legal rate of interest on the sum remaining undistributed should be charged against the administrator, making annual rests in the accounts, and charging interest on the annual balances. The decrees were also reversed in so far as they directed the costs of the plaintiff to be paid out of the fund, and it was ordered that the administrator should pay all the Plaintiff's costs, subsequent to the original decree in 1800. And it was ordered that G. S. should be charged with the arrears of rent, and it was referred back to the Master to review his report as to the several sums stated as arrears of rent, and as to whether and how far they were due at death of John Stacpoole, and were received, or without wilful neglect, etc., might have been received by G. Stacpoole, etc. ; and the decrees, so far as not reversed or varied, to be affirmed.

Agent for Appellant, WILLIAM STACPOOLE KEANE.

Agent for Respondents, G. STACPOOLE, WILLIAMS, and BROOKS.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

MOORE,—*Appellant* ; BLAKE, and Another,—*Respondents* [1815 ;
March 20, 1816].

[Mews' Dig. viii. 775 ; xiii. 1762, 1838 ; xiv. 1740.]

[A. conveys (or assigns his interest in) lands to B. in consideration, among other things, that B. shall make or give a lease back again to A. of a half or portion of the lands, [231] and in consideration also of a loan of £200 by B. to A.—B. covenants to execute the lease accordingly, subject to the repayment of the £200 for which B. has a judgment. No lease actually made, but A. remains in possession of his portion upon his equitable title.—B. lends further sums of money to A. and obtains judgments for these sums, and then conveys the lands, and assigns the judgments to C.—C. issues writs of *fi. fa.* on the judgments, and in 1781, procures a sale by the Sheriff of A.'s equitable interest ; and on ejectment brought on the demises of the purchaser, and of C., A. is turned out of possession.]

- [A. in 1782 files his bill in chancery for relief, and execution of a lease to him according to the agreement, but from embarrassment in his circumstances, does not further prosecute the suit till 1801. No steps taken between 1782 and 1801 to dismiss the bill. In 1808 the bill dismissed below.]
- [The decree of dismissal reversed by the house of Lords, for 1st, The right to a suit in equity is not a proper subject of sale by the sheriff under a *fi. fa.* and the sale is a nullity.—2d, The delay in prosecuting the suit is well accounted for, and no steps were taken to dismiss the bill; and, at any rate, the right to the lease does not rest merely on the covenant by the landlord to make it, but is part of the consideration of that conveyance or assignment by which the landlord himself acquired his title.—Therefore the principle of delay does not apply, and A. is still entitled to have his lease executed in terms of the contract; and has his relief in equity, without the necessity of resorting for redress to the Court, out of which the *fi. fa.* issued.]

Richard Moore, the Appellant's father, filed his bill in chancery, on the 26th April, 1782, against Richard Blake, George Blake, Thomas Martin, Valentine Blake, and George Geale, Defendants, therein named, stating the following facts: That Thomas Duel, late of Ballymagibbon, in the county of Mayo, was, in his life time, possessed of the town and lands of Killesarogh, or Ballymagibbon, and Kilfrehane, or Douogh, containing about 300 [232] acres of profitable land, under a lease from the see of Tuam, for a term of 21 years, at a small yearly rent, and fine for renewal. In 1761, Duel, on the inter-marriage of his eldest daughter, Mary Duel, with Richard Moore, (the Appellant's father) by marriage articles, duly registered, assigned his interest in the lands to Richard Moore, in consideration of the marriage, and a sum of £300 paid by R. Moore, to Duel's other daughters, etc.; and Moore on his part covenanted to settle on Duel's wife, and on his own intended wife, £30 each, by way of jointures, chargeable on the lands.

Duel having died in 1769, Moore took possession of the lands, and afterwards contracted debts, and became extremely embarrassed in his circumstances. In consequence of these embarrassments, with which, as was alleged in the bill, John D'Arcy, of Houndwood, in the county of Mayo, was well acquainted, Moore agreed to sell all interest in the lands or farm (which produced a profit of £800 a year) to D'Arcy, in consideration of D'Arcy's paying off Moore's debts, which amounted to about £800, and of his, D'Arcy's, making or giving back a lease to Moore of one half of the lands at half the yearly rent and renewal fines, payable to the see of Tuam for the whole, and for the same term under which the whole was held. D'Arcy having afterwards refused to pay more than £575 of the debts, Moore found himself under the necessity of acceding to the terms; and accordingly assigned his interest in the land, upon the above mentioned conditions, to D'Arcy, who however advanced £200 to Moore, by way of loan, to secure the repayment of which, [233] Moore gave his bond and warrant of attorney, upon which judgment was entered up.

Immediately after the execution of the last mentioned deed, another deed or instrument in writing was executed by D'Arcy to Moore, bearing date the 6th day of November, 1769; whereby, after reciting the assignment, and that D'Arcy had paid £200 over and above the said £575, for which sum of £200 Moore passed a bond and warrant of attorney, he, D'Arcy, covenanted with Moore: "That in consideration of such assignment to the said D'Arcy, he the said John D'Arcy would, at the request of the said Richard Moore, his heirs and assigns, perfect and execute a lease to the said Richard Moore, subject to the usual clauses between landlord and tenant, of all that part of the said lands then in the occupation of the widow Duel, John Browne, and Richard Moore, on the same footing and tenure that the said John D'Arcy held or should thereafter hold the same under the see of Tuam, and renew the same from time to time, subject nevertheless to the yearly rent of £5 5s., and also to half the fines, fees, and expenses of renewal of the whole concern with the see of Tuam, and also subject to the payment of the said last mentioned sum of £200 and interest thereof to the said Richard Moore, indemnifying and saving harmless him the said John D'Arcy, his heirs and assigns, from all debts, jointures, and incumbrances, affecting or thereafter to affect the said concerns, or any part thereof."

It is observable that, in the deed of assignment, the lands of which Moore was to have a lease were [234] stated as a moiety, while in the deed of covenant they are mentioned as the part in the occupation of the widow Duel, and others, which seems to have been the portion called Killesarogh or Ballymagibbon. Of that portion Moore continued in possession, and D'Arcy took possession of the other moiety as it was called in the bill, or that portion denominated Kilfrehane, or Douogh.

D'Arcy afterwards advanced two other sums of £40 and £20 to Moore, who gave bonds for them, upon which judgments were entered up, but never executed the lease; and, in 1777, he assigned his interest in the whole lands, and the three bonds and judgments to Richard Blake, who had an estate adjoining to Moore's farm. Richard Blake revived the judgments in his own name, and, without notice to Moore, as the bill alleged, caused three writs of *fi. fa.* to issue on the three judgments, directed to the sheriff of Mayo; and procured the same to be delivered to one James Geale, who acted as sub-sheriff to Valentine Blake, the high sheriff, over whom (Geale) Richard Blake, as the bill alleged, had great influence. The bill further stated that Richard Blake having called together two or three of his friends, they repaired to the sessions house, at Ballincobe, in the said county of Mayo; and set up for sale by public cant, without having posted any previous notice thereof, Moore's interest in the moiety, or rather, Ballymagibbon portion, of the lands, though Moore had never obtained any lease from D'Arcy, and consequently had not the legal title; and that George Blake, the brother of R. Blake, having bid £330, being about £15 more than [235] the amount of the executions and costs, and by several hundred pounds less than the real value, was declared the purchaser, and the interest was assigned to him by the sheriff. The bill further stated that an ejectment was brought on the separate demises of R. and G. Blake, and that they threatened to turn Moore out of possession, under colour of the sheriff's sale. And the bill charged that Blake knew before the sale that Moore had only an equitable title, and prayed that the sale and writs might be set aside, and that Blake, being liable to the same equity as D'Arcy, might be compelled to execute a lease to Moore, pursuant to the agreement: that the defendants might be restrained from turning Moore out of possession, and that a reasonable time might be allowed to Moore to pay the demands against him.

The defendants by their answers admitted the material facts in the bill, and stated that they believed the reason for D'Arcy's refusing to execute a lease to Moore was, that Moore had not performed his part of the agreement, by payment of the £200 and his half of the rent and fines; and they denied that George was merely a trustee for Richard Blake; and insisted that, as Moore had no other property for payment of his debts, the sale was valid: and that George Blake, the purchaser, and not Moore, was entitled to the lease under the agreement.

Moore, it appeared, was unable, owing to the embarrassment in his circumstances, to prosecute the suit for several years, and was turned out of possession. At length in January, 1801, he filed his [236] amended bill against R. and G. Blake, and Stephen Blake, and Margaret, his wife, who was personal representative of John D'Arcy. Richard Blake having died, Moore, in December 1801, filed another amended bill, and bill of revivor against his representatives, praying in substance as before; and answers having been put in, and witnesses having been examined on both sides, the cause came on for hearing before Lord Chancellor Ponsonby, who on the 14th March, 1807, decreed: That the said article of the 6th day of November, 1769, should be carried into execution so far as related to a moiety of the said lands, and that the Master might inquire and report who had been in possession of the said moiety of the said lands from April 1782; and that if the Master should find that he the said Richard Blake, or those deriving under him, were in possession thereof from that period, that the Master should take an account of the rents, issues, and profits from that day to the time of making the said decree, and also the sum due for principal, interest, and costs, on foot of the said three judgments in the pleadings mentioned, and also an account of the yearly rent of £5 5s., and the expenses and fines of renewal, and to set off the rents and profits received out of the said moiety of the said lands against the same, first to be applied in discharging the interests of the said judgments; and next to sink the principal of the said sum; and, on payment of what might appear due, if any thing, to Defendants, that they should execute a lease of a moiety of the said lands on the terms mentioned in the said article of 6th Novem-[237]-ber, 1769; and as to so much of the bill as

sought to be decreed to the other moiety of the said lands, that same should stand dismissed.

The defendants afterwards obtained an order for rehearing; and, Richard Moore having died, the Appellant, his son and representative, revived the cause; and, the same having been reheard before Lord Chancellor Manners, his Lordship, by decree of the 10th December, 1808, dismissed the bill. It was stated in the Appellant's case that the ground of dismissal was, that the plaintiff was not entitled to relief, in consequence of the delay in prosecuting the suit. From this decree of dismissal Moore appealed.

The cause was heard in the House of Lords in 1815. The note of the argument has been mislaid, but the cases of *Giffard v. Hort*, 1 Scho. and Lef. 386, 405. Dom. Proc. 1st May, 1812.—*Daniels v. Davison*, 16 Ves. 249.—*Scott v. Scholey*, 8 East. 467.—*Smith v. Clay*, 3 Bro. Ch. Ca. 639, 6 Bro. P. Ca. 395. Amb. 645.—*Hercy v. Dinwoody*, 4 Bro. Ch. Ca. 257, 2 Ves. 87, were cited.

The reasons for the appeal given in the Appellant's case were these:—1st. Because the said Richard Moore's equitable interest, under the article of the 6th of November, 1769, could not pass to a purchaser under a sheriff's sale, had by virtue of any writ of *fiery facias*; and the sale relied upon by the Defendants in bar of the relief sought by the original and amended bills was altogether a nullity. And it was incontrovertibly proved that the said defendants, Richard Blake and George Blake, had notice of the said article of 6th November, 1769, previous to either of them having become purchasers; and the Respondents were, after they had obtained possession, placed in contemplation of a Court of Equity, in the situation and character of mortgagees in possession, or stood in the situation of trustees of the said moiety of the said lands, by virtue of the said articles of agreement and declaration of trust of the 6th of November, 1769, and the notice thereof to the said Richard and George Blake.

2d. Because it was also clearly proved that it was the poverty and imprisonment of the said Richard Moore which prevented him from prosecuting the said cause with diligence, (which inability was caused by the oppressive conduct of the said Defendants, and the fraudulent sale, and the dispossessing of the said Richard Moore as aforesaid, and the adverse and fraudulent answers filed by the said defendants, Richard Blake and George Blake, to the said Richard Moore's original bill,) and as the said original bill never was dismissed, nor the said cause abated, until after the said Richard Blake's appearance to the said amended bill in the year 1801, as herein before-mentioned, same must be deemed a *lis pendens*; and as it was not laches in the said Richard Moore to have rested on his equitable title, previous to the filing of the original bill, the possession having gone up to that time with the equitable agreement contained in the said article, according to the authority of Lord Redesdale, in *Ormsby v. Crofton*, 2 Schole and Lefroy's Reports, so the pendency of such original bill, according to the same authority, as reported in 1 Schole and Lefroy, 386, had the effect of preserving to the Appellant a right to the same relief, which the said [239] Richard Moore was entitled to at the time of filing the original bill as aforesaid, and therefore the Appellant should not have been barred from the relief to which the said Richard Moore was entitled at the time of filing the original bill by reason of the delay suffered in prosecuting the suit.

It appeared that the decree below had not been made up, and the judgment was delayed till the defect should be rectified.

Lord Eldon (C.) (March 20, 1816). In the Appellant's case, and at the bar here, it was represented that the latter decree in this case proceeded on the ground of the delay in prosecuting the suit. And the question now is, whether this or the former decree is the right one; and whether, if the last decree should not be sustained, the relief under Lord Chancellor Ponsonby's decree was exactly that which ought to be given. It is unnecessary to state the circumstances of this case prior to 1769, when Richard Moore, the Appellant's father, became possessed of this property. It appeared that he was in very embarrassed circumstances; and for the reasons, and upon the conditions stated in the case, conveyed his interest in these lands to one John D'Arcy, who thereupon entered into possession of a portion of the lands, known by the name of Kilfrehane, or Dough. Soon after this the instrument of agreement, of which I have now seen the original, was executed between the parties; and that instrument, which is dated 6th Nov. 1769, after reciting this last deed, and that John D'Arcy had paid the £200 over

and above the £575, for which sum of £200 Moore had [240] given his bond and warrant of attorney, (upon which judgment was afterwards entered up,) states, that D'Arcy covenanted with Moore that, in consideration of the assignment, he would at the request of Moore, his heirs and assigns, perfect and execute a lease to Moore, etc. subject to the usual clauses between landlord and tenant, of all that part of the lands in the occupation of, etc. on the same footing and tenure that the said D'Arcy held, or should thereafter hold the same under the See of Tuam, and renew the same from time to time; "subject nevertheless to the yearly rent of £5 5s., and also subject to half the fines, fees, and expenses of renewal of the whole concern with the see of Tuam, "and also"—it was for this passage that I was anxious to see the original—"and also "subject to the payment of the said last mentioned sum of £200 with interest thereof, "to the said Richard Moore, indemnifying and saving harmless him, the said John "D'Arcy, his heirs and assigns, from all debts, jointures, incumbrances, etc."

I take the liberty of addressing your Lordships first on this case, which involves considerations better known to those acquainted with the administration of justice in Ireland, in order to have those doubts which, when viewing this as an Irish case, exist in my mind as to points, which I take to be clear law, both at law and in equity in England. But if the nature of this transaction is to be understood, as I conceive it would be understood here, it made Richard Moore a co-lessee with D'Arcy to the amount of a moiety of the lands—in equity I mean—and also placed him under the obligation to pay [241] half the rent and fees of renewal for the whole of the lands: but that, whilst it constituted this relation of co-lessees, it also created another relation, that of mortgagor and mortgagee between Moore and D'Arcy, and D'Arcy was under an obligation to make this lease of a part of the lands to Moore, standing at the same time in another relation with respect to Moore as his mortgagee, to the extent of the £200, which was a charge on the lease which he so agreed to make.

Then the cases represent that D'Arcy having taken possession of half the lands, and Moore remaining in possession of the other half or portion, Moore became further indebted to D'Arcy in two sums of £40 and £20, for which he gave his bond and warrant of attorney, to enter up judgment, which was accordingly entered up. D'Arcy, without having made the lease to Moore, assigned his interest in the lands to Richard Blake, together with the bonds and judgments for the £200, £40, and £20; and then Blake, in 1781, caused three writs of *fi. fa.* to be issued upon the judgments; and under these, as I understand it, Moore's interest was put up to sale, and purchased by George Blake, the brother of Richard Blake, and a conveyance was accordingly executed upon which Blake caused an ejectment to be brought, which, if not upon that, he might have caused to be brought on the legal estate which was in himself.

Then a bill was filed to set aside the sale, to compel the execution of the lease to Moore, etc. This bill, as I understand it, was filed in 1782; and, if Lord Manners's opinion, that no relief could be [242] given, rested on the ground of delay, that is a ground which does not import an opinion that, if the suit had been prosecuted with due diligence, relief ought not to be given. I mention that, because it was stated—a statement so new to me that I did not know how to deal with it—that it was the usage in Ireland for sheriffs, under writs of *fi. fa.* to sell such interests as this, and then it was further argued that, even if the Sheriff had no right to sell it, redress ought to be sought by application to the court of law from which the *fi. fa.* issued, and not by application to a Court of Equity. It seems to me, that neither of the Judges below adopted that idea, and when we come to consider what this is, we see the more reason to question it. If A. B. makes a lease to C. D. and A. B. afterwards becomes a creditor of C. D. and obtains judgment and sells the interest, he who buys is actually in. But if the matter rests merely in agreement, consider what an advantage the landlord has in this way by being a creditor; for when he becomes the purchaser of the interest he gets the estate itself, whereas another would only get a right to a suit in equity. And this too is not a case where a landlord merely lets a lease, but where he contracts also in such a way as to make himself a mortgagee or incumbrancer on the lease which he was to grant. And the interest is such that, if the landlord were not a creditor, the equity of redemption could not be foreclosed without a suit in equity; and that interest is not the subject of a sale at law, and the transaction of the sale is therefore a nullity from the beginning to the end.

Then we are to consider whether there is any [243] thing to bar the relief upon the

authority of those cases—not of the cases which justify a dismissal on the ground of not commencing a suit in due time—but of those cases which justify a dismissal on the ground that, though begun in due time, it has not been prosecuted with due diligence; and I do not think the present case falls within that principle. The equity of redemption was never foreclosed, and they might at any period have moved to dismiss the bill. I cannot therefore understand the ground upon which the not prosecuting the suit with due diligence has been in this case considered as a bar to the relief. There never was any motion to dismiss the bill for want of prosecution; and the case does not appear to fall within the principle upon which length of time is a bar.

But if relief ought to be given, I doubt whether Lord Chancellor Ponsonby's decree has not gone too far; for, though the length of time during which the suit has been depending is no bar to the relief, permanent improvements may have been made, and other alterations may have taken place, which ought to be provided for in the decree. In these respects there are difficulties to a certain extent; but if, after hearing the noble Lord (Redesdale), it should appear that he concurs in my view of the case, the minor matters may be postponed till another day. If I had stood alone, it would have been my duty to give the best opinion on the case that I could; but I am glad that we have the assistance of the noble Lord, who is so much better acquainted with these Irish proceedings, and I hope he will favour us with his opinion; intimating, [244] however, that it appears to me that the latter decree cannot stand at all, and that the former cannot stand in its full extent.

Lord Redesdale. I was not present when this case was argued; but it appears that the question relates to a property held by Moore, under lease renewable for ever, from the See of Tuam, subject to the provisions made upon Moore's marriage. The lands, and this ought to be attended to, consisted of two portions, each having a distinct denomination; the one Kilfrehane, or Douogh; the other, Killesarogh, or Ballymagibbon. Lord Chancellor Ponsonby's decree was inaccurate in one point, as it proceeds on the idea that a precise moiety of the whole was what was claimed; whereas the part or portion called Killesarogh, or Ballymagibbon, was that to which the bill applied. Moore was in embarrassed circumstances, and entered into an agreement with D'Arcy, to dispose to the latter of his interest in the whole lands; but with a condition, that D'Arcy would execute to him a lease of that part called Ballymagibbon, he (Moore) paying half the rent and fines of renewal. I suppose this was generally understood to be a moiety of the whole; but it is stated that Kilfrehane was more valuable. A conveyance was accordingly executed, by which Moore, in consideration of D'Arcy's taking upon him to discharge £575 of Moore's debts, and advancing him £200 more on his bond, and of his executing a lease as aforesaid, transferred his interest in the whole to D'Arcy; and an instrument of agreement, dated 6th November 1769, was at the same time executed, by which D'Arcy agreed to execute a lease of that part called Ballymagibbon, to Moore, subject to the payment of half the rent and fines, and to the payment of the £200, etc. The effect of this transaction then appears to be this, that the contract on the part of D'Arcy to execute this lease, was part of the consideration for which Moore disposed of his interest in the whole. He parted with the whole, subject to this contract, and to the advancing of £200; and the lease to be executed was again made subject to the payment of this £200. Then Moore was to indemnify D'Arcy against the annuities, and other incumbrances on the whole.

Under these circumstances, it seems to me that this was not simply a contract for a lease, but that the execution of the lease was part of the consideration of the sale of the whole interest; and that D'Arcy could not refuse performance, and yet retain the property. The ground of delay then does not apply to this, as it was not a mere contract of lease between landlord and tenant, but a part of the transaction, which gave D'Arcy the character of landlord. Moore possessed without a lease, and D'Arcy had this security for his £200, in consequence of the contract not being carried into execution. D'Arcy, in 1777, assigned the whole interest in the lands, and the bonds, and judgments, to Blake; and in 1781, four years after, writs of *ji. fa.* were issued on the judgments, and a sale of Moore's interest took place. Now Moore was in possession thirteen years under this contract; both rested upon it, and Moore being in possession, Blake must necessarily have notice that he had [246] some title, and it is reasonable to suppose that he inquired what that title was. If Blake had been desirous to foreclose for non-payment of the £200, and had, as he might have done under the Irish statute,

tacked the judgments to the mortgage, he might have filed a bill for that purpose, and then Moore would have had a limited time appointed, within which he must pay, or, if not, he would be foreclosed. But, instead of that, Blake takes a different course, which cannot be sustained, that is, he resorts to a sale of right to a suit in equity; and it would be of dangerous consequence if such a transaction could be sustained, for it would then be impossible for mortgagors, who had judgments against them, to sell the equity of redemption of the mortgaged property.

Then the only question is as to the delay. The bill was filed the moment Blake executed this contrivance, and therefore there was no undue delay in filing the bill, as it was filed before Moore was turned out of possession under the ejectment, and before Blake got possession. There was delay in prosecuting the suit, but then Blake might have moved to dismiss the bill for want of prosecution. He suffered the matter to rest however until Moore proceeded with it and obtained a decree, from which it appears that the Lord Chancellor acted upon somewhat of a mistaken notion of the nature of the case. He decrees a lease of a moiety to be executed; but it was not a moiety, but a distinct portion. When the cause came on for a rehearing Lord Manners dismissed the bill, and it was stated that the ground of that decision was the delay in [247] prosecuting the suit. If there was no other ground, that ground did not apply. Whether that was the ground or not I do not know, but I have heard of no other, except the alleged practice in Ireland of selling interests of this nature under writs of *fi. fa.*, and even that is stated to have been the practice only in 1781, for I do not understand it to be said that it is the practice now.

The judgment must be somewhat special, as allowance must be made to Blake for improvements, and the first decree has not provided for the application of the rents to the reduction of the fines and rent to the Archbishop, after which they must be applied to the reduction of the principal and interest of the mortgage money. This requires further consideration, but the contract must be held to be still binding.

On the 26th of March, 1816, the formal judgment was delivered in by Lord Redesdale, reversing the decree of 1808, and affirming that of 1801 with alterations and additions as above; Lord Redesdale stating (Lord Eldon (C.) concurring) that the costs were calculated on the principle that the landlord might refuse to execute the lease till paid his debt, interest, and costs.

Agent for Appellant, WATKINS.
Agent for Respondents, WINDUS.

[248] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

MARNELL, and Another,—*Appellants*; BLAKE, and Another,—*Respondents*
[May, 1815; April 1, 8, 1816].

[Mews' Dig. v. 422; vi. 719, 773, 801; x. 1435, 1591; xv. 665. Commented on in *Muskerry v. Chinnery*, 1835, Ll. & Geo. 185, 227; *Minchin v. Minchin*, 1870-71, 5 I. R. Eq. 178, 189, on app. 258, 268; *Pennefather v. Pennefather*, 7 ib. 300, 318; *L'Estrange v. L'Estrange*, 1890, 25 L. R. Ir. 399, 407.]

[In this case a tenant for life, having a power to raise a sum of money, granted an annuity charged on the settled estates till a certain sum should be paid off, without, in the annuity deed, referring to the power. Held that this, under the particular circumstances of the case, was a good, though an informal, execution of the power.]

[The peculiar circumstances were chiefly, that the settlement gave no directions as to the mode of execution; and that it contained a prohibition against sale or mortgage, which, though it was understood as only a prohibition against sale or mortgage so as to defeat the provisions of the settlement, might have had the effect of inducing the tenant for life to have recourse to the mode of annuity.]

[Lord Eldon (C.) (Lord Redesdale concurring) expressly guarding the judgment against being understood as a decision that in all cases, where tenant for life had such a power, a grant of an annuity without reference to the power, would be a good execution.]

By indenture bearing date the 18th of September 1779, and made between Edmond Marnall, then of Cregan, in the county of Galway, Esquire, and Elinor Marnell his wife, and James Marnell his eldest son and heir, (all since deceased,) of the first part, James Henry Burke, Edmond O'Flynn, Thomas Kelly, and Ulick Burke, Esquires, of the second part; and Honora Morgan, (since de-[249]-ceased,) then the widow and executrix of Jeffery Morgan, deceased, of the third part; after reciting (amongst other things) that a marriage was intended to be had between the said James Marnell, and Honora Morgan, and that the said Edmond Marnell then stood seized in fee simple, of the following lands, tenements, and hereditaments, that is to say, Moher, Grallaghduff and Kiltogher, containing 163 acres, Stafford survey, more or less, (which denominations with their appurtenances were reputed, known, and taken as part and parcel of the demesne lands of Cregan Corlack, otherwise Knock-vigue, containing fifty-three acres, like survey, more or less,) Kilroan Temple, otherwise Ballyglass, containing seventy-three acres, like survey, Gilkagh, containing sixty-four acres of land, Irish plantation measure, more or less, the lands of Carrawin and Carraclogher, otherwise Kilcooley, containing 144 acres, Stafford survey; the said Edmond Marnell, for the consideration therein-mentioned, covenanted and agreed with the said James Henry Burke, and Edmond O'Flynn, that they should stand seized of an estate of inheritance, in fee simple, in possession of and in all the said recited lands and hereditaments, under and subject to the provisos and agreements therein declared, of and concerning the same, (that is to say,) to the use of the said James Marnell, during the term of his natural life, without impeachment of waste, and from and after his decease, to the use, intent and purpose, that the said Honora his intended wife, should yearly during the term of her natural life, out of the said lands and tenements, have and receive one clear third part of [250] said lands, or any other estate or lands that her said intended husband should either purchase or acquire in any manner whatsoever, or whereof he should die seized; and from and after the decease of the said James Marnell, then as to all the said lands and hereditaments, to the use of the first, and every other son of the said James Marnell, on the body of the said Honora Morgan to be begotten, in tail male, charged and chargeable with, the judgment debts which then affected said lands, and for default of such issue, then to the Appellant Richard Marnell, the elder second son of the said Edmond Marnell, for and during the term of his natural life, and to the heirs male of his body lawfully to be begotten, with several remainders over; and it was further agreed by, and between all the parties to said indenture, that a sum of £1300 sterling, intended as a provision for the younger children of the said Edmond Marnell, was to be an absolute debt and incumbrance, affecting the said estate and lands until paid off and discharged, and to be at the absolute disposal of the said Edmond Marnell, and payable in manner as therein-after expressed. And the said Edmond Marnell by said indenture covenanted and agreed with said James Marnell, and the said trustees, that he would apply the said Honora's marriage portion of £1600 sterling therein mentioned, (which he was to receive,) in the discharge and payment of the judgment debts affecting said lands, and in discharging and paying off the said sum of £1300 sterling, intended for the said younger children of said Edmond Marnell; and an annuity of 100 guineas, was thereby made [251] payable to the said Edmond Marnell, during the term of his natural life; and the said James Marnell by said indenture, agreed to pay an annuity of £50 a year during her natural life, to Elinor Marnell, the wife of said Edmond Marnell, in case she should survive the said Edmond; and after reciting that it might be convenient and necessary for the said James Marnell to have the power of raising a sum of money, it was expressed to be the true intent and meaning of all the said parties, notwithstanding any thing therein contained to the contrary, that it should be lawful for the said James Marnell, at any time thereafter that he should think proper, to raise or borrow any sum or sums of money, not exceeding £1500 sterling, and that without the consent, approbation, or control of the said trustees, or the survivor or survivors of them, or their, or either of their executors or administrators; and it was by the said indenture agreed that no part of the sum of £1300, intended for the younger children of the said Edmond

Marnell, should bear interest; and certain portions were thereby provided for the younger children of the said James Marnell; and it was by said indenture further covenanted, that said James Marnell, or the Appellant Richard Marnell, should not mortgage or sell any part of the estate or lands during their lives, any thing therein contained to the contrary notwithstanding.

This was the statement given in the printed cases of the indenture of settlement, but it appeared that in the original, Edmond Marnell was made to agree with the trustees that they and their executors [252] should stand seized of an estate of inheritance, in fee simple, for and during a term of ninety-nine years, and afterwards that the trustees and their heirs should stand seized to the uses of the settlement. It is observable also that, while the instrument gives the power to raise the £1500, it contains a prohibition to sell or mortgage.

The deed was registered on the 3d February, 1780. The marriage took place, and pursuant to a covenant in the settlement, a fine of the lands was levied as of Hilary Term 1780, by Edmond Marnell the father, and Elinor his wife to James Marnell and his heirs. And by indenture of release 25th March, 1780, reciting the settlement and fine, Edmond conveyed the lands to James Marnell and his heirs.

It appeared that Edmond Marnell, the father, was indebted to William Ousley as executor of Sarah Ousley, by bond executed by E. Marnell to Sarah Ousley dated 21st June, 1762, for the principal sum of £200, payable with interest in May following. James Marnell the son, was also indebted to Ousley in his own right in a sum of £60, to secure the payment of which Edmond and James Marnell gave their joint and several bond and warrant of attorney dated 20th March, 1776, upon which separate judgments were entered up. James Marnell was further indebted to Ousley in a sum of £177 5s., for which he gave his bond, etc. dated 10th February, 1787, and also in a sum of £162 14s., for which he gave his bond dated 19th September, 1792. On all these bonds judgments were entered up. The several sums stated made up the principal sum of £599 19s.

[253] Ousley being desirous of calling in the amount of his securities, an indenture, called a deed of rent charge, dated 6th June, 1794, was made between James Marnell and Ousley, by which, after reciting that Marnell was indebted to Ousley by bonds and judgments, in several sums of money amounting in the whole to £744 2s., it was witnessed that Marnell, in consideration of that sum, gave and granted to Ousley, an annuity or yearly rent charge of £150, payable out of, and chargeable upon the lands of Ballyglass and Gilkagh, being part only of the lands mentioned in the settlement, to have and receive the said annuity, etc. until the said sum of £744 2s. and the interest and costs then due, or thereafter to grow due, should be fully paid off and discharged, and no longer, with power of distress and entry in case the annuity should be in arrear. And it was also agreed that, in case of default of payment at the stated periods, or that the said Ousley, his executors, administrators or assigns, should meet with any legal interruption in the payment thereof, then Ousley, his executors, etc. should be at liberty to resort to the said judgments and proceed thereon, etc. in as full and ample a manner as if the indenture had never been made.

When the first gale, as it was called, of the annuity became due, Ousley was prevented from obtaining judgment by the interference of other creditors, and, resorting to his judgments, he in 1797, procured a grant in custodiam, as it is called, of part of the estates. But before any rents were paid him, James Marnell, in 1798, died without issue (Edmond Marnell had died in 1795), and his brother, [254] Richard Marnell, became entitled to the lands under the provisions of the settlement, and Ousley lost the benefit of his custodiam grant.

In March, 1797, Ousley had assigned the annuity and bonds and judgments to Henry Blake, who had married his daughter, to secure £400 as a portion for the daughter.

In M. Term, 1801, Blake and Ousley filed their bill in behalf of themselves and the other creditors of James Marnell, against Richard Marnell and his son, and the Rt. Hon. Thomas Kelly the only surviving trustee under the settlement of 1779, stating the facts abovementioned, and praying an account on foot of the bonds and judgments; and that what should be found due might be decreed a charge on the lands comprised in the settlement; and that James Marnell might be declared to have, by the annuity deed of 1794, well executed the power to charge the lands; or that the defective

execution might be aided by the Court, and that Richard Marnell might be decreed to pay what should appear due by a short day, or that a competent part of the lands might be sold for that purpose, etc.; and that such other creditors of James Marnell as should come in and contribute to the expense of the suit might be paid their debts, etc.

Richard Marnell in 1809, put in his answer, and insisted that the grant of the annuity was never meant as an execution of the power, but a mode of paying the debt by instalments out of James Marnell's life-interest; and he submitted that there was no fair consideration for the annuity deed, and that by the statement in the bill itself, only £599 19s. [255] appeared to have been due to Ousley. The son, an infant, submitted his interest to the Court, and Kelly put in no answer.

After examination of witnesses relative to the intent to execute the power, and some other proceedings not material to be stated, the cause came on for hearing; when the Court, without taking any notice of that part of the bill which related to the other creditors of J. Marnell, on the 25th November, 1811, decreed an account on the foot of the £744 2s., the consideration money in the annuity deed; and that whatever should appear due was well charged on the lands by the said deed, and that Richard Marnell should pay the sum due in three months, or that the same should be raised by sale or mortgage of a competent part of the lands; and that each party should abide his own costs.

From this decree, Blake, and Mary Ann Ousley, the widow and representative of William Ousley, who had died in the course of the proceedings, appealed.

It was observed in argument for the Appellants that it was difficult to conceive how the money was to be raised under the power, except by sale or mortgage, and yet both were forbidden. The deed which was said to be an execution of the power contained no reference to it, and the decree made the sum a charge on all the estates in the settlement, though the deed itself had only charged part of those estates. The question was, whether this annuity deed was a good execution of the power. If there was an execution of the power in favour of a volunteer, the Court would give the creditors the [256] benefit of it; but where, as in this case, there was no attempt to execute the power at all, the Court would not execute, even in favour of creditors: *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206. Ever since Sir Edward Clere's case, 6 Rep. 17, 6, where one having a power, makes a deed which cannot operate except by the power, then he shall be presumed to have intended to execute the power, though it is not referred to. But it is otherwise where he has an interest on which the deed may operate, *Cox v. Chamberlain*, 4 Ves. Junr. 631. A total omission to execute a power could not be supplied in equity, though an informality in the execution would be aided, where there was a meritorious consideration. But the question here was whether he meant to execute the power at all. The intention must be clear, and if the person charging the land has, besides the power, an interest in respect of which he could charge the land, independent of the power, then, unless he mentions the power, the act shall be applied to the interest, and not to the power. And here the probability is that he meant only to charge his life interest without reference to the inheritance. He did not pretend to bind any but himself. In the reasons in the printed case, it was further objected that though the suit was in behalf of the other creditors of James Marnell, as well as the Respondents, the decree proceeded entirely on the ground of the annuity deed of 1794—that the deed did not charge all, but only part of the lands comprised in the settlement; and that at any rate it was not intended to be an execution of the power, but the object of it was to give Ousley a right to [257] receive his debt by instalments out of part of the lands during the life of James Marnell, and thereby to suspend proceedings on the judgments against J. Marnell, until default in payment of the rent charge—that if the parol evidence were admitted, it would show that the deed had been obtained by undue means, and that the Court ought not, on the mere recital of the deed, to have assumed that £744 were due, but ought to have directed an inquiry.

The reasons in support of the decree in the case of the Respondents were these:

1st, The said indenture of the 6th day of June, 1794, ought to be deemed a part execution of the power of charging £1500 given to the said James by the marriage articles of the 18th of September, 1779. By these articles James Marnell had an estate for life, and had also a power to charge the lands of which he was tenant for life, with

any sum not exceeding £1500; it is a principle that where a man hath both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power, though the power be not referred to by the instrument creating such estate. By the deed of 1794, James Marnell granted the rent charge of £150 per annum, till the debt thereby secured should be paid; therefore, as the deed of rent charge, if it were supplied out of his interest, would expire with his life, it ought, on the aforesaid established principle, to operate as an execution of his power.

2d, Because the evidence of the witnesses examined on the part of the Appellants, so far as it [258] went to prove that the said James Marnell did not intend, by the deed of the 6th June, 1794, to execute his charging power, was inadmissible (parol evidence being inadmissible to control the legal operation of the instrument, or to explain the intention of the person executing it); and the Respondents submit, that the decree from which the Appellants have appealed would have been more consonant to justice and equity, if it had given costs to the Respondents, as well as satisfaction of the debts so justly due to them.

Sir S. Romilly and Mr. Hart for Appellants; Mr. Leach and Mr. Dowdeswell for Respondents.

Lord Eldon (C.) (April 1, 1816). I propose at present merely to state what this case is; and here I must observe that in this, as in other Irish cases, one cannot trust a single word they put in print. The indenture of settlement, as stated in the cases, is this—(states the settlement of 18th September, 1779, from the cases as above). In looking at the original deed, however I find it to be—I do not very well know what—not a legal conveyance, but something like an equitable contract. The covenant is that the trustees and their executors shall stand seized of an estate of inheritance in fee simple, for and during a term of 99 years, and afterwards there is a proviso that the trustees and their heirs shall stand seized to the uses. And as to this £1500, one cannot very well see how James Marnell was to raise it. If we were to indulge in conjecture, one would think that it must be by sale or mortgage. But then a proviso was [259] inserted that James and Richard Marnell should not sell or mortgage during their lives. So that they had a power to raise £1500 by mortgage or sale, but could not sell or mortgage till they were dead. It is impossible that such an instrument as this can have any effect as a legal conveyance. Equity would perhaps, for the benefit of children, and so forth, make something out of it, so as to enable him to charge the estate by sale or mortgage.

Now the principle is that, if the tenant for life so charges the estate, he keeps down the interest, and those entitled to the inheritance are to pay the principal; and it is clear that where one charges under an authority, if the charge cannot be made good out of his interest, it is good by the authority. But then it must appear on the face of the instrument that he meant to execute the power. Now this is a deed of rent charge—so christened on the back of it—by which Marnell gave and granted to William Ousley, an annuity or rent-charge of £150 sterling, charged upon all that and those the town and lands of Ballyglass and Gilkagh—not affecting to charge the whole, observe—situate, lying, and being, in the half barony of Ballymoe, and county of Galway, etc. etc. And then there is an agreement, Ousley being a judgment creditor before the execution of this instrument, that in case the annuity should be in arrear, Ousley, etc. should be at liberty to resort to the judgments, and proceed thereon, in as full and ample a manner as if this indenture had not been entered into.

Now, suppose we can get over the difficulties which may arise from this curious instrument of [260] settlement, the first question will be whether Marnell, having a power to charge the estates with a sum of £1500 which would make him liable to pay the interest, the person entitled to the inheritance having to pay the principal—whether, if this £1500 was not charged upon all the estates by way of mortgage or sale, but an annuity was granted of £150, charged on part only of the estates, until a sum of £744 should be paid off—that could be taken as a good execution of the power, and whether, it having happened that the person who granted the annuity died when only one gale, as they called it, had been paid, the person who had dealt with him for this annuity can now turn round and say, “this is a charge on the whole estate, and the £744 ought “to be raised out of it;” and whether, Marnell having a power to raise a sum of £1500 by mortgage or sale, out of the whole estates—that is, having power to do one thing, and

having in fact done another, it is to be held that he meant to do that which he had a power to do.

It further appears that he resorts under the last clause in the indenture of 1794, to the judgments and custodiam, as they call it ; and then the next question is, supposing this were a good execution of the power, whether, as he has taken advantage of the alternative in the deed, he is not to be considered as having waived this particular remedy by execution of the power.

Another point is that, while we are obliged to examine every instrument in these Irish cases, whether printed or not, we are not always accurately informed from the cases of what passed below. This was a [261] bill filed to declare this a good execution of the power, and the cause came before two Lord Chancellors, one of whom is here. The defendant demurred to the bill, and one of the cases informs us that Lord Redesdale being of opinion that the deed of rent charge was a good execution of the power, overruled the demurrer. Lord Redesdale is now present, and perhaps it may appear that he gave no opinion at all on the point. Under these circumstances, however, Lord Manners thought this was a good execution of the power. Whether he saw the original settlement or not, I do not know. But your Lordships will have now to consider, 1st, What is the effect of this first instrument ; 2d, What is the effect of the next instrument, under the proceedings had upon it by custodiam and otherwise. 3d, Whether, if this was a power to raise by sale or mortgage, and the proceeding upon the judgments was no waiver, whether considering the nature of the annuity transaction, this is, or is not, a good execution of the power ; and, if we can find our way through these difficulties to the last question, I do say it is as difficult a question as almost any I ever met with.

Lord Redesdale (April 8, 1816). The object of the bill in this case was to have it declared that a sum of £744 was well charged on the lands by virtue of a power given to James Marnell by his marriage settlement. The decree is confined to the claim of Blake and Ousley, and does not extend to the whole creditors of J. Marnell, according to the prayer of the bill—and it is appealed from only by Richard Marnell, and his [262] son, and therefore we have only to consider that part of the case.

This instrument of marriage settlement is so extraordinary, so informal, so inconsistent, such a jumble of contract and conveyance, that it is impossible it can operate as legal conveyance, and can be considered only as an equitable contract of settlement of this description.—Edmond Marnell covenants to convey the lands to trustees to the use of James Marnell for life ; with remainder to his first and other sons in tail male, reserving certain annuities on the estates ; and in default of such issue, remainder to the Appellant Richard Marnell and his issue, in strict settlement. There was a power to James Marnell to raise a sum of £1500 out of the estates, and the settlement was in consideration of a sum of money, the property of the intended wife ; which has been received by Richard ; and one object of the settlement was the application of this money in paying off incumbrances.

The important question is, whether the sum of £744, which was the consideration in the deed of 1794, was effectually charged by James Marnell on the estates ; the manner being his granting an annuity, not out of the whole, but out of a part of these estates to Ousley, until he should be paid that sum. There was in that deed a provision that, if Ousley should not be able to get payment out of the rents in this manner, he should be at liberty to have recourse to his judgments, one of which was a judgment of Edmond Marnell. The others were the judgments of James Marnell, which would attach on his interest. In this settlement there was a pro-[263]-vision in its form absolute, by which James takes the absolute property in fee. But as the settlement was registered, James, though he had the legal estate, would be bound to make a conveyance according to the settlement. The decision of the Court of Chancery was, that it should be referred to Steward King, Esq. the Master in the cause, to inquire and report, whether any and what sums remained due to the Respondents for principal and interest and costs on foot of the sum of £744 2s., being the consideration money mentioned in the deed of the 6th day of June, 1794, in the pleadings mentioned. And it was further ordered, adjudged, and decreed, that whatever sum might remain due on foot of the said £744 2s. should be, and the same was thereby declared to be well charged on the lands and premises in the pleadings mentioned by virtue of the said deed of the 6th day of June, 1794. And it was further ordered that the Appellant Richard

Marnell the elder should in three calendar months after the confirmation of the Master's report pay unto the Respondents the sum which should be reported due to them, with interest from the confirmation of the Master's report; and in default of payment thereof it was further decreed, that the same should be raised by sale or mortgage of a competent part of the lands in the pleadings mentioned, and that in such case all proper parties should join in the necessary deeds to be executed on such sale or mortgage. And it was further ordered, that each party, plaintiffs and defendants, should abide their own costs in the cause.

The decree therefore has determined that the [264] £744 was well charged on the estates. Ousley having been unable to avail himself of his annuity, in consequence of the interference of the other judgment creditors of James; and he having a judgment of Edmond which would take place against the judgments of James's creditors, he proceeded by custodiam, and endeavoured to get possession under it. This is a proceeding by which the debtor is outlawed, and the king gets the lands, and grants them to the creditor to hold till he is paid his debt out of the rents. But James Marnell died soon after, and there was an end of that proceeding as the death of the outlaw puts an end to the transaction, and to the grant of the crown.

Then it was objected that this was not an appointment in pursuance of the power; and it was contended that the way in which the land ought to be charged was by sale or mortgage, and not in the form of an annual revenue, which must have the effect of charging the immediate enjoyment, whereas the £1500 was meant to be a charge on the inheritance.

That this was an informal execution of the power there can be no doubt; but where there is an attempt to execute a power, and for valuable consideration, the Courts have considered that the instrument is to be reformed, so as to be an execution in the manner he had a right to execute. Such was the principle of decision in *Lady Coventry's case* (Fran. Max. 73.—2 P. Wms. 222, etc.), which was founded on a variety of cases which had been before decided; such as *Lady Clifford's case*, decided in 1700 by Lord Keeper Wright (2 Vern. 379), where tenant for life, with a power to [265] make a jointure of £1000 per annum, covenanted to make such a jointure on his wife, and afterwards settled lands accordingly, said to be of £1000 value; but proved to be worth only £600 per annum. Upon bill by the widow, the Court directed the £600 to be made up £1000 by the issue in tail. There are several other cases of that kind, from which it is clear that, where the intention to execute appears, and the property is charged, it shall be taken to be an effectual act to the extent of the power. Now, in this case, the deed is defective only in the manner of raising the money. It has no reference to the life of J. Marnell; but only to the time when the money was to be raised. It was an annuity granted out of the lands till the sum of £744 should be paid off; and, consequently, it could not be meant to confine the time to the life of J. Marnell. This, therefore, is an instrument which provides that the lands shall be charged with the sum of £744, and, being so, though the mode is not that intended by the settlement, yet a Court of Equity will make it a charge according to the mode intended by the settlement.

The case is stronger here, as the legal estate was in James Marnell. The conveyance to James and his heirs was contrary to the settlement; but if a bill had been filed against James, to compel him to execute a conveyance according to the settlement, then there would have been an equity for James, to the extent of his power of charging, of which in his judgment creditors might avail themselves.

On these grounds I think this a right decree, so [266] far as it considers the lands to have been well charged; but, on the part of the Appellants, it is objected that the sum due was not £744, but a less sum, only £599 19s. With the impression which I have mentioned, I think the decree ought to be affirmed, with a variation as to the sum charged; for it could not be the intent of James Marnell to charge the lands for more than the sum actually due. Ousley has no equity to support his demand against the irregularity in the mode of execution, except as a purchaser for valuable consideration; and he is so only to the extent of the judgments. Your Lordships may therefore order, and adjudge that the charge is well made for the sum actually due on the 6th June, 1794, not exceeding £744; but that the Appellants shall be at liberty to falsify as to the amount, and with that variation, that the decree be affirmed. It will then stand as a decree that the sum actually due is well charged on the lands, that sum not exceeding £744, instead of £744 absolutely. If it does not amount to that sum, the

Appellants may show that fact. But farther we cannot go; for as Marnell acknowledged on the face of the instrument, that £744 was due, it rests on Appellants to show that a less sum was due.

Lord Eldon (C.). In this case, which I have before, it will be remembered, represented as one of great difficulty, I accede to the proposition of the noble Lord. But at the same time, it must not be understood, that we mean to hold that, where tenant for life has a power to charge lands for £1500 or any other given sum, the grant of an annuity out of these lands is, in all cases, to be taken as a good [267] execution of the power. That is not my meaning, nor, as I understand him, that of the noble Lord; but merely that, in the very particular circumstances of this case, it may be so taken.

I have already stated that the deed of settlement, considered as a conveyance, is nonsense from the beginning to the end. But looking on it as an equitable contract, it gives J. Marnell a power, in some way or other, to charge these lands with a sum of £1500. In what way, it is very difficult to say, unless you reject the proviso that he should not sell or mortgage, and it is not impossible, that he might have resorted to the mode of execution by annuity, on account of the clause in the deed forbidding him to sell or mortgage. In this case, I think J. Marnell did mean to execute the power; and if it appears from the instrument that such was the intent, it is not necessary that he should refer to the power; for, if he meant to execute, you will refer the act to the power. And the mode too would have been the most beneficial one for the inheritance if he had lived; for if the money had been raised by way of mortgage, the principal would have been a charge on the inheritance, and he would have had only to keep down the interest.

Another consideration is, and for that we are indebted to the noble Lord, that it happened that James Marnell had the legal estate. Whether he ought to have had it or not, is another question. But still he had it, and it would be very difficult to compel him to execute a conveyance according to the settlement, without allowing him to charge in this way. But it is not to be understood that, [268] generally where a tenant for life has a power to charge land to a certain amount, that he may execute the power by granting an annuity or rent-charge.

Lord Redesdale. This case is totally different from the generality of other cases, for there is no direction how to execute the power. It is merely that he shall have a power to charge to that amount; and the meaning of the proviso that he should not mortgage or sell must be, that he should not mortgage or sell so as to defeat the provisions of the settlement; otherwise it would be absurd to say that he should have such a power, and yet should not mortgage or sell, and probably J. Marnell might have been led into this mode of execution by this extraordinary proviso.

Appeal dismissed, and the decree affirmed, with liberty to the Appellants to falsify the amount of the sum charged.

Agent for Appellants, BENBOW and ALBAN.

Agent for Respondent, WINDUS.

[269] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DOUGLAS, and Others,—*Appellants*; SCOUGALL, and Others,—*Respondents*
[May 17, 1816].

[Mews' Dig. xiii. 1160 : 3 Scots R. R. 319. Commented on in *Dudgeon v. Pembroke*, 1875, 1 Q. B. D. 96, 109. See *Parker v. Potts*, 1815, 3 Dow, 23.

[Ship sails, and soon after encounters a storm, becomes leaky, puts back, and is found on survey to be materially decayed, and damage discovered which could not be fairly considered as the effect of the storm. Held by the House of Lords reversing a judgment of the Court of Session, that the ship was not sea-worthy when she sailed on the voyage insured.]

[Lord Eldon (C.) observing, that nothing in the law of insurance was of more importance than the implied warranty of sea-worthiness, with a view both to the benefit of commerce and the preservation of human life; that in a question of sea-worthiness, honesty of intention is no answer, but that the fact of sea-worthiness must appear, or otherwise the underwriter is discharged; and that, though a vessel after sailing encounters a storm, yet, unless the damage which unfits her for the voyage can be fairly considered as the effects of the storm, the implied warranty is not complied with.]

This was an insurance on the ship *North Star*, and her freight, from Leith to Pictou, in North America, and the question was whether the vessel was sea-worthy at the time of her sailing from Leith?

The vessel was an old Dutch prize 350 tons burthen, which had been employed as a whale ship, and was purchased in 1804 by the Respondents at the price of £1200, including the fishing materials valued at £500. The vessel was put into the hands [270] of Strachan and Gavin, ship carpenters in Leith, to prepare her for the voyage to America. The vessel was not stripped nor opened so as to enable the carpenters to judge of her internal state and condition; but repairs to the amount of £280 were done to her outer coating or skin, which, in the opinion of the carpenters, put her in a condition to perform her voyage to America, and they certified accordingly.

On the 23rd May, 1804, the vessel sailed on her intended voyage, and on the same day the Appellants underwrote a policy of insurance on her and her freight, to the extent of £2100. On the 6th and 7th June she encountered a severe gale of wind, and as she began to make so much water that the crew could not keep her free with both pumps, the master bore up for a port, and brought her to Greenock on the 15th June.

Soon after her arrival the vessel was surveyed under the authority of the magistrates, by John Scott and Robert Steele, two ship builders, who reported that the vessel was materially decayed. The Respondents called on the under-writers to repair her, but they refused, on the ground that the report proved that she was not sea-worthy when she sailed on the voyage insured. The Respondents then caused her to be repaired, and brought an action in the Court of Session for payment of the amount, being a sum of £1426 9s. 3d. The Lord Ordinary by several interlocutors, in 1807–8–9, decided in favour of the assured, upon the ground of the certificate of sea-worthiness by the Leith carpenters and the protest of the master. Upon petition to the first division of the Court condescendances were [271] ordered and given in, and by interlocutor 20th February, 1810, a proof was allowed and led.

The certificate of the Leith carpenters, and the master's protest relied upon by the insured, were as follows:

“ Leith, July 19, 1804.

“ We hereby certify to all whom it may concern, that the *North Star* of Leith, belonging to Messrs. Richard Scougall and Co., and others, was in our dock in April last, and

"underwent every repair that was judged necessary, for enabling her to proceed on her voyage to Pictou, for which she was engaged, and that the carpenter's repairs amounted to £280 sterling." (Signed) "STRACHAN & GAVIN."

In the protest the master stated that, "on the 6th and 7th current, (June 1804), he met with a severe gale of wind, which obliged him to lay the vessel to under a close-reefed main-top-sail, and she then began to make a great deal of water: that on the 8th, the vessel shipped a sea, which laid her upon her beam-ends; that he then found it necessary to cut away the mizen-boom and sail, also the mizen-staysail, to get the ship wore round on the larboard tack; she then began to strain and make so much water that they could scarcely keep her free with both pumps constantly going; in this situation they continued during the gale, till the people were entirely done out at the pumps: at six A.M. shipped another sea, which sprung the boltsprit, and wrought the stem entirely loose; at the same time washed the boats out of the chocks; the ship at this time making [272] three feet water in the hour, and the people refusing to stand longer by the pumps, the representer then judged it proper to beat up for the north of Ireland or any other place where they could get the ship in safety."

The most material documents, however, were the reports of the Greenock ship-builders, especially the first. They were as follow.

FIRST REPORT.

In pursuance of the warrant of Nathan Wilson, Esq., justice of the peace, we have this day carefully and minutely examined the ship North Star of Leith, James Edmonstone, master, at present in the dry-dock here. We find the iron-work in general very much decayed, and wrought loose; one rider in the after-hold broke; three lower-deck beams decayed, and sprung abaft the main-mast; three and one-half ditto decayed, and sprung before the main-mast; six lower-deck knees decayed, and sprung; three breast-hooks forward in the lower-hold, and one above the deck, decayed; one plank below the lower-deck beams, on each side, decayed; and two planks on the larboard side of the bilge taken off, to examine the timbers, which we find good, but the iron-work quite gone; the ceiling on the floor in general, quite loose; the iron-work about the hanging-knees in general decayed, and the timber about the bolts; a part of the outside doubling we have taken off, in order to examine the state of the plank and iron-work; the plank we find good and sound, but the bolts and nails quite gone; the boltsprit is sprung, and the stem wrought loose, [273] on account of the decayed iron, and labouring of the ship at sea.

N.B.—There is one top-timber, and two ceiling planks, broke in the 'twixt decks, on the starboard side.

(Signed) JOHN SCOTT.

ROBERT STEELE.

Greenock,

July 12, 1804.

SECOND REPORT.

Agreeable to the appointment of Nathan Wilson, Esq. justice of the peace, we have examined and surveyed, a second time, the ship North Star, of Leith, at present in dock here, after the doublings is taken off the bows, and some of the lower-deck beams and breast-hooks is taken out, a great number of tree-nail and bolt-holes are bored all over the bottom, from the keel to the bends; most part of the old bolts extracted; we find the timber and plank sound and fresh, as far as can be seen; and it is our joint opinion that, after the repairs going on is completed, and what is pointed out to us by Mr. Scott and Captain Edmonstone, that the ship North Star will be staunch and sea-worthy, and fit to proceed on her present voyage to Pictou in North America.

(Signed) JOHN SCOTT.

ROBERT STEELE.

FRANCIS MORGAN.

JOHN GALT.

Greenock,
Aug. 10, 1804.

The log-book was not produced in an entire state, a great part of it having been used for making cartridges; but some leaves of it were produced, which went to confirm

the protest. Neither the master nor any person on board at the time of the storm were examined as witnesses. Steele and Scott were ex-[274]-mined, and reconciled the first and second report by stating that the second related to parts of the ship which could not be inspected at the time when the first report was made; part only of the doubling or outer planks having been taken off at time of the first report, whereas the whole had been taken off when the second was made.

The Court by interlocutor December 6th, 1811, adhered to the Lord Ordinary's interlocutor reclaimed against. Immediately before pronouncing that interlocutor the Respondents produced, and were allowed to lodge in process, a letter, which had been mislaid, and had not been till then recovered, written to them by Scott, who was employed to repair the vessel after she had been opened up. The letter was as follows:

“Greenock, 28th July, 1804.

“Messrs. R. Scougall and Co., Leith.

“Gentlemen—Captain Anderson delivered us your favour of the 24th instant. Next day we began our operations on your ship, the North Star. All the doublings is nearly stript off both bows, and two of the worst of the lower-deck-beams is taken out, and some of the hanging-knees. The ship turns out much better than ever we could imagine. All the timbers in the wake of beam-ends is perfectly sound and fresh, and nothing is as yet discovered defective in any part of the ship that we have opened and examined. The bolts in the doubling is innumerable, and very difficult to extract. All the inside plank is sound and good. We have now a much better opinion of the ship than we had, and will write you next week [275] how she proves, before we put any thing new on her. We remain,” etc.
(Signed) “JOHN SCOTT and Sons.”

The Court afterwards by interlocutor 29th May, 1812, remitted to the Lord Ordinary to examine Scott again as to the circumstances set forth in the above letter, and generally as to the state of the vessel.

Scott was accordingly again examined, and the most material part of the deposition with reference to the above letter was as follows:

“Depones, that the second report is perfectly correct; and he adds, in general, that he is now satisfied that what he stated in that report, and letter of 28th July, is perfectly correct and true. Being interrogated, if he wishes to alter his former deposition, now that he has seen said letter? depones, that he does not. Interrogated for the defenders, whether he is now of opinion, that any of the facts stated, with regard to the state of the vessel, in the first report, was erroneous? depones, that he does not wish to contradict the statement made in said report; but he adds, in explanation, that, from the slight and cursory inspection which he made of the vessel at the time he made his first report, he thought there was a certain decay in her, but, upon more minute inspection, which he was enabled to make by taking off her doublings, she turned out to be in a much better state than he at first thought her. Interrogated, whether, if he had known the state of the vessel to be such as it turned out to be, on a minute inspection at Greenock, he would have [276] considered her in a fit or safe state for a voyage to America from Leith? depones, that he certainly would, and that many ships in a worse state have gone to America and back again; and the Deponent adds, that the vessel in her voyage from Leith to Greenock, had experienced a severe storm and heavy sea, and had suffered by it.”

The Court by interlocutor of 27th May, 1813, adhered to the interlocutor reclaimed against; and from these interlocutors the underwriters appealed.

Sir S. Romilly and Mr. Adam, for Appellants; Mr. Serjeant Marshall and Mr. Grant, for Respondents.

Lord Eldon (C.). This is a mere question of fact, whether this ship when she sailed from Leith to Pictou in North America was sea-worthy, or well furnished, tight, staunch, and strong for the voyage insured. I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is sea-worthy when she sails on the voyage insured: and I have endeavoured, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine as far as, in the exercise of a sound discretion, I have been enabled to do so.

It is not necessary to inquire, whether the owners acted honestly and fairly in the transaction ; for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not sea-worthy, the underwriter is not liable. And this, [277] I think, may be fairly stated, without imputing any moral blame to the owners in this case, that both they and the Leith ship-carpenters undertook to run some risk ; as it is quite clear that, whether it be customary to strip off the double skins or coatings, or not, unless they do go through that operation, they may, without intending wrong, fall into fatal mistake. Here the stripping off of both skins did not take place, and the outer, if stripped off at all, was but very partially stripped off ; and it is not speaking too harshly to say that the owner was willing she should be repaired at the very least expense that should appear to be necessary.

The ship sails, and appears to have been for two or three days in a violent storm. If so damaged as that the damage might be fairly considered as the effect of the storm, that is one view of the case. But if damaged in such a manner as in common probability she would not be if she had been sea-worthy when she sailed on the voyage, the implied warranty is not observed.

On the ship coming into port she was surveyed by Scott and Steele, and, whatever Scott might say in 1812, it is clear that he and Steele, applying particular assertions to particular facts, upon this survey, stated that part of the timbers were decayed, and that the iron work, in general, was very much decayed and wrought loose ; and they distinguished between that sort of decay and the damage which would have been produced from the effect of the storm alone ; and no ingenuity can reconcile this with the construction attempted to be put on Scott's evidence in 1812. Steele states how he reconciles it with his second report, and his evidence goes to [278] support the effect of the first survey, from which it appeared that the ship was not sea-worthy for that voyage. Scott seems to have forgot his letter of 28th July, 1804 ; and I do not wonder that, when it was produced, the Court felt a curiosity to see how he would reconcile his notion of the state of the vessel on 28th July, 1804, with the first report, and his evidence in 1811. Instead of that plain way in which Steele explains himself, see what species of testimony he gives in 1812 to explain the apparent contradiction. Suppose, however, that he acted honestly in this, still it could never have been laid down here, or recommended in Guildhall that his evidence in 1812 in opposition to his first report, and his evidence in 1811 should do away the effect of all the rest.

I do not say anything as to the log-book ; but cases have been sometimes decided on what is not given in evidence, as well as on what is given. If the captain was at the port when the survey was made in 1804, those who wish to support this demand against the underwriters, ought to have called him, and to have asked him "what do you say as to the state of the vessel at the time of this survey?"

Having considered the whole of this evidence, I never was more clear about any thing than that it is proved to be perfectly manifest, and proved to my entire satisfaction, that this vessel was not sea-worthy for the voyage when she sailed, whatever might then have been the opinion of the owners and carpenters who repaired her ; and if the cause could have come, and had come here originally, I would have recommended to give costs to the underwriters. [279] But it is not customary to give costs where a decision of the Court below is reversed.

Judgment of the Court below reversed.

Agent for Appellants, CAMPBELL

Agent for Respondents, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MAXWELL, and Others,—*Appellants*; GORDON,—*Respondent* [Feb. 16,
June 19, 1816].

[3 Scots R. R. 323.]

[On refusal of the heritors of a parish to take the proper steps to rebuild the parish church found by the Presbytery to be ruinous, the Presbytery themselves advertise for and adopt a plan and estimates, and contract for the rebuilding, and assess the heritors for the necessary sums, but neglect to assess some feuars of a part of a small village included in the parish. Suspension presented by the adverse heritors against the charge for the sums, on the ground of irregularity in the proceedings of the Presbytery, but all objection abandoned as to the jurisdiction of the Presbytery to assess, in case of refusal by the heritors. Suspension refused by the Court of Session, and the judgment affirmed by the House of Lords, with a remit as to the feuars.]

In consequence of a representation and complaint made by Mr. M'Culloch, of Ardwell, one of the heritors of the parish of Anwoth, to the Presbytery of Kirkeudbright, of the ruinous state of the parish [280] church of Anwoth, the Presbytery at its meeting, 1st October, 1810, appointed a meeting to be held on the 7th November then next, to take the state of the church into consideration; and the minister of the parish was directed to make intimation to the heritors, by citation from the pulpit and by circular letters, to inform them of the time, place, and purposes of the meeting, and to summon tradesmen to attend.

The Presbytery met at the time appointed, and most of the heritors attended personally, or by proxy, and two tradesmen summoned by the minister of the parish attended to report on the state of the church. An objection taken to the jurisdiction of the Presbytery, by the agent of Sir D. Maxwell, one of the heritors, was repelled; and the heritors, being asked whether they had any objection to the tradesmen, declared they had none; and the tradesmen, being put on oath, were directed to examine the church, and report as to its dimensions and its condition, and whether it was or was not capable of being repaired. The tradesmen reported the dimensions, and also the state of the church, from which it appeared that it was incapable of repair, and also that it was too small to contain the legal number, namely, two thirds of the examinable persons in the parish.

At the request of one of the heritors present at this meeting, the Presbytery, as there were no tradesmen present on the part of the heritors, agreed to delay proceedings till their next ordinary meeting, to give an opportunity to bring them forward; with certification that, if the heritors should then fail to bring forward a report of other tradesmen, the [281] Presbytery would proceed in the business on the evidence before them.

The Presbytery met, and the agents of three of the heritors (Appellants) attended. No tradesmen appeared, and no report was produced on the part of the heritors. The Presbytery therefore proceeded to take into consideration the report of the tradesmen given in at their last meeting, and unanimously found "that the Kirk of Anwoth is ruinous, and ought to be rebuilt; and therefore did, and hereby do, ordain the heritors of said parish to procure plans and estimates of a new Kirk, sufficient to accommodate the inhabitants of that parish, and to lay them before the Presbytery, at their next meeting on the first Wednesday of January, with certification, that if they fail to do so, the Presbytery will themselves order plans and estimates, and stent the heritors in a sum sufficient for executing such a plan as may be adopted, as accords of law."

"It was not stated, however, whether this sentence of the Presbytery was intimated to the heritors, and none of them appeared at the next meeting, which took place on

the 2d of January ; but Gordon the agent of Mr. M'Culloch, of Ardwell, attended, and produced several plans, one of which was adopted. The Presbytery then appointed the minister of the parish to advertise for estimates ; to convene the heritors by edictal citation from the pulpit and circular letters, and to lay before them the plan and estimates, to give them an opportunity of contracting with tradesmen for re-building the church ; and they ordained the heritors to contract accordingly, on the plan adopted, with certification that, [282] if the heritors failed to do so, the Presbytery would contract, and stent the heritors in a sum for executing the work.

The heritors having been convened, entered objections on their minutes to the proceedings of the Presbytery ; the grounds of which objections were, that the heritors ought to be allowed to have it ascertained, by tradesmen named by themselves, whether the church was capable of being repaired ; and if not, the heritors ought to be allowed to give in and execute their own plan, and that the Presbytery had no power to approve or disapprove, except the church were to be too small to accommodate the legal number of persons (two thirds of the examinable persons in the parish), and they also objected to the proceedings of the Presbytery as illegal and irregular.

These objections were laid before the Presbytery at its next meeting, at which the heritors, or some of them attended. The Presbytery however considered the application of the heritors to be allowed to prove, by tradesmen of their own nomination, that the church might still be repaired, etc. as coming too late, and refused the request. The Presbytery then ordered the plan of which they had formerly approved, to be rectified, so as to reduce it to the lowest dimensions, consistent with the accommodation of the legal number of persons ; and then having at a subsequent meeting, approved of the plan as rectified, they again ordained the heritors to contract, etc. with certification as before. The heritors having refused, the Presbytery appointed their clerk to advertise for estimates, and an estimate having been given in, and, at the request of Mr. [283] M'Culloch, adopted, they pronounced the following sentence :

"The Presbytery, having considered the above statement and request of Mr. M'Culloch, examined the estimates laid before them, and inserted in their minutes ; heard parties at the bar, and reviewed the whole proceedings in the cause, and fully reasoned thereon, did and thereby do, unanimously adopt the estimate of John Bodan and Andrew M'Dowal ; and appoint a committee of Presbytery, along with the said James Murray M'Culloch, Esq. and such other heritors of the parish of Anwoth as choose to concur, and Mr. Robert Gordon, writer in Kirkcudbright, to prepare and execute a legal and formal contract with the said John Bodan and Andrew M'Dowal, and proper and sufficient cautioners, to rebuild the church of Anwoth, according to the rectified plan and specifications referred to in their estimate. The committee to consist of Dr. Muter, Mr. Johnston, Mr. McClellan, and Mr. Smith, with any other member of Presbytery who may choose to attend (any two a quorum), to meet in the King's Arms Inn, Kirkcudbright, on any day convenient, before the fourth Wednesday of October current, Mr. Smith convener. Said committee shall bind and oblige said contractors, with their cautioners, to have the church of Anwoth roofed in before the 1st day of October, 1812, and the whole work finished before the 1st day of May, 1813. And farther, that the Presbytery did, and hereby do decern, against the heritors, life-renters, tenants, tacksmen, and all others liable for their respective portions of [284] the sum of £710 sterling, being the amount of the estimate of John Bodan and Andrew M'Dowal ; and of the sum of three guineas to James Sharp, for plans and specifications ; and of the sum of £3 11s. 6d., being the expense of advertising ; and of the sum of two guineas, to Messrs. McClellan and Lawrie, for their trouble in inspecting and making a report on the church of Anwoth ; and of the sum of £6 15s. for contract and stamp ; amounting in toto to £725 11s. 6d. sterling, with factor's fee, at five per cent. thereon, and duties of extract. Appoint Mr. Robert Gordon, writer in Kirkcudbright, factor for uplifting said sum, by the following instalments, viz. one-third part thereof at the 1st of November next ; another third part at the 1st of August, 1812 ; and the remainder at the 1st of February, 1813 ; and crave the Right Hon. the Lords of Council and Session to interpose their authority to this decret, that letters of horning on six days, and other execution necessary, may pass hereon."

The proportions were settled by the Presbytery clerk, and Gordon the factor, according to the valued rents ; and Gordon then raised letters of horning, and charged

the heritors for the sums respectively due by them. The Appellants presented a bill of suspension, in which they confined their objections to the alleged irregularity of the Presbytery's proceedings, without bringing the jurisdiction to assess at all in question. The Lord Ordinary by interlocutor 28th February, 1812, refused the bill, and the Court by interlocutors 11th March, and 16th May, 1812, unanimously adhered. In [285] their petitions to the Court the Appellants expressly abandoned all objection to the jurisdiction.

Against the above interlocutors of the Court of Session, the Appellants lodged their appeal, in support of which, resuming the objection as to the jurisdiction, they stated the following reasons in their case.

1st, If the Presbytery have any jurisdiction at all over the repairing and building of churches, their province is strictly limited to a declaration that the church is out of repair, and ought to be repaired ; or is ruinous, and ought to be rebuilt ; or is too small for the parish, and ought to be enlarged ; leaving it to those who are to bear the burden, that is, to the heritors, or the owners of lands and houses, to settle among themselves what shall be the plan of the repairs, or new edifice, as well as all the details both for the assessment of the necessary money and for the application of it.

This is recognized as a general rule, in the case of the Minister of Tingwall against the Heritors, decided on the 22d June, 1787.

The case of Dunning, 10th June, 1807, (the first which decided that Presbyteries have a jurisdiction in the building and repairing of churches, and which has not yet been brought under the view of this honourable House) is quite consistent with this rule : there the Presbytery had gone no further than to find that the church was insufficient to accommodate the parishioners, and that certain additions ought to be made ; it was with this proceeding, carried no further, that the heritors were dissatisfied, and applied against it to the Court of Session ; and the Appellants cannot refrain from adding, that this case of Dunning, is quite a re-[286]-cent and single decision upon a very important question of law, as affecting the civil rights, of the subject in Scotland ; and which, if it were brought to the last resort, the Appellants conceive it would be found very difficult to maintain.

2d, Even if the Presbytery could be admitted to have the power of imposing and assessing the parochial tax, their proceedings throughout this case have been highly irregular. They have also made the assessment irregularly, in point of form, and substantially contrary to the rule declared by this most honourable House, in the case of Peterhead, in Dom. Proc. 24th June, 1802.

3d, It was not necessary, that this church should be rebuilt ; the repairs which the heritors had undertaken, and were proceeding to make, would have rendered it quite sufficient, in every respect, for the accommodation of the parish.

With reference to the non-assessment of some feuars in a village, part of which was included in the parish, the Appellants cited, besides the Peterhead case, the cases of Crief, 20th November, 1781 ; Campbellton, 1774 ; and St. Andrews, 1791.

In the Respondent's case it was contended, that the Presbytery had jurisdiction to assess, and the case of Dunning, June, 1807, was cited ; and that at any rate the objection had been abandoned ; that it was absurd to object to the apportionment of the sums, as the respondent might have charged the whole sum against any one heritor ; that the proportions of the feuars was too minute for assessment ; and that the whole of the proceedings were regular.

[287] Sir S. Romilly and Mr. Horner (for Appellants). This case involves a most important point of law, that is, whether a church judicatory in Scotland has power to tax the subject. There is not a single case, nor any authority in the text books for that proposition. The case of Dunning does not at all embrace it, for the point was not there raised, whether a church judicatory could tax the subject. It only establishes this, that the Presbytery had jurisdiction to find that repairs were necessary. (Lord Eldon (C.). What jurisdiction has the Presbytery in this matter?) To find the fact that the church is out of repair and wants repair, or that it is ruinous, and ought to be rebuilt, and, if the heritors refuse the necessary sums for these purposes, then the Presbytery, or the minister of the parish, may apply to the civil Courts to compel them to pay. (Lord Eldon (C.). The reason in the suspension is, that it is illegal in the Presbytery to assess, unless the heritors were previously called on, and refused to take the proper steps to build or repair the church, and your complaint below was, that you

had not been regularly summoned to one of the meetings, so as to give you the proper opportunity. But, to use a technical expression in one of your own papers, you went slap-dash at every thing.) The mode also in which the assessments were made was wrong.

Mr. Leach and Mr. Brougham (for the Respondents). The Lords, as the Court of Appeal, could look only at the grounds taken below, and would not go on other grounds first suggested here. It never entered into the minds of those who drew [288] this suspension, that the mode or manner of assessment was irregular; and if that had been stated as a ground of complaint, the papers show that it could not have been maintained a moment. Then they deny the power of the Presbytery to assess at all. That point was never insisted upon below, and, in their own papers, they make admissions which entirely exclude the objection. (Lord Eldon (C.). I take them to have, in their suspension, admitted the jurisdiction.) We are not called upon, then, to show that it is the general law, that Presbyteries have this power, because it is admitted to be the law of the case. But suppose the point could be opened, there is not a shadow of foundation for their denial of jurisdiction as applied to this case. All the requisites of the act of 1572 have been followed. The Presbytery did not proceed upon the assumption of an unqualified power to assess, but only claimed and acted upon the jurisdiction to assess, after the heritors had been called upon and refused to assess themselves. They say, the Presbytery ought not to assess at all, but to apply to the civil power; how are they to apply, and to what part of the civil power? They called upon the heritors to assess themselves, with a clear notice that unless they did the Presbytery would do it. The heritors refused, and the Presbytery proceeded to stent them. As to the Peterhead case, the objection there was not taken here, and though it had been taken, the circumstances were different. The effect of the decision in that case was, that the heritors, as well as feuars, should be assessed, not according to their nominal or valued rent, but according to their real rent. That is not the question here. The town [289] proprietors were there assessed, but the parish included a large sea-port town, and the church was principally occupied by the town population, and it was but just that the town proprietors should pay part of the expense. But this was strictly a landward parish, including only a very small part of a small village, and the smallest coin was not small enough to represent the proportion of each of the twelve or fifteen feuars belonging to the parish.

Sir S. Romilly (in reply). The important question, it seems, is not open to us, as it has been waived on our part. But if we have admitted the jurisdiction, it was only on failure of the heritors to contract and rebuild; and no opportunity was given them for that purpose. Then the feuars were not taxed, and it was quite clear from the Peterhead, and other cases, that the feuars ought to be called upon to pay their proportions. (Lord Eldon (C.). This case, I believe, turns on the facts whether the church was capable of being repaired, or sufficient for the congregation.)

Lord Eldon (C.) (June 19, 1816). I am of opinion that the judgment in this case ought to be affirmed, but subject to a remit to the Court of Session, to consider whether, having regard to what this House did in the Peterhead case, the judgment requires any alteration with respect to the feuars. I understand it will not, as the proportion of these feuars must be so very minute, that the Court did not ill advise themselves in overlooking it. But we cannot with propriety omit to notice that point, though the remit may have no effect.

[290] Judgment affirmed, subject to a remit as above, in case the Appellants chose to bring the question as to the feuars before the Court within four months.

Agent for Appellants, GORDON.

Agent for Respondent, RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SPROTT (Procurator Fiscal of Edinburgh), — *Appellant* ; SCOTT, and Others, —
Respondents [Feb. 21, 1816].

[Any master trader or manufacturer exercising his trade or calling within the new town of Edinburgh only, without exercising it in the old, is, by the proviso in the act 7 Geo. 3, c. 27, exempted from the payment of the tax called entry money, exacted by the magistrates of Edinburgh from those who enter as burgesses.]

The respondents are master builders in the new town of Edinburgh, who refused to pay to the magistrates the entry money which each master trader or manufacturer who establishes himself in the city and exercises his craft within its limits or royalty is called upon to pay. The ground of the refusal was, that the act of 7 Geo. 3, c. 27, by which the royalty was extended over a great part of the [291] new town of Edinburgh, did not entitle the magistrates to that tax. The question therefore depended on the construction of that act : the material part of which, as far as relates to the present purpose is as follows :

“ And whereas the Lord Provost, Magistrates, and council of the said city, as well
 “ in further execution of the before recited act as in view to the extension aforesaid,
 “ have expended large sums of money in purchasing houses and areas on the north side
 “ of the High-street of the said city, and in building a bridge, whereby an easy and
 “ proper communication will be opened to the city :

“ And whereas the grounds after-mentioned are without the royalty of the said
 “ city, and it being just and reasonable that the royalty of the said city should be
 “ extended over these grounds, in consideration of the great expense the city has
 “ been and will be put to in building the said bridge, and making the communica-
 “ tion and access to the said city otherwise easy, and for the equal apportioning of
 “ public burdens and benefits, and administration of justice amongst all the real in-
 “ habitants of the place ; but as this salutary purpose cannot be accomplished without
 “ the authority of parliament, etc.” therefore it is enacted, “ That from and after
 “ the 24th day of June, in the year of our Lord 1767, the royalty of the City of
 “ Edinburgh shall be extended over, and comprehend the following lands which now
 “ belong in property to the said city, etc.” (The Lands are then enumerated.) “ And
 “ that the said magistrates and town council, from and after the said 24th day of
 “ June, in the year of our Lord 1767, shall [292] have and enjoy the same rights,
 “ privileges, and jurisdictions over the said grounds hereby annexed to and compre-
 “ hended in the said royalty, as they do now enjoy and exercise over and within the
 “ limits of the present royalty by any law, statute, or established custom, and shall
 “ and they are hereby empowered to levy the same mails, duties, customs, and other
 “ taxations, within these annexed grounds, in the same manner and by such actions
 “ at law as the said magistrates and town council are entitled to use by any law,
 “ statute, or otherwise, within the present royalty, for recovery of such mails, duties,
 “ customs, and taxations, as aforesaid.”

The following clause is that on which the Respondents' argument was founded :
 “ Provided always, and it is hereby enacted and declared, that it shall and may be law-
 “ ful to all and every person and persons to exercise any trade, or calling, within the
 “ limits of the lands hereby annexed to, and comprehended within the said royalty, any
 “ thing in the present act to the contrary notwithstanding : saving always, and reserv-
 “ ing to the several societies and incorporations, within the city of Edinburgh, all such
 “ rights and privileges which do now belong and are enjoyed by them within the limits
 “ of the present royalty of the said city.”

For the Respondents it was contended that by the above proviso, the exercise of any trade or calling in the new town was left perfectly open and free ; saving however all corporate rights within the old Royalty.

The Appellant contended that the act ought to be [293] construed with reference to the constitution of the royal burghs, and the exclusive rights of burgesses, in carrying on trades and handicrafts within burghs, as established from the earliest times by different acts of the Scottish Parliament; and recognised in the decisions of the supreme Court in that country. He referred to the statutes of King William of Scotland, intituled, "The Libertie of the Merchantis Gilde," cap. 35 and 36. He also referred to the *Leges Burgorum*, cap. 18, by which it was enacted "that stranger merchants should buy and sell from burgesses only;" and cap. 139 of the same laws, declaring, "that burgesses may buy and sell freely within all parts of the realme."

The Appellant next referred to the acts 1466, cap. 11, 12, and 13, as establishing the same exclusive privileges in favour of burgesses within royal burghs, and to the acts 1592, cap. 154, and 155, declaring an obligation on all burgesses to pay entries, dues, and taxes, and perform burgh services. Reference was also made to the acts 1672, cap. 5.—1690, cap. 12.—1693, cap. 28.—and 1698, cap. 19, and 20.

It was further observed by the Appellant, that these rights and privileges belonging to royal burghs, and to the individual burgesses, for which in return persons made burgesses were to pay certain sums of money in name of entries and taxes, were confirmed and rendered perpetual by the twenty-first article of the treaty of union (1707, cap. 7).

The Appellant next took notice of the following decisions pronounced by the Court of Session in support of the rights and privileges of royal burghs and of burgesses, as by law established, viz. The [294] Magistrates of Glasgow against the Writers, 21st November 1695, and 13th December 1695, reported by Lord Fountainhall—Websters, Freemen in Stirling, against Unfreemen, 26th March, 1658, reported by Durie; in which it was found that craftsmen unfreemen cannot exercise their trade within burgh, but may work in their houses in the suburbs—Town of Linlithgow against Unfreemen of Borrowstownness, 30th January, 1663, reported by Lord Stair, vol. i. p. 165—Town of Glasgow and Dumbarton against Unfreemen of Greenock, 7th December, 1676, reported by Stair, Dirleten, and Gosford—and the Corporations of Mary's Chapel against Kelly, 14th January, 1747, reported by Falconer: and he referred particularly to the following case, which most strongly recognised the rights of the magistrates of royal burghs to demand, that those exercising trade or craft within their burghs should become burgesses, and pay the accustomed dues or tax at entry:—Duncan against the Magistrates of Aberdeen, 21st July, 1786, of which the following account is given in the Faculty Collection: "Between the years 1620 and 1675 the fine or composition, paid in the town of Aberdeen by intrant burgesses, had been gradually increased by the magistrates from 100 to 400 merks. In 1699 these dues of entry were reduced to 100 merks; and on this footing matters continued till 1779. About this time the trade of the town had greatly increased. A considerable debt too had been incurred in building a commodious harbour, and in other improvements of the same nature; and the dues of entry were augmented to £25 sterling. Alexander Duncan [295] and other unfreemen brought an action for setting aside this regulation," of which they complained as an undue extension of the town's privileges. "Answered what is here complained of as an undue extension of the privileges conferred on this town is only a proper exercise of its established rights. The benefit of exclusive trade forms an essential part of the constitution of every corporation of this sort, nor has any limitation been imposed as to the manner in which it is to be communicated to Strangers. As a due regard must necessarily be paid to the advantages arising from such a communication, this will always vary as trade and commerce are thriving or in a declining state. Thus the present alteration is fully justified by the circumstances of the case; and the necessity of an additional revenue on account of the expenses recently incurred for the general utility renders it altogether unavoidable.

"The Court were unanimous in sustaining the defences. Even the Judges who, in the question from the town of Glasgow, voted against the exaction of the new imposts of any sort without Parliamentary authority, expressed their opinion that the price of the right of burghship might be proportioned by the magistrates to the benefits accruing from the participation of trade. The Lords sustained the defences, thus giving effect to the regulation in question."

The Appellant then proceeded to comment on the act of the 7 Geo. 3. for extending the royalty of the City of Edinburgh, and attempted to show that the clause

in this statute, founded on by the Respondents, did not establish in their favour the exemption [296] which they claimed; and contended that the just construction of the clause in the act of Parliament founded on by the Respondents is, that it shall and may be lawful to all and every person and persons (being burgesses) to exercise any trade or calling within the limits of the annexed lands, although they be not entered with any of the inferior corporations of the city, saving and reserving to these incorporations their rights and privileges within the old royalty. This qualification, that persons exercising trade within the new royalty, although not entered with any of the corporations, must nevertheless be burgesses, was one which might either be expressly mentioned or might be omitted in the act of Parliament, for it imports nothing more than a statement of the public law of the realm, and was therefore as much to be understood and implied, though not expressed, as that the persons exercising trade should be liege subjects of the King and not aliens.

Upon action in the Dean of Guild Court for this entry money Sprott, the Procurator Fiscal for the city, obtained decree against the Respondents for payment. The decree and cause having been brought by suspension before the Court of Session, where, by interlocutor 6th of Dec. 1810, judgment was given in favour of the Respondents, and this judgment, upon appeal argued in the House of Lords on 21st of Feb. 1816, was affirmed.

Agents for Appellant, SPOTTISWOODE and ROBERTSON.
Agent for Respondents, ———.

[297] ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BULLEN,—*Appellant*; MICHEL (Clerk),—*Respondent* [June 10, 12, 13, 1816].

[S.C. 2 Price, 399; Mews' Dig. v. 1239; vi. 701. As regards modus, etc., the Tithe Commutation Acts have made cases of this kind of little importance. As to the ancient entries, see *Meath (Bishop of) v. Winchester (Marquis of)*, 1836, 3 Bing. N. C. 183, 201; *Reg. v. Mytton*, 1860, 2 E. & E. 557, 565.]

[Bill, by Vicar of Sturminster Newton, for vicarial tithes in kind against several occupiers of farms. Answers (separate) setting up farm moduses. Issues directed, and the issue respecting Bagber farm (Bullen's) tried. Proof for Appellant Bullen, Plaintiff in the issue, by the evidence of old persons that a sum of £5 3s. 4d. had been invariably paid for the vicarial tithe of Bagber farm for about sixty years past. Offered in evidence for Defendant (the Vicar), to prove rankness, a rate-paper, from which it appeared that the whole parish had, during the same period, paid rates in the same way in lieu of vicarial tithes, amounting together to £68. Offered also certain entries, without date, but proved to be of the hand-writing of the end of the thirteenth or beginning of the fourteenth century, in a book called the Chartulary of Glastonbury Abbey: viz. an entry of the ordination of the Bishop on the appropriation of the church of Sturminster to the Abbey: and the entry immediately following, beginning with the words "portions of the church of Sturminster assigned to the vicarage to be ordained to remain in the same for ever," and then enumerating the several articles with the value of each, without any allusion to a money payment in lieu of the tithes, and making the whole vicarage of the clear yearly value of £9 12s. 5½d. This entry was offered as a copy of, or extract from, the endowment, the original being lost. The book was produced from the muniment room of the Marquis of Bath, who had lands which had belonged to the Abbey, but not in Sturminster Newton. Besides entries in which the Abbey was concerned, the book contained several idle stories, and a

great deal of other miscellaneous matter. The rate-paper and Chartulary rejected, and verdict for the modus. But the Court of Exchequer, being of opinion that these documents ought to be admitted, ordered a new trial. Proof for Appellant as before, and the rate-paper and entries in the Chartulary read for the Respondent, besides [298] other documents, to rebut the presumption of a modus. Verdict for Respondent, and against the modus; and new trial, moved for on the ground of the alleged improper admission of the Chartulary in evidence, refused—and appeal to the Lords from this order of refusal.]

[Objections to the admission of the entries:—1st, that the book did not come from the proper custody; 2d, that the endowment itself could have been no evidence on this issue; and if it could, yet the entry respecting the portions assigned to the Vicar did not purport to be a copy or extract, and was not good secondary evidence; 3d, that this was *res inter alios acta*.]

[The order of the Court of Exchequer refusing the new trial affirmed by the House of Lords on the grounds, 1st, that the entries had been properly received in evidence, the custody being proper, the entries being authentic copies of instruments of which the originals would have been good evidence; and *res inter alios acta* being in this case no objection, and also that the whole of the rate-paper was proper evidence on this particular issue: 2d, that, supposing the entries to have been improperly admitted, the verdict was warranted by the other evidence, and that it signified nothing to say that the Jury might possibly have come to their conclusion upon the ground of the Chartulary, because the object of an issue out of equity was to satisfy the conscience of the Court; and where the evidence was such as fully to satisfy the conscience of the Court, a Court of Equity was not bound, either in tithe causes or others, to order a new trial, or to direct an issue originally at all; exercising, however, a sound discretion in each particular case, whether to do so or not.]

The Respondent, Michel, is Vicar of the Parish of Sturminster Newton in the County of Dorset; and the Appellant, Bullen, is the occupier of Bagber farm in that parish. The question was, whether a certain payment in lieu of small tithes for that farm was or was not a modus.

The parish contains from 4000 to 5000 acres of land, the greater part of which was formerly under [299] the plough; but now the lands are converted into pasture or meadow, except about 240 acres. There are in the parish seven fields called “the Common Meads,” containing about 120 acres, divided into small allotments held in severalty till the hay is cut, after which they become common to all the tenants of the manor of Sturminster Newton. This manor, comprehending the greater part of the lands in the parish, and the advowson of the rectory, formerly belonged to the Abbey of Glastonbury, as did also the advowson of the vicarage from the time of its endowment till the dissolution of the monasteries by Henry VIII.

From 1743 till 1800, the incumbents were the Rev. Henry St. Loe, the Rev. John Bird, and the Rev. William Butler. There was no evidence that any tithes, great or small, had been paid in the parish during the memory of any living person; but, during the incumbencies of the three persons mentioned, every occupier of land in the parish paid a certain money-rate for the small tithes of the whole of his land, exclusive of the Common Meads, the occupiers of which paid a certain other distinct rate for the meads.

The Respondent was instituted in 1800, and accepted the rate payments in 1800 and 1801; but, thinking them inadequate to the value, he gave notice that they were to determine on St. Thomas’s-day, 1802, and invited the occupiers to make new compositions, which being refused and the payment of the tithes in kind resisted, he filed his bill in the Exchequer in M. T. 1804, against Bullen, Williams, Rabbetts, Dashwood, and Atchison, five of the [300] principal occupiers, praying an account and payment of the single value of all their tithes, except corn and grain. The defendants answered separately, admitting the Respondent’s title as Vicar, but insisting that the payments were moduses, or ancient customary payments to the Vicar in lieu of all tithes

except corn and grain, exclusive of certain lands occupied by Dashwood and Atchison in the Common Meads, the tithes of which were admitted to be due.

The cause was heard in Nov. 1809, and on May 5, 1810, it was decreed that the parties should be referred to trials at law, in feigned actions, in the nature of issues upon the several farm moduses laid by the Defendants in their separate answers: and an account was ordered of what was due to the Vicar from the two Defendants Dashwood and Atchison, for tithes admitted to be due in respect of the Common Mead lands, the other three Defendants having no lands in the Common Meads. The Vicar procured a re-hearing of the cause upon that part of the decree which directed issues: but the Court, Jan. 22, 1812, affirmed the decree. The form of the sixth issue, the only one now in question, was as follows, viz. "Whether from time immemorial the "occupiers or occupier of the farm and lands called Bagber farm have or hath paid, and "have or hath been accustomed to pay, and ought of right now to pay, to the Vicar of "the parish of Sturminster Newton, on St. Thomas's-day in each and every year, a "certain modus, or ancient customary yearly payment of £5 3s. 4d. for, in lieu, and full "satisfaction and discharge of [301] the tithe of hay and grass seeds, and of all other "titheable matters and things (except corn and grain) yearly arising, growing, and "renewing upon and throughout the said farm and lands called Bagber farm." And it was further ordered that the Appellant should be Plaintiff, and the Respondent Defendant at law in the said issue.

The Defendants in equity being Plaintiffs at law, had an opportunity of setting down the issues in the order most advantageous to themselves, and they selected the sixth as the first to be tried, being that of the Defendant Bullen, the present Appellant, whose farm, called Bagber farm, contains 146 acres, 3 rods, 25 perches, and whose tithe rate was £5 3s. 4d., being about 8½d. per acre. The record next in order was that of the Defendant Williams. The issues in these two records were tried at Dorchester, before Mr Justice Chambre and a special Jury, on July 17 and 18, 1812.

On the trial of the issue as to Bagber farm, Bullen, the Appellant, proved by the testimony of some old persons, that no tithes in kind had, within their recollection, been rendered for Bagber farm: but that the above-mentioned payment had been annually made in lieu of the vicarial tithes. Receipts given by Mr. St. Loe and his successors were produced to prove the same payment; and it appeared on the cross-examination of one of the Appellant's witnesses, that the payments for the rest of the parish, as well as for Bagber, were collected from one and the same paper called "the rate-paper." The Vicar on the other hand, to show that the payment was so large that it was incredible it should [302] have been made so far back as the time of legal memory, produced several documents, hereinafter more particularly mentioned, to prove the value of the vicarage at different periods. The Respondent then offered to give in evidence—1st, "the rate-paper," to show that the uniform payment in lieu of tithes was not peculiar to Bagber, but extended over the whole parish: 2d, certain entries in a book, called a Ledger-book or Chartulary (hereinafter more particularly mentioned) of the Abbey of Glastonbury, brought from the muniment room of the Marquis of Bath: 3d, certain accounts of the reeves of the Abbey for the manor of Newton (also found in the custody of the Marquis of Bath), for the purpose of showing that the reeves obtained allowances and acquittances in their accounts with the Abbey for various articles of small tithes arising from demesne lands of the manor, as having been rendered in kind at different periods subsequent to the time of legal memory. These three last heads of evidence were rejected by the Judge; and, the evidence being the same on the second issue, verdicts were found on both records in favour of the moduses.

On Nov. 10, 1812, the Respondent obtained an order of Court to show cause why a new trial should not be granted, on the ground of the rejection of the above-mentioned evidence; and cause having been shown in H. T. following, judgment was reserved; and the Chief Baron Macdonald having in the mean time resigned, the matter was re-argued before Sir Vicary Gibbs, his successor, and the other barons, on Feb. 21, 1814. The objection to the rate-paper, or rather to the general application of it, [303] was that the other payments were not proper evidence on the particular issue. The reeves' accounts were not at all produced on the second trial. The objections to the chartulary were—1st, that it did not come from the proper custody; 2d, that the entry could not be received as secondary evidence of the endowment, not purporting to be either a copy or extract, and that even the endowment itself would be no evidence: 3d, that at any

rate it was not admissible evidence between the present parties, being *res inter alios acta*. On Feb. 23, 1814, the Chief Baron Gibbs delivered the opinion of the Court that the rejected evidence ought to have been received; and a new trial was accordingly ordered.

The cause was tried on March 18, 1814, at Dorchester, before Mr. Justice Bayley, and a Special Jury. The evidence for the Appellant was as follows:—

The depositions of Amos Chin (a witness who had been examined for the Appellant in Equity, and was since dead) were read, and proved his knowledge of the farm for 70 years; that it had always during his recollection consisted of the same parcels; and that no tithes in kind had ever, to the witness's knowledge or belief, been set out to, or demanded by, the Vicar. The depositions of another witness, James Castleman, examined in Equity, and unable to attend at Dorchester, were also read, and proved his knowledge of the farm for sixty or seventy years, he having himself occupied it three years, and always lived near it; that it always, during his recollection, consisted of the same parcels; that no tithes in kind had ever, to the witness's knowledge, [304] been paid to, or demanded by, the Vicar; that he had heard that payments had been made to the Vicar about Christmas in lieu of the tithes of the parish. Richard Moore, aged 72, proved that he had collected the payments for tithes from about the year 1760, and that his father collected them when he first remembered. He proved the hand-writing to about sixteen receipts, for the sum of £5 3s. 4d., expressed to be paid by a Mr. Joyce, a former occupier of Bagber farm, and other succeeding occupiers, due at St. Thomas's-day, in different years, from 1754 to 1791, most of them expressed to be "for a year's tithe," some of them "for rates," or "rates for tithes," and some generally for the farm. These receipts comprised the rates for three other farms, occupied along with Bagber farm, but now in other hands, which made the total payment £7 14s. 6d.

On his cross-examination he said that, on the Sunday before St. Thomas's-day, he always gave a public notice, which was read by the clerk in the church, that the tithes of the parish were to be paid on the 21st of December; that he collected for the whole parish from a rate, and that the papers shown him were some of those rates; that the whole parish was under these money payments; that when he first knew the parish the Common Meads stood by themselves. He proved the paper indorsed "The rate for the Common Meads" to be that from which he collected the rates for the Meads. Examined by the Judge, he stated that in collecting the rates he made no distinction between Bagber farm and the other parts of the parish. He believed [305] Mr. Joyce was the only person who required a receipt (his payment was the largest). In general the payments were only marked off on the rate-paper.

From the rate-paper thus referred to by Moore it appeared that the sum total of the yearly payments was about £68, exclusive of the Mead payments, which amounted to about £10 more, making about £78 in the whole. Of this evidence for the Appellant it was afterwards observed by Lord Redesdale that it was not conclusive, but raised a presumption of a *modus*; and that, as it was proved that all the payments were made in the same way as this for Bagber farm, the presumption must be that all of them were *moduses*, or that none of them was so.

To rebut this presumption the Respondent produced several documents to show, as already stated, that the payments were so large that it was incredible they could have been made so far back as the time of legal memory. But, first, Richard Moore proved that he collected from all the persons named in the rate-paper, in the same manner as from the occupiers of Bagber farm; that the gross sum of the rates remained the same, though the number of payments was afterwards increased; that he collected the Common Mead tithe-rates from another rate-paper; that most of the lands in the parish had the appearance of ridge and furrow, as if formerly ploughed. Then an extract from Domesday Book was read, to show the state of the parish, and the value of land there at the time of that survey. It was then found that the church of Glastonbury held the manor of Newton, consisting [306] of 25 carucates (that is to say, from 2400 to 3000 acres, the contents of a carucate being from 100 to 120 acres), besides which there were 14 carucates in demesne which were never taxed. There were at that day (as at present) three mills, and only sixty-six acres of meadow. The woods were two miles and a half long, and one mile broad (now there is scarcely any wood). The whole had been formerly worth £30, but at the time of the survey was only worth £25. Eleven

carucates were then worth £7 (being about 1½d. per acre). This extract, Lord Redesdale afterwards observed, proved little except the extent of the parish.

In order to introduce the Chartulary, Charles Bowes proved a search in the Bishops of Bristol and Salisbury's Registries (it did not appear that any search had been made in the Augmentation Office) for the original endowment, or a record of it, and that none was to be found. Thomas Davis, Steward of the Marquis of Bath, produced the book, called the Chartulary, from the muniment room of the Marquis, who was proprietor of certain lands which had once belonged to the Abbey, though he had none in Sturminster Newton. This book, together with entries relative to the rights of the Abbey, contained a great deal of miscellaneous matter, including several idle stories: such as, an account of the giants who originally inhabited the British island, a genealogy of the kings of England, beginning from Adam, something *de pondere lance*, a calendar, a list of bulls and licences, etc. Then, after an entry of the date 1333, came the entries, without date, relating to the appropriation of the [307] rectory and endowment of the vicarage of Newton. The first was entitled "*Ordinacio Dñi Epi et capituli Sañ super donacionē et appropriacionē Ecclæ de Nywtonē et Sturminster.*" And then followed the ordination; and after that, with the title "*Ordinacio Vicarie de Sturminster*" prefixed, came the second entry, supposed to be a copy or extract of the endowment, stating the portions of the church of Sturminster assigned (the appropriate technical term used in ancient endowments) to the vicarage, to be ordained to remain in the same for ever. "*Porções ecclæ de Sturmynstr' assignate vicarie ordiande in earū ppetuis tēpibꝯ duratur Mansū cū gardiō & valet, &c.*" Then the several articles, with the annual value of each, were separately stated, from which it appeared that the net annual value of the vicarage was, at the time of the entry, £9 12s. 5½d. There was no mention in it of any money payment in lieu of tithes. A witness proved the handwriting to be of the time of the 1st, 2d, or 3d, Edwards, or about the end of the 13th or beginning of the 14th century. The taxation of Pope Nicholas (afterwards mentioned) proved that the endowment itself must have been made before 1291; and the Judge, having over-ruled objections which had been urged against the reading of the entries, stated to the Jury that the entry appeared to be contemporaneous with the endowment, and was material evidence, as raising the inference that such a money payment as that now contended for could not then have existed. In the early part of the book there was an Index or summary of the contents, entitled, "*Kalendar Sequentis Operis*," in [308] which, at the commencement of the enumeration of those instruments which related to Newton, the following entry appeared, "*Deficit Ordinatio Vicarii Nypton.*" This entry was read on the part of the Appellant, but it did not seem to be considered as of much weight even by the Appellant's counsel.

The valor or taxation of Pope Nicholas, in 1291, was then read, by which it was found that the vicarage of Sturminster Newton was then of the estimated yearly value of £10, and that the rectory was estimated to be worth £13 6s. 8d., making in the whole £23 6s. 8d. Of this, it was observed by Lord Redesdale that, being a taxation, the estimate must be supposed to be rather under than above the real value. A writ of *ad quod damnum*, directed to the King's Escheator for the county of Dorset, in 37 Ed. III., to inquire whether it would be to the prejudice of the Crown to license the conveyance in mortmain, by Hugh Pembridge and others, to the Abbey of Glastonbury, of three messuages, and 195 acres of land in East Bagber (being that quarter of the parish in which the Appellant's land is situate), and the inquisition thereupon taken on oath, were read, whereby it appeared that the Jury were charged to inquire, amongst other things, how much these lands were worth by the year in all issues, according to the true value of the same, and that the jury on their oaths assessed the value at £2 2s. 2d., being 2¼d. per acre. So that, as was afterwards observed by Lord Redesdale, upon the supposition of a modus, the payment of £5 3s. 4d. being about 8s. 4d. per [309] acre, the vicarial tithe alone of an acre of Bagber farm must have been, so far back as the time of legal memory, of from three to four times the whole value of an acre in East Bagber, in 37 Ed. III., which is within the time of legal memory. The general ecclesiastical survey, taken in pursuance of an act of parliament in 26 Henry VIII., was read, whereby it appeared that the vicarage of Sturminster Newton, with the chapel of Bagber annexed, was stated to be of the clear yearly value of £16 16s. 6¼d. A terrier, returned to the Bishop's Court in 1784, of the glebe-lands belonging to the vicarage was read, to show the quantity to be sixty-five acres; the annual value of

which, in 26 Henry VIII. (1535), appeared by the survey of that date to have been £4, or about 1s. 3d. per acre.

Upon this evidence the Jury found a verdict for the Vicar, and against the modus. The records of the remaining issues were withdrawn by consent, and it was agreed that they should abide the event of this cause; and a rule of *nisi prius* was made accordingly, which was afterwards, May 17, 1814, made a rule of Court. In May, 1814, the Appellant, on objections stated to the admissibility and relevancy of the entries in the Chartulary, obtained an order *nisi* for a third trial of the issue as to Bagber farm; but, upon cause shown, that order was, on Jan. 25, 1815, discharged: the Court, with the exception of Mr. Baron Wood, being of opinion that the entries had been properly read in evidence. Against this order of discharge, of Jan. 25, 1815, Bullen appealed to the Lords, praying [310] the House to reverse the same, and order a new trial of the issue as to Bagber farm. It appeared from a statement of one of the counsel for the Respondent, in answer to a question by the Lord Chancellor, that they were permitted to read the entries in the Chartulary only for the purpose of raising the inference that tithes in kind had been paid to the Vicar within the time of legal memory, and were prevented from using them as evidence of an endowment within legal memory, so as, on that ground, to upset the prescription.

The reasons of appeal in the Appellant's case, signed Lens, Dauncey, Gazelee, Casberd, and Heald, were these.

1st, Because the said book called the Chartulary was not sufficiently authenticated by being traced to the proper custody, so as to render the same legal evidence.

2d, Because, supposing the said book to have been sufficiently authenticated, the entries therein are not of such a nature as to be legally receivable in evidence. They do not purport to be an original instrument, nor a copy of an original instrument, nor a substitute capable of being received in the absence of an original instrument; nor do they profess to be an extract of any description, or an original declaration proceeding from any particular party. They are entries evidently referring to some prospective act; yet so indefinite and uncertain in their nature as to be incapable of any specific title or denomination; and if it were possible to contend that they might be construed as [311] an original endowment, which it is submitted is impossible, it is obvious that the instrument would not be derived from the proper custody.

3d, Because supposing the said book to have been duly authenticated, and the entries therein from their nature to be legally admissible in evidence, such entries are not appropriate evidence with reference to the issue on the record; for the endowment of the vicarage so far from being a subject of dispute, or constituting a necessary part of the Respondent's proofs, is admitted by the very nature of the Appellant's own case; and as to that, which is the only point in issue, namely, the mode in which tithes are payable annually for Bagber farm, those entries cannot be received in evidence, although as to another point, if it were a matter in controversy, they might be considered as legal proof.

4th, Because those entries are not legal evidence as between the parties upon the present record; for they cannot be considered in the light of a public act, in which the world at large may be supposed to have borne a part, nor of an act to which the Appellant or any former owner of Bagber farm can be construed to have been a party. They seem to have been the unauthorised act of certain individuals, as against whom it may be conceded such entries would be evidence, but as against the Appellant, or in other words, the owner or occupier of Bagber farm, who had no participation or concern in their formation, nor any knowledge whatsoever of their existence, those entries, on the [312] ground of their being *res inter alios acta*, are inadmissible in evidence.

Sir S. Romilly and Mr. Dauncey at the bar contended (for the Appellant) that the Judge (Bayley) was mistaken in supposing that the entry as to the portions of the church of Sturminster was contemporaneous with the endowment; and if the entry was received in evidence on mistaken grounds, there ought to be a new trial, because it was impossible to say what effect this mistaken view of the subject might have had on the minds of the Jury, or what would have been the verdict if it had been clearly shown that the entry was not contemporaneous with the endowment. The endowment must have taken place previous to the year 1290, and these entries must have been made subsequent to the year 1333, or the 7th of Ed. III., as the preceding entry was of that

date; so that it was manifest from the book itself, that the entries in question could not have been contemporaneous with the endowment. It was manifest also that the entries ought not to be received in evidence, for, supposing that the endowment itself might be read, if produced, this entry as to the portions assigned to the vicarage did not purport to be a copy nor an extract from either copy or original. But even the endowment itself would have no evidence on this issue, as it was no question between the Rector and Vicar. If there had been never so many moduses, none of them would appear from the endowment, which would merely show the tithes as [313]-signed to the vicarage, without saying any thing as to how they were paid. Even as between the rector and vicar, this entry could have been no evidence; it was no diary of acts done at the time, and was accompanied by no act whatever. At any rate it was clearly *res inter alios acta* with respect to Bullen; and if such entries were admitted as evidence against third parties, the rector and vicar might make entries cutting down all moduses at their pleasure (*Vid. Aveson v. Lord Kinnaird*, 6 East, 188). The only judgment given by the Court of Exchequer as to this book was that it came out of a proper custody, leaving the rest open. But it was left by Mr. Justice Bayley very strong to the Jury in this way, that the enumeration of the articles was indicative of the payment of the tithes in kind, and that the total value was of such a size, as to be inconsistent with the notion that so large a modus had existed so far back as the time of legal memory: so that this entry had a weight given to it which it did not deserve; and it was impossible to say that, without this, the verdict would have been as it was; for the opinion of the Jury might have been formed on this very document so left to them.

Pell (Serjt.) and Gifford (for the respondent). The whole weight of the cause was not laid by Mr. Justice Bayley on the Chartulary, for great stress was laid on the rate-paper which was in evidence on the second trial; though on the first, Mr. Justice Chambre had refused it, thinking that the other payments were not good evidence on this issue. If this payment was a modus, all the others must be moduses; and then it was a fair question [314] for the Jury, whether so large a sum as £68 could have been paid in lieu of the vicarial tithes of this parish so far back as the time of legal memory. There were other documents likewise to show that there could have been no such payment for this farm so far back as the time of legal memory. From the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, etc., it appeared incredible that the payment could have existed at that period. But the Chartulary was good evidence between these parties. This was clear law, that an entry or declaration made by a person against his own interest, was evidence between other persons who were neither parties or privy to that entry or declaration—not, of course, in the person's lifetime, because then he might himself be called. *Roe d. Brune v. Rawlings*, 7 East, 279.—*Higham v. Ridgway*, 10 East, 109; in which latter case an entry in a book by a man-midwife, of his having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, was held to be evidence as to the age of the child. So an attorney's book was evidence between other parties, *Warren d. Webb v. Grenville*, 2 Str. 1298. A terrier was evidence against the Rector, though no party to it, *Illingworth v. Leigh*, 4 Gwill. 1615. These cases furnished a sufficient answer to the objection that the entries were *res inter alios acta*. To the same purport were the cases of *Stead v. Heaton*, 4 T. R. 669—and *Doe d. Reece v. Robson*, 15 East, 32; in the latter of which cases Lord Ellenborough (C. J.) said, "The ground upon which this evidence has been received is "that there is a [315] total absence of interest in the persons making the entries to "pervert the fact, and at the same time a competency in them to know it." And per Bayley (J.), "It has long been an established principle of evidence that, if a party, who "has knowledge of the fact, make an entry of it, whereby he charges himself, or "discharges another, upon whom he would otherwise have a claim, such an entry "is admissible evidence of the fact, because it is against his own interest." The entries were made when the book was in the custody of the Abbot of Glastonbury, who was Rector of the church of Sturminster. The whole of the tithes belonged *de jure* to the Rector, and whatever he admitted to be due to the Vicar was against his interest; and, on the principle of the decisions, such entries were evidence as between third parties. The endowment itself would clearly have been admissible evidence, as in *Scott v. Smith*, 1 Ves. Beam. 142, where M. R. admitted an endowment, and held

that the endowment, being within legal memory, negatived the prescription. The Bishop's registry had been searched, and the endowment could not be found; and when the original was lost, any secondary evidence might be given—a copy, minutes, an extract, or evidence of one who had read it. It was not necessary to show that the entry was an exact copy: if it was a true account of the matter it was sufficient. *Underhill v. Durham*, Freem. 509, 2 Gwill. 542.—*Greene v. Proude*, 1 Mod. 117. If the entries gave a true account of the subject, it was no good objection to the admissibility of the evidence that the book contained [316] miscellaneous matters: *Moore v. Mayor of Hastings*, 10 State Tri. (Fol. Ed. Appdx. 138). The account of the giants, etc., properly speaking, formed no part of the book. Such idle stories were often written by the monks on the blank leaves of abbey books. The custody was clearly the proper one, as the Marquis of Bath possessed some of the lands which had belonged to the Abbey, and the possession of a person having such lands was sufficient; and the case must be argued as it would have been previous to the dissolution of the monasteries, and as if the book had come from the Abbey. And it was not only admissible, but material evidence, and so it had been considered by the Court of Exchequer, when that Court ordered a new trial; for the mere admissibility would have been no good ground for a new trial, if the book had contained nothing of consequence. But suppose this book out of the question, the other evidence was amply sufficient to support the verdict; and if so, the Court would not send the matter to a new trial: for the intent and object of an issue out of equity was to inform the conscience of the Court; and if the Court was satisfied on the rest of the evidence that the verdict was right, there could be no good reason for sending the case to a new trial, though the objections to this book should appear to be well founded (*Vis. Richards v. Symes*, 2 Atk. 319). *Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. 155.—*Pemberton v. Pemberton*, 11 Ves. 52.

Sir S. Romilly (in reply). The doctrine contended for on the other side, with respect to these issues, would render the judgment of juries on the facts of no avail. The evidence for the *modus* was not slight, [317] as the payments had been proved to have been invariably made for sixty years past, the period of limitation of a writ of right; and it was difficult to conceive how a farm *modus* could be proved in any other way. The rate-paper could properly be evidence only in as far as it related to the payment made for this farm; and it would be unjust to raise an inference from the other payments against the Appellant on this issue. As to the book called a Chartulary, they might as well have produced the *Chronicles* of Thomas Herne; and, besides, no evidence was given of a search for the endowment in the Augmentation Office.—(*Gifford*. That was not before made a ground of objection.)

Lord Eldon (C.). Considering that this is a case of great consequence, and that it is impossible for me, during the few minutes that remain before the time when the Judges are to attend on very important business (*Doe d. Oxenden v. Chichester*, 4 Dow, 65–91), to address your Lordships so fully on this case as I wish to do, I shall say nothing as to the affirmance or disaffirmance of the judgment at this moment. If the entries in this book have been properly received in evidence, and their effect accurately stated and justly construed (as I know of no noble Lord who thinks the verdict wrong in that view of the case), then the cause may be decided in that way. If the book has not been properly received, then there may be other important matters to be considered.

I understand that it was determined below, both on the first hearing and on rehearing, that these issues ought to be directed; and considering that new trials were afterwards twice applied for, and [318] that on the first application, all the Judges, and on the second, all, except Baron Richards, I think, were of opinion that the directing of the issues at first in this case was right; it is difficult to say here, now, that to have directed these issues originally was improper; and I should not be disposed to say any thing on that point, without looking at the record and the evidence, and the whole proceedings in the Exchequer. But I have no difficulty in saying, after forty years' experience, that a Court of Equity has a right itself to determine questions of fact without the assistance of a Jury. A Court of Equity may, and often does, in the exercise of its judicial discretion, call for the assistance of a verdict by a Jury. But if it can, to its own satisfaction, itself decide upon the evidence, it is not bound to send the matter to be tried by a Jury. This is as clear in tithe as in other causes; and if the

original decree, so far as it directed the issues, had been appealed from, the weight of evidence appears to be so much on one side that I should have found it difficult to say that any issue ought in this case to have been granted. But issues were directed, and we must now take it that this was properly done.

With respect to the case of the Warden and Minor Canons of St. Paul's (9 Ves. 155), that case was decided not merely by the humble individual who now addresses you, but also by this House. The case was brought here by appeal, and this House, well assisted at the time, concurred in this doctrine—that where, on trial of an issue out of a Court of Equity, evidence is improperly rejected, if in looking at that evidence the Court is satisfied that, though it [319] had been received, it ought not to have produced a different verdict; and that if the verdict had been the other way, that verdict ought not to stand; the refusal to grant a new trial is in the proper course of proceeding. I thought that, in the case of the Minor Canons of St. Paul's, there existed no good reason to direct an issue at all. But an issue had been there directed; and it was considered that it was properly done, as the order had not been appealed from. Lord Kenyon disposed of it very speedily, there being, as he said, nothing to try. Another issue in the same case was tried at bar in the Exchequer, and some material evidence was offered. Three Judges were of opinion that this evidence ought not to be received; and one (Baron Graham) thought that it ought to be admitted; and upon that ground a motion was made before me for a new trial. I declared that I thought Baron Graham in the right, and that I should have admitted the evidence; but, considering the nature of the functions of a Court of Equity, and the principle upon which it calls for the assistance of a Jury, the object being to satisfy the conscience of the Court, I could not agree to send the case again to a Jury, when, even though the evidence were admitted, the verdict ought not in my opinion to be different; and when, if it should be so, the conscience of the Court would not only not be satisfied, but would on the contrary be dissatisfied. And then it becomes a matter of nice distinction—if no new trial ought to be granted, though evidence has been rejected which ought to have been received, where, if that evidence had not been rejected but admitted, the court is of opinion that the verdict should be [320] the same; it becomes a matter of nice distinction then, to say, that because evidence has been admitted which ought to have been rejected, a new trial ought to be granted, though the Court should be of opinion that, even if that evidence had not been received but rejected, the conclusion ought to be the same upon the other evidence.

I have said so much to-day, because I take it to be indisputably clear that these title causes, as well as others, may be decided by a Court of Equity, without directing issues; the Court of course exercising a sound discretion in each particular case, as to whether in that case an issue ought or ought not to be sent to a jury. But if there is any where a notion that a Court of Equity is bound on all questions of fact to direct an issue or issues, I say that it is contradicted by my experience, and by the administration of the law for a long series of years.

If your Lordships should determine the question on the first point, I am anxious to protect this decision against an inference that we decide any thing as to what a Court of Equity ought to do if the evidence had been rejected.

Lord Redesdale (after stating the case) (June 13, 1816). The book, which was produced as the Chartulary or Ledger-book of the Abbey of Glastonbury, was of this kind. The steward of the Marquis of Bath proved that it had been kept in the muniment room of the Marquis, who was proprietor of certain lands which had formerly belonged to the Abbey; and it is well known such books are sometimes found in the possession of private individuals, who have got lands which had belonged to the Abbey. The proper cus-[321]-tody perhaps was the Augmentation Office. But the fact is, that these Chartularies, or Ledger-books, have in some instances got into the hands of private persons, instead of being kept in the Augmentation Office.

The objections that were made to the reading of the entries in this book were of three descriptions:—1st, that the custody was not the proper one, an objection however which seems not to have been pressed at the last trial; 2d, that the entries did not contain evidence in itself proper to be received; and 3d, that, if they did, the matter was *res inter alios acta*, with which the owner of Bagber farm had nothing to do.

With respect to the book itself, many observations were made upon it as containing matter not at all connected with the possessions of the Abbey. But, as far as I can

judge from this writing, there are, from the sixteenth page for a considerable extent into the book, various entries with which the Abbey was concerned, and such as are usually found in this sort of books belonging to Abbeyes; for the monks were in the habit of transcribing instruments which concerned the Abbeyes, and also of transcribing public instruments as far as they related to their own interests. It is that kind of book therefore in which ancient deeds and instruments are usually transcribed for the sake of reference and preservation, as is the custom in families which have a muniment room.

Search was made in the Bishop's registry to ascertain whether an endowment of the vicarage existed, but none was found. Then this book was produced, and it contains entries which appear to [322] be transcripts of two instruments: 1st, the ordinance of the Bishop of Salisbury for the appropriation of the church to the Abbey. Now it was expressly required by the statute 15 Richard II. cap. 6, that, on the appropriation of churches, the diocesan should ordain that the Vicar be well and sufficiently endowed, and that statute I take to have been in affirmance of a practice before existing, and that it was, previous to that statute, required that in cases of appropriation the Vicar should be properly endowed, and that it was the duty of the ordinary to see that this was done. The instrument of which this seems to be a copy is the ordinance of the Bishop on the appropriation of the church to the Abbey of Glastonbury, in which it was provided that the endowment should be ten marks at least, "*que valeat annis singulis ad firmam tradi pro decem marcis ad minus, etc.*" This is very important if it be an authentic copy of an authentic instrument, as the next instrument is conformable to it, and is entitled "*Ordinacio Vicarie de Sturminster.*" But it has been said that this title was not originally in the book, as it is written in a very small compass. But in looking over the book I find all the titles put in the same way, and the matter is not at any rate of much consequence. This entry begins with the words "*Porciones Ecclesie de Sturminster Vicarie Ordinande in eadem perpetuis temporibus duratur mansum cum gardino, etc.*" and then expresses the several articles. That entry is in conformity to the preceding instrument; for, if an allowance was directed, on the appropriation, as a provision for the Vicar, and that was not made, the law was that the appropriation [323] was void; and though at this distance of time it is to be presumed that every thing was rightly done, yet at that time, unless the vicarage was endowed as appointed by the Bishop's ordinance, the appropriation was void; and it was important for them, therefore, to preserve the ordination, and the endowment making provision for the Vicar in terms of the ordinance for the appropriation. Then these entries appeared to be copies of authentic and contemporaneous instruments, the one immediately following and corresponding to the other. So the several articles were enumerated, and the value of each, making the annual value of the vicarage £9 12s. 5½d. after all charges deducted.

The question is whether this copy so produced was properly admitted in evidence; and first it was made a question whether the original, if produced, would have been admissible evidence. Your Lordships observe that this evidence was offered to rebut a presumption which the Jury were called upon to draw from the Plaintiff's evidence, that this was an immemorial payment. To rebut that, the Vicar produces evidence to show that it was impossible to draw that presumption, and that the Jury ought to presume the other way; because, from what appeared to be the value of the whole at three several times, and the value of one parcel at another time, this sum of £5 3s. 4d. for Bagber farm was so much beyond what it could possibly have been in the time of Richard I., that it was impossible it could be an immemorial payment. Upon the principle of some of the arguments for the Appellant, no evidence could ever be given to show that a modus was too rank. You never can prove directly the [324] value of the several articles in the time of Richard I. You can only show what has been reputed to be the value; and in questions of reputation, *res inter alios acta* is no objection, and so it seems to be admitted in other parts of the case. The taxation of Pope Nicholas was *res inter alios acta*. The occupier of Bagber farm had nothing to do with it. But it is evidence of the value of the vicarage as estimated for the purposes of that taxation. So the survey of 28 Henry VIII. is *res inter alios acta*; but these surveys are constantly admitted in evidence, not as an accurate account of the precise value, but as an estimate of the value from which the Jury may draw an inference. So it is with regard to the inquisition *ad quod damnum*, in the 37th of Edward III. The occupier of

Bagber farm had no concern with it ; but it was admitted to show that at that time the tithes were estimated to be of such a particular value, from which the Jury might draw their inference.

I take it then the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, the survey, and a variety of similar evidence, such as old leases of other lands, from which the Jury may draw their inference. They are evidence of reputation, as to matters where no other evidence can be had, to rebut the presumption raised for the other side ; for it is merely a presumption.

This being the view I have of the matter, the only question then is whether the entries in this book are evidence of these two instruments. If the originals could be produced, these entries could [325] not be evidence. But search has been made, and the originals cannot be found ; and, as a great authority observes, if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall do constant injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances : and secondary evidence is then admitted to raise a presumption or inference where no direct evidence can be had. This then is the next best evidence ; and perhaps evidence still more inferior might have been admitted if this could not have been produced. This, however, appears to be the best after the originals ; for what is it ? These two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the Abbey, because it was important for the interests of the Abbey that the instruments should be preserved ; and for the same reason it might be presumed that they were faithful copies ; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept. The second instrument was particularly important to the Abbey as following the appropriation, and being evidence to show that the vicarage had been endowed to the extent required, and that the appropriation was consequently good and not void. It was material for the Abbey also that the values should be correct, and especially that they should be high enough, as it was necessary that the endowment should be of the value of ten marks at least ; and is it credible then that, if this one little farm paid the sum of £5 3s. 4d., the circumstance, [326] when they were valuing the whole vicarage tithes, should not have been mentioned in this instrument ? This therefore is in my opinion evidence proper to be received, and decisive on the subject.

It has been objected that the Judge stated to the Jury that the latter entry was contemporaneous with the endowment. Supposing that to be a ground of objection, it is better than cavilling about words : for the meaning was that it was made about the same time. But even critically speaking I should be of opinion that it was made at the same time, and preceded the actual appointment of the Vicar, for the words are, portions, etc. assigned to the vicarage to be ordained.

But supposing the objection to the admission of the entries in this book as evidence to be well founded, what is to be done on the application for a new trial ? The design of the trial is to inform the conscience of the Court, and any special matter ought to be indorsed on the *postea*. It is not a verdict to be put on record for judgment, for none is given upon it ; but it is to inform the conscience of the Court, and that is the right way of considering it. Then, when I look at what the other evidence is, it appears to me amply sufficient to warrant the verdict. The Appellant's evidence is the slightest I ever remember to have seen in such a case. The evidence was, that all the parish was covered by these immemorial payments to the amount of about £70 a year in the whole ; the very slightest presumption of immemorial payment. To rebut that, there is the taxation of Pope Nicholas, the writ of *ad quod damnum*, and inquisition thereon, in the 37th Edward III., and the survey of [327] 26 Henry VIII., all of which must be founded on the grossest error if this be a true immemorial payment. The inference is that this could not be an immemorial payment ; and the verdict is therefore right, though the entries in this book had been improperly admitted. The conscience of the Court then is sufficiently informed, and there appears no good reason to grant a new trial ; and in my opinion, therefore, the judgment ought to be affirmed.

I have gone more at length into the case than usual, as the question is of great importance with reference to the trial of cases of the same nature. I am satisfied that the book called the Chartulary was properly received in evidence, and that, if it were

not so, the verdict is still right, and that the Court below was therefore justified in refusing to send the matter to another trial.

Lord Eldon (C.). I shall comprise what I have at present to say upon this case in a narrow compass. The suit was instituted twelve years ago, and the question is whether an issue shall for the third time be directed; there being already one verdict for the Appellant establishing the *modus*, and another for the Respondent against the *modus*. But though this cause has endured twelve years already, yet, if it be necessary, regard being had to the course of a Court of Equity in these cases, we must subject the parties to what we know belongs to a third trial.

This was a bill filed in the Court of Exchequer by the Vicar of Sturminster Newton, for an account and payment of tithes in kind; and there is this singularity in the case, that all the lands in the [328] parish, except the Common Meads, if the defence can be supported, are covered with *moduses*, the whole of them amounting to £68, being contracts for valuable consideration so long ago as the time of Richard I., and that too exclusive of the tithe of corn and grain; and a Jury was to be called upon to conclude that the tithes of this parish, excluding those of corn and grain, amounted, in pecuniary value, in the time of Richard I., to £68 a year. We know what was the value of money at that time; and then consider that the Rector was to have the tithe of corn and grain; and if so, I think there is hardly any clergyman who would not wish at this day, I mean if there are no *moduses*, to have the living of Sturminster Newton; for if the tithes of that parish were of such value then, what must their value be now?

The Defendants however stated these *moduses*, and that they were ready to pay them. It was proved (so it is stated in the Judge's notes) that for a long time tithe had not been paid for this farm *qua* tithes, but certain payments in money; and that no tithe in kind had been paid during that period. Then the rate-paper was given in evidence, which Justice Chambre had refused at the first trial, and it was contended that the only use that could be made of it was this, not that any inference could legally be drawn from the whole as to any particular place, but that *reddendo singula singulis*, what was applicable to farm A. should alone be read as to farm A., and what was applicable to farm B. should alone be read as to farm B., and so on. Now it appears to me that this is clear evidence with quite a different application. In the [329] case of the Warden and Minor Canons of St. Paul's a book of rates containing a variety of payments was produced, and was taken as evidence in this view, that it must be contended that all of them were customary payments, or that it might rationally be inferred that none were so. The rate-book then seems to me not merely good, but most material evidence, upon this issue.

Now on considering, in addition to the rate-paper, the taxation of Pope Nicholas, the inquisition on the writ of *ad quod damnum*, and the survey, 26 Hen. VIII., I confess I am surprised that any issue at all should have been directed, as I can now state that it appears to me that, independent of this Chartulary, there is demonstrative evidence that this is no *modus*; and it is not the principle of a Court of Equity, because there is a question of fact which may be tried by a Jury, on that account merely, to send it to be so tried. That is not the principle of a Court of Equity.

Mr. Justice Chambre, at the first trial, thought that neither the rate-book nor the Chartulary ought to be received. On a motion for a new trial the Court was of opinion that the rate-book and Chartulary ought to be received in evidence; and it was made a question at the bar, as to the Chartulary, whether the judgment of the Court of Exchequer was merely that it was competent or admissible evidence, or whether the judgment was, that it was not only admissible, but that it ought also to have some effect. If I were sitting to decide whether this book was competent evidence, and were of opinion that, though competent, it ought to have [330] no effect, I could never think of sending it to a jury if satisfied that the direction to the jury ought to be that, after looking at the book, they were to shut it again as if they had never seen it; and if there was any difference of opinion on that point among the Judges below, I agree with the majority that it must have some effect; though they said, very properly, that they could not appreciate what effect it ought to have on the minds of the Jury, because that might depend on circumstances, and on the nature and import of the whole evidence.

Then the cause was sent to another trial, and your Lordships will recollect that this was to satisfy the conscience of the Court. I am of opinion that no issue ought to have

been directed, as the evidence appears to me completely satisfactory without any issue. It is impossible this could have been a payment at, and ever since, the time of Richard I.; and I cannot admit that, consistently with my oath, I ought, if a verdict is right, either to direct or refuse a new trial by reason of any miscarriage in the conduct of the previous trial. Speaking in the hearing of persons on the other side of the bar for whom I have the highest respect, I must say, that in nine cases out of ten the object of these issues is misunderstood. We send issues out of the Courts of Equity, and they proceed upon them as they usually do at trials at *nisi-prius*, and think that sufficient on issues out of Courts of Equity. For instance, in cases of wills, where the subject in question may be of the greatest consequence, we send the matter for trial upon an issue, *devisavit vel non*, and a Court of Equity is not satisfied unless [331] the will is proved by the three subscribing witnesses. They however usually call only one witness, who proves the signing by the testator, and the attestation of himself and the others, in the testator's presence, leaving it to the other side, if they think proper, to call the other witnesses, for reasons understood among themselves; and then it has been said that the issue must be tried over again, which shows on what foundation the thing proceeds; and that issues out of Courts of Equity depend on different reasons, and lead to different conclusions, from those of issues in trials between man and man. (*Vid. Doe v. Smith*, 1 Esp. N. P. C. *Longford v. Eyre*, 1 P. Wms. 741—Bul. N. P. 264.)

I beg leave here again to mention the case of the Warden and Minor Canons of St. Paul's (9 Ves. 155). An issue was there directed which was first tried in the King's Bench, and afterwards in the Exchequer at bar. Material evidence was offered, and three Judges were of opinion that it ought not to be received; but Baron Graham thought that it ought, and on that ground they moved for a new trial. I looked over the whole of the proceedings, from the beginning to the end, to see whether the verdict ought to have been different if the evidence had been received; for it would be curious if you were to send a case for trial to give an opportunity for admitting evidence, when, if that evidence were taken, and a different verdict given in consequence, your conscience would not thereby be satisfied but dissatisfied. I declared my opinion that Baron Graham was right, and the other Judges wrong: but I further said, that, even if the evidence had been received, it ought not to have produced a different [332] verdict: and that, if a different verdict had been given, I would have granted a new trial. Such being my opinion, I could not grant a new trial merely because evidence had been rejected, which, if received, ought to have made no difference in the conclusion. That however does not rest merely on my opinion, but on that of this House, well assisted at the time when that case came before it on appeal.

This House then having so determined that, though evidence had been rejected which ought to have been received, yet if you were satisfied on all the evidence, that, if that evidence which was rejected had been admitted, the verdict ought still to have been the same, you ought not to send the matter to another trial.—Such being the opinion and judgment of this House in that case, it is difficult to say that, in this case, merely because some evidence may have been received which ought not to have been admitted, though the verdict is good upon the rest of the evidence independent of that evidence which ought, as is contended, to have been rejected; that, in this case so put, you ought to grant a new trial. My own opinion clearly is, that this verdict is good upon the rest of the evidence, and that therefore, even upon the supposition that the disputed evidence has been improperly received, no new trial ought to be granted.

Then have the entries in this book been properly received in evidence? It has been said that even the endowment itself, if it had been produced, ought not to have been received. Not received, my Lords! [333] By what evidence can you negative such an issue as this? We produce general evidence of the value of the lands, and show that the value of the whole lands was not equal to your alleged tenth at the time of Richard I. On what principle was the taxation of Pope Nicholas received? On what principle the inquisition in the 37th of Edward III.? On what principle the survey in 26 Henry VIII.? On what, but this, that, from the nature of such issues, they must be met by this general evidence of value, and that evidence is demonstrative that the payment in this case could not be a real modus; because, upon that supposition, your tenth must be of greater value than that tenth and the other nine parts together, which is impossible.

Then as to the custody in which the book was found, it is the natural and proper custody for such a book; for, as to this purpose, it is the custody of the Abbey of Glastonbury. I do not trouble your Lordships about the question, whether the Judge was right in saying that this entry was contemporaneous with the endowment. The entry appears to be a transcript of the original instrument, and, within the scope and principal of all the authorities, ought to be received as evidence. The result is clear, and on this ground alone the new trial might be refused; and I should have thought it unnecessary to touch upon the other parts of the case, had it not appeared to me in the course of the argument, that notions were entertained respecting the functions of a Court of Equity, which rendered it proper not to dispose of this case without taking [334] care that your Lordships' decision, if it should rest on this point, should not prejudice the other points in the cause.

Appeal dismissed, and the order complained of affirmed.

Agent for Appellants, VANDERZEE.

Agents for Respondents, FORSTER, COOKE, and FRERE.

ENGLAND.

ERROR, FROM THE COURT OF KING'S BENCH.

BENSON—*Plaintiff* (in Error); WHITE—*Defendant* (in Error) [May 17, 1816].

[Action by indorsee of a bill of exchange against the acceptor.—Declaration states in first count, that payment was demanded at the place where the bill was made payable, without averring that payment was refused; and, after other counts, declaration states in conclusion, that the acceptor had not paid any of the sums in the declaration mentioned. Judgment entered up generally on the whole of the declaration, and error brought for want of averment in the first count of a refusal to pay. Held to be no error in this case, and judgment affirmed.—(*Vid.* *Butterworth v. Le Despenser*, 3 Maule. Sel. 150.)]

This was an action brought in the Court of King's Bench by the Defendant in error, as indorsee of a bill of exchange, for the sum of £500, to recover [335] against the Plaintiff in error, as the acceptor thereof, the amount of the said Bill of Exchange.

The first count of the declaration stated, that one John Thompson, on January 1, 1814, drew the bill in question on the Plaintiff in error, payable nine months after date, to the order of the drawer; that the Plaintiff in error accepted the bill, payable at the house of Butler Brothers, Esq. Broad-Street, London. It then averred that John Thompson, the drawer, indorsed the bill to the Defendant in error, and delivered the same so indorsed to the Defendant in error, and that, by reason of the premises, and by force of the usage and custom of merchants, the Plaintiff in error became liable to pay to the Defendant in error the money in the said bill specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof, and of the said indorsement so made thereon as aforesaid, and a promise to pay the same according to the tenor and effect of said bill of exchange, and of his said acceptance thereof, and of the said indorsement thereon as aforesaid. It then averred that afterwards, and when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the fourth of April, in the year aforesaid, the said bill of exchange, so accepted and indorsed as aforesaid, was shown and presented for payment at the place where the same was made payable as aforesaid, and payment thereof was then and there demanded, without averring that payment was refused, according to the tenor and effect of the said bill of exchange, and of the said acceptance thereof, and of the said indorsement so made [336] thereon as aforesaid. And, after other counts, the conclusion of the declaration stated, that the Plaintiff in error had not paid any of the sums of money in the declaration mentioned.

The Defendant in error obtained, and entered up, a general judgment on the whole declaration. On this judgment the Plaintiff in error brought his writ of error, and assigned, in addition to the common errors, the following special errors:—1st, That it was stated and alleged that the bill of exchange, in the first count mentioned, was, by and according to the tenor of the acceptance thereof, made payable at a particular place, namely, the house or shop of Butler Brothers, Esq. in Broad Street; and yet it is not averred that payment thereof was ever refused at the said house or shop of the said Butler Brothers, or by the said Butler Brothers, or by the Plaintiff in error. 2dly, That when a bill of exchange is accepted payable at a particular place, the acceptor cannot by law be sued or made liable, unless such bill be presented at the place where it is made payable, and payment thereof be refused at such place; yet that it was stated in the first count that the bill of exchange therein mentioned was accepted payable at a particular place, and that the same was indorsed to the Defendant in error, after such acceptance, whereby he must by law be deemed to have adopted such qualified acceptance, and bound himself to the terms thereof; yet it was not stated that payment of the bill was ever refused at the place where it was made payable. 3dly, That where a previous demand and a previous refusal are necessary before a complete cause of action can accrue, a [337] mere demand without a refusal cannot by law give or create a cause of action; and although, in order to afford and give a complete cause of action against the Plaintiff in error, in respect of the said bill of exchange, a refusal of payment of the said bill of exchange at the place where the same was made payable was essential, there was no averment that the bill of exchange in question was refused payment at the place where it was made payable, or by the persons to whom it was made payable, or by the Plaintiff in error.—The Defendant in error replied that there was no error.

Mr. Barrow for Plaintiff in error; Mr. Foljambe for Defendant in error.

The reasons given for reversing the judgment were these:—

1st, That although a person is not bound to receive a bill of exchange, accepted payable at a particular place, or by particular persons, other than the drawee of such bill; yet if he does so receive it, he adopts such special acceptance as part of the contract, and is bound by all the consequences of such special acceptance; and that the Defendant in error having taken the bill in question with such special acceptance was bound by it.

2dly, That the drawee of a bill of exchange is not bound to accept it generally: he may restrict his acceptance; and by accepting it payable at the house or shop of a particular person or particular persons, he refuses to accept it generally, so as to make himself liable to pay it anywhere, but engrafts [338] upon it as a condition, precedent to his being called upon to pay it, that it shall be presented for payment at the place where it is so made payable, and be refused payment at such place, or by the persons by whom it is made payable. And the person taking a bill with such special acceptance is bound to present it for payment at the place where it is so made payable, and to aver and prove that he had done so, and that payment was refused before he can sue the acceptor.

3dly, That the practice of accepting bills payable at a banking-house, or at some particular place, or by some persons other than the drawees, has of late years become almost universal. That it is a great convenience to both holder and acceptor: to the holder, because, by having a bill made payable at a house of business, he is certain of finding some person who will give him an answer whether the bill be paid or not, without being under the necessity of calling frequently; and to the acceptor, because it facilitates the keeping accounts, and if he should have occasion to leave his residence, his acceptance may be paid in his absence.

4thly, That in cases of such special acceptances it is almost uniformly the fact that they are made payable by the acceptors' bankers or agents, and that consequently there must be a refusal by such bankers or agents to pay the bill, before the acceptor can be called upon. The averment that a demand was made does not necessarily imply a refusal. The party may not wait to receive an answer. Suppose the case, which very frequently happens, [339] that a man has nearly or entirely overdrawn his account at his bankers'; and a bill accepted by him, and made payable at such bankers', is presented for payment, some time must be allowed for the cash clerk to consult the principals whether they will honour the acceptance. But the person presenting the bill does not think proper to wait. In this case there would be a demand, but no

refusal; because the bankers might think proper, notwithstanding the acceptor's account was overdrawn, to give him further credit. And yet such a case would come entirely within the averments of the present declaration, which merely avers a demand, but no refusal. Again, payment of the bill might be demanded of a person who had no authority to give an answer. It would leave it in the power of a malevolent man to blast the credit of a merchant by merely demanding payment without waiting for an answer. And as the Plaintiff is not bound to prove more than he states in pleading, the party under the declaration in this count need only prove the demand, and it opens a door to fraud, by allowing a person to swear only to the latter.

5thly, Because it would be a most serious grievance, if the acceptor of a bill of exchange, who has accepted it payable at a particular place, and on the faith of its being presented for payment, when due, at such place, should have left funds at that particular place to pay it, and may have left his residence on business, might be arrested, at any place, at any distance from home, and at a time when he might not have any funds about him to take up such bill.

[340] 6thly, Because, where a party is only liable on the default of another, there must be an actual default by a refusal by that other person to do the act required, before the party can be called upon to make good such default; but it does not appear that there was any default by Butler Brothers, at whose house the bill in question was made payable. And the Plaintiff in error was not liable to be sued, unless there was a refusal to pay the bill in question, by or at the house of Butler Brothers.

It was not thought necessary to hear the Defendant in error's counsel, but the reasons given in the case for affirming the judgment were these:—

1st, That the first count of the said declaration does state and aver that, at the time when the bill of exchange became due and payable, it was shown and presented for payment at the place, at which the same was made payable, and payment thereof was then and there demanded according to the tenor and effect of the said bill of exchange, and of the acceptance thereof and the indorsement thereon; and the conclusion of the said declaration states that the said Plaintiff in error hath not paid any of the sums of money in the said declaration mentioned, and consequently that he has not paid the bill according to his promise and undertaking.

2dly, That it is not necessary to aver that any refusal to pay the bill was made by the persons at whose house or shop the same was payable, because the acceptance of the Plaintiff in error did not impose upon such persons any legal obligation to pay the said bill; and that the tenor of the acceptance is not that the persons at whose house or [341] shop the bill was made payable would pay the same, but that the Plaintiff in error would himself pay the amount of the bill at that house or shop.

Judgment affirmed, with £134 costs (May 17, 1816).

Agent for Plaintiff in error, BARROW.

Agents for Defendant in error, WHITE and DOWNES.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HIGGINS,—*Appellant*; LIVINGSTONE, and Others,—*Respondents* [April 4, 1814; July 1, 1816].

[3 Scots R. R. 328. Sequel of *Cunyngname v. Higgins*, 1802, 4 Pat. 401.]

[Certain of the trustees under an act of parliament for making a road, the fund provided by the act being neither sufficient nor available for the object until the completion of the road, raise money on their personal credit to carry on the work, and afterwards bring an action against the other trustees who had attended any of the meetings for payment of an equal proportion each of the whole expense of the road, or at least for a proportion of the expense authorized at the meeting or meetings which they attended. Held at first by the Court of Session that the mere fact of

presence at meetings did constitute a *prima facie* ground of personal liability, and that the *onus* lay on the Defenders to show, if they could, facts and circumstances exempting them from that personal liability. But on an appeal to, and a remit by, the House of Lords, held that the mere fact of presence at meetings did not constitute a *prima facie* ground of personal liability, and that the *onus* lay upon the Pursuers to show acts beyond mere attendance done by the Defenders to render them personally liable; and there-[342]-fore the defences of those trustees, against whom nothing was alleged and proved except the mere fact of presence at meetings were sustained; but as to those trustees who signed contracts, they were held personally liable for a proportion of the expense of such contracts as they signed; and this judgment affirmed in Dom. Proc.]

[*Dicente* Lord Eldon (C.). That when trustees confined themselves to the act of parliament and the application of the parliamentary funds, they were not personally liable; but that this also rested on strong principle, that as the trustees must know whether there are funds to carry on the work, when they contract with those who do not know, they shall be considered as representing that there are funds, and shall be bound to provide funds to pay the contractors.]

In 1792, an act of parliament was passed for making a new road from Edinburgh to Glasgow, by Bathgate and Airdrie, and the principal proprietors of land in those parishes of the counties of Linlithgow and Lanark, through which the road was to pass, together with the provosts or chief magistrates of the cities of Edinburgh, Glasgow, and Burgh of Linlithgow, and sheriffs depute of the counties of Linlithgow, Lanark, and Edinburgh, were nominated trustees for carrying the act into execution. The trustees were authorized to hold their first meeting on the first Saturday of June 1792, and half yearly meetings, at which all orders for issuing or borrowing money, for assigning the tolls in security, and for erecting side bars, were to be given. The trustees, or any five or more of them, or persons appointed by any five or more of them, were empowered to levy certain tolls and duties. Some proprietors more immediately interested in the object of the act had subscribed a sum of £3650, [343] towards carrying it into execution; of which sum, after the expenses of obtaining the act of parliament had been defrayed, £3000 remained applicable to the purposes of the road, and the trustees were empowered to raise this money from the subscribers, their heirs, executors, and administrators; the same to be paid out of, and until paid to remain a lien upon, the tolls and duties. The trustees were also empowered to borrow £10,000 on the security of the tolls; to enter into contracts for making and repairing the road, and to assign the proper powers and a proportion of the tolls to the contractors. Private parties were to be recompensed for the ground taken for the road, out of the tolls or the money borrowed on the credit thereof: and the money raised by toll, and borrowed as aforesaid, was to be applied first, in defraying the charges of obtaining the act; then in defraying the expenses of erecting toll-houses and turnpike gates, and of collecting the tolls, of repairing the roads, and of management; after which the money was to be applied in paying the interest of the debt, and extinction of the principal, etc.

From previous estimates it had been concluded that the sum of £3650 subscribed, and the £10,000 to be borrowed, would have been adequate to the object. But this conclusion turned out to be erroneous, and two other acts were passed, the one in 1795, the other in 1798, by which the trustees were empowered to raise an additional sum of £30,000 on the credit of the tolls, and the expense of the road when completed amounted to £29,400.

Several meetings were held under the act, and [344] committees were appointed to contract for making bridges and parts of the road, and contracts were accordingly entered into, which were afterwards approved and ratified by general meetings. The first tangible fund for carrying these operations into effect was the money subscribed, there being no tolls on which money could be borrowed, until the road should be completed. The Appellant's constituents, who were the trustees chiefly interested, then obtained a cash-credit from the Bank of Scotland for £2000, for which they granted a bond, binding themselves "not only as trustees, but also each of us for ourselves, bind
"and oblige us conjunctly and severally, our heirs, executors, and successors whomso-

"ever, to content and pay, etc." Additional sums were borrowed by the Appellant's constituents from individuals, to whom they granted bonds, by which "they bound and obliged themselves, conjunctly and severally, their heirs, executors, and successors whatsoever, to content and repay the same" to the lenders. From these funds the road contractors, and proprietors whose grounds were occupied or damaged, were paid, and the Appellant's constituents, on payment of the subscriptions and the advance of these sums, were, from time to time, declared creditors on the tolls by regular meetings of the trustees.

The committees appointed by the body of the trustees, upon entering into contracts with road-makers, masons, etc., bound themselves only as trustees, while the contractors bound themselves, their heirs, executors, successors, and representatives, as in the contract with one Creelman, who was made "to bind and oblige himself, his heirs, executors, [345] successors, and representatives whatsoever," to complete the road, etc., while the committee "bound and obliged themselves, and the whole other trustees upon the said road, to make payment, etc."

When the road was completed, the Appellant's constituents, who had advanced, for the purposes of the trust, the money borrowed on their own personal credit, paid up the balances due to the contractors, land-owners, and others, who had claims against the trustees, taking from these persons assignments of their claims, and then conveyed the whole to the Appellant, who, in their behalf, raised an action in the Court of Session against all the other trustees whose names appeared in the minutes of the proceedings as having attended any of the meetings, concluding to have it found that the other trustees were bound to relieve the Appellant's constituents of a proportion of the whole expense of the road; and should be decreed to make payment of £1000 each, or such sum as should be found to be the proportion, etc. The object of the action was to have all the trustees, who had attended any of the meetings, found personally liable with their whole fortunes for a proportion of the whole expense, or at least for a proportion of the expense of the contracts, etc., authorized, approved, or in any way sanctioned, at such meeting or meetings as each had attended, and so liable, *per capita*, or each for an equal part, without distinction as to their acts, or the interest they had in the concern.

The cause came before Lord Craig (Ordinary) on Feb. 14, 1798, who ordered memorials, and reported the cause to the Court. The Court, on [346] Nov. 15, 1799, appointed counsel to be heard in their presence; and, before hearing, appointed the pursuers to give in a special condescendence of the grounds on which they meant to support their claims against the different Defenders, together with copies of the obligatory clauses in the contracts, and the bonds for the money borrowed. The Court, on Dec. 12, 1799, pronounced the following interlocutor: "The Lords having heard the counsel for the parties, resumed consideration of the cause, and advised the same, they find it proved by the minutes referred to, that the trustees assembled at meetings held under the act of parliament for making the road in question, appointed committees of their number, with power to enter into contracts and agreements relative thereto, in consequence of which, and of the contracts and agreements thus entered into, a great expense was incurred, which made it necessary to borrow considerable sums of money upon the credit of the tolls, and upon the private credit of the Pursuers' funds; that the Pursuers are entitled to a proportional relief from the other trustees, called as Defenders in this action, who were members of these meetings, and as such either gave their concurrence in appointing committees with power to contract as aforesaid, or afterwards homologated and approved of those contracts and agreements entered into for carrying the said resolutions of the said general meetings into execution, and remit to the Lord Ordinary to proceed accordingly."

The cause having come back to the Lord Ordinary, [347] his Lordship ordained each of the Defenders to state, in a special condescendence, the particular circumstances by which he alleged he did not fall under the findings of the interlocutor of the Court. Before any further proceedings below, the cause was appealed, and on June 26, 1802, the House of Lords made the following order:—"It is ordered and adjudged by the Lords Spiritual and Temporal, in parliament assembled, that the cause be remitted back to the Court of Session to review the interlocutors complained of, of Dec. 12, 1799, and Feb. 18, 1800, generally, and to find from which of the Defenders, and in respect of what particular sums as to each of them, the Pursuers, and which of them, are entitled to proportional relief, and by reason of what acts each such Defender became personally liable, and in what sums the Defenders are respectively liable to

“contribute to such relief; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of May 14, 1800, be, and the same is hereby, “reversed.”

The state of the case, under these judgments, appears to have been this; that the Court of Session at first thought that the circumstance of presence at a meeting was *prima facie* evidence of personal liability, and that the onus lay on each particular Defender to show, if he could, facts and circumstances exempting him; but that the House of Lords, on the contrary, thought that mere presence was not *prima facie* evidence of personal liability, and that the onus lay on the Pursuers to show other facts and circumstances by which each of the Defenders incurred that liability.

[348] The Lord Ordinary, to whom it was remitted to apply the judgment of the House of Lords, accordingly ordered special condescendences to be given in, by the Pursuers, against each Defender. By consent of the parties eight of the cases were selected, the decision of which, it was hoped, would govern the rest, and in these cases the condescendences were given in. Sir Alexander Livingstone, and Mr. Hamilton of Westport, had not only attended meetings, but had been members of committees, and signed some contracts for making parts of the road and building bridges, and also references with landowners, to settle the compensation for ground taken for the purposes of the road; in which they bound themselves, their heirs and successors, to pay the sums that should be awarded.

Lord Polkemet's name was inserted in the minutes as having attended two meetings, which authorized some works, approved of others, and agreed to references. His property lay chiefly in the line of a rival road; and, though on public grounds he did not oppose the objects of this trust, he took no active part in promoting them. He attended one meeting for the purpose of supporting a proposition that the road should be carried along the north side of a certain bog, instead of the south side, he having understood that the former line would be more beneficial to the public; but the south line was ultimately preferred. His design, in attending the other meeting, was to represent against what he conceived to be an improper practice adopted by the trustees, of demanding toll from those who merely crossed their new road. Sir Wil[349]-liam Cunningham, Mr. Hamilton Colt, Mr. Buchanan of Ardinconnel, and the father of Mr. Nisbet of Cairnhill (Mr. Nisbet being, it was contended, liable as representing his father), had merely attended a meeting or meetings where committees were appointed to contract, and contracts approved. Mr. Russel, of Andrew's Yards, had gone to the door of the room where a meeting was holding, to speak to one of the trustees on a matter of private business; and being seen at the door, a trustee proposed that his name should be put down as having attended, upon which, without entering the room, he stated that he did not mean to attend, and had never attended any of the meetings. His name, however, was inserted in the minutes, and this was the only ground of personal liability as to him.

After answers, etc., the Lord Ordinary reported the cause to the Court, and the Court, on Nov. 13, 1807, pronounced an interlocutor, “finding that no acts had been “condescended upon sufficient to render the Defenders liable.” On advising petitions against this interlocutor, with answers, the Court altered their previous interlocutor so far as to “find that Alexander Livingstone, and Mr. Hamilton of Westport, were “personally liable, in relief to the Pursuers, for such contracts or deeds as they “severally signed, but to no further extent.” From these interlocutors the Appellant, Higgins, brought his appeal against Sir Alexander Livingstone, and Hamilton of Westport, in so far as they had not been found liable to the extent of the demand made by the Appellant, and against the rest generally.

For the Appellant, Higgins, it was contended that [350] the trustees must have known that the only tangible fund was the £3000 subscribed, and that no money could be borrowed on the credit of the tolls until the road should be completed, and the expense incurred, and that no contractor would undertake any of the operations on that security; that, under these circumstances, it was optional to every person to accept the trust or not; that such as accepted might have kept clear of individual responsibility by paying the contractors and land-owners with money borrowed on the credit of the tolls according to the act, or, if this could not be done, by giving up the trust; that the trustees did, in fact, occupy the ground, lay open inclosures, and enter into contracts, knowing that no money could then be borrowed on the credit of the tolls, and without any stipulation

that the land-owners and contractors should accept the security of the future tolls for their payment; and that, therefore, the trustees themselves became personally liable, and each of them liable for an equal proportion of the whole expense, or at least of that which he authorized by attendance at meetings where the undertakings were ordered, in consequence of which the expense was incurred; that many of the operations had been sanctioned by the trustees before any money was borrowed on the individual credit of the Appellant's constituents; and, that on the same principle on which Livingstone, and Hamilton of Westport, who had, as members of committees, signed obligations, were personally liable, the great body of trustees who appointed the committees, and sanctioned their proceedings, ought also to be personally liable, because the Mandatory, acting within the [351] limits of his instructions, and having his acts sanctioned by the Mandant, cannot be individually liable without the right of recourse against the Mandant.

The following reasons, taken from the case of Buchanan of Ardinconnel, are a summary of the arguments for the Respondents.

1st, The Respondent did not bind himself in any written instrument to pay a share of the expense of making the road in question; and neither in virtue of the act which they obtained, nor of any general principle, were the Appellant's constituents, or others, entitled to impose any personal liability upon the Respondent.

2d, When the Appellant's constituents originally expended their money in making the road in question, they did not act under the belief that the Respondent was bound by law or contract to relieve them out of his private property.

3d, The only pretext in virtue of which the Appellant's constituents claimed to be relieved by the Respondent is merely this, that he attended three road-meetings. But that circumstance certainly cannot prove that he attended in any other character than as a trustee, or bound himself personally, and his heirs and executors, to do anything not sanctioned by the act of parliament under which the meeting was held. The deeds of the majority might bind him as a trustee, but not as an individual, and there is no evidence that he bound himself in this last character.

4th, The meetings, attended by the Respondent, acted merely in an official capacity, as trustees under a turnpike act. Abundance of funds for the execu-[352]-tion of the project, authorized by the turnpike act in question, were put into the hands of this and other meetings by the Appellant's constituents, who were interested in forwarding the work: and the meetings, or general body of trustees, acted properly, when they lent the sanction of the authority delegated to them by the legislature, for the purpose of carrying into effect an useful public work. By giving their sanction to the lawful operations of the Appellant's constituents, the general body of trustees could incur no personal responsibility. The meetings sanctioned contracts and other transactions merely in the character of trustees. The Appellant's constituents were the only parties who bound their heirs and executors in any transaction.

5th, The demand is most unreasonable, that the Respondent shall repay to the Appellant's constituents a share of the expense of passing the turnpike acts, and which just amounts to a demand that, after they voluntarily subscribed sums for a public purpose upon the security of tolls, the money shall be repaid by their neighbours instead of themselves.

6th, Were this action of the Appellant's to be attended with success, it would prove nearly impossible to find trustees to execute any turnpike act, and nearly the whole of the landed proprietors in Scotland, or their descendants, would find themselves involved in the most perplexing and intricate law-suits about questions similar to the present.

It was questioned at the bar, though the point was not much insisted on, as both parties had admitted the evidence below, whether the mere circumstance of a trustee's name appearing on the minute book, in the list of those stated to be present, was, [353] of itself, legal evidence of his having been actually present, as the name might have been inserted by mistake. As to Livingstone, and Hamilton of Westport, who had lodged a cross appeal, it was contended for them that they ought to have been exempted on the same principle, on which the other Defenders had been found not to be individually liable; for a member of a committee, acting as such, bound not himself but his constituents, who authorized him to act; and, if the great body of the trustees were not individually liable, it followed of necessity that those ought to be exempt who acted under their appointment and by their authority.

The case of *Horsley v. Bell*, (n.) 1 Bro. Ch. Ca. 101, was cited at the bar for the Appellant, in which the commissioners under an act of parliament for carrying on a navigation, as it was called, at Thirsk, in Yorkshire, were held personally liable for orders which they had not signed. But it was answered that, in that case, there was an unqualified personal order, that it was a case of personal profit to the commissioners, and that all the commissioners had signed some orders probably recognising the rest.

Sir S. Romilly and Mr. Abercrombie for the Appellant; Mr. Adam and Mr. Leach for the Respondents.

Lord Eldon (C.) (after stating the previous proceedings) (July 1, 1816). When the cause came before this House, it was attended by two noble Lords (Roslyn and Alvanley) since dead, who felt this to be a matter of infinite importance, and found it very dif-[354]-ficult to say that a trustee, by the mere act of going into the room at the time when a meeting was held there, should be personally liable for all that was done at that meeting; and even that, if the meeting homologated or sanctioned the proceedings of previous meetings, and matters arising out of them, he, because he happened to be present at that meeting, should be personally liable for the whole. I might mention one or two instances, connected with these proceedings, to enable your Lordships the better to sift that principle, and judge of the extent of its operation. Suppose a man, nominated a trustee in the act of parliament, had gone, as Russel did, into the room, or to the door of the room, to ask for a friend, and had been seen, and his name put down, as the clerk puts down the name of a peer attending whether he votes or not, he would be personally liable for all the proceedings though he took no part in them. And so in the case of a magistrate of a burgh, nominated a trustee during his office, if he had gone into the room at the time of holding a meeting, only one day before the end of his year of office, though he went for no other purpose than to inquire about the health of a friend, he would be in like manner personally liable.

No case decided in this country applicable to the present has been found, except that of *Horsley v. Bell*,* C. C. Feb. 9, 1778, of which I have been [355] furnished with an accurate note by my friend (Mr. Cowper) who sits near me. On the authority of one noble Lord, that case was not very satisfactorily decided. But if it is to be understood in this limited sense, that the commissioners in that case were personally liable, not only as to orders which they signed, but also as to those orders which, though they did not sign them, they recognised by other orders which they did actually sign; that is different from attaching personal liability to the mere circumstance of presence at meeting, or going into the room.

As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that when persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally liable. But this also, I think, rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they had a fund applica-[356]-ble to the object, and are then personally bound to provide funds to pay the contractors.

When this case was here before, the House must have been of opinion that the mere circumstance of presence at a meeting of trustees did not subject those so attending as individuals to contribution, or payment of the tradesmen; for the fact of presence was then before the House, by means of the minutes and names put down, as fully as

* The case, as stated in 1 Bro. Ch. Ca. (n.) 101, was this Bill filed by Plaintiff, the undertaker of a navigation at Thirsk, in Yorkshire, against the commissioners (named in the act of parliament for carrying it on) who had signed the several orders. Three questions were agitated at the bar: 1st, Whether the Defendants were personally liable, they contending that they were exercising a public trust, and that the credit was given to the undertaking itself, and not personally to them, and that the remedy was therefore *in rem*; 2d, Whether all who had been present at any of the meetings, and had signed some, but not all the orders, were liable as to all the orders, or only as to those which they had respectively signed; 3d, Whether the Plaintiff was right in filing his bill in this Court, or his remedy was merely at common law. Ashurst and Gould, justices, and the Lord Chancellor, giving their reasons *seriatim* (for which see Brown), held the affirmative of all these propositions. Decree affirmed in D. P., March 23, 1787.

it could, in this case, be brought under your Lordships' view : and the House could never have thought proper to remit the cause, if the Lords had been of opinion that mere presence at meetings did subject the trustees to personal liability. And then, when one considers the difference between giving orders for the execution of any particular work, and the fact of a person merely coming into the room while a meeting on the subject of the trust is there held, it would be going a great way to say that a person, so coming in, should be personally liable for everything done at the meeting. A person may come in for the purpose of stating his opinion upon a particular point, as Lord Polkemmet did with respect to the question whether the line of road should be carried along the north side, or along the south side, of a certain swamp or bog ; and having given his opinion on that point, he leaves the room : and then, when he is no longer present, for the minutes do not distinguish between those who continued present and those who went away, certain contracts are made at that meeting ; and if, merely because the meeting gave its authority to these contracts, he is to be held personally responsible, it is [357] one of the hardest doctrines that can belong to the execution of a public trust of this kind.

Then this House made the following order (June 26, 1802): "It is ordered and adjudged " by the Lords Spiritual and Temporal, in Parliament assembled, that the cause be remitted back to the Court of Session to review the interlocutors complained of, of Dec. " 12, 1799, and Feb. 18, 1800, generally, and to find from which of the Defenders, and " in respect of what particular sums as to each of them, the Pursuers, and which of them, " are entitled to proportional relief, and by reason of what acts each such Defender became personally liable, and in what sums the Defenders are respectively personally " liable to contribute to such relief." When the House made this order it was perfectly cognizant of the minutes, and if the House had meant to hold that, because A. B. and C. were at such meetings, and at such periods, that was sufficient to fix them personally, the House should have said so at the time, and not have sent the cause back again to the Court of Session, as the minutes were then before the House.

I would here observe that even at these Scotch meetings, where they have larger powers than are given in this country, though, if the trustees confine themselves to the act of parliament, and the application of the funds provided under the act, they are entitled by a majority to bind the rest ; yet, if they enter upon the consideration of what does not strictly belong to the execution of their duty as trustees, the majority cannot bind the others ; and then, if the majority contract, before they can bind the minority they must show certain acts of homologation or approba-[358]-tion, by which each is—not made liable in the execution of the trust—but personally pledged.

Now the manner in which the remit has been applied is this. The Lord Ordinary, to whom the cause was remitted by the Court of Session, to give effect to the judgment of the House of Lords, appointed the Appellant to state in separate condescendences the facts, in virtue of which each of the Respondents was alleged to be liable, and the extent of the liability. Condescendences were accordingly given in, and the acts, in virtue of which the personal liability was incurred by each, and the extent of that liability were stated ; and, as to this second point, the Appellant's constituents persisted in maintaining that each trustee who approved of any part of the road, was liable for a proportion of the expense of the whole road. This was wonderfully large. But they say this, You knew that, though the road was allotted into parts or districts for the facility of contracting, the whole road under the trust was truly and in fact only one road ; and therefore, when you authorized the expense of a part, you authorised the expense for the whole. It would be difficult however to bind any person by such reasoning as this. And then they contended that each of the Respondents was liable for a proportion of the expense of every undertaking, of which, as a member of a meeting or otherwise, he had authorized the performance.

Sir Alexander Livingstone was at a variety of meetings, was a member of committees, and signed contracts. Lord Polkemmet was present at two meetings, which, among other acts, authorized a com-[359]-mittee to contract for one division of road, approved of a contract for another, and entered into references, by which a great expense was incurred, and, the number present being given, his share was assigned. There is a very able paper on the part of Lord Polkemmet, and it represents his ignorance of the expenditure ; that in attending the meetings he had two particular objects in view, and left them when these were disposed of ; that the meetings were distant a

year and a half from each other; that he took no part in the business beyond the particulars mentioned; and that the demand was a surprise upon him. Sir William Cunningham was present at two meetings: Mr. Buchanan was present at three meetings; and as to him they relied upon an answer written by him to a letter from their agent, which he however sufficiently explains.

Now, without troubling your Lordships with a further statement of particulars, the result is that, with the exception of the cases of Hamilton of Westport, and Sir Alexander Livingstone, the circumstance from which the liability is contended for is, that the parties were present at certain meetings; and the case of Nisbet is remarkable, as he was said to be liable as representing his ancestor, because that ancestor was present at a meeting.

Then the question here, as I take it, is this; whether, when you consider your own remit, it is possible to say that this last judgment of the Court of Session has miscarried. It is one thing to say that I shall consent myself with a condescendence, alleging the mere fact of presence, and another thing to say that, at such meetings, A. B. and C. [360] took such parts, with a view not to subject them on account of mere presence, which appears to have been negatived by the remit, but in consequence of some act done by them. And though presence is not *primi facie* sufficient, if it had been shown that a trustee was there, and had done so and so, as in the case of Sir Alexander Livingstone, that would have met the idea of your Lordships. But I cannot think that the meaning of the House was, that the circumstance of mere presence at a meeting or meetings should make a trustee personally liable.

After further considering the case, the first judgment was this. "On report of Lord Craig, having advised the memorial for the Pursuer, with the counter memorial for John Hamilton Colt, Esq., and whole cause, together with the remit from the House of Lords, the Lords find that no acts have been condescended upon sufficient to render John Hamilton Colt liable in payment of the sums demanded, or in relief to the Pursuers; therefore recall their interlocutors of Dec. 12, 1799, and Feb. 18, 1800, appealed from; sustain the defences pleaded for the said John Hamilton Colt; assolvie him from the conclusion of the action, and decern, and find no expenses due; appoint the condescendences, answers, replies, and duplies given in before the Lord Ordinary to be withdrawn from process, and make no part of the proceedings." A similar interlocutor was pronounced in the case of each and every of the Defenders. A petition was presented by the Appellant, complaining of the interlocutor as applicable to the case of Sir Thomas Livingstone, one of the Defenders, in which the [361] merits of the cause were fully argued; and short petitions were presented against the other Defenders, referring to the argument contained in that against Sir Thomas Livingstone.

Upon advising these petitions, with answers, the following interlocutor was pronounced of this date: "The Lords having resumed consideration of this petition, and advised the same, with the answers thereto for Sir Thomas Livingstone, and the common agent in the ranking of Sir Alexander Livingstone, his father's creditors; and having also resumed consideration of the several petitions for the Pursuer against Sir William Augustus Cunyngham, the Honourable William Baillie of Polkemmet, John Hamilton Colt, William Hamilton, Andrew Buchanan, George More Nisbet, Defenders, alter their interlocutors reclaimed against, in so far as to find that the deceased Sir Alexander Livingstone was personally liable, and that the said William Hamilton is also personally liable in payment of the sums demanded, and in relief to the Pursuer for the expense of such contracts or deeds as they severally signed, but to no further extent; and to that extent they find the Pursuer entitled to have decreet *cognitionis causa* against Sir Thomas Livingstone, and remit to the Lord Ordinary to proceed accordingly; but *quoad ultra* adhere to said interlocutor, and refuse the prayer of the several petitions against these two Defenders; and as to the whole of the other Defenders above named, the Lords adhere to their interlocutors reclaimed against, and refuse the prayer of the respective petitions, etc."

[362] Now it appears to me that this judgment proceeded on this principle; that, if you state in your condescendence and prove no more than the mere coming into the room, or presence at a meeting, that is not sufficient to render a trustee personally liable: but, on the other hand, if they made themselves parties to the contracts, so as to pledge themselves personally to the other parties with whom they contracted, or so as to be considered as between themselves and those with whom they so contracted, as

undertaking that there was a fund sufficient to answer the purpose, that then they were individually liable: and that accounts for the distinction made between the cases of Sir Alexander Livingstone and Hamilton of Westport, and the others: and then the personal liability of these two must proceed, not on the circumstance of presence at the meetings, but on the acts and deeds done by them, the contracts which they executed, and the evidence that they concurred. As to the others, nothing was alleged but the mere fact of their going into the room while the meetings were held, and by the former judgment of this House that was considered as not sufficient to bind the parties personally. And to be sure, nothing could be harder than that Russel, who went into the room, or to the door of the room, while a meeting was holding, merely to ask for a friend, should be personally liable for any contract there entered into; or harder than that if a person in office went, once during the year of his office, into a room where a meeting was holding, he should, on the mere evidence of these minutes that he was present, be considered as therefore personally liable.

[363] This does not break in at all on the principle that they might be liable personally if they homologated what had been done. But the condescendences and case carry it no further than mere presence at meetings.

I propose, therefore, that the interlocutors complained of be affirmed generally as they stand.

Judgment of the Court below affirmed.

Agent for Appellant, CAMPBELL.

Agents for Respondents, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MAULE,—*Appellant*; MAULE,—*Respondent* [April 9, May 10, 1816].

[3 Scots R. R. 337.]

[Submission and decret arbitral in 1782 between A. and B.; the latter taking burden upon him for his son C., a minor, whose interest was concerned. B. dies in 1789, and C. comes of age in 1794, and does various acts under the decret arbitral, believing it to be a *boni fide* submission and award. In 1809, C. discovers the uncorrected scroll of the submission, and letters of one of the arbiters, from which it appears that the arbiters had not been left to the free exercise of their own judgment on the matters referred to them, but had been bound down by a previous agreement or compromise between the parties; so that the transaction was in reality an agreement to be carried into execution under the colour of an award. Held by the House of Lords, reversing the judgment of the Court of Session, [364] that, under these circumstances, and upon this evidence, the transaction was not a valid decret arbitral, nor binding as such upon C.]

The estates of Panmure having been forfeited to the Crown in 1715, by the attainder of James, then Earl of Panmure, and brought to sale, were purchased by the York Building Company; and that Company, on April 23, 1724, executed a lease for ninety-nine years, of the house and parks of Panmure, to the Countess of Panmure, widow of Earl James, and her assignees whatsoever, at £100 yearly rent; and a lease, of the same date, of the mansion-house and parks of Brechin to Mr. Harry Maule, brother and next heir of Earl James, and to his assignees whatsoever, for ninety-nine years from the time of his entry, which was declared to be at the determination of the said Countess of Panmure's life-rent of the subjects, for £50 yearly rent.

In 1730, Sir Harry Maule, with the concurrence of his sons William and John, executed a strict entail of the estate of Kelly; and the son William, of the same date,

executed an entail of the estate of Ballumbie, to which he was then entitled in possession, to the same series of heirs; and also granted an obligation to employ a sum of £9000 sterling in the purchase of lands, to be settled according to the provisions of the entail, in consideration of a bond for £10,000 which had been granted by the late Earl of Panmure to the Countess previous to his forfeiture, to which he, William, had acquired right. The Countess and Sir Harry, in [365] the same year, also executed entails of the leases of the mansion-houses and parks of Panmure and Brechin, to the same series of heirs. The destination was, after Harry Maule's decease, to William Maule, his eldest son and the heirs male of his body; whom failing, to John Maule, his other son, and the heirs male of his body; whom failing, to any other heirs male to be procreated of the body of Harry Maule: whom failing, to Dr. Henry Maule, Lord Bishop of Cloyne, in Ireland, his next heir male, and the heirs male of his body; whom failing, to James Maule, the Bishop's brother, and the heirs male of his body; whom failing, to the nearest lawful heirs male of Harry Maule; whom all failing, to his nearest lawful heirs and assignees whatsoever. The entails were never recorded.

The Countess of Panmure died in 1731, and Mr. Harry Maule in 1734; and William the eldest son, afterwards created an Irish Peer, with the title Earl of Panmure, made up titles to the estate of Kellie upon Harry Maule's investitures, dated 1687, which did not extend the substitution to the Bishop of Cloyne. He continued to hold Ballumbie on his title prior to the entails, and he possessed the mansion-houses and parks of Panmure and Brechin, without any acknowledgment of the entails of the leases, from 1734 to 1781, the period of his death, previous to which he purchased the property of the subjects of the leases.

In July, 1781, John Maule, the other son of Harry, a Baron of the Exchequer, died without issue, having bequeathed to Lieutenant Thomas Maule, grandson of the Bishop of Cloyne, and [366] father of the Appellant, a bundle of papers, including the entails of 1730, and the obligation for £9000.

The Earl of Panmure having purchased the whole of the family estates in Forfar shire, including the subjects of the leases, in 1781 executed an entail of the whole to his nephew, the Earl of Dalhousie, in life-rent; and to his second son, and his younger sons, *seriatim*, in fee. The Earl died without issue in less than three months after executing this entail; and then a competition for the estates arose between the Earl of Dalhousie for himself, and as administrator in law for his second son the Respondent; and Thomas Maule, the Appellant's father, descendant and heir male of the Bishop of Cloyne, claiming under the entails of 1730. The result was that the Court of Session, by interlocutor of March 1, 1782, found that the entails, 1730, of Kelly and Ballumbie, had been cut off by the positive and negative prescription, and that the obligation relative to the £9000 was cut off by the negative prescription; and that the Earl had full power over these subjects. But with respect to the leases of the mansion-houses, etc. of Panmure and Brechin, the subjects now in question, the Court found that Thomas Maule had a right to take them up.

The Earl of Dalhousie entered an appeal to the House of Lords against this judgment in so far as respected the leases. The parties then referred the whole matters in difference to the arbitration of Mr. Wight, the leading counsel for Thomas Maule, and named by him as arbiter, and Sir Hay Campbell, leading counsel for the Earl of Dalhousie, and [367] named arbiter by him, and in case of variance between these arbiters, to the decision of McQueen, of Braxfield, one of the Judges of the Court of Session, whose opinion had been given in favour of Thomas Maule with respect to the leases; the Earl of Dalhousie taking burden upon him for the Respondent, and T. Maule for the Appellant. The submission was dated March 30, 1782, and the arbiters made their award on the 2d of April following, thereby finding that the leases were at an end in consequence of the purchase of the property by the Earl of Panmure, and that the entails of them were at any rate cut off by prescription, and were not subsisting deeds; and therefore they reduced the same, and reversed the interlocutor of the Court so far as respected the leases, and affirmed it as to all other points. But in consideration of depriving Thomas Maule, and the heirs under the entails of 1730, of the leases adjudged in their favour by the Court of Session, the arbiters ordained the Earl of Dalhousie, his son, and their heirs, to advance £3500, £500 of which was to be paid to Thomas Maule immediately, and the remaining £3000 to be laid out on security, in the name of trustees, to the use of Thomas Maule and the other heirs under the

entails of 1730 (except as under-mentioned), who were to be entitled to the interest of the principal remaining unpaid, during the subsistence of the trust; £500 of the principal to be paid in 1789, £2000 in 1823, the time of the expiration of the Panmure lease, and the remaining £500 in 1831, the time of the expiration of the Brechin lease. There was this difference between the destination of the [368] leases and that of the money; that in the case of the leases the ultimate destination was to the heirs and assignees whomsoever of Harry Maule; and with respect to the money, the ultimate destination was to the heirs and assignees whomsoever of Lieutenant Thomas Maule.

The appeal was then withdrawn; the money was advanced in terms of the award, and the £500 paid to Lieutenant Maule. Mr. Wight and Sir Ilay Campbell were appointed trustees, and Lieutenant Maule received the interest of the £3000 till his death in 1789. In 1791 the Appellant, then a minor, was served heir male, and of provision under the decret arbitral; and concurred with the Respondent, after the death of Mr. Wight, in the discharge of Sir Ilay Campbell, and the appointment of Mr. Campbell, now Lord Succoth, and Mr. Corbet, advocates, as trustees; and the deed was written by the Appellant himself, who, since his father's death, received the interest and discharged it, and did other acts which were afterwards founded upon as acts of homologation.

The Appellant came of age in 1794, and soon after went into the army, and was ordered with his regiment to Ireland, where he resided till 1809, when he came to Scotland. He then heard of the death of a Mr. Maule, factor to the Earl of Moray, who had promised him a legacy; and, on examining certain papers, part of which had belonged to the deceased, and part to a Mr. James Maule, clerk to Mr. Leslie, writer to the Signet, who had been agent to Lords Panmure and Dalhousie, he found a paper entitled, "Opinion of Mr. David Rae, and [369] Mr. Ilay Campbell upon the title "deeds of Kellie and Ballumbie, August, 1781;" and another entitled "Submission, "between George Earl of Dalhousie and Thomas Maule, Esq. 1782." The Appellant then caused a search to be made among his father's papers, and found two letters of the dates March 24 and 29, 1782, from Mr. Wight to the Appellant's father. From the papers thus discovered, it appeared that Sir Ilay Campbell and Mr. Rae, afterwards Lord Eskgrove, had been of opinion that the leases were not extinguished by the purchase of the property, and that it was very questionable whether the entails of them were extinguished by prescription; and that an agreement or compromise had been entered into by the parties, or their counsel, previous to the submission and award, in which the utmost amount of the sum to be given for the leases and the other points to be decided, and which afterwards were decided by the award, had been arranged and settled. The letters of Mr. Wight referred to the treaty, and mentioned his exertions to bring the other party to higher terms; and in the scroll of the submission, prepared by Mr. Leslie, it was stated that, to avoid further proceedings at law, a treaty had been entered into between the counsel for the parties, and a verbal agreement concluded to the following effect; and then the terms of the agreement were set forth as they afterwards appeared in the decret arbitral. This narrative was, on revision, struck out.

Upon discovering these papers the Appellant applied to the Respondent to consent to depart from the transaction, and to a re-hearing of their claims [370] on the footing on which they had been placed by the judgment of the Court of Session in 1782; but this being refused, the Appellant raised an action of reduction and declarator to set aside the decret arbitral and service thereon, on the grounds that the arbiters had not been permitted to exercise their own judgment on the matters pretended to be referred to them, but had been bound down by a previous agreement, bargain, or transaction, and that the parties to the transaction had no power to bind the Appellant as heir of entail.

Several important questions were agitated in the course of the pleadings; but the only point decided by the Court was, that this was a valid decret arbitral, and was homologated as such by the Appellant. The Judges were equally divided till Lord Pitmilley was called in; and he being of opinion that the decret arbitral was valid and binding, the Court (2d division) by interlocutor of March 9, 1813, repelled the reasons of reduction, etc. From this interlocutor the Appellant appealed.

The appeal was heard in the House of Lords in April, 1816.

Lord Eldon (C.) (April 9, 1816). This is an appeal from an interlocutor of the

Court of Session of March 9, 1813, in which William Maule, of Killumney in Ireland, great grandson of Doctor Henry Maule, Lord Bishop of Cloyne, and the Honourable William Ramsay Maule, of Panmure, are the parties; and the object of the Appellant, William Maule of Killumney, was to reduce or set aside a certain decret arbitral or pretended decret arbitral, and the opi-[371]-nion of the Lords of Session appeared in the interlocutor appealed from, which was this: "The Lords having resumed consideration of this process, and advised the mutual informations and additional informations for the parties, writs produced, and former proceedings, repel the reasons of reduction, sustain the defences, assoilzie and decern, etc." I here take a short notice of the fact that the Court was equally divided till Lord Pitmilley was called in, and that some of the Lords who were in favour of the interlocutor stated that this was a case of very great difficulty.

It is unnecessary to state the previous proceedings at length, but the result was the interlocutor of 1782. No judgment, it was stated, had ever before been given in favour of an entail of leases. The property in dispute was represented as being very valuable. The fact was admitted that Mr. Wight and Mr. Campbell, afterwards Sir Ilay Campbell, were present at the time when the judgment was pronounced; the one as counsel on the one part, the other as counsel on the other part. What was called the submission was executed on March 30, 1782, and afterwards the award, or what was so termed, was made on April 2, 1782, two days after the execution of the submission, and was as follows. After the usual preamble it proceeds: "1st, We find that the said leases of the house and parks of Panmure, and castle and inclosures of Brechin, obtained by the Countess of Panmure and Mr. Harry Maule from the York Building Company, in 1724, are now at an end, in consequence of the late Earl of Panmure having purchased the pro-[372]-perty"—(that is a finding of the arbiters contrary to the law of the interlocutor of March 1, 1782);—"and that the tailzies of them executed in 1730, and founded on by the said Thomas Maule, Esq. are at any rate cut off and extinguished by prescription as well as upon other grounds of law, and are not now subsisting deeds; and therefore we reduce the same, and assoilzie the said George Earl of Dalhousie, as life-renter, and the said William Ramsay Maule, his second son, as fiar of the estate of Panmure, and the other heirs of entail of the said estate, from all claim or demand upon those leases, or upon the tailzies thereof, at the instance of the said Thomas Maule, Esq. or his son, or any other person claiming under these deeds of 1730; and we so far alter the interlocutor of the Court of Session recited in the submission pronounced on March 5 last; but we adhere to the said interlocutor in all other points, and declare the same to be final and unalterable."

Having thus decided the case in all particulars, and affirmed in substance that Thomas Maule had no claim to anything, they proceed thus:—"And as we conceive it to be just and reasonable, that the said Thomas Maule, Esq. though not entitled to make any legal claim upon the foresaid deeds executed in 1730, should have the following provision in money settled upon him and his heirs under-mentioned, in consideration of our having, by this decret arbitral, deprived him and them of the benefit of the leases, which the Court of Session had adjudged in their favour, we decern [373] and ordain the said George earl of Dalhousie, for himself, and as administrator in law for his said second son, and taking burden as aforesaid, and his heirs and successors in general, to make payment to the said Thomas Maule and his heirs under-mentioned, of the sum of £3500 sterling, in manner and at the terms following: viz. £500 thereof to the said Thomas Maule himself, immediately after the decree is registered, and the remaining £3000 at the term of Whitsunday next; but which £3000 is then to be laid out upon good and sufficient security, to be taken in the name of two trustees, one to be named by each party, for the use"—observe—"of the said Thomas Maule, Esq. and the heirs male of his body; whom failing, any other heirs male of the body of Dr. Harry Maule, Lord Bishop of Cloyne; whom failing, the heirs male of the body of Captain James Maule, brother to the Bishop; whom failing, the heirs male whatsoever of the said Mr. Harry Maule; whom failing, the said Thomas Maule, Esq. his heirs and assignees whatsoever: which trust is to continue till the term of Whitsunday 1831; but with the following conditions and limitations: in the first place, that the said Thomas Maule, and, failing him, the heirs of his body, and other heirs already mentioned, shall have full right to the yearly interest arising upon the said sum from Whitsun-

“ day next, and in time coming, during the trust, so far as the capital shall remain
 “ unapplied to their uses. 2dly, That £500 of the said capital of £3000 shall be
 “ uplifted and paid over to the said Thomas Maule, or, fail [374]ing him, the heirs
 “ male of his body, or other heirs already mentioned, at the term of Whitsunday 1789;
 “ that £2000 more of the said capital shall be payable to him or them, at the term of
 “ Whitsunday 1823, and the remaining £500 at the term of Whitsunday 1831, and
 “ then the trust shall be at an end: and if either of the trustees shall happen to die
 “ before the expiration of the trust, the party by whom, or by whose predecessor, he
 “ was named, shall have power to appoint another, and so on till the end of the trust;
 “ and the trustees shall have power to change the securities from time to time, when
 “ necessary. 3dly, We further declare, that if either the said Thomas Maule, or his
 “ said son William Maule, or any other heir male of his body, or subsequent heir called
 “ by the said deeds in 1730, now reduced, shall hereafter attempt to make any claim
 “ upon the said deeds, or any of them, under pretence of their not being bound by this
 “ submission, or on any other ground whatever, it shall be competent for the said
 “ George Earl of Dalhousie, and his said second son, or the other heirs in the estate of
 “ Panmure, in their order, immediately to insist for repetition of the trust money, so
 “ far as the same is unuplifted at the time, or so far as the same has been uplifted by
 “ the person making such claim, or by any other whom he represents, and for damages
 “ against the said Thomas Maule and his heirs: and, in like manner, if the said George
 “ Earl of Dalhousie, or his said second son, or any of the other heirs succeeding in the
 “ estate of Panmure, shall attempt, in any shape, to [375] counteract this our decret
 “ arbitral, they shall be liable in damages to the other party; and the said George Earl
 “ of Dalhousie’s heirs of every kind shall be so liable, etc.”

I should have mentioned that Lord Braxfield was made oversman in the submission, and it was admitted at the bar that it was chiefly by the weight of his opinion that the Court was led to pronounce the interlocutor of March 1, 1782; and I should also have mentioned that the award was to be made in eight days from the date of the submission.

Thus the gentlemen acting as arbiters affirmed the interlocutor so far as it was in favour of the Earl of Dalhousie and his son, and disaffirmed it in so far as it found that the entail of the leases was binding; thereby asserting that, in point of law, Thomas Maule had no right to the leases, and that they were at an end in consequence of Lord Panmure’s having purchased the property, and that the tailzies of the leases were at any rate cut off and extinguished by prescription; and then having, as it seems to me, decided that Mr. Thomas Maule was entitled to nothing, they go on to say that, though Thomas Maule was not entitled to make any legal claim, yet as they had deprived him of all that benefit in respect of the leases to which the Court had found him entitled, it was just and reasonable that he should have a sum of money, part of which was to be paid to Mr. Thomas Maule immediately, the rest to be secured for the use of the heirs substituted in the entail of the leases. This decret arbitral was made on April 2, 1782.

The Appellant’s case then proceeds to state the [376] reasons why the suit to set aside the award was not instituted till 1809. The Pursuer it seems then discovered certain papers which led him and his advisers to think that the award was not binding upon him; and he thought proper to institute the present action of reduction and declarator, calling for production of the alleged submission and decret arbitral, with the retour of his service expedite thereon; and concluding, that these writings should be reduced and set aside for the following reasons:—“ 1st, That, although *ex facie* of
 “ the foresaid pretended submission it bears to be a reference of the depending processes,
 “ and various points of dispute between the parties therein named: yet, in fact, it was
 “ not a submission, but only a bargain, covenant, or agreement, of a nature essentially
 “ different from what, in law, is held and understood to be a regular and proper sub-
 “ mission or reference; and the said pretended decret arbitral, following thereon, is
 “ false, feigned, and destitute of truth. It sets forth that the arbiters had considered
 “ the claims of the parties, and had God and a good conscience before their eyes, and
 “ were well and ripely advised therewith: whereas the truth is, that the said arbiters
 “ never heard parties on, nor considered their claims, nor had any power whatever so to
 “ do under the said pretended submission. They were fettered and bound down by a
 “ previous agreement, to pronounce the said pretended decret arbitral in the terms in
 “ which it is given forth, and were not at liberty to exercise, nor did they exercise

“ their own judgment and discretion upon the questions apparently submitted to them. 2d, The parties to the said pretended submission, bargain, covenant, or agreement, whereon the said pretended decreet arbitral proceeded, had no power to bind the pursuer, as heir of tailzie, to give effect to the same, or abide thereby : and, therefore, the same, with the service of the pursuer, as heir male and of provision, under the said pretended decreet arbitral, and whole acts and deeds done by the pursuer, on the ground, and under the erroneous conception of its being a fair decreet arbitral, pronounced upon a solemn and legal submission by arbiters, at full liberty to exercise their own judgment upon the points apparently submitted to them, are null and void so far as regards the pursuer, and not binding on him.” And it being so found and declared, “ the said Honourable Wm. Ramsay Maule, defender, ought and should be decerned and ordained, by decreet foresaid, to flit and remove himself, his servants, cottars, dependants, and all others, off and from the said houses and parks of Brechin and Panmure, and others foresaid ; and to leave the same void and redd, to the effect the pursuer, for himself, his servants, cottars, tenants, and others, may enter thereto, and possess, bruik, and enjoy the same at pleasure, during the currency of the said leases ; and the said Honourable William Ramsay Maule, ought further to be decerned and ordained, by decreet foresaid, to hold compt and reckoning with the pursuer for his intromissions, with the rents and profits of the said houses and parks of Brechin and Panmure, and others fore-[378]-said, since the death of the said Lieutenant Maule, and pay over to the pursuer the amount thereof, as the same shall be ascertained in the course of the process to follow hereon, etc.”

Your Lordships observe that this action insists that these writings are not to be considered in law as a submission and decreet arbitral, and that relief ought to be given on that ground, as if the submission and decreet had never been made. What relief ought, in the opinion of the Court of Session, to be given to the pursuer, in case this should not be considered as a binding decreet arbitral, we cannot collect, as the circumstance, that the majority of the Court were of opinion that the decreet arbitral was valid and binding, made it unnecessary to give any opinion on that point.

In these papers questions have been elaborately and ably discussed, on which it is not necessary to give an opinion. The first point argued in the Appellant's appeal case is that the judgment of the Court of Session in 1782, sustaining Lieutenant Maule's claim to be served heir of tailzie to Lord Panmure, in the leases of Panmure and Brechin, was well founded. That however is not the question here at present ; the only question now before us is, whether this is a valid decreet arbitral. The other points may be material if the decreet arbitral is not valid and binding, but the Court below has given no opinion upon them. The same observation applies to some other questions discussed under the second and third heads of argument stated in the Appellant's case. I intimated at the hearing that the Judges had given no opinion upon this as [379] a transaction in any other sense than in that of a decreet arbitral. As to the point of homologation, all the Judges, according to the notes which I have, speak of the homologation of the transaction only in its character of a decreet arbitral. They have decided that it is a valid decreet arbitral, and if so it was unnecessary to consider the homologation in any other view ; and, if they did not consider it in any other view, then there is no opinion of the Judges on the homologation of this transaction as different from a decreet arbitral.

The simple point then is, whether this is a real submission and award, or only an agreement of the parties, to which the form of a decreet arbitral was given, for the purpose of giving it greater validity. And when I come to discuss that point it will be most painful to me if, with the opinion that this is no more than an agreement under the form of a decreet arbitral, it should be supposed that I accede to any imputations that may have been thrown out against the gentlemen who acted as arbiters. For at an early period of my life I believe I have been at that bar with Mr. Wight, a man of high character ; and as for Sir Ilay Campbell, he is well known, and of his character I need say nothing : and, under the circumstances of the case, I think it would be dealing very hardly with two counsel to say that there was any serious imputation against them, merely because they happened to take the form of a decreet arbitral, though the transaction was in reality an agreement.* We have heard much [380] of the case of

* The opinion seems to have been entertained by some of the most eminent men at

Mackenzie (8 Bro. P. C. per Tomlins, 42); I well recollect that Lord Thurlow never thought that there was any ground of reflection on the conduct of Mackenzie. I think I was counsel in the cause; and it was a surprise upon us that the imputation was made, as it had been stated that one of the Judges of the Court of Session had purchased property sold in the course of a cause in which he had acted as Judge. But this House thought, upon a great principle applicable to the high as well as the low, as persons in these situations had an opportunity of knowing a great deal more about the subject than others, of which, though honourable men would not, yet men less scrupulous might, take an improper advantage; that persons in such circumstances ought not to be permitted to deal for the property at all.

When I come now to consider whether this was, or was not, a proper decret arbitral, permit me to say that arbiters ought to go into the room as judges, and that though one is chosen by one party, and another by another, each is not to act merely for the interest of the party by whom he is named. Arbiters, by whomsoever named, ought to be perfectly indifferent between the parties, and owe to the particular parties duties of the same nature as [381] those which the King's Judges owe to his Majesty's subjects in general, though not named by them.

Having premised these observations, I shall read the judgment of 1782 (Fac. Col. vol. ix, p. 66). The Lords found, "that the deed of tailzie, executed by the deceased Mr. Harry Maule of Kelly, with consent therein mentioned, in the year 1730, of the lands and estate of Kelly, and also the deed of tailzie executed by the late William Earl of Panmure, in the aforesaid year, of his lands and estate of Ballumbie, are cut off by the positive and negative prescription; and that the obligation for employing £9000 sterling, executed by the said William Earl of Panmure, in the aforesaid year, is cut off by the negative prescription. That the said William Earl of Panmure had full power to make the deed of tailzie, executed by him, in favour of the said Mr. William Ramsay Maule, and his administrator in law. That the said Mr. William Ramsay Maule was entitled to be served heir of tailzie and provision to the said deceased William Earl of Panmure, his grand uncle, in virtue of the foresaid deed of tailzie in his favour, and remitted to the macers to proceed in his service accordingly, on the brief brought before them by him and his administrator in law. They farther found, that the said Lieutenant Thomas Maule had a right to take up the leases of the house and parks of Panmure, and house and parks of Brechin, and remitted to the macers to proceed in his service, in so far as regards these two leases; but that he was not entitled to be served heir male of tailzie and provision to the said William Earl of [382] Panmure, in virtue of the deed of tailzie of the estate of Kelly, executed by the late Mr. Harry Maule, nor in virtue of the deed of tailzie of the estate of Ballumbie, executed by the said William Earl of Panmure; and that his service on the brief taken out by him could not proceed with regard to the said estates of Kelly and Ballumbie; and remitted to the macers to dismiss the same accordingly, in so far as concerned these two estates." So that this interlocutor finds, that Thomas Maule was entitled to take up the leases of the houses and parks of Panmure and Brechin, which leases were represented as being of the value of £50,000; but whether the value was £50,000 or £50, is, as to the present purpose, immaterial.

This being the judgment of the Court of Session, the Earl of Dalhousie appealed to this House, and that fact is noticed in the letter of March 24, 1782, written by Mr. Wight, which is material. The letter is in these words:—"I have received yours, and I am sorry you should have put yourself to the expense of an express, on the subject to which it relates. It was understood between us that Lord Dalhousie should enter his appeal, so that, in all events, the matter might be determined this Session, in case we did not agree." These words, "it was understood between us," do not mean that it was understood between Mr. Wight and his client, Lieutenant Maule, but between

the Scotch bar, that a decret arbitral might be properly used to carry an agreement into execution, and might be valid as such though so used. *Vid.* *Routledge v. Carruthers*, *post*, for a decret arbitral of this sort by Mr. Ferguson, afterwards Lord Pitfour, and Mr. Lockart, advocates. This circumstance might perhaps account for and explain the proceeding of Sir Ilay Campbell and Mr. Wight, without any necessity for the slightest imputation in a moral sense, even though their character had not stood so high as it does.—P. D.

Mr. Wight and some other person ; and another, and not Lieutenant Maule, was alluded to in the words, "in case we did not agree." Then the letter proceeds—"but if Leslie had been at home, there [383] would have been no attempt at a service ; that has proceeded from a mistake in his clerk. But you may be perfectly easy. Mr. Ferguson and I have your interest at heart, and you may depend upon us. I am only to ask of you not to trouble yourself about any thing, till we see you." And then there is a postscript with the words "flurried a little," which seem to be of no consequence.

Then Mr. Wight writes another letter of March 29, 1782, which, let it be observed, was the day before the submission was executed. "I have spent three hours with Mr. Campbell this forenoon ; and the utmost length that they will go, is to give £3500 for the leases. I wished much to bring them higher, and struggled hard for their coming the length of £4000 ; but they are resolved not to give a sixpence more. Whatever others may think, I am most clearly of opinion that, in your situation, you ought to accept of this offer, rather than run the risk of losing all ; the more especially, as Lord Dalhousie agrees to give up any claim he has by the entail ; without which, in the event of your own and your son's death, he would exclude your daughters. I was surprised to learn just now, that Mr. Crosbie was drawing a case for the house of Lords, upon the idea that the appeal was to proceed : I therefore beg you will let me know whether you mean to end upon the terms proposed by the other party, as they expect a speedy answer." [This last letter is indorsed in the handwriting of Lieutenant Maule.] "Mr. Wight, March 29, 1782, settling with Ilay Campbell ; pushing to close."

[384] From this, it is obvious that Mr. Wight, in his previous letter, by the expressions, "it was understood between us" ; and "in case we did not agree," alluded to Mr. Campbell : but they did not act consistently with the principles of arbitration, unless the award was the judgment of both ; for if it was not the judgment of both, it was the judgment of neither. Mr. Wight says, "I have spent three hours with Mr. Campbell this forenoon ; and the utmost length they will go is to give £3500 for the leases. I wished much to bring them higher, and struggled hard for their coming the length of £4000 ; but they are resolved not to give a sixpence more. Whatever others may think, I am most clearly of opinion that, in your situation, you ought to accept this offer, etc." so that this sum of £3500 was proposed by the other arbiter. Do I characterize this too highly, when I say that Mr. Wight and Sir Ilay Campbell had been spending these three hours in determining what the one should take and the other give for the title which Thomas Maule had under the interlocutor of the Court of Session, pronounced chiefly in consequence of the influence of Lord Braxfield's opinion : the one struggling for £4000, or a higher sum than £3500 ; the other offering £3500, and refusing to give more ? And Mr. Wight then states his opinion that Maule ought to accept the offer, that is, the offer to give £3500 for the title ; for, though words are not to be strained, they must be construed according to their common meaning and natural import. Mr. Wight also says, in his letter, "I beg you will [385] let me know whether you mean to end upon the terms proposed by the other party." Was not this, then, a proposal by the other party ? and Mr. Wight tells Maule that they expected a speedy answer.

The submission was dated March 30, and the scroll of it has been recovered. Your Lordships will recollect that it was prepared by Leslie, as to whom it had been stated by Mr. Wight, in his letter of March 24, speaking of the appeal, that if he (Leslie) had been at home there would have been no attempt at a service. So the scroll was prepared by Leslie ; and this could not have been done so early, unless a speedy answer had been returned by Lieutenant Maule. The scroll was afterwards altered and corrected by Sir Ilay Campbell, and the submission was drawn out thus :—after narrating the actions brought, and the interlocutor of 1782, it goes on—

"But to avoid farther proceedings at law, the parties have agreed to settle matters by arbitration ; therefore, the said George Earl of Dalhousie, for himself, and as administrator-in-law for his second son, the honourable William Ramsay Maule, and for his whole other children, and the honourable Lieutenant-Colonel Malcolm Ramsay, his Lordship's brother, on the one part ; and Thomas Maule, for himself, and as administrator-in-law for (the Appellant) William Maule, his only son, on the other part ; have submitted and referred, and do hereby submit and refer, to the

“ amicable decision and final sentence and decret arbitral of Mr. Alexander Wight and
 “ Mr. Ilay [386] Campbell, advocates, arbiters mutually chosen by the said parties
 “ submitters; and in case of variance between the said arbiters, to the honourable
 “ Robert M^cQueen, Esq.” (that is, the very gentleman by whose influence the interlocutor in favour of Lieutenant Maule had been pronounced, he acting only in case of variance between the arbiters), “ one of the Senators of the College of Justice, overs-
 “ man, mutually elected by the said parties, all questions between them, or which either
 “ of them may or can have with the other, in relation to the premises, and particularly
 “ the whole of the said processes and claims, with the interlocutor thereon pronounced,
 “ and appeal thereon entered; and cross appeal, competent to have been entered; both
 “ of which are hereby agreed to be departed from: with full powers to the said arbiters,
 “ and, in case of variance, to the said oversman, to take in the different claims and
 “ allegations of the parties, and to receive all necessary proofs; and, in general, to do
 “ every other thing else that shall appear to them proper and expedient, for determin-
 “ ing on the matters herein submitted: and whatever the said arbiters, and, in case of
 “ variance between them, the said oversman, shall decide, by decret arbitral to be
 “ pronounced by the said arbiters and oversman, between and the 8th day of April next
 “ to come, the said parties submitters, for themselves, and as administrators-in-law, and
 “ taking burden on them respectively, as aforesaid, bind and oblige them and their said
 “ children, and their heirs and executors, to acquiesce in, implement, and perform,
 “ [387] under the penalty of £100 sterling, over and above performance.” Then follows a clause of registration, etc.

The scroll had been drawn out by Leslie, from some information or conjecture as to what the parties meant, as a verbal agreement entered into between the Counsel for the parties, between the afternoon of March 29 and 30; and the arbiters afterwards, on April 2d following, somehow or other, do the very thing which Leslie had considered as having been agreed upon. This scroll, as I before stated, was laid before Sir Ilay Campbell, and he made out the instrument of submission.

The arbiters then proceed to the execution of their duty, and made their award as early as the 2d of April. It was a question of some difficulty, one would imagine, whether the decision of the Court of Session in favour of Thomas Maule, produced, as was stated, chiefly by the influence of Lord Braxfield, the oversman, ought to be recalled; but in two days they decide that the judgment was wrong, Braxfield, the oversman, having said that it was right. They find that the leases were at an end, in consequence of the Earl of Panmure having purchased the property, and that the tailzies of them executed in 1730 were at any rate cut off and extinguished by prescription, and were not subsisting deeds, and they reduced the same; and so far altered the interlocutor of March 1, 1782, but adhered to it in all other points; that is, they made it in all respects favourable to Lord Dalhousie, and unfavourable to Mr. Thomas Maule. I speak with reserve; but I have no conception that the Courts [388] here would permit arbiters to go this length; for I say that they ought to have been both for and against Lord Dalhousie, and both for and against the other party. But what they do is to give Lord Dalhousie every thing, and Lieutenant Maule nothing. Then they proceed to state that they thought it just and reasonable that T. Maule, though not entitled to make any legal claim, should have a provision in money settled on him and his heirs undermentioned, in consideration of their having deprived him and them of the benefit of the leases. Permit me to call your Lordships' attention for a moment to the letter of Mr. Wight, of March 29, in which he states that the utmost length he could bring them to was to give £3500. The arbiters then ordain Lord Dalhousie to make payment to T. Maule and his heirs of the sum of £3500; that is, the sum which Mr. Wight said the other party had offered; £500 therefore to T. Maule immediately, the remaining £3000 to be secured for the use of T. Maule and the persons in remainder, nearly as in the original scroll of the submission and the destination of the entails of the leases.

Then we have on March 29 the counsel for the parties treating about the price to be allowed to T. Maule, in consideration of his giving up his claim; a price offered by the other party, and the proposal accepted; a scroll of submission drawn out, proceeding on the narrative of a treaty between the parties; of a verbal agreement, and the terms of the agreement. That scroll was indeed afterwards altered so as to make it an ordinary submission. The submission was executed on March 30; Lord Brax-

[389]-field, by the influence of whose opinion the judgment of 1782 with respect to the leases had been obtained, being made oversman. The award was to be made by April 8, and is made on April 2, carrying the agreement into execution according to the terms mentioned in the letters of Mr. Wight, and in the scroll of the submission. Why then, though, as I said before, I do not think there is any ground of imputation against the arbiters in this case, yet, upon every consideration of justice and right, I must deal with this as with other cases; and I cannot represent the transaction to my own mind, especially when considering it with reference to the interests of the son of Lieutenant Maule, in any other light than as an agreement executed under the colour of a decret arbitral; and I can, therefore, look upon this neither as a valid submission nor a valid decret arbitral. As to the consequences of this opinion, I do not enter upon that consideration now, as the Court below has decided only upon the ground that this was a valid decret arbitral; but, however I may regret my differing from the majority of the Court of Session, I protest I cannot bring my mind to consider this as a valid submission and decret arbitral.

Then we have been called upon to decide upon the whole case immediately. That however we cannot do, as the Court below has given no opinion except as to the validity of the decret arbitral; and if your Lordships concur in the opinion which I have stated, we may declare that this is not a valid decret arbitral, and remit the cause as to the other points.

Lord Redesdale. The mode proposed by the [390] noble Lord does appear to be the only proper way of dealing with the case as it comes before us.

The question here is simply this: whether the instruments, in the forms of a submission and decret arbitral, are in reality what they are in form. If they are, then they are binding as such. The object of the suit by the Appellant was to reduce this decret arbitral, and the Court repelled the reasons of reduction, sustained the defences, assoilized the Defenders, and decerned. Now it does appear to me perfectly clear that the instruments, under the form of a submission and decret arbitral, were not, in the view of the parties, in reality the instruments of which the shape was so assumed. For it is clear, from the proceedings of the parties, that they were not dealing in the mode of arbitration, but in the way of contract or agreement, to give up the title for a certain sum of money. Whether this transaction is binding as a contract, is a question not now before us to determine: the simple question being whether it can be sustained as a decret arbitral. If this had been, in form, a contract, or transaction of any other description, to abandon the rights of one of the parties, it could not be stronger than in this case, as there was no discussion of the rights of the parties by the arbiters, who proceeded on the grounds of the contract or agreement previously concluded between themselves on behalf of the parties, as is completely manifest from the letters of Mr. Wight, and from the scroll of the submission, where it was actually stated that the matter had been previously settled by agreement, though that [391] was afterwards struck out. I, therefore, perfectly concur with the noble Lord that the decision of the Court below, finding that this should have effect as a decret arbitral, ought to be reversed. But it is too much for your Lordships at present to decide finally upon the whole case.

The formal judgment was as follows (May 10, 1816):—

“ The Lords find, that in this action and proceeding between the present Appellant and Respondent, the alleged submission and decret arbitral of the 30th March and 2d April, 1782, ought not to be considered as having in law the effect of a submission or decret arbitral, but as a form adopted, by which an agreement previously made between Thomas Maule, the Appellant's father, and George Earl of Dalhousie, parties to the said submission, was concluded: and with this finding, it is ordered that the cause be remitted back to the Court of Session, to review the interlocutor complained of, and to do therein as is just and consistent with this finding.”

Agent for Appellant, SMITH.

Agent for Respondent, CAMPBELL.

[392] SCOTLAND.

APPEAL FROM THE COURT OF SESSION (1ST DIVISION).

MRS. ANNE ROUTLEDGE, otherwise MAJENDIE, and her husband, the LORD BISHOP OF BANGOR,—*Appellants*; CARRUTHERS, and Another,—*Respondents* [May 5, 7; June 29, 1816].

[3 Scots R. R. 348. See *Majendie v. Carruthers*, 1820, 2 Bli. 692, for subsequent proceedings; see also *Smith Cunninghame v. Anstruthers Trs.*, 1870, 8 M. 1013, 1024; *Whyte v. Robertson*, 1890, 17 Rettie, 708, 712; *Macdonald v. Scott*, [1893] A. C. 664, reported as *Macdonald v. Hall*, 20 Rettie, H. L. 88.]

[A., by his marriage contract, settles lands, on failure of heirs male, on the heirs female of the marriage, and the heirs male of their bodies; and cohabits ten years with his wife without issue. Wife misconducts herself, and divorce obtained, but is delivered of a female child, B., before the decree for the divorce. B. marries C., and with his consent renounces, for a sum of money, all claim under the contract, and dies before A., her presumed father. Held by the Court of Session that this renunciation was good against the son of B. *Sed per* Lord Eldon (C.), there is a difference between enabling a father to accelerate the implement of a contract by conveying the estate to his son or daughter (though he should afterwards obtain a re-conveyance), and laying down a rule by which an opulent father, without parting with the estate, may, by giving small sums of money to indigent persons who may become entitled, defeat the object of the contract any time he pleases: and the cause remitted for review to the division from which it came, with instructions to take the opinion of the other division.]

[In the course of the cause the legitimacy of B. was questioned; but per Lord Eldon (C.), concurring with the Judges below, the legitimacy of the child born *stante matrimonio* must be presumed.]

In 1731, Francis Carruthers, of Dormont, married Margaret Maxwell, eldest daughter of Sir William [393] Maxwell, of Monreith; and in 1735 a post-nuptial contract of marriage was entered into between the husband of the one part, and the wife, with advice and consent of the trustees for her brother, of the other part; whereby, in consideration of the marriage and the wife's portion, Francis Carruthers bound himself, his heirs, etc. to make up titles to the estates, and to infeft Mrs. Carruthers in life-rent in a yearly annuity of 1600 marks, etc., and to make due and lawful resignation of the estate of Dormont, and for new infeftment of the same to be made and granted to Francis Carruthers himself, and the heirs male lawfully to be procreated betwixt him and the said Mrs. Margaret Maxwell his spouse; whom failing, the heirs male of the said Francis Carruthers, his body in any subsequent marriage; whom failing, the heirs female to be procreated betwixt the said spouses, and the heirs male to be procreated of their bodies, the eldest daughter or heir female, and the heirs male descending of her always excluding the rest, and succeeding without division; whom all failing, to the said Francis Carruthers his heirs and assignees whatsoever. And then, in case the daughters of this marriage should be excluded by heirs male of the body of Francis Carruthers in any subsequent marriage, there was a provision that the daughter, if there should be only one, should have 18,000 marks; and if two or more, that they should have 20,000 marks, Scots money, to be divided as the father should think proper; and, if he made no division, then to be equally divided, etc. at the first term of Whitsunday or Martinmas after their respective majorities or marriage which should first happen.

[394] In implement of the first obligation in this contract, Francis Carruthers made up titles to the estates in such a way as to vest in himself and his heirs the fee simple. These titles were completed in 1740. It was contended in the course of the cause that this contract was a contravention of an entail of 1708, made on occasion of the marriage

of one of the Carruthers, of Dormont, with Mary Bell, of Winterhophead. But it is unnecessary, in the present state of the cause, to consider that entail more particularly, as it was not noticed by the Lord Chancellor; the judgment of the Court below having turned upon another ground.

For ten years there was no appearance of issue of the marriage; but on May 28, 1741, Mrs. Carruthers brought forth a female child, which was disowned by Mr. Carruthers, who had raised a process of divorce against his wife for adultery some months before the birth of this child. On Jan. 9, 1742, about seven months after the birth of the child, he obtained a decree in that action. It was stated in one of the cases that Mr. Carruthers had gone into England in the beginning of August, 1740, at which time Mrs. Carruthers was, as the husband had informed his counsel he was able to prove, in a situation in which women are not when with child; and it was stated also, that Mr. Carruthers had been advised by counsel to raise a Declarator of bastardy, to ascertain the illegitimacy of the child, which however was not done. Mr. Carruthers defrayed the expense of the girl's aliment till she was seven years of age; and then she was, by his orders, sent to the house of a farmer in Cumberland, or Northumberland, [395]-land, where she remained till August, 1758, when she married Henry Routledge, the son of a neighbouring farmer.

In 1758 Mrs. Routledge and her husband raised an action against Mr. Carruthers, for implement of the obligation, in the contract of 1735, to pay £1000 to the daughter on her marriage. The defence was that Mrs. Routledge was not the daughter of Mrs. Carruthers; and Mrs. Routledge was ordained to give in a condescendence of the facts alleged by her, tending to show that she was the daughter of Margaret Maxwell, born, *stante matrimonio*, betwixt Mr. Carruthers and the said Margaret. A condescendence was given in, and a proof adduced, establishing that Mrs. Carruthers was delivered of a female child on May 28, 1741; that the Pursuer was that person; and that she was the lawful wife of Henry Routledge. When the cause was in this state, the parties agreed to settle matters without further legal proceedings, and a contract, dated Oct. 26, 1759, was entered into between Mr. Carruthers, Mr. Routledge (taking burthen upon him for his wife), and Mr. James Ewart, accountant to the Bank of Scotland, a creditor of Routledge, and assignee of Routledge's claims on Mr. Carruthers; whereby Routledge and Ewart engaged that Mr. and Mrs. Routledge should renounce all claim under the marriage contract of 1735, competent to Mrs. Routledge, or any one deriving right from her, in consideration of £650 which Mr. Carruthers agreed to pay. In order to carry this agreement into execution, a submission, dated Nov. 30, 1759, in which Mr. and Mrs. Routledge, Mr. Ewart, and Mr. Carruthers, [396] were the parties, was entered into, and the matters in difference referred to the arbitration of Mr. Ferguson of Pitfour, and Mr. Alexander Lockhart, advocates; and a decret arbitral was made, Dec. 7, 1759, pursuant to the contract. On the same day a discharge and renunciation was executed by Mr. and Mrs. Routledge, and Mr. Ewart their assignee, of all claims in virtue of the marriage-contract of 1735; and on the next day, Dec. 8, 1759, Mr. Carruthers executed a disposition of his estate in favour of himself and the heirs male of his body; whom failing, in favour of his brother, William Carruthers, and the heirs male of his body; whom failing, to his own nearest heirs male whatsoever; and, upon the procuratory in this disposition, obtained a crown charter. Mrs. Routledge was under age at the time of the renunciation, and died, without having ratified it, in 1768. Her husband died soon after, and Francis Carruthers died in 1773, or beginning of 1774, and was succeeded by his brother William, who entailed the estates on himself; whom failing, on his eldest son, William Aikman Carruthers, and the heirs male of his body; whom failing, on his second son, and the heirs male of his body, etc. William died in 1787, and was succeeded by his eldest son, William Aikman Carruthers, who died in 1802, and was succeeded by his son, William Thomas Carruthers, the Respondent.

There were three children of the marriage between Mr. and Mrs. Routledge, a son and two daughters. The son, in 1806, served himself heir of provision, before the Magistrates of Canongate, to Francis Carruthers, of Dormont, in terms of the marriage- [397] contract, and brought an action for setting aside the disposition of 1759, and subsequent conveyances, on the grounds:—1st, that they were in face of, and in direct contradiction to, the destination and obligations in the marriage-contract of 1735, in favour of the heirs of the marriage; 2dly, That they were executed in face of letters

of inhibition, raised by Sir William Maxwell, etc. ; 3dly, That his mother having predeceased Mr. Francis Carruthers, who died without having married a second time, the writs called for had been executed in fraud, hurt, and prejudice of his just rights as the heir served, and retoured under the contract 1735. In order to bring forward the defence in the most convenient form, a counter-action was brought by the Respondent, to set aside the service before the Magistrates of Canongate, as clandestinely and irregularly obtained ; this was conjoined with the principal action. In the course of the proceedings the pursuer, Routledge, died ; and his sister Mrs. Anne Routledge, otherwise Majendie, wife of the Lord Bishop of Bangor, and her husband, for his interest, sided themselves as parties in the cause, and are the present Appellants.

In defence to the principal action it was at first insisted that the pursuers had no title to pursue :—1st, Because Mrs. Routledge, the mother, was not the lawful daughter of Francis Carruthers : 2dly, That she was not the child of which Mrs. Carruthers had been delivered in 1741. To the first point it was answered that, for any thing that appeared in evidence, Francis Carruthers might have cohabited, and must be presumed to have co-[398]-habited, with his wife from the day of their marriage to the final separation ; and that “*pater est quem nuptiæ demonstrant* : and as to the second point, it was answered that the indenture of Mrs. Routledge was clearly established by the evidence. But the defence chiefly relied upon was, the settlement and discharge of 1759. The entail of 1708, under which the Respondent was said to be entitled, was also relied on ; but this entail, as no opinion was given upon it, at least in the House of Lords, may be considered as at present out of the question. To the chief defence it was answered :—1st, That the discharge of 1759 only affected Mrs. Routledge’s own right to succeed in the event of her surviving her father ; 2dly, That Mrs. Routledge, who, at the time of granting this discharge, was not, and never afterwards became, the heir of the marriage, could not effectually discharge a right which never had belonged to her, to the prejudice of the true heir of the marriage.

The Lord Ordinary (Balmuto), and afterwards all the Judges of the first division, were of opinion that the preliminary defences could not be sustained, and that the legitimacy of Mrs. Routledge must be presumed ; but the Lord Ordinary, by interlocutors of March 11, and July 11, 1807, sustained the defences founded on the submission, decret arbitral, and discharge of 1759. The Court, however (first division), by interlocutor of the 19th, signed February 21, 1811, sustained the reasons of reduction ; but afterwards, by interlocutors of May 19 and 22, 1812, sustained the defences in the principal action, and repelled the defences in [399] the counter-action, and decreed. From the interlocutors of the Lord Ordinary, and the last two interlocutors of the Court, the Appellants appealed.

It ought to be noticed that no action of reduction of the submission and decret arbitral had been brought, and that the Judges were, on May 19, 1812, equally divided, till Lord Armadale was called in, whose opinion was unfavourable to the Appellants.

The points argued for the Appellant were :—1st, that Mrs. Routledge renounced only her claim to the £1000, and her own chance of succession, and that the decret arbitral carried it no farther : 2dly, That the decret arbitral itself was a nullity, not being in reality what it purported to be ; 3dly, That Mrs. Routledge had no power to renounce more than her own chance of succession ; and on this, the great point in the cause, the cases of *Campbell v. Campbell*, *Kaimes*, Rem. Dec. Jan. 1742—*Hay v. Lord Tweeddale*, *Stair*, July 21, 1676—*Panton v. Irvine*, March, 1684—*Cairns v. Cairns*, Jan. 31, 1705—*Lyon v. Garden*, July 26, 1715—*Anderson v. Heirs of Shiells*, Nov. 16, 1747—*Maconochie v. Greenlees*, Jan. 12, 1780 ; and the opinion of Lord President Blair in the case of *Cunynghame*, Dec. 20, 1810, were cited.

For the Respondent, on this last point, were cited the case of *Stewart of Burgh*, 1728, affirmed in the House of Lords, 1729, (very imperfect as a precedent from its not being known whether the renouncing son did, or did not, survive the father)—*Edgar v. Maxwell*, 1756—*Traill v. Traill*, 1737—*Allardice v. Smart*, 1720—Case of *Sinclair of [400] Southdean*, 1768—*Fotheringham v. Fotheringham*, 1792—*Moncrieff v. Moncrieff*, 1759. It was contended for the Respondent that the object and effect of the decret arbitral and renunciation were that they should be a complete discharge of the obligation in the marriage-contract, not only as to Mrs. Routledge, but as to all her descendants, substitute heirs of provision in the destination, and that no reduction of the decret arbitral had been attempted ; that allegations made by the Appellants as to minority,

lesion, fraud, and oppression, were irrelevant, as being *jus tertii* as to them, they not representing Mrs. Routledge; and were at any rate unfounded, etc. The entail of 1708 was also relied upon in behalf of the Respondent, while it was contended for the Appellant, that it was no entail at all. But for the reasons before-mentioned it is considered unnecessary here to notice it further.

Mr. Leach and Mr. Horner for the Appellants: Sir S. Romilly and Mr. Clerk for the Respondent.

Lord Eldon (C.) (June 29, 1816). In this cause, which is one of very great importance, Mrs. Anne Routledge, otherwise Majendie, wife of the Lord Bishop of Bangor, and her husband for his interests, are the Appellants; and William Thomas Carruthers of Dormont, and James Carruthers his guardian, are the Repondents. It appears that in 1731, Francis Carruthers, of Dormont, married Margaret Maxwell, and that in 1735 a marriage contract was made between them, in which it was set forth that, in contemplation of the said marriage already solemnized, and tocher [401] after mentioned, the said Francis Carruthers bound and obliged himself to make up sufficient titles, in his person, to the estates after specified, and to infest his wife, Margaret Maxwell, in life rent, after his decease, in a yearly annuity of 1600 merks, to be restricted to 1000 merks in case of children procreate and existing at the dissolution of the marriage. The contract then proceeds to provide for, and secure, the heirs of the marriage as follows:—
 “And moreover in contemplation of the said marriage already solemnized, and tocher after mentioned, the said Francis Carruthers binds and obliges himself and his fore-
 “sails to make due and lawful resignation, etc., and for that effect he constitutes, etc.
 “his lawful procurators, etc. to resign, and he by these presents resigns, etc. all and hail
 “the five merks land of Dormont, all and hail the five pound lands of Twathlats and
 “Knox, etc. etc. in the hands of his immediate superiors thereof, or their commissioners
 “foresaid, in favour of, and for new infestment of the same to be made and granted to
 “the said Mr. Francis Carruthers himself, and the heirs male lawfully to be procreated
 “betwixt him and the said Mrs. Margaret Maxwell his spouse; whom failing, the heirs
 “male of the said Francis Carruthers his body in any subsequent marriage; whom
 “failing, the heirs female to be procreated betwixt the said spouses, and the heirs male
 “to be procreated of their bodies, the eldest daughter or heir female, and the heirs
 “male descending of her always excluding the rest, and succeeding without division:
 “whom all failing, the said Francis Carruthers his heirs and [402] assignees what-
 “soever; with the burden always of the said Mrs. Margaret Maxwell her life rent
 “annuity above written, etc.” And then by another clause certain provisions are
 “destined to the daughter or daughters of the marriage, in case there should be no heir
 “male of that marriage, and that the daughters should be excluded from the land estate
 “by the existence of heirs male of a subsequent marriage. “And furthermore, in regard
 “the said Francis Carruthers his lands and estate, is provided, failing heirs male of this
 “marriage, to the said Francis Carruthers his heirs male in any subsequent marriage,
 “whereby the daughters of the present marriage may be excluded; therefore, and in
 “that case, that the daughters of this present marriage shall be excluded from the said
 “estate by the heirs male of the said Francis Carruthers his body in any subsequent
 “marriage, the said Francis binds and obliges him, his heirs and successors, to content
 “and pay to the daughters, one or more, to be procreate betwixt him and the said Mrs.
 “Margaret Maxwell, the sums of money following, in full of all portion natural,
 “legitim, executry, or what else they might claim, through the decease of the said
 “Francis Carruthers and Mrs. Margaret Maxwell, viz.:—If there be but one daughter,
 “the sum of 18,000 merks, and if two or more the sum of 20,000 merks, Scots money,
 “to be divided among them as the said Francis Carruthers shall think fit; and in case
 “of no such division by the father, to be divided equally after a *procurum* of 2000
 “merks shall be set apart to the eldest daughter, and that [403] at the first term of
 “Whitsunday or Martinmas after their respective majorities or marriage which shall
 “first happen, with ten per cent. of liquidate expenses, in case of failzie, and annual
 “rent of the said respective portions, so long as the same shall remain unpaid after the
 “foresaid terms of payment; and the said Francis Carruthers binds and obliges him
 “and his foresails to furnish the said daughters with aliment, clothing, and
 “education, according to their degree, until the foresaid portions become payable.”

Of this marriage there was issue one child, Elizabeth, born May 28, 1741. As to this child, whether legitimate or not, that is one point to be decided; and I concur with

all the Judges below that, in law, she must be taken to be the legitimate daughter of Francis Carruthers.

This daughter was afterwards married to Henry Routledge, who brought an action in the Court of Session, concluding, "that the said Elizabeth Carruthers being the only child of the said Francis, procreated by him of the marriage with the said Margaret Maxwell his spouse, she is therefore entitled to the whole provisions in the said marriage contract contained; and therefore that the said Francis Carruthers, her father, ought and should be decerned and ordained to implement and perform to the said pursuer and her husband, for himself and his interest, the whole obligations, conditions, and provisions, incumbent upon and prestable by him, as in the said marriage-contract mentioned and conceived in her favours; and particularly to make payment of the aforesaid £1000 [404] sterling of money provision obliged to be paid to her as the only daughter of the marriage, at the day of her marriage, which was August 13, 1758 years, and annual rents from that day and in time coming during the non-payment: at least the said defender should be decerned in payment of the annual rents from the said day of marriage and in time coming, etc."

It appears that Francis Carruthers had brought a process of divorce against his wife, and obtained a divorce accordingly. It is unnecessary however to go through the statement as to the legitimacy or illegitimacy of this child, as we must take her to be legitimate. But, in the course of the proceedings, an arrangement was made between the parties, and carried into effect by four different deeds. The first was a contract between Henry Routledge and James Ewart, accountant to the Royal Bank of Scotland, his creditor, on the one part, and Francis Carruthers of Dormont on the other. This contract, after reciting the marriage contract of 1735, and the claims made under it by Mrs. Routledge and her husband, proceeds thus:—"But, in order to remove all claims or pretensions that they may have thereupon, and also to remove and put a stop to all processes they may have against one another, of whatever kind or nature, they (that is, Mr. Routledge and Mr. Ewart on the one part, and Mr. Carruthers on the other) hereby agree, in manner after-mentioned, that is to say, the said Henry Routledge and James Ewart bind and oblige them, conjunctly and severally, their heirs, executors, and successors, that the said Elizabeth Carruthers, and [405] her said husband, shall accept of £650 sterling in full satisfaction of the whole provisions contained in the foresaid contract of marriage by right of succession, or any other claim or demand of whatever kind or nature, which the said Elizabeth Carruthers, or her foresaid husband, or her or their heirs, or the said James Ewart, or any other persons deriving right from them, can demand or pretend to in any manner of way, by virtue of the said contract of marriage, or any other ways whatsoever, against the said Francis Carruthers, his heirs, executors, or assignees, now and for ever. And in order that the said Francis Carruthers and his foresaids may be effectually secured against the same, or any future claim, that the said Elizabeth Carruthers, her said husband, and her or their foresaids, or the said James Ewart, may make, they hereby bind and oblige them and their foresaids, that they shall execute and grant renunciations, or whatever deed or deeds in writing which shall be thought proper and necessary, by the said Francis Carruthers and his foresaids, or their lawyers, to effectuate and secure the premises, and to exclude all claims or pretensions they or their foresaids can have against him or his above-mentioned: and whereas the said Elizabeth Carruthers is now a minor, the said Henry Routledge and James Ewart bind and oblige them, conjunctly and severally, their heirs, executors, and successors, that the said Elizabeth Carruthers shall, upon attaining to the years of majority, judicially ratify, and, if needful, renew the said renunciations or deeds, or any other deed or deeds in writing, that may be thought proper [406] for the said purposes by the said Francis Carruthers or his foresaids, for their farther security concerning the premises; and they shall warrant the deeds to be granted as aforesaid to the foresaid Francis Carruthers and his foresaids, at all hands, and against all deadly, as law will. And, on the other part, the said Francis Carruthers obliges him, his heirs, and successors, to pay to the said Elizabeth Carruthers, Henry Routledge her husband, or to the said James Ewart, for their behoof, the forfeited sum of £650 sterling, upon the day that the said deeds shall be delivered to him properly executed by the parties foresaid, with the interest thereof, from the time of executing the deeds, during the non-payment thereof."

This contract was executed at Dumfries, and bears date October 26, 1759. Mrs. Routledge herself was not a party to it; but her husband, taking burden for her, in conjunction with Ewart, his creditor, thereby engaged, 1st, that Mr. and Mrs. Routledge should renounce the provisions contained in her father's contract of marriage, and every claim or demand in virtue of it, competent to her or any person deriving right from her; 2dly, that the value of this abandonment of all her claims should be £650, and no more; and it was agreed, that she and her husband should execute and grant renunciations, or whatever deed or deeds in writing, which should be thought proper and necessary by the said Francis Carruthers, or his foreshaids, or their lawyers, to effectuate and secure the premises.

There followed on this a submission for a decret arbitral, a proceeding somewhat different from arbi-[407]-tration in this country; for here the grounds of dispute are referred to the arbitrators, and they determine on them. But it seems to have been not uncommon in Scotland for the parties to come to an agreement between themselves on the subject of the matters in difference, and then to put that agreement in the form of a submission and decret arbitral, for the purpose of giving it effect as such. Accordingly, on Nov. 30, 1759, a submission was executed between Elizabeth Carruthers and Henry Routledge her husband, and James Ewart, of the one part, and Francis Carruthers, of Dormont, on the other, which sets forth the contract of marriage and previous proceedings; and, after mentioning that the said Elizabeth Carruthers and her said husband had made over their claims in virtue of the said contract of marriage to James Ewart, accountant to the Royal Bank of Scotland, in security of certain sums due by the said Henry Routledge to him, it submits and refers "to the final sentence and "decret arbitral to be given and pronounced by Mr. James Ferguson of Pitfour, "advocate, and Mr. Alexander Lockhart, advocate, arbiters mutually chosen by the "said parties; and, in case of their variance, by an oversman to be named by them, "which they are hereby empowered to do, all questions, clags, claims, controversies, or "demands of whatever nature, that either party has or can have against the other, and "particularly all right or claim of succession, or other right or claim of whatever kind, "which the said Elizabeth Carruthers and her said husband have or can pretend to, "either now, or at any time, or in any event that may hereafter [408] happen, in "virtue of the provisions mentioned in the said contract of marriage in favour of the "children thereof, either with regard to the succession of the estate of Dormont, and "others, provided by the said contract to the heirs female of the said marriage, or with "regard to the provision of £1000 sterling to one daughter of the said marriage, in the "event of her being excluded from the succession of the said estate by an heir male of "the body of the said Francis Carruthers of any other marriage, in manner mentioned "in the said contract, or any claim which the said James Ewart has or can pretend to "in right of the said Elizabeth Carruthers or Henry Routledge, or any other claim or "demand which they or any of them have or may have against the said Francis "Carruthers or his heirs, in any manner of way whatsoever."

The decreets arbitral, which have it for their object to carry these agreements into execution, are made very promptly; and accordingly, on Dec. 7, 1759, the arbiters by their decret arbitral, after reciting the deed of submission, and that they had considered the claims or demands of Elizabeth Carruthers against her father, and particularly any right or claim of succession, etc. ordained "the said Francis Carruthers to make payment "to the said Elizabeth Carruthers, and to the said Henry Routledge, her husband for "his interest, and to the said James Ewart in their name, as having right for them in "manner before mentioned, of the sum of £650 sterling, in full satisfaction to the said "Elizabeth Carruthers and her said husband, and the said James Ewart, in their right, "of all right [409] of succession, or other right which they, or any of them, have, or "can or may have, at any time, or in any event that may hereafter happen to the said "estate of Dormont and others foreshaid, and of the foreshaid provisions to the children "of the marriage, in virtue of the foreshaid contract, or any portion natural, executry, "legitim, or whatever else the said Elizabeth Carruthers, her said husband, or the said "James Ewart, in their right, may claim through the decease of the said Francis "Carruthers, and that betwixt and the 15th day of Dec. instant, with the legal interest "of the said principal sum, from the date of these presents, during the not payment of "the same. And, in the next place, we decern and ordain the said Elizabeth Carruthers "and the said Henry Routledge, for himself, his own right and interest, and as taking

“burthen upon him for his said spouse, and the said James Ewart, for his right and interest, and as taking burthen upon him for the said Elizabeth Carruthers and Henry Routledge, to exoner, quit claim, and *simpliciter* discharge the said Francis Carruthers, of all clags, claims, controversies, or demands, of whatsoever nature, which they, or any of them have, or can have, against the said Francis Carruthers, for any cause or occasion preceding the date of the said submission; and particularly, to discharge, renounce, and overgive, in favour of the said Francis Carruthers, his heirs or assignees, all right or claim of succession, or other right or claim of whatever kind, which the said Elizabeth Carruthers, and her said husband, or the said James Ewart, in their right, have, or can pretend [410] to, either now, or any time, or in any event that may happen after the date of the said submission, in virtue of the provisions mentioned in said contract of marriage, in favour of the children thereof, either with regard to the succession of the estate of Dormont and others before mentioned, provided by the said contract to the heirs female of the said marriage; or with regard to the provision of £1000 sterling, to one daughter of the said marriage, in the event of her being excluded from the succession of the said estate by an heir male of the body of the said Francis Carruthers of any other marriage; and also, to renounce and discharge all portion natural, legitim, executry, or whatever else the said Elizabeth Carruthers, and her said husband, or the said James Ewart, in their right, may claim, or pretend to, by and through the decease of the said Francis Carruthers; and for that effect, to execute and deliver to the said Francis Carruthers, or his foresaids, a valid, formal, and effectual discharge and renunciation, in the terms before-mentioned, containing a clause of absolute warrandice by the said Elizabeth Carruthers, Henry Routledge, and James Ewart, and all other clauses necessary. And upon payment of the foresaid sum, we decern and declare the said whole claims to be discharged and renounced, and the said Francis Carruthers, and his foresaids, to be free thereof, and acquitted therefrom for ever.” I just observe here that nothing is expressly said as to the children of Mrs. Routledge.

On the day when this decree arbitral was signed, a discharge and renunciation was obtained from Mrs. [411] Routledge, described as Elizabeth Carruthers, only child procreate of the marriage betwixt Francis Carruthers, and Margaret Maxwell, and from Henry Routledge her husband, and James Ewart their assignee, which recites the terms of the decree, and then proceeds in these words: “Therefore, know ye, that I the said Elizabeth Carruthers, with the special advice and consent of my said husband; and I the said Henry Routledge, for myself, my own right and interest, and as taking burthen upon me for my said spouse, and we both, with mutual advice and consent; and I the said James Ewart, for my own right and interest, and as taking burthen upon me for the said Elizabeth Carruthers and Henry Routledge,—have exoner and discharged, as we by these presents, exoner, quit claim, and *simpliciter* discharge the said Francis Carruthers, his heirs and successors, of all clags, claims, controversies, and demands, of whatever nature, which we or any of us have, or can have against the said Francis Carruthers, for any cause or occasion preceding the date of the said submission; and particularly, we, for our respective rights and interests, and as taking burthen, in manner before-mentioned, have discharged and renounced, and by these presents, discharge, renounce, and overgive, to, and in favour of the said Francis Carruthers, his heirs and assignees, all right of succession, or other right, which I the said Elizabeth Carruthers, and my said husband, or I the said James Ewart, in their right, have or can pretend to, either now or at any time, or in any event that may hereafter happen, in virtue of the pro-[412]-visions mentioned in the said contract of marriage, in favour of the children thereof, either with regard to the succession of the estate of Dormont, and others before specified, provided by the foresaid contract to the heirs female of the said marriage, or with regard to the sum of £1000 sterling, provided to one daughter of the said marriage, in the event of her being excluded from the succession of the said estate, by an heir male of the body of the said Francis Carruthers, of any other marriage; and also, to have renounced and discharged, as we, by these presents, for our several rights and interests, and as taking burthen in manner foresaid, renounce and discharge all portion natural, legitim, executry, or whatever else I the said Elizabeth Carruthers may claim or pretend to, by and through the decease of the said Francis Carruthers, with all action or execution competent to us, or any of us, concerning the premises.”

Your Lordships will permit me here to mention that it was contended, on the one hand, to have been the intention of the parties in these proceedings, that Mrs. Routledge should compromise, for this sum of £650, not only her claim to the sum of £1000 in case there should be an heir male, but that the proceedings were intended as a discharge and renunciation of the succession of Elizabeth to the estate in case there should be no heir male, and that too to the extent of precluding any children of hers who might be heirs under the contract from succeeding to the estate, though she should predecease her father.

The next day, Dec. 8, 1759, after the discharge [413] was granted, Mr. Carruthers executed a disposition of the estate of Dormont in favour of himself and the heirs male to be procreated of his body : whom failing, in favour of William Carruthers, his brother, and the heirs male of his body : whom failing, in favour of his own nearest heirs male whatsoever : and on the procuratory of resignation contained in this deed he was infeft.

Mrs. Routledge died in 1768, before Mr. Francis Carruthers of Dormont, who died in 1773, or 1774. Of the marriage between this Elizabeth and Mr. Routledge three children were born : a son and two daughters. John, the only son, being advised that he had right to the estates of Dormont, on Feb. 1, 1806, served himself heir to Francis Carruthers of Dormont, under the marriage-contract : and this was an action of reduction, at his instance, to set aside the disposition of Dec. 8, 1759, and subsequent conveyances, as being in direct contradiction to the obligations in the marriage-contract of 1735 : contending, 1st, That it was never intended to renounce the right of Elizabeth to the succession in case there should be no heir male, but only her right to the £1000 in case there should be an heir male ; and 2d, That, as she was not heir in the life-time of her father Francis, she could not make a renunciation of the right ; and if she could, she could renounce only her own right, and that she could not prevent her son from succeeding in the event of her dying before Francis Carruthers.

The action was commenced before the separation of the Court : but the cause was heard after that [414] separation, before the first division, and it was decided by four Judges against one that the action was well founded ; Lord President Blair being at the head of the four Judges, and stating that he was perfectly satisfied that Mr. Ferguson, afterwards Lord Pitfour, did not mean that Elizabeth should renounce, and would not have permitted her to renounce, more than her own interest in the £1000 or in the estate : and that he was also clearly of opinion that, as she predeceased her father, her discharge could not affect the interest of her son.

A reclaiming petition was presented against this interlocutor, and a change of Judges had taken place in the interim. It appears that, on this second consideration of the cause, the Judges were equally divided till Lord Armadale was called in. The Lord President Blair had died : and the next President was of opinion that the parties did mean that the whole rights should be renounced, and that, though Mrs. Routledge died before her father, the renunciation operated so as to destroy the right of her son : and he compared it to this case, that, if the father had conveyed the estate to the daughter, he would thereby have implemented the contract : and if she then reconveyed to the father, that would bind her heirs, though she predeceased her father ; and that so in this case, where the father parted with nothing, the renunciation of the daughter bound the son. Then the Lord Ordinary was called in, and carried it against the previous judgment. At the first hearing, therefore, the then Lord President and three other Judges, against one, were of opinion that the [415] action was well founded. At the last hearing three Judges were in favour of the former decision, and three against it, and the Lord Ordinary's casting vote carried it against the former judgment : and thus it stands as to judicial opinion.

This cause is important to the parties in point of value, and it is of very great consequence to the landed interest in Scotland. There is a wide difference between enabling a father to accelerate the implement of his marriage-contract, and laying down a rule by which an opulent father, by giving small sums to distressed persons who may become entitled to the succession under his marriage-contract, may deprive them of their rights any day he pleases. Now this has been determined, that when a father parts in his life-time with the estate, and it is then re-conveyed to him, this binds the succession. And this also seems to have been determined, that if a child renouncing happens to outlive the father, in as much as the right of the individual renouncing has thus accrued, he and those coming after him are bound. But the distinction here is, that the daughter

was not heir, but died before her father; and then the question is, whether there are cases where the renunciation of children in these circumstances, dying before the father, have been held effectual. A great variety of cases have been cited as authority for this, and especially that of Stewart of Burgh. That case has been particularly observed upon, as a decision of the House of Lords. But it is not certainly known whether in that case the son outlived the father; and it does not [416] appear to me that the case was very fully considered; and, upon looking at it with accuracy, it may be found to be doubtful whether there are not circumstances in that case, distinguishing it from the present case, which have not yet been observed.

Now I can take it upon me to say that this case has been examined with the most laborious attention by my noble friend (Lord Redesdale) and myself, and we have an inclination of opinion on the question, though I shall not at present intimate what it is: for your Lordships will recollect that we may do infinite mischief by deciding a case of this consequence before we clearly know what the Court below, looking at all the circumstances of the case, think the law to be. Considering therefore the importance of the subject in point of value to the parties, the importance of the question to the landed interest, and the weight of judicial authority on both sides, this does appear to me that very species of case contemplated by the statute dividing the Court of Session into two bodies, when it provided that, when cases proper to be remitted, such as this, arose, they should be remitted to the same division from which they came, but, by virtue of your authority, calling upon their brethren of the other division for their opinions. My humble advice therefore is, that this cause be remitted to the division from which it came, and that they should be required to call for the opinion of the other division according to the exigency of the statute; intimating however that I have no doubt as to the [417] legitimacy of the daughter, which is a point decided in the cause.

The cause was accordingly remitted for review, as to the principal point.

Agents for Appellants, SPOTISWOODE and ROBERTSON.

Agent for Respondent, CHALMER.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

DALY, and Another,—*Appellants*; KELLY,—*Respondent* [May 10, 1813;
Feb. 7, 15, 25, May 21, 1816].

[Mews' Dig. vi. 712; ix. 337; xiv. 1253.]

[A. and B. claim under separate wills as devisees of C., and upon suit at the instance of A. the will in favour of B. set aside, and that in favour of A. established. B. then sets up a bond of the devisor for £40,000, being more than the value of the whole property, on which bond he brings action at law and obtains judgment, whereupon A. amends his bill, and prays and obtains injunction to restrain execution.]

[A., after the will in his favour had been established, and before action on the bond, gives to D., his solicitor and attorney, a mortgage of the lands devised as a security for past and future costs in the proceedings, and for money advanced by D. to A. D. does not make himself a party, but suffers the suit to proceed in the name of A. as the sole Plaintiff.]

[Decree in 1800 for payment of the sum in the bond, with interest from the time of the devisor's death instead of from its date, so that the bond was partly relieved against; and *per* Lord Redesdale afterwards in Dom. Proc. the bill must be understood as having submitted to have the relief made [418] effectual according to the rights of the parties. A. then compromises the suit, and refuses to appeal; and the whole property sold and purchased in trust for B. for a less sum than that reported due to him.]

[D. files his bill against A., B., and another, charging collusion and fraud, and praying that the decree of 1800 might be declared void as against him, and that he might be at liberty to appeal from it in the name of A. if that should appear to be for his advantage. Decided that the mortgage was valid as between D. and A., and that D. had a right to appeal in A.'s name. Appeal accordingly] by D. in A.'s name in the cause A. v. B., and appeal against the decree authorizing that appeal.]

[The House of Lords, without deciding whether D. had a right to appeal in this way, refer back D.'s cause to the Court below for re-hearing, that the Court might decide whether D. might not impeach the decree in the cause A. v. B. to the extent of his claims, by bill in the nature of a bill of review or otherwise, though the same remained in force against A.]

Denis Daly, of Montpleasant, in the county of Galway, was seised of a considerable settled real estate, and also seized and possessed of a large property, real and personal, unsettled. He had two sons, Denis and Michael, and three daughters. Previous to, and from the year 1777 till the time of his death in 1791, he was in a state of animosity with his first son Denis, and on April 5, 1777, executed a bond conditioned for payment of £40,000 to his son Michael, a sum larger than the amount of his whole unsettled property. The bond was made payable in May following, but appeared not intended to be really payable till the father's death; and the father afterwards gave a bond for £5000 to a favourite, and dealt in all respects with the property as if the bond to Michael had not existed: [419] and on this account it was afterwards contended that the father never meant that the bond should be obligatory at all, except in the event of his dying intestate, his object being at all events to exclude his first son from any share in the unsettled property. The anxiety of Michael to get a will made in his favour, and his paying the £5000 bond when the person entitled challenged in chancery the will under which Michael afterwards claimed, though he (Michael) might as executor have retained, and thereby exhausted the whole fund, were also circumstances relied on to show that Michael himself did not consider the bond as obligatory. On the other hand there was evidence of the acknowledgment of the obligation in the bond by the father after he had made a will or wills, and a short time before his death. This bond, according to the statement of Michael in his answer to a bill in Chancery afterwards filed against him, after having been delivered to Michael and remaining some short time in his possession, was by him returned to his father, in whose custody till his death it continued uncanceled.

In Feb. 1778, the year after the execution of the bond to Michael, Denis the father made a will, and thereby devised and bequeathed all his unsettled, real, and personal estates to his son Michael and his (Michael's) children.

In 1790, he made another will, by which he devised and bequeathed all his real and personal estates to his grandson, Arthur Henry Daly, a younger son of Michael, subject to the payment of his debts and legacies.

[420] On March 13, 1791, the day before his death, he made a third will, devising and bequeathing all his unsettled real estates and personal property to his son Michael, who took possession accordingly, and possessed himself, among other things, of the £40,000 bond.

Arthur Henry Daly, being led to believe that the will of 1791 had been obtained by undue means, was desirous to assert his right; but, having no funds to carry on the necessary proceedings, application was made to Kelly, a solicitor, who agreed to advance money to prosecute the suits, and to maintain A. H. Daly and his family in the meantime; and A. H. Daly, to secure Kelly, gave him bonds from time to time for the money advanced, on which judgments were entered up.

In 1792, A. H. Daly proceeded in the Prerogative Court to have the probate granted to M. Daly under the will of 1791 revoked, to set that will aside, and to establish that of 1790. He prevailed in the suit, and the sentence was finally affirmed by the Court of Delegates in 1797.

In the same year 1792, A. H. Daly filed his bill in Chancery against Michael Daly and others, impeaching the will of 1791, on the ground that the testator, at the time of its alleged execution, lay dying, and in a state of insensibility; and praying, among other things, that the will might be set aside and that of 1790 established, and also that

the bond for £40,000 might be declared void, and delivered up to be cancelled, on the ground that the testator did not sign it with intent that it should be obligatory on him in the event of his making a will. [421] Michael, in his answer, insisted that the will of 1791 was valid; and that, in case it should be set aside, he had a right to set up the bond, which the testator had always admitted to be obligatory upon him; and then, alleging that the bond was payable at the time mentioned in it, May 1777, he insisted that a sum of £73,000 was due to him on the foot of the bond. An issue was directed, to try the validity of the will of 1791, and a verdict given against it, the effect of which was understood to be to establish that of 1790 in favour of A. H. Daly.

In this state of the proceedings A. H. Daly, by deed of mortgage, or what seems intended to have been, and was considered as a mortgage, of the date September 14, 1795, conveyed and assigned to Kelly all the personal property, and the rents and profits of the real estates, devised and bequeathed to him by the will of 1790, to secure the payment of £6336, the amount of the judgments, and such other sums as should be advanced by Kelly, or become due to him for costs. This deed was duly registered.

The bond, which had been in the custody of the Court of Chancery during these proceedings, was delivered to Michael Daly, who, in Hilary Term, 1797 (stated to be in 1791 in one of the cases), brought his action on the bond on the Pleas-side of the Exchequer; and the fact of the execution of the bond not being contested, A. H. Daly, after having filed a general demurrer to the declaration, was advised not to proceed in defence, and judgment by consent was entered up for the Plaintiff. A. H. Daly then amended his bill, and prayed and [422] obtained an injunction to restrain further proceedings at law on the bond and judgment.

The cause having been heard before Lord Chancellor Clare, his Lordship, on March 7, 1800, decreed that the bond should stand as a security for the principal sum of £40,000 and interest from March 14, 1791, the time of the testator's death, and that the Master should take an account accordingly. The cause was re-heard, and in Nov. 1800, Lord Clare affirmed the original decree.

In May 1801, A. H. Daly executed a power of attorney, authorizing Kelly to lodge an appeal to the House of Lords; but, very soon afterwards, directed Kelly not to proceed with the appeal. Kelly then ceased to act for A. H. Daly. A report was made by consent that a sum of £55,906 was due on the bond; and by a final decree, Feb. 17, 1802, this sum was decreed a charge on the real and personal estates of the obligor, which were directed to be sold. The property was accordingly put up to sale, and purchased by Richard Gore for £35,000 in trust for Michael Daly.

In 1804 Kelly exhibited his bill in Chancery against A. H. Daly, M. Daly, and R. Gore, stating these circumstances, and that a sum of £10,493 was now due to him for costs and advances, and that A. H. Daly had, by a fraudulent and collusive compromise with M. Daly, declined to prosecute the suit by appeal to the House of Peers; and praying that the decree of March 7, 1800, and all subsequent proceedings thereon might be decreed and deemed void as against Kelly, and his right and title under the aforesaid mortgage and assignment, [423] etc.; and that he might be at liberty, if he chose, to carry on the proceedings in the cause of "Daly v. Daly," by way of appeal or otherwise, in the name of Arthur M. Daly. After answer put in by M. Daly, denying the fraud and collusion, and stating that A. H. Daly had desisted from the suit in question at the intervention of his friends and from despair of success, Kelly moved the Court for liberty, as prayed by his bill, to lodge an appeal in the name of A. H. Daly, in the cause "Daly v. Daly," as the time was almost out. The Lord Chancellor (Redesdale), on August 21, 1805, made an order intitled in both causes, giving liberty to Kelly to enter an appeal accordingly, but without deciding the right; and this permission was to be "without prejudice to any question between the parties, or to any objection which Michael Daly might be advised to make to the prosecuting and hearing such petition of appeal, Kelly undertaking to pay any costs that might be awarded against A. H. Daly, in consequence of the prosecution of such petition; and it was further ordered that A. H. Daly should be restrained from doing any act to prevent such petition of appeal from being presented and heard, or in any manner impeding the same; and it was further ordered that Kelly should forthwith speed his cause to a hearing, etc." The answer of A. H. Daly was put in after this order had been made, and denied fraud and collusion.

Kelly did not speed his own cause to a hearing, but suffered it to rest, and entered an appeal in "*Daly v. Daly*," in the name of A. H. Daly, according to permission. M. Daly, and A. H. Daly, [424] appealed from the order of permission, and, Michael Daly having died, the appeals were revived against John Sutherland, his legal personal representative. The appeals came on for hearing on May 10, 1813, but were ordered to stand over until the Court below, before which Kelly was directed to bring his own cause to a hearing, should decide on the validity of Kelly's security.

The Court, by decree of June 30, 1813, declared Kelly entitled as against A. H. Daly to the benefit of the mortgage of Sept. 14, 1795, for payment of the costs and advances; and that as it appeared that the mortgage security would be unavailable, in case the decree of March 7, 1800, in "*Daly v. Daly*" should stand and be in force; and as the only question to be determined was the validity and effect of the bond of April 5, 1777, being the point decided by the decree of March 7, 1800, from which an appeal had been lodged in the name of A. H. Daly; it was ordered that Kelly should be at liberty to prosecute the said appeal in the name of A. H. Daly; and that the account on the foot of the mortgage should be stayed till the appeal should be decided. From this decree A. H. Daly, and Sutherland representative of M. Daly, appealed.

The causes came on again for hearing in the House of Lords on Feb. 7, 1816.

For the Appellants (Daly and Sutherland) it was contended that the prosecution of an appeal from a decree in equity by one in the name of another, could not be defended on principle, and as to precedent there was none. This right of suing in the [425] name of another was confined entirely to cases at law, where, from the maxim that a chose in action could not be assigned, it was necessary that the assignee should be allowed to sue in the name of the original party. The reason for permitting an assignee to sue in the name of the assignor there was, that the assignee could not proceed in his own name. That was not the case with Kelly, who, when he became a mortgagee, might have made himself a party. But this he neglected, and then attempted to prosecute an appeal in the name of another that other not wishing it. If Kelly had made himself a party by a supplemental bill, he might have prosecuted the appeal in his own name, as far as his interest was concerned. But, having neglected that, it would be a bad precedent if he were permitted to prosecute the appeal in this way. Kelly alleged fraud and collusion. If he could have proved that the decrees of Lord Clare had been obtained by fraud and collusion, he might have impeached them below on that ground. But no such thing was proved; and no fraud could be presumed, unless the decrees were so palpably erroneous that without fraud they could never have been made. The transaction with Kelly was unknown to Michael, and it was Kelly's fault that he did not assert his personal interest; and if the decree did not bind him against a new suit, how could he appeal against a decree by which he was not so bound?

The case of a solicitor advancing money for his client, and taking a security of this kind, without disclosing the interest which he had in the cause, was always regarded with suspicion, and not one [426] which ought to be favoured. A mortgagee before the suit was a necessary party, without whom the Court, if informed of the circumstance, would not proceed. To such a mortgagee the *lis pendens* was, by the policy of the law, considered as notice; and if he neglected to prosecute his interest below, he could not come in upon appeal. A mortgagee, whose interest accrued pending the suit, was, upon the general policy of the law, not a necessary party; because, if he were, the mortgagor, by continually creating fresh incumbrances during the course of the cause, might prevent its ever being brought to a termination. But in regard to appeals, mortgagees of both descriptions stood on the same footing, and could not then for the first time come into the cause, the interest having commenced before, or pending, the suit below. It would be of dangerous consequence to permit persons with notice, and especially solicitors in the cause, thus to lay over and throw the whole burthen on another party, and then come in at the close and take the advantage.

For the Respondent Kelly it was contended that, as it had now been decided that Kelly held a valid security, the compromise under the circumstances must have been fraudulent. Lord Redesdale, in 1805, had given permission to Kelly to appeal in A. H. Daly's name. (Lord Eldon, C. The difference is that the order of 1805 gives permission to enter the appeal, leaving to the Lords to decide the right; whereas the decree of 1813 decides that Kelly had the right to appeal. Could A. H. Daly have

appealed on account of the alleged compromise, [427] and could Kelly appeal on any other ground than such as might have been taken by Daly, in whose name he appealed? Lord Manners has said that the mortgage is good as between A. H. Daly and Kelly, but he should have said whether it was good or bad as against Michael. Kelly's bill was founded on fraud, and charged collusion between A. H. Daly and Michael Daly; and, on that ground, prayed that Lord Clare's decree should be declared void as against Kelly. Did not that require judgment whether the mortgage was good as against Michael? There was fraud in preventing the judgment from being reviewed. The bill prayed relief in the alternative that the decree might be held not binding on him, or if so that he might be at liberty to appeal. Lord Redesdale, when he permitted it, must have been of opinion that he might do so, consistently with the rules of the Court. (Lord Eldon, C. Do you know any case where a *mesne* incumbrancer, *lite pendente*, who has not made himself a party, has been allowed to appeal? and if fraud and collusion may be a ground for that, must not the fraud and collusion be proved? Was the land aliened before the bond was put in suit, or was there any question about the alienation in the cause "*Daly v. Daly*"?) The Court must have been aware of Kelly's interest. This was the case of a solicitor. Suppose a trustee refused to appeal against a decree, would that prevent the *cestui-que trust* from appealing? No doubt the Court of Chancery would compel the trustee to permit his name to be used: and that is the case here, only that here there is an original bill to show the interest. Kelly appeared [428] in two characters, as solicitor and mortgagee. There were *dicta* at law that an attorney by whose industry and at whose expense property was recovered had a lien upon it, and that a settlement or alienation without his consent was a fraud on the attorney. And so here the compromise itself was evidence of fraud and collusion. This was in principle like the case of a creditor not proceeding with due diligence where other creditors might come in and conduct the suit.

In reply it was contended that Lord Redesdale carefully avoided deciding the right to appeal. The whole foundation of Kelly's claim to appeal was the compromise. The answer had put him on proof of the fraud and collusion in that transaction. He had not proved it, and could not stir a step. The Court would say, You had a right to make yourself a party; and so it would in the case of a *cestui-que trust*. The case of a creditor not proceeding with diligence did not at all apply. On the same principle that Kelly was bound to indemnify the other parties against the costs of the appeal, he ought to indemnify them also against the costs of all the proceedings since 1800.

Sir S. Romilly, Mr. Leach, and Mr. Heald, for Appellants; Mr. Hart and Mr. Johnstone for Respondent.

Lord Eldon (C.) (Feb. 7, 1816). If I had not thought that a noble Lord (Redesdale), who usually attends here at the hearing of causes, would have been present this day, I would have advised your Lordships not to proceed so far with these appeals now, as I [429] profess that I feel extreme difficulty in understanding these Irish causes as they are presented to us. The state of the case, if I understand it, is something of this nature. The first question was whether Michael Daly was entitled, as devisee of Denis Daly, the testator, or Arthur Henry Daly as devisee of the same testator; and that question depended upon two wills. Michael said he was a bond creditor of his father the testator for £40,000. Arthur's claim was established under the will, and Michael's bond was held to be a valid security. Arthur had filed a bill as to the wills, also bringing into contest the bond for £40,000, and praying for an injunction to restrain proceedings at law upon it. Lord Clare thought that the bond was a valid security; and, generally speaking, the result would have been that the bill would have been dismissed as to the injunction. But probably it may appear on looking at the bill, which I have not been able to get at, that there had been some passage in the bill as to relief on the bond, which may afford ground for this mode of proceeding. It had occurred to me to put this question to myself, how the land would be affected by such a proceeding in law or equity here. For where a real estate is in the heir at law or devisee of a person dying indebted by bond, and that is aliened before action commenced on the bond, the land is not affected by the judgment, but the money received would be assets to pay the debt. It is stated in one of these cases that the action was not brought till H. T. 1797, and in another place that the action was brought before the bill was filed; and whether before or after may be a very material question. [430] Arthur was advised to bring the matter to a rehearing before Lord Clare, who affirmed his former decree;

and so, on two hearings, this bond was held to be a valid security, which was an important circumstance with reference to the charge of collusion. As to the particular causes why Arthur had not appealed, I do not enter into the merits at present, as the question here must be decided on a drier ground. It is true the bill charges collusion, and your Lordships will attend to the distinction that it was not collusion up to Lord Clare's decree, but commencing after it, to prevent an appeal to this House. Then Kelly files an original bill, stating the incumbrance, as to which I shall only say at present that this House was well warranted in calling for the judgment of some Court as to the validity of that incumbrance before it proceeded further with the appeal, especially as that security was of a nature which Courts of Justice look at with great jealousy; and in March, 1813, the cause was ordered to stand over for that purpose. A motion had been made in Ireland that Kelly might be allowed to present a petition of appeal in the name of A. Daly; and that was allowed, as I understand it, because, if not allowed, it was questionable whether the petition could be presented in proper time, and the party could not otherwise, if the Court should think that the security was good, and that an appeal in this way was competent, have his relief, by reason, if I may use the expression, of the ancientness of his appeal. And so the order of 1805 was made. That amounts to no more than this: Here is a bill on account of this compromise, praying to have the benefit which the party would have [431] had if there had been no such compromise. It was merely a permission to present the appeal before the time elapsed, leaving it to the Lords to say whether this House would receive it. When that was considered in 1813, sufficient appeared on the face of the instrument of incumbrance to induce the House not to decide the case till they saw whether the instrument, which formed the ground of the demand, would be supported below. And the matter was accordingly deferred till the other cause was heard below; and now there is a decree that the security is good as against Arthur H. Daly for the costs in the prosecution of his cause. I do not desire your Lordships to go into the question as to the merits in that respect; that will be discussed hereafter. But, suppose for a moment that he had a right to this security on the land for past and future costs, the security must at least be regarded with a great deal of jealousy, because, when an attorney has such a security, there may not be so much caution in the expenses as would otherwise be applied. But, suppose the money has been actually advanced in behalf of Arthur H. Daly, there is not a word here as to the collusion; but the decree merely asserts that the mortgage is valid as against A. H. Daly, and that Kelly ought to have liberty to appeal in the name of A. H. Daly; and the difficulty is not confined to this; for you are placed in this difficulty also, whether you must not alter Lord Clare's decree, not only as far as respects the interest of Kelly, but whether you must not subvert it altogether with reference to the interest of A. H. Daly likewise, who is substantially no party here. [432] Then is it the practice of a Court of Equity, or of this House, if, pending a suit, an incumbrance is effected, and the incumbrancer is not made a party, that he should be at liberty to appeal in the name of the original parties? This at least is a novelty. If it were clear that a judgment was obtained by a fraudulent collusion, then there might be a ground for it; and further, if a person were acting in a cause for the benefit of another, and the parties by a fraudulent collusion deprived him of his fair remuneration, I can conceive that, if the collusion were established, relief ought to be given in some way, by either vacating the judgment, or that, if there was an appeal in this way, this House might perhaps receive it. But the first question is whether it is a fraud, the not appealing in behalf of a party who stands on the simple ground of being made an incumbrancer during the suit. Some other things are also to be considered. In one page it is said that the action was before the alienation, and in another that it was after. But, whoever got land before the action brought, by alienation from the devisee or heir at law of a dead person, the land cannot be affected by a bond-creditor, but the money is assets for the payment; and here we may have to consider whether the bond would affect the land in the hands of Kelly at all. At law a bond attaches on the land by force of the judgment. But in equity the bond-creditor can only have satisfaction from the land in the mode of equitable execution; that is, by a sale of the land to pay the debt. But how can a sale be made without the party who has got the estate, and must make the conveyance? [433] Then another question is, whether Kelly ought not to have been a party to the suit, and to have appealed in his own name, confining it to his own interest, instead of coming

in the name of Arthur H. Daly. I mention these things only to show the extreme difficulty which I feel in this case. Your Lordships know what valuable assistance we get in these Irish cases from a noble Lord not now here (Redesdale) even where the causes have not come before him below. He had this case before him, and knows more about it than the whole of the rest of us put together; certainly more than I do, for among these papers I cannot even find the bill. I propose, therefore, that the cause should stand over till that noble Lord can attend.

Lord Eldon (C.) (Feb. 15, 1816). The order of 1805 was made by the then Chancellor, to enable the party to enter his appeal in time, in case it should appear that he had merits, and had a right so to appeal. Then the cause came on here, in 1813; and the question was, whether Kelly had a right to appeal in the name of A. H. Daly, and if he had, whether he had any merits: and the order made on that occasion, according to the impression on my mind, was, that the Court of Chancery below should decide both questions, whether he had merits, and whether he had a right to appeal in this form. One of the difficulties which occurred to me in that case was, whether there was not an alienation of this property before any suit on the bond. It was likewise a singularity in the case, that this was a bill for an injunction to restrain proceedings at law on a bond; [434] and the consequence, generally speaking, when there appeared no ground for this injunction, would be that the bill as to that would be dismissed. But I stated before, that there might possibly be something in the pleadings to induce the Court below to retain the bill in that respect, and so to turn the Defendant into a Plaintiff. The cause now comes here on appeal against the order of 1805, and an appeal against this decree of 1813, and it was insisted that the Court was wrong in permitting the appeal; for there was little argument, as yet, as to the point, whether the mortgage to Kelly was a valid security, nor was it necessary in the first cause. But, in 1813, the House had doubts as to the validity of the security, considering its nature as between solicitor and client. But it would not be necessary to go into that, if the House should be of opinion against the appeal in the first cause. Now when we made the order of 1813, we did not, as far as the impression on my mind goes, mean to decide that Kelly had a right to appeal in the name of Daly; but expected the Court below to give its opinion, not only as to the merits, but whether, supposing there were merits, the party ought to be allowed to prosecute the suit in this form. I did not consider the order of 1805, as determining anything but this, that the party should be at liberty to enter his appeal: I take it, at present, that the security was valid. But there is one thing to be observed, that this suit originated by a bill for an injunction to stay proceedings at law on a bond. When it appeared that the equity could not be sustained in that view, the ordinary course here [435] would have been to dismiss the bill. But I take it that there was some specialty in the case to induce the Court to retain it. There was another difficulty: if a bond-creditor proceeds at law against a devisee, or heir at law, he takes execution against the land. But if he proceeds in equity he only gets satisfaction out of the land by sale for as much as is due; and then the conveyance must be executed by him who has the legal estate; and if there is an alienation pending the suit, though that would not prejudice the Plaintiff, yet the alienee must be brought before the Court in some shape or other. Here, I take it, the course would be to bring the alienee before the Court in order to convey. But the course in this case has been different; for Kelly appeals in the name of Daly, who, though he has a much greater interest, repudiates the suit; and if the Court was of opinion that he could so appeal, the decree ought to have been that he should only appeal to the extent of his own interest. What do you say to that, Mr. Hart? I confess I cannot get over it. (Mr. Hart. There was no change of possession, and Kelly had only the equitable, not the legal estate. There is no lease for a year.) Lord Eldon (C.) It is stated, in one of the cases, that the mortgage was by lease and release, and we have been proceeding here on the supposition that this was correct.—Hart. The cases were prepared on the other side of the water.—Lord Redesdale. It is not the practice in Ireland, I believe, to make a lease for a year, as by act of parliament it is provided that a recital of a lease for a year in the release shall be evidence of the lease.—Lord Eldon (C.) [436] (After looking at the deed.) This is neither lease nor release, nor any thing like either. It seems to be no freehold conveyance at all, but only gives a right to the rents and profits till the debt is paid.

Lord Redesdale (Feb. 25, 1816). I shall state the circumstances of this case, as it

appears to me they have not been exactly understood. The first bill was filed in 1792, to establish the will of 1790, and set aside that of 1791; and, an issue having been directed, a verdict was, in 1794, given against the will of 1791; the consequence of which was understood to be the establishment of the will of 1790, and there was an end of all dispute on that subject. Then, the will of 1790 being established, the mortgage to Kelly was made in September 1795, which mortgage was of an extraordinary nature, as he was only to enjoy the rents and profits till he was paid; so that the mortgage was made before there was any question as to the £40,000 bond. The mortgage was registered in September 1795; and the effect of the registration is different in Ireland, from what it is in England in those instances in which it is used; as in Ireland the effect is to give a preference, both in law and equity, against all subsequent deeds whatever. The effect then was to give a prior right to the mortgagee, as this was an alienation by the devisee prior to the action on the bond. The action was brought after the alienation; and by the statute of Anne in Ireland (4 Anne, c. 5), which is the same as the statute of William here (3 Gul. Mar. c. 14), the alienation is not affected by the judgment, but the demand is personal against Arthur H. Daly for the value. This seems [437] totally to have escaped attention. The action on the bond was then brought, and the judgment was subject to the mortgage to Kelly. The bond was not in suit till 1797; for the proceedings in the Ecclesiastical Court, annulling the probate taken under the will of 1791, were not completed till 1797. The action being brought, the bill was amended, and prayed an injunction; for Arthur Henry Daly seems to have been advised to make no defence at law against the bond; whether rightly advised or not is another question; but he seems to have been, in point of fact, so advised.

Then the cause came to a hearing in March 1800, and the decree was of this description, that the bond should stand as a security to Michael Daly for the principal sum of £40,000, with interest, from March 14, 1791, the day of the testator's death, instead of from the date in the bond, which, I presume, was founded on evidence that the bond was not intended to operate, unless in the event of no provision being made for Michael Daly by will. I do not see on what other ground it could be. Then an account is directed to be taken of what was due to M. Daly under the bond; and the Master was ordered to set off the amount of such sums as M. Daly had received. In November 1800, the cause was reheard, and the decree was affirmed. Now this decree supposes that the bond was to be relieved against to a certain extent, and is therefore so far correct; for whereas the bill prayed relief against the bond, the decree did relieve to a certain extent, but ordered payment of the bond according to the nature of the relief, and the bill [438] must be understood as having, by implication at least, submitted to have the relief made effectual according to the rights of the parties.

This decree was followed up by an order in the common way, that the estates should be sold, and that all necessary parties should convey. That however did not bind Kelly. The real estates were sold to Gore in trust for M. Daly, and conveyed to him by A. H. Daly: so that Gore took only what A. H. Daly could give, and no more; and that was subject to the mortgage to Kelly.

Then Kelly filed his bill to establish his own mortgage, and charged collusion between the parties to defraud him (Kelly); and that in consequence of such collusion, A. H. Daly had abandoned an appeal from the decree, which he once intended, and that he (Kelly) was in danger of losing the benefit of his security. That bill was against M. Daly, A. H. Daly, and against Gore, and was properly so filed. Afterwards he moved the Court to be allowed to present an appeal in the name of A. H. Daly, in the cause of "Daly v. Daly," as the time was almost out. An order was accordingly made under the restrictions therein mentioned, and Kelly was also directed to speed his own cause to a hearing; but instead of that, he let it rest. It was material, however, that he should have speeded his own cause, as the decree in the other cause was still open to review in the Court of Chancery; and this bill was against Gore, who might dispute the validity of the mortgage.

Then the cause came here, and the Lords saw that there was an impeached mortgage, and that [439] the decree, not being affirmed here, was open to review below, so far as the interest of a third party was concerned. Then an order was made to speed Kelly's cause—(Lord Eldon, C. Is any decree in Kelly's cause made up? Hart. No. Lord Eldon, C. Then we cannot hear any appeal from it.)—and a decree was

made in it. This decree proceeds on the idea that the Court could not enforce Kelly's security, in case the decree in "*Daly v. Daly*" should not be impeached here. That however was a mistake; for that decree not being affirmed here, the Court below could still take cognizance of it by review.

The only way of proceeding therefore is to send this again to Ireland, that the Court below may try the question between Gore and Kelly, and whether Kelly cannot still have satisfaction out of the real estate of the testator Denis Daly. If that can be done, the consequence will be that the appeal in "*Daly v. Daly*" may drop, if Kelly may have a decree against the lands in the hands of Gore, which I think he may; and then A. H. Daly would be personally answerable to the others. We cannot proceed in these appeals as they stand.

Lord Eldon (C.). I concur in this view of the case, which is as I before stated, with the exception of my not having noticed the circumstance of the registration. But even now I cannot see the necessity of giving Kelly liberty to appeal against the decree in "*Daly v. Daly*." If the alienation was prior to the action on the bond, and the statute of Anne in Ireland is the same as the statute of Wil[440]-liam here, the consequence is that the estate must answer the value of the incumbrance. As the Court cannot proceed but by sale of the estate, it is necessary to have the alienee before it to convey; and, if there are vexatious alienations pending a suit, the Court will restrain them.

Sir S. Romilly. The estate was devised by the testator Denis Daly, subject to the payment of his debts.

Lord Redesdale. That is a new question. If the testator devised the lands charged with payment of his debts, that puts an end to Kelly's security, unless he can impeach the bond.

Sir S. Romilly. It was not thought material to press that point, until the view now taken of the case by Lord Redesdale.

(May 21, 1816.) The formal order of the House, after the common recitals, with the addition that, as the decree of 1813 had not been made up, the Lords could not hear an appeal from it; and that the minutes would only have warranted a decree establishing the right of Kelly to the benefit of the mortgage against A. H. Daly, and not against the other parties claiming the property comprised in the mortgage, by force of the decree of March 7, 1800, proceeded thus:—"It is ordered, etc. that the said cause, "in which the said Thomas Kelly is Plaintiff, and the said Arthur Henry Daly and "others are Defendants, be referred back to the said Court of Chancery in Ireland, and "that the said Thomas Kelly do apply to the said Court for leave to re-hear the said "cause, [441] and to bring before the said Court, on such re-hearing, or in such other "manner as to the said Court shall seem fit, all proper parties for the purpose of enabling "the said Court to decide whether the said Thomas Kelly is entitled to the benefit of "the said indenture of mortgage, of the 14th day of Sept. 1795, against the several "persons claiming the benefit of the said decree of the 7th day of March, 1800, notwithstanding such decree remains in force against the said Arthur Henry Daly; and "whether the said Thomas Kelly has a right to impeach the said decree of the "7th March, 1800, being no party thereto, to the extent of his claims under the said "indenture of mortgage, either by bill in the nature of a bill of review, or otherwise. "And it is further ordered, that the said appeal in the name of the said Arthur Henry "Daly in the first-mentioned cause, and the appeal against the order made in that "cause, and in the said cause of Kelly against Daly, for liberty to present such first "appeal, do stand over until the further order of their Lordships."

Agents for Appellant, HANROTT and METCALFE.

Agent for Respondents, KEANE.

[442] IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

ROSSE (EARL OF),—*Appellant*; STERLING (REV. JAMES), and Others,—*Respondents* [May 17, 20, 22, 24, June 24, 29, 1816].

[Mews' Dig. xiv. 1757.]

[Bill in 1805 for performance of an agreement made in 1761, for sale of lands, and decreed accordingly below; but the decree reversed in Dom. Proc., Defendant having been left in possession as owner for a long time, and Plaintiff having done acts inconsistent with the notion of his being owner himself, which was considered as amounting to a waiver.]

[Objection to a decree made in 1812, that it ordered payment of a sum found due, and directed to be paid with interest by a decree made in 1766, on the foot of accounts settled in 1756 and 1761, between attorney and client, in which the attorney charged interest upon interest, with interest on the consolidated sum from 1766 to 1812. That sum acknowledged by the objecting party, by solemn deed in 1783, to be due with interest, and the objection comes too late; though, if objections had been recently made for the purpose of opening the accounts, they could hardly have failed of being effectual.]

[Father, tenant for life, borrows money, to secure which he, and his son, remainder-man in fee, join in a mortgage of the inheritance. The son is entitled in equity to rank as a creditor on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost of it for the son's relief, etc. etc.]

By a settlement, dated September 4, 1730, made on the marriage of Lawrence Parsons, grandson and heir apparent of Sir William Parsons, of Par-[443]-sonstown, in the King's County, and Mary Sprigge, eldest daughter of William Sprigge, of Clonivoe, in the King's County; after reciting that the Parsons' estate was subject to certain incumbrances, and amongst others to a mortgage created in 1707, described as Upton's mortgage, the Parsons' estate in the King's County was settled on Lawrence Parsons for life, remainder to his first and other sons in tail male, with power to charge the estate with £400 per annum for any future wife, and with £4000 for the younger children of any future marriage, in case he should have no younger children by Mary Sprigge: and by the same settlement, William Sprigge covenanted to stand seized of an undivided moiety of Clonivoe, Clonad, and other lands, of which he had the reversion in fee expectant on his own death without issue male, and possessed of an undivided moiety of certain leasehold estates, to the use of Lawrence Parsons and Mary Sprigge, and the survivor of them, for life; remainder to their first and other sons in tail male; remainder to Mary Sprigge, her heirs and assigns, reserving a power to himself to charge the undivided moiety of the lands with £2000.

The marriage took effect. Mary Sprigge died in 1731, leaving William, the father of the Appellant, her only child; and William Sprigge died in 1735 without issue male, leaving William Parsons the son of his daughter Mary, and his daughter Margaret married to Thomas Burgh, his co-heirs at law, having executed his power in favour of his daughter Margaret.

In 1742, Burgh and his wife filed a bill for [444] raising this £2000 out of the Parsons' moiety of the Sprigge estate, and obtained a decree; and in 1746, the sum was paid by Lord Loftus upon the security of an assignment of the decree. In 1742, also, Sir Lawrence Parsons married again; and, under the power reserved in his first marriage settlement, he charged the Parsons' estate with £400 per annum as a jointure for his second wife, and £4000 for the younger children. There were issue of this marriage two sons; but the whole charge of £4000 became vested in Anne Parsons, the daughter

of one of them, and wife of Richard Blake Deverall. Of this sum of £4000, a sum of £3275 was afterwards paid by the Earl of Rosse subsequent to his father's death.

In 1754, Sir Lawrence Parsons, and William his son, suffered a recovery of the Parsons' and Sprigge estates, the uses of which were, subject to Loftus's charge, and Upton's mortgage, to Sir Lawrence for life, remainder to his son William and his heirs.

In the same year 1754, on the intermarriage of William Parsons with Mary Cleare, only child of John Cleare, of Kilbury, in the county of Tipperary, marriage articles were executed, by which it was agreed that all the estates included in the settlement of 1730, except those of Clonivoe and Clonad, should be conveyed to trustees for a term of 200 years, with remainders to Sir Lawrence and William for life; remainder, subject to a jointure to Mary Cleare, and a provision for younger children, to the first and other sons of the marriage in tail male. And it was agreed that, as soon as Mary Cleare should come of age, her estates should be [445] settled to the like uses. And the trusts of the 200 years' term as to the Parsons' estate were declared to be, that the trustees should, at the request of Sir Lawrence Parsons, raise thereout, by sale, mortgage, or demise, a sum not exceeding £12,000, to be applied in paying off all incumbrances affecting the said Parsons' estate, except jointures, and the residue to be applied as Sir Lawrence Parsons should direct. The trusts of the term of 200 years created of the Cleare estates were declared to be to pay the debts of John Cleare. These articles were prepared and witnessed by Marlborough Sterling, agent and attorney for Sir Lawrence and Sir William Parsons.

Sir Lawrence Parsons died in October 1756, leaving his son William, his only issue by his first marriage; and in December 1756, an account was settled between Sir William Parsons and Marlborough Sterling, and in this account Sir William was made debtor in a sum of £3899, of which £2500 were the debts of Sir Lawrence. This latter sum was made up of two judgments, obtained by one Moore against Sir Lawrence Parsons in 1730, and assigned to Marlborough Sterling in 1751, and of a bond given by Sir Lawrence to Sterling in 1753, with interest upon these sums. The same day on which the account was settled, Sir William² Parsons executed to Sterling a mortgage in fee of the lands of Clonivoe and Clonad, which were not included in his marriage settlement, for securing the payment of this sum of £3899, the interest being thus made principal.

In 1758, a private act of parliament was obtained [446] to raise the £12,000 agreed to be raised at the request of Sir Lawrence Parsons, a doubt being entertained whether it could be raised otherwise, Sir Lawrence Parsons having done nothing to signify his request or consent. By this act—reciting the articles of 1754, etc. and that £8000 of the £12,000 was, then and at the time of the execution of the said articles, a charge on the estates of Sir William by old mortgages; and that £4000 was due from Sir Lawrence by judgments which would be lost to his judgment creditors unless the £4000 should be raised: also reciting that the debts of John Cleare amounted to £7000; and that Sir William Parsons, not having received any ready money with his wife, Mary Cleare, had contracted debts to the amount of £6000; and that Mary Cleare, or Parsons, was desirous to raise, by sale of a competent part of her estates, £6000 to pay Sir William's debts; and that Sir William was seized in fee of an undivided moiety of certain lands in the King's County which he was desirous to settle to the uses of the marriage articles of 1754 as a compensation to his wife Mary Cleare for such part of her estates as should be sold for the payment of his debts—it was enacted that the Cleare and Parsons' estates should be vested in trustees for the purposes stated in the recitals; and, subject to such purposes, they were limited to the same uses as declared by the articles of 1754. The lands which formed the subject of compensation, as above-mentioned, were part of those which had been previously mortgaged to Sterling. There were several sons of this last marriage, of whom the Earl of Rosse was the eldest.

[447] In March 1761, an agreement was entered into between Sir William Parsons and Marlborough Sterling, for the sale to the latter of the lands of Clonivoe and Clonad, reciting the settlement of 1730 and the other family transactions mentioned; and that Sir W. Parsons was seized in fee of these lands, they not having been included in the articles of 1754, nor in the private act of parliament; that Lord Loftus had filed a bill in 1759, praying that the £12,000 might be raised, and the sum due on his security paid thereout, or that the lands of Clonivoe and Clonad might be sold for that purpose:

and also reciting that Sir W. Parsons was indebted to Sterling in several sums of money due on judgments and otherwise etc., and that Sterling had agreed to purchase the lands, in discharge of the whole or some of the judgments, at the price of £3934, being at the rate of twenty-three years' purchase, allowing £900 for the casual rise of the rents on the expiration of the leases: and further reciting that it was uncertain whether the lands in question were not chargeable with the debt of Lord Loftus, equally and rateably with the lands of which Sir W. Parsons was tenant for life, until a decree should be made in the said cause, it was witnessed that Sir W. Parsons agreed to convey the lands to Sterling, or any person whom he should appoint, within a reasonable time after such decree obtained. And Sterling agreed to discharge such of the judgments as he, his heirs, etc. should think proper or convenient, amounting to the sum of £3934, the purchase money of the said lands, provided that, in case the lands should be found chargeable with any [448] part of Loftus's debt, Sterling, etc. should be at liberty, at his or their election, to pay the sum charged upon the lands, and should be allowed the same as part payment of the £3934; or, in case they did not choose to advance the money, and it should be raised out of the lands, that Sterling should be allowed to deduct the same out of the purchase money: and Sterling, in consideration of an assignment of the rents and profits of the lands from March 25, then instant, agreed that the interest on the judgments making up the purchase money should cease from that time, Sterling having agreed to accept the rents in lieu of interest. And it was agreed that, in case the agreement should not be carried into effect, nothing contained in it should affect or invalidate the mortgage of the lands before executed to Sterling.

In July 1761, a sale was made of part of Lady Parsons' estate under the act of parliament, and a sum of £1385 was paid by the trustees to Sterling. On August 14, 1761, a general account was stated between Sir W. Parsons and Sterling, including, besides the incumbrances, several simple contract debts due from Parsons to Sterling, which were afterwards discharged and form no part of the present question; and a balance of £1915 was stated to be due to Sterling: and this account was signed by Parsons and Sterling, acknowledging that it was correct.

In 1764, Sir W. Parsons filed a bill against Lucy Sterling, the representative of M. Sterling, impeaching the accounts of 1756 and 1761, and praying that they might be opened, and that Parsons might [449] be relieved from the agreement of March 1761, for sale of the lands of Clonivoe and Clonad. Lucy answered, stating that she was willing to settle accounts on the footing of the accounts of 1756 and 1761, and to waive the agreement for a sale, on payment of what should appear due. By decree July 8, 1765, it was referred to the Master to settle an account on the ground of the mortgage of 1756, and the account of August 1761. In Feb. 1766 the Master made his report, finding that the sum of £8857 was due to the representative of M. Sterling, in which was included a sum of £1512, alleged to be due on account of two judgments passed by Sterling to a person of the name of Neynoe, as a farther security for debts of Sir L. and W. Parsons: though this latter sum was afterwards admitted to be, for the greater part, an overcharge.

On Feb. 28, 1766, a decree was made in the cause, that Plaintiff do, in six months, pay to Defendant the said sum of £8857 with interest from Feb. 26, 1766, the time of confirming the report; and that thereupon the sale agreed to be made should be set aside, and that the Defendant should re-convey the lands; and that, in default of payment of principal and interest within the time limited, the sale should stand absolutely confirmed, and that an injunction should issue to put Lucy Sterling in possession etc.; and that either Plaintiff or Defendant might make up a decree for performance. In this decree no provision was made, in the event of the sale being carried into effect, for the payment [450] of the residue of the debt, above the sum for which the lands were to have been sold.

In 1779, Sir W. Parsons and his eldest son, the Earl of Rosse, suffered a recovery of the lands comprised in the articles of 1754, and the act of 1758, except the small part of the Cleare estate sold in 1761, the uses of which, subject to Upton's mortgage and Lord Loftus's demand, were declared to be such as Sir W. and his son should appoint, and, in default of appointment to Sir William for life, remainder to the Earl of Rosse in fee. No steps were taken by the representatives of M. Sterling to enforce the decree of 1766 for a sale of the lands of Clonivoe and Clonad, of which

Sir W. Parsons was left in possession during the remainder of his life, a period of twenty-five years.

In 1783, Sir William Parsons having occasion to borrow certain sums, amounting in all to £15,000, was joined by the Earl of Rosse in a mortgage of the settled estates to one Browne, who advanced the money; and at the same time Sir W. Parsons and his son, and Lucy Sterling, executed a deed, reciting the decree of 1766, and that the sum of £8857 was due under that decree to Lucy Sterling, together with a large arrear of interest; reciting also Browne's mortgage, and that, in order to protect the mortgage, it was necessary that three of the old judgments vested in Lucy should be assigned in trust for Browne, and that two more of them should be satisfied, and that £2500, part of the money borrowed from Browne, had been paid to Lucy Sterling, in part and on account of interest [451] due to her on foot of the said sum of £8857 so decreed to her, and that Lucy had agreed to assign and satisfy these judgments as aforesaid: and Sir W. Parsons and the Appellant thereby agreed that this transaction should be without prejudice to the demands under the decree, and the other demands of Lucy Sterling against Sir W. Parsons and his father, or to any securities that remained for the same, but that they should be in full force, deducting the said £2500 which Lucy acknowledged to have received in part and on account of interest due to her on foot of the £8857, and released and discharged the same accordingly.

Sir W. Parsons borrowed a further sum of £2000 from Browne, on assignment of Upton's mortgage; and Lord Loftus's charge of £2000 was assigned, in 1803, to Sir G. Piggott. Sir William Parsons died in May 1791, leaving the Earl of Rosse his eldest son and heir at law, having made and published a will, dated August 1761, devising all his estate and lands in the county of Wexford, which descended to him as heir at law, to his uncle Piggott Parsons St. George, to trustees, to sell the whole or a competent part of the same to discharge his judgment debts; and devised to his right heirs such part of the estate and lands as should remain unsold; and bequeathed his personal property to such younger children as he should have at the time of his decease, and in case he should have none, to his wife Mary Parsons; and appointed his wife and the Rev. Richard Challoner, executors.

From the time of his father's death the Appellant paid the interest of the £15,000 borrowed from [452] Browne, together with an arrear of interest due thereon at that time. He also, since his father's death, paid various sums for interest on Loftus's or Piggott's mortgage, and Upton's mortgage, and for younger children's portions created under the settlement of 1730, and a sum due from his father at his death to a creditor of Lucy Sterling; and in 1796 sold the lands of Clonad, and applied the purchase money in these payments.

In September 1805, the Respondents, as representatives of Marlborough Sterling, filed their bill against the Earl of Rosse and others, admitting an overcharge in the report of 1766, with respect to Neynoe's judgments, and offering to give credit for it, and praying an account on foot of the decree of 1766, and offering to waive the agreement of 1761 for the sale of the lands of Clonivoe, etc. on being paid what should appear due to them on that account; otherwise that the sale might stand, and the purchase money be applied to disencumber the lands so agreed to be sold: and in that case the bill prayed an account on the foot of the mortgage of 1756, and a foreclosure; and that the balance, if any, should be decreed a lien on the trusts of the act of parliament for raising the £12,000, and £6000; and in case it should appear that these sums had been fairly applied, and that sufficient did not remain to satisfy the demands, then that the Wexford estates might be sold for payment of the Plaintiffs and other judgment creditors of Sir W. Parsons, etc. This appears to have been the prayer generally, though the printed cases did not, in several material particulars, correspond to the original pleadings; [453] and there was some dispute at the bar as to whether the bill was to be considered as a bill for specific performance, or a bill of foreclosure. The Earl of Rosse, in his answer, stated several objections to the securities; that M. Sterling was the attorney as well as agent and receiver of Sir L. and Sir W. Parsons, and in the accounts settled charged interest on interest; that the judgments assigned to M. Sterling were stale demands, and that it was very unlikely he should have paid full consideration, etc.

By decree, Feb. 5, 1810, it was referred to the Master to take an account of

what was due on foot of the sum specified in the decree of 1766, deducting the overcharge on account of Neynoe's judgments, and to take other accounts arising out of the above mentioned circumstances. The Master made his report, finding £17,000 due to the Respondents; which, together with a sum for interest from 1810 to 1812 not calculated by the Master, made up £18,744 in the whole.

On Nov. 17, 1812, the Court decreed the Respondents entitled to the sum of £18,744, with interest from the time of confirming the report, and that, unless the Appellant should pay the same in six months, the Respondents should be, and were thereby declared to be, entitled to have the agreement of 1761 for sale of the lands of Clonivoe, etc. carried into specific execution; and the Appellant was ordered to convey accordingly; and the Master was directed to ascertain the purchase money to be paid for the lands under the agreement of 1761, etc., and to take an account of the rents and profits from that period, and of the purchase money and interest [454] thereof of certain parts of the lands sold by the Appellant; and it was ordered that the Master should ascertain the sum due to the Respondents, and that the same should be a charge on the Wexford estates, and the rents thereof received by the Appellant, and on the sums of £12,000 and £6000 mentioned in the private act of parliament, so far as these sums might be applicable to the payment of the Respondent's demands, and that in default of payment sales should be made accordingly, etc.

From this decree the Earl of Rosse appealed.

The grounds of the principal objections made to the decree were, that the agreement which it directed to be carried into specific execution had been waived; that by directing payment with interest of the sum specified in the decree of 1766, interest was charged on interest, which was allowable only in case of a mortgage; and the cases of *Creuse v. Hunter*, 2 Ves. 157, 4 Bro. Ch. Ca. 316, and *Tew v. Lord Winterton*, 1 Ves. 451, where interest was refused on arrears of annuities, were cited. (Lord Redesdale. The decree of 1766 directs the payment of the sum found due, with interest; that decree is not appealed from, and the question is not open to you except in this way, that, as this is a bill to carry into execution a decree, that decree may be impeached for impropriety.) That was stated to be the ground taken; and the proposition was that interest was to be calculated as if no decree had been made in 1766, and the cause had still remained in Court. The decree could not, as a decree, affect the real assets of Sir W. Parsons descended or devised. The Respondents could affect them only [455] by resorting to their securities, and could only have an account of the sums due upon them with simple interest, subject to the inquiries and directions which the securities and alleged settled accounts between attorney and client called for. Another objection made to the decree was, the charging the Appellant with bygone rents of the estates descended and devised, which he had applied in payment of other judgment and mortgage creditors of Sir W. Parsons, and most part of them before the filing of the Respondent's bill; and it was objected also that no provision had been made by the decree for the payment of Browne's mortgage as far as possible out of the assets of Sir W. Parsons, the fund primarily liable to pay it.

Sir S. Romilly and Mr. Wetherell for the Appellant; Mr. Leach and Mr. Nolan for the Respondents.

Lord Eldon (C.) (May 24, 1816). This case itself is a difficult one on account of the variety of transactions at different periods which it involves; and the difficulty is increased by the difference between the case as it appears in the prints, and the same case as stated in the pleadings, a difference now known to be very material. This circumstance I hope will not occur again, as it is impossible that this House can, consistently with the due discharge of its judicial and other functions, take the trouble of minutely examining all the papers in the cause which are not in print, in order to know what the case really is.

The principal question is, whether the contract [456] of 1761 ought to be specifically performed, more than half a century after it was made. There was a mortgage in 1756, which comprehended these estates in the contract in 1761.

It appears by the bill of 1764 that it was filed partly for the purpose of impeaching the contract of 1761, and a decree was made upon this bill for payment, by the Plaintiff, of the sum of £8857, or otherwise that the sale should stand confirmed. And I mention that now, as this practice which they seem to act upon in Ireland, where a bill is filed for the purpose of impeaching a contract, of pronouncing a decree upon it, not dis-

missing the bill, because there are no grounds for impeaching the contract, but ordering the contract to be carried into execution, is a species of proceeding very much unknown to us, etc.

[It is unnecessary to state the remaining observations made this day, as they were in substance the same as those made on a subsequent day, as under.]

Lord Eldon (C.) (June 24, 1816). (After stating the preceding part of the case, and particularly adverting to the account of 1756). It has been very truly remarked, that Sir W. Parsons was, within a month after his father's death, made debtor in this account in a sum of £3899, of which £2535 consisted of the debts of his father Sir Lawrence, who was strict tenant for life; and that M. Sterling, on the same day, obtained a mortgage from Sir W. Parsons of the lands of Clonivoe and Clonad for securing the said sum, of which a considerable part consisted of interest, which was thus made principal. I take notice [457] of these circumstances that it may be seen that they have not escaped my attention; but, though this transaction in 1756 was one against which a great deal might be urged if challenged at the time, yet, after what has passed, the representatives of M. Sterling must be held to be creditors for a considerable sum of money.

By articles made in 1754, on the marriage of Sir W. Parsons with Mary Cleare, a sum of £12,000 was to be raised out of the Parsons' estates, at the request of his father, Sir L. Parsons, for paying off incumbrances on these estates; and a private act of parliament was obtained, in 1758, by Sir W. Parsons, reciting the articles and the death of Sir Lawrence without having done any thing to signify his request, etc. and reciting also that £8000, part of the said £12,000, was then, and at the time of the execution of the articles, a charge on the estate of Sir W. Parsons by old mortgages; and that the remaining sum of £4000 was due from Sir L. Parsons by judgments, which would be lost to the judgment creditors, unless that sum should be raised; and reciting that Dame Mary Parsons was desirous to raise a sum, not exceeding £6000, to pay the debts of Sir W. Parsons, and that Sir W. Parsons was seized in fee of certain lands therein mentioned, which he was desirous to settle to the uses of the articles of 1754; and then enacting that the Cleare estate should be vested in trustees to raise the £6000, to be applied in payment of debts upon any securities in writing given by Sir W. Parsons before January 1, 1757; and that the Parsons' estates should be vested in the same trustees to [458] raise the £12,000 to be applied in payment of incumbrances affecting these estates on June 28, 1754, and then in payment of judgment debts of Sir L. Parsons.

The next transaction was an agreement, in March 1761, between Sir W. Parsons and M. Sterling, for sale to the latter of the lands of Clonivoe and Clonad, upon which, it will be remembered, M. Sterling had obtained a mortgage to secure the balance of the account settled in 1756; thus, as to some of the items, converting interest into principal. This agreement recited the settlement of 1730, and subsequent family settlements; that Sir W. Parsons was seized in fee of the lands of Clonivoe and Clonad, which were not included in the articles of 1754, nor in the private act of parliament; that Lord Loftus had filed a bill in Chancery to have his mortgage money paid, praying that the £12,000 might be raised, or that the lands of Clonivoe and Clonad might be sold for that purpose; that Sir W. Parsons was indebted to M. Sterling by several judgments, and was desirous to pay off so much thereof as the purchase money of Clonivoe and Clonad would cover; and that M. Sterling had agreed to purchase these lands for a sum of £3934, being at the rate of 23 years' purchase for the then rents, allowing £900 for the casual rise of rents on the expiration of the leases, etc.: and then the instrument went on to witness that Sir W. Parsons had agreed to sell the lands to Sterling, and that Sterling agreed to release such of the judgments as he might think proper to the amount of the purchase money, and that, in case the lands were subject to Lord [459] Loftus's mortgage, Sterling should be allowed still to retain undischarged so much of the judgment debts, otherwise to be released, as would pay that mortgage: and then came a clause deserving particular attention, by which M. Sterling, in consideration of the grant and assignment of the rents and profits of the premises from and after March 25, 1761, agreed that all interest on so much of the judgments as should amount to the purchase money should, from that day, cease and determine; it being the agreement of the parties that, though the interest should exceed the rents and profits, Sterling had, in consideration of the rise in value of the lands on the expiration of the leases, consented to accept the profits of the lands in lieu of the interest: and regard ought to have been had to

that particular stipulation. And then there was a clause that, in case the agreement for the purchase of the lands should not take effect, nothing therein contained should affect or invalidate the mortgage. This deed was never registered.

In July 1761, a sale was made of part of Lady Parsons's estate by the trustees under the act of parliament, and a sum of £1385, paid to Sterling in part discharge of his demands against Sir W. Parsons: and on August 14, 1761, a general account was stated by Sterling on the foot of the incumbrances, and also on foot of some simple contract demands and costs which appear to have been discharged, and therefore it is unnecessary farther to notice them. Objections were stated to several items of this account, which, if made at an early period after the transaction, for the purpose of [460] opening the whole account, would have considerable weight. But these objections came too late in a suit instituted after the year 1800, though, if recently made, they could hardly have failed of being effectual.

In 1764, Sir W. Parsons filed a bill against Lucy Sterling, widow and administratrix of M. Sterling (who had died in 1762), and against his two daughters, who were his only issue, praying that the accounts of 1756 and 1761 might be opened, and an account taken on the foot of the original securities, and likewise praying to be relieved from the agreement of sale of the lands of Clonivoe and Clonad. This being a bill for opening the accounts, if Sir W. Parsons did not then obtain the relief prayed for on the grounds then stated, it is impossible that in a fresh suit he should on the same grounds have the relief which he failed to obtain in the former suit. Lucy Sterling answered that she was willing to account on the footing of the settled accounts, and agreed to waive the sale on being paid what remained due to her. By decree, in July 1765, it was referred to the Master to take an account on the foot of the mortgage of 1756, and the stated account of 1761. The Master having made his report, a decree was pronounced on February 28, 1766, which, though it is such as I cannot understand, has not been disturbed since that time. The decree was, that "the Plaintiff do in six months pay to the defendant, Lucy Sterling, the sum of £8857 8s. 4d. with interest from February 26, 1766, the time of confirming the report, and that thereupon the sale made of the "lands of [461] Clonivoe and other lands agreed to be sold be, and the same is hereby, "set aside, and that Lucy Sterling should re-convey the lands so agreed to be sold." So far the decree is quite intelligible, the other party having agreed to waive the purchase on being paid the money due on foot of the mortgage of 1756, and settled account of 1761, and the Court having found that, on these grounds, a sum of £8857 was due. But there was another alternative, that the Plaintiff might not pay the money; and then, I think, it would not have been difficult to frame a proper decree, regard being had to all that had passed. But all that the decree does is this—that in default of the Plaintiff paying the money within the time aforesaid the sale should stand absolutely confirmed, and that an injunction should issue to put Lucy Sterling in possession of the lands, and that either Plaintiff or Defendant might make up and enrol a decree for performance. If there was no objection to such a decree on such a bill, the land could be conveyed only in consideration of part of the debt, suppose £4000, and the debt was £8857; and the decree did not provide for payment of the residue of the debt. It was then stated that this sum of £8857 included, on account of Neynoe's judgments, a larger sum than was actually due.

No further steps were taken by the representatives of M. Sterling: and Sir William Parsons, who had been decreed to pay the money in six months, or otherwise that the sale should stand confirmed, continued in possession of the lands during his whole subsequent life, being a period of twenty-five years, [462] receiving the rents and profits during all that time. But in 1783 an instrument was executed which, even if the possession for so long a period should not be considered as a waiver of the sale notwithstanding the decree, appears to me, and the matter is viewed by a noble Lord (Redesdale) near me in the same light, to amount to a waiver of the agreement. I allude to the deed of July 15, 1783, twenty-two years after the agreement, and seventeen years after the decree, between Sir W. Parsons and the Appellant, and Lucy Sterling. This deed recites the judgments vested in Lucy Sterling, and the decree of 1766, and that the principal sum of £8857, with a large arrear of interest, was due to Lucy on the foot of that decree; and that Robert Browne had agreed to lend Sir W. Parsons a sum of £9000 on mortgage of the Parsonstown estates (in which Sir W. had been joined by the Appellant), but required that certain old judgments which partly made up the said

sum of £8857 should be satisfied or assigned to his trustee to protect his mortgage; and that £2500, part of the said £9000, had been that day paid to Lucy on account of interest; and that Lucy had agreed to assign to Browne's trustee three of the judgments, and to satisfy two more of them: and it is by this deed covenanted and agreed between Sir W. Parsons and the Appellant, and Lucy Sterling, that such assignments made, and satisfactions acknowledged, should not prejudice the demands of Lucy under the decree, after deducting the £2500 out of the arrear of interest, but that the decree and all her securities should continue in full force; and Lucy thereby acknowledged the receipt of the [463] £2500 on account of interest of the sum due under the decree, and discharged the same accordingly.

This instrument is important in several views. It must be taken as an acknowledgment, seventeen years after the decree, that the sum of £8857 was due, and whatever might have been the effect of the objections to the accounts if recently made, these accounts cannot now be opened up on these objections. There is also another important inference to be drawn from it as to the purchase of the lands of Clonivoe and Clonad; for if the representatives of M. Sterling meant to insist that they were owners of the lands it was impossible that in 1783 they could have considered the interest as due on the sum of £8857; for they must have said "We became owners of the lands" after default of payment in 1766, and account to us, not for interest on the sum of £8857, but for the rents and profits of the lands which we must take according to the "agreement in lieu of interest of the judgments which made up the purchase money;" and then the £2500 would have been taken in discharge on that principle. Besides, therefore, the long possession by Sir W. Parsons, the agreement must, by this transaction also, be considered as waived. Another circumstance to be attended to is, that the assignments and satisfaction should not prejudice the judgments as securities. That is material in this view. Sir William Parsons had occasion to raise £9000 by mortgage, and in the deed of mortgage there was a clause enabling him to borrow more in the same way. He was then tenant for life, with remainder to the Appellant in tail or in fee. This sum of [464] £9000 was borrowed for the tenant for life; and the consequence generally in equity would be that the son, joining in a mortgage of the inheritance, would be considered as a creditor on the real and personal assets of the father to the amount of the mortgage, and might call upon the mortgagee to make use of it against the real and personal assets of his father to work out his relief: and in general cases Browne would have been bound to make the most of it against the assets of Sir W. Parsons, so as to relieve the Earl of Rosse as far as he could. But then it was agreed that the Earl of Rosse should not make use of that equity as to the £2500, to the prejudice of the Sterlings.

In 1805 the Respondents, as representatives of M. Sterling, filed their bill, admitting an overcharge in 1776 on Neynoe's judgments, of which overcharge the amount was therefore to be deducted, and praying an account on foot of the decree of 1766, and offering to waive the agreement of sale on being paid what should be found due to them, otherwise that the sale might stand confirmed, etc., etc.

Now, without going through the detail of these pleadings, of which much is printed, and much ought to have been which has not been printed, the first question is whether the decree is right in considering the agreement of 1761 as binding at this day, so as to form a ground for enforcing a sale and purchase. The decree has so considered it, and after all the attention that I have been able to bestow on the case I cannot advise your Lordships to hold that this is right: and if it is wrong that will produce a very considerable variation in the [465] decree. Another circumstance to be attended to is this. The money raised on Browne's mortgage, in which the Appellant joined, was the proper debt of Sir W. Parsons, and should be paid out of his assets; and the consequence is that the Earl of Rosse may be entitled to rank as a creditor generally on his father's assets for this sum, and to stand in the place of persons whose debts he paid, in competition with the Sterlings. By the industry of the noble Lord (Redesdale) who sits near me, a judgment applicable to the case will probably soon be prepared.

(June 29, 1816.) Ordered and adjudged: "That the decree of 27th Nov. 1812 "be reversed. And it is declared that the contract contained in the deed of 17th "March, 1761, for sale of the lands therein described, ought to be considered as "having been abandoned, and ought not now to be carried into execution. And it is "therefore ordered, That the Respondents' bill, so far as the same seeks a perform-

“ance of such contract, be dismissed; and it is further declared that the lands
 “comprised in such contract are to be considered as real assets of Sir William
 “Parsons, Bart., deceased, the father of the Appellant, descended to the Appellant,
 “discharged from such contract, but subject to the mortgage made thereof, with
 “other lands, by the said Sir William to Marlborough Sterling deceased, in the
 “pleadings in this cause named, and to the debts by judgment affecting the same,
 “and to the charge for payment of judgment debts created by the will of the said
 “Sir William. And it is further declared that so much of the sum of £8859 13s. 1d.,
 “mentioned in the decree of 26th February, 1766, as appears to have been due at
 “the time of the said decree, after deducting thereout the sums mentioned in the
 “Master’s Report of 25th June, 1811, to have been improperly included therein,
 “ought to be considered as a principal debt due from the said Sir W. Parsons
 “deceased, with [466] interest thereon from the date of the said decree of 26th
 “February, 1766, as directed by the said decree, and acknowledged by the deed of
 “15th July, 1783, in the pleadings mentioned; and that such debt ought to be
 “considered as secured by the mortgage made by the said Sir W. Parsons of the
 “lands comprised in the said contract, and by the judgments obtained by the said
 “M. Sterling, or assigned to him as in the pleadings mentioned, and not comprised
 “in the said deed of 15th July, 1783; and it is further declared that the Appellant
 “is to be considered in equity as a creditor generally on the assets, real and personal,
 “of the said Sir W. Parsons, his late father, for the sum of £15,000, raised by mort-
 “gage to W. Browne, of the settled estates in the pleadings mentioned, and for the
 “interest accrued due on the said £15,000 and paid by the Appellant since the death
 “of the said Sir W. Parsons: and it is declared also that as to so much of the
 “said sum of £15,000 as has been applied in discharge of debts and incumbrances
 “affecting the real estates of the said Sir W. Parsons descended to the Appellant as
 “aforesaid, the Appellant is entitled to stand in the place of the persons who were
 “respectively entitled to such debts and incumbrances according to their respective
 “priorities, except as to the sum of £2500 paid out of the money advanced by the
 “said W. Browne to the said Lucy Sterling deceased, and except as to the judgments
 “assigned by the said Lucy Sterling to said W. Browne, which, according to the
 “terms of the said deed of 15th July, 1783, cannot be claimed by the Appellant
 “against the assets of the said Sir W. Parsons to the prejudice of the Respondents:
 “And it is further declared that the Appellant is entitled to have credit out of the
 “real estates descended to him, including the estates charged by the will of the said
 “Sir W. Parsons with payment of his judgment debts, for the several sums paid by
 “the Appellant in discharge of debts and incumbrances affecting the said estates
 “respectively according to their respective priorities; and that the Appellant is
 “entitled, as against the Respondents, to credit out of the rents and profits of such
 “descended estates, considered as [467] real assets, or as subject to the mortgage or judg-
 “ments claimed by the Respondents, for such payments as have been made by him
 “prior to the filing of the Respondent’s bill, in discharge of interest of debts by
 “mortgage or judgment affecting such real assets, whether prior or subsequent to the
 “Respondent’s demands; and that the Appellant is entitled to have credit out of
 “the sums of £12,000 and £6000 in the pleadings mentioned for all such sums of
 “money as were payable out of such sums of £12,000 and £6000 respectively which
 “have been discharged out of the said sum of £15,000, raised by such mortgage as
 “aforesaid, or by the Appellant, in preference to any demand of the Respondents
 “upon the said sums of £12,000 and £6000, and that the Respondents can be
 “entitled to no demand against the Appellant in respect of the said sums of £12,000
 “and £6000, or either of them, except as creditors of the said Sir William Parsons,
 “deceased, and which the said Sir William might have had if living: and subject
 “to the said orders and declarations, it is further ordered, That the said cause be
 “remitted back to the Court of Chancery in Ireland to do therein as shall be just.”

Agent for Appellant, LANE.

Agent for Respondents, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

IVORY AND CO.,—*Appellants*; GOURLAY,—*Respondent* [Feb. 21, 23, 1816].

[3 Scots R. R. 357.]

[Though a merchant's books may, by the law of Scotland, afford a *semiplena probatio* in his own favour, yet in order [468] to have this effect they must be regularly kept; for otherwise no man could be safe in dealing with another; and even honest demands can be enforced only in a manner consistent with general policy, and the interests of the community.]

In 1803, Ivory and Co., flax manufacturers at Douglas town, in the county of Forfar, became insolvent, and a sequestration (in the nature of a commission of bankrupt) was issued. Gourlay, merchant in Dundee, entered his claim for £1437 for flax furnished. The trustee in the sequestration rejected the claim, and in 1804 an action was brought before the Sheriff to recover the above sum, being the price of four several parcels of flax; the first alleged to have been furnished in 1797, the second in 1799, the third in 1800, and the fourth in 1802. The defence was, that there was no evidence that any of the parcels had been furnished, and that the second article had been introduced solely for the purpose of saving the first from the triennial prescription which, as there was no evidence of the furnishing of the second article, had run upon the first supposing it to have been furnished. The Sheriff decided in favour of the claim, and the cause was removed into the Court of Session by advocacy.

Under a remit from the Lord Ordinary an accountant examined the books, and he reported that first article was regularly entered in the day-book of Frederick Gourlay, under whom the Respondent, Gersham Gourlay, claimed; that the amount was transferred to the ledger, and that an account of it [469] had been produced entitled on the back, in Ivory's hand-writing, "Gourlay's flax, 1796"; the delivery appearing to have taken place in 1796, though the price was stated in Gourlay's books to have been due in 1797.

The second article was also entered in Gourlay's books, but placed to the debit of one Sturrock, a flax manufacturer who had become insolvent before Ivory and Co., and with whom Ivory and Co. had some dealings. This, in a different hand-writing from that of the original entry, was by a marking on the margin, without date, transferred to the debit of Ivory and Co. This article was in the ledger carried to the debit of Ivory and Co. and appeared not to have been charged against the estate of Sturrock. The accountant however was of opinion that the irregularity of the entry was such as to deprive it of that degree of credit which would have been due to it if originally made to the debit of Ivory and Co.

As to the third article, it was entered in Gourlay's books, but the entry in the day-book was inserted at the bottom of a page, out of the regular order of dates; and the accountant was of opinion that it had been interpolated, and that the Pursuer was not entitled to found upon Gourlay's books in support of this article. But there was an entry in the receiving books of Ivory and Co., of flax received at different times from the 7th of March to the 29th of April, 1801; and Sturrock having deposed that he assisted in the purchase of a quantity of flax for Ivory and Co. from F. Gourlay and the Pursuer, but in what year he did not recollect, the accountant thought it might be presumed that the [470] parcel in question might be part of this flax, and therefore reported that sufficient evidence had been adduced to prove the delivery of the third article.

The fourth article was regularly entered in Gourlay's books, and in those of Ivory and Co., and, on the appeal, was not disputed.

The Lord Ordinary and Court of Session were of opinion that the evidence was sufficient to prove the delivery of all the articles, and decreed for payment of the whole demand. From this judgment Ivory and Co. appealed.

It was contended for the Appellant that the entries in the books of Gourlay were by themselves *semiplena probatio*, and, with the Pursuer's oath in supplement, and evidence of Sturrock, ought to be considered as full evidence of the delivery (Ersk. lib. 4, tit. 2, s. 4). On the other hand, it was contended that these books were too irregularly kept to be relied on as to the second and third articles, and that these being out of the question, the price of the first was extinguished by the triennial prescription.

Lord Eldon (C.). If a merchant's books may, by the law of Scotland, afford a *semiplena probatio* in his own favour, they ought at least to be more regularly kept than these are: for no man can be safe in dealing with another, if books so irregularly kept are to be admitted as evidence. The whole demand may be honest: but there are many honest demands which, on grounds of general policy, cannot be enforced, on account of the danger to the interests of the community: and if persons will keep their books in this way they must bear the loss.

[471] Judgment:—"That there was sufficient proof to sustain the demand in respect of the first article, unless barred by prescription; that there was not sufficient evidence to sustain the demand as to the second and third articles; but the finding to be without prejudice to the instituting of any other suit in relation to the third article, in case the Pursuer should allege that any thing was due to him in respect thereof, otherwise than as represented in this account: and that there was sufficient proof as to the fourth article: And with these findings the cause was remitted."

Agents for Appellants, SPOTTISWOODE and ROBERTSON.

Agent for Respondent, RICHARDSON.

NOTE.—In the cases of "Jones v. Hancock," and "Long v. Hancock," [4 Dow] p. 145, it ought to have been stated in p. 150, in addition to the statement as to the heir-at-law's case, that on the ejectment by the heir of Hugh Henry, the ultimate devisee, the judgment in K. B. was against the lessor of the Plaintiff, and that that judgment was affirmed by the Court of Exchequer Chamber (*Vid.* Index, or Table of Contents, tit. "Devise").

In the case of *Stacpoole v. Stacpoole*, p. 221, by the words "nothing was said upon this point" (viz. whether such of the next of kin as did not appeal against a decree were entitled to the benefit of the appeal of one who did appeal) "in the ultimate judgment," it is meant that nothing was said about the point in the speech in judgment; for it will be perceived, from the abstract of the formal judgment, that they were, though nothing was said about it in the speech in judgment, in fact held entitled to the benefit of the original appeal, having been first made parties to the original and cross appeals, as Respondent.



VOLUME V.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BARRETT,—*Appellant* ; BURKE,—*Respondent* [Feb. 26, March 5, 1817].

[Mews' Dig. viii. 840. As to the Tenantry Act (19 & 20 Geo. III. c. 30) (Ir.), see Nolan and Kane's *Stats. relating to Law of Landlord and Tenant in Ireland* (ed. 1898), Appx. of Stats. pp. xii., xiii.; and *Hussey v. Donville*, (1900) 1 I. R. 417.]

[Lease in 1713 for three lives, renewable for ever on payment of a fine on the dropping of each life, at £50 rent, by A. to B. B. leases the lands to C. at £100 rent, with covenant to renew for ever to C. on the same terms; and B. also covenants to renew regularly with A. C. pays his fines and renews with B., but B. never renews with A. A representative of A., in 1793, accepts some money from C. towards the discharge of the fines due from B., and makes demands for payment of the whole of the fines by C., which C. neglects to comply with. A formal demand of the fines made by a representative of A. in 1799, against C., who does nothing for nine months after demand, and then makes an illusory tender which is not accepted. Held, by the House of Lords, that under these circumstances C. had no claim in equity to a renewal.]

[2] [*Per* Lord Redesdale. A formal demand is not necessary under the Tenantry Act. The true meaning of the Tenantry Act is to declare what was the Equity of Ireland, with respect to these leases, before the statute. When a demand is made, the neglect to pay, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect and becomes wilful. What is a reasonable time for payment must depend on circumstances, and no precise time applicable to all cases can, with justice, be fixed. Though a formal demand is not necessary, yet, when such a demand is made, the prior demands are waived, and the time is to be computed from the period of the formal demand: but prior demands are to be taken into account in considering what is a reasonable time after the formal demand. When the first lessee receives the fines from his under-tenant, and neglects to pay them to the head landlord, that is fraud in the first lessee, who is therefore not entitled to a renewal, and the remedy of the under-tenant is against the first lessee, and not against the head landlord. The landlord, in making the demand, is not bound to state the precise sum due, nor to make a demand upon, or give notice to, every individual interested in the subject. The original design of these leases, was the better cultivation of inferior lands and the more easy recovery of the rent, etc.]

By indenture, dated 23d December 1713, the Honourable Edward Brabazon, being seized in fee of certain lands, those of Garrylish and others, in the county of Tipperary,

demised the same to John Marshall, of Clonmell, for three lives (of the Brabazon family), at £50 rent, with a covenant for perpetual renewal, upon the request, and at the expense, of the lessee, within twelve months after the expiration of any of the lives then inserted or thereafter to be inserted, upon payment of a fine of £25 for each new life added. Robert Marshall, the son of John, having become entitled, he agreed to ex-[3]-ecute a lease of the lands to one Terence Magrath, and then assigned his remaining interest to William Nash, whose nephew and representative, James Nash, afterwards specifically performed the agreement with Magrath, by executing a lease of the lands to Milo Burke, (the Respondent's ancestor) who had become entitled to the benefit of that agreement. The indenture, dated 9th Jan., 1761, after reciting the death of one of the *cestui que vies* in the original lease, and the nomination of a new life (that of Burke's son), witnessed, that in pursuance of the agreement, and in consideration of a £25 fine then paid on the insertion of the new life, Nash demised the lands to Burke for three lives, with covenant for perpetual renewal, at a rent of £102 10s. Burke covenanted, within six months after the expiration of any of the lives, to name another life, and pay the fine; and Nash covenanted, in three months after a life so nominated and fine paid, to renew with the head landlord at Burke's expense. The indenture contained a proviso that, in case Burke neglected to nominate a life within the six months, Nash should be at liberty to nominate to the head landlord any life he might think proper: and Burke covenanted to pay interest to Nash on any of the fines that might be advanced by Nash to the original lessor before payment by Burke to Nash. The last of the *cestui que vies* in the original lease died in 1772, and, in point of fact, the lease never was renewed with the head landlord.

The Appellant became entitled to the lands as head landlord, in 1799, by devise from Edward [4] Brabazon; and, having been unable to discover the representatives of Nash, he, by advice of counsel, calculated the renewal fines up to the 25th Feb., 1801, and executed a power of Attorney to one Dowling, authorizing him to demand and receive the fines. On the 27th Feb., 1801, Dowling, accompanied by the Appellant, went to the lands, and there a formal demand of the fines was made from the principal occupier, and also from the other occupying tenants; and a notice of the demand was then also served by Dowling on the several tenants, including Milo Burke, the Respondent's father, who was then in possession; and a copy of the calculation of the renewal fines was also served on Burke. The Appellant caused a notice of the demand to be published in the Dublin and London Gazettes, on the 5th March, 1801, which was continued for two months from that time. On the 24th March, 1801, Milo Burke furnished the Appellant with an account of money paid by him from 1774 to 1799 to the Brabazons, from which it appeared that Burke had paid considerably more than his own rent; and he alleged that the excess was paid on account of renewal fines. Burke however took no step towards settling the account till the 27th Nov., 1801, on which day he made what was called a tender of the fines, taking credit for the sum alleged to have been paid by him to the Brabazons beyond his own rent. The tender consisted of eight notes of the Bank of Ireland, two notes of Messrs. Finlay and Co., and seven bills of exchange, accepted by several persons in trade in Dublin, some of which bills were then over due, and in the [5] hands of the holder, dishonoured. When Burke made this tender he was accompanied by his law agent, Mr. Edward Kirby, who had been agent for Mr. Edward Brabazon, the deviser of the Appellant. The Appellant took a memorandum of the particulars of each note and bill, and of the dates of the bills, and then returned the notes and bills, and asked Burke whether he had any more to say, and Burke answered that he had not.

In M. T. 1801, the Appellant brought an ejectment against Burke; and on the 4th Dec., 1801, Burke filed his bill in the Court of Exchequer, stating, that in 1780, William Brabazon, then the head landlord, had agreed to accept Nash's profit rent in discharge of the arrears of the head rent and renewal fines; and that from 1782 the head and profit rents had been regularly paid; and that, in 1793, Edward Brabazon, the son of William, had distinctly agreed to accept of this mode of payment, so that the forfeiture was waived; and praying that the Appellant, or the heir at law of Edward Brabazon, might be decreed to execute to Burke, as trustee for the heir or representative of Nash, a renewal of the original lease, and for an account and injunction. To this bill none of the Nashes were parties. The Appellant in his answer insisted that there had been such laches and neglect on the part of the Nashes, and those deriving under them,

as amounted to gross fraud : and that the right of renewal was forfeited, particularly by the lapse of ten months from the time of demand and notice, without any attempt to pay the fines, except the illusory tender in November 1801.

[6] Burke then, in July 1802, filed an amended bill, making the representatives of Nash parties, in which it was stated, that by an agreement in writing, executed in 1782, Nash consented to assign his profit rent to William Brabazon until the arrears of the head rent should be discharged :—a statement differing from that made in the original bill, inasmuch as it was not alleged in the amended bill that, in the agreement with William Brabazon, any thing was said respecting the renewal fines. The consent of Edward Brabazon in 1793 to accept the profit rent in discharge, both of arrears of head rent, and renewal fines, was stated as before : and the prayer was the same as in the original bill. Answers having been put in, and the cause revived by the Respondent on the death of his father, issue was joined, and witnesses examined.

The only evidence material to be noticed for the present purpose is that of the law agent for the Plaintiff, Mr. Edward Kirby, who had been the law agent of Edward Brabazon relative to the transaction of 1793. He stated, that in consequence of letters written by him, at the desire of Edward Brabazon, to Milo Burke, requiring Burke to settle an account of arrears of rent due from the Nashes, a meeting took place in May 1793, between Burke and Brabazon, at which he, Kirby, was present : and it then appeared that all arrears of rent had been paid up to November 1792, with an over-payment of £100 : that Edward Brabazon said “ he would allow the over-payment out “ of the renewal fines due by the Nashes to him for the lands, whereupon deponent did “ then communicate to [7] said Burke that said Edward would expect immediate pay- “ ment of all renewal fines due to him from the Nash family, and that renewals should “ be at once taken out, or words to that effect : to which the said Milo replied, that his “ father had paid up all renewal fines due by said Bourke to the Nash family and “ obtained regular renewals of said premises, and that said Bourke had then a renewal “ executed by James Nash for three lives, all of whom he alleged were then living ; “ and saith, said Bourke did then produce to said Edward and to deponent a deed or “ instrument engrossed on paper purporting to be a renewal of said lands executed by “ said Nash, wherein said Milo Bourke, William Bourke, and John Bourke, said Milo’s “ father and brother, as deponent believes, appeared to be the lives named therein ; “ and believes the said William and John were then and still are living. Saith, on the “ production of said deed or renewal, said Edward expressed much displeasure that the “ Nash family should receive the renewal fines from said Bourke their under-tenant, and “ execute renewals without paying his, said Edward’s, family or himself their renewal “ fines, though the renewal fines payable by Bourke, on the fall of each life, to said “ Nashes, was same as was payable by the Nashes under their lease. Saith, said “ Bourke, under apparent distress of mind, informed said Edward, that he had a family “ of eight or ten children, and that he would be ruined if the said Edward would seek “ to enforce from him payment of the renewal fines, then appearing due to him ; upon “ which, said [8] Edward, with strong expressions of feeling and kind disposition “ towards said Bourke, declared he would not take advantage of him, and that for the “ present he would not proceed for payment of said fines : whereupon deponent, or said “ Edward, desired said Bourke should, as soon as he could, endeavour to make up the “ amount of the renewal fines, for that he, Mr. Brabazon, would not pay any compliment “ to the Nash family. And that deponent did then ask said Edward, whether, as all “ arrears of rent were then paid up, deponent should continue to receive from said “ Bourke, the profit rent of £52 10s. a year, arising out of said lands, to said Nashes, “ which said Edward desired deponent to do, saying, he would allow such payments out “ of the renewal fines.” And then, after adverting to some matters of account, he pro- “ ceeded thus : “ Saith, that prior to May 1793, deponent believes he got instructions “ from said Edward Brabazon to demand or enforce renewal fines from the Nash family ; “ in consequence whereof, deponent did, as he verily believes, apply to Milo Bourke, “ deceased, and also to Mary Nash, the widow of James Nash, for payment thereof. “ Saith, that from 1st May, 1793, till within a month of said Edward’s death, as “ deponent best recollects, said Edward never did, to this deponent’s knowledge, direct “ deponent to take proceedings to evict the interest in the lands in the pleadings men- “ tioned, in case said renewal fines were not paid ; but saith, that in the latter end of “ November, or beginning of December 1799, said Edward in conversation told deponent

“ that he [9] wanted a new coach ; in answer to which, deponent told him he could easily get one ; to which said Edward replied, that he would not go in debt for a coach, but that he would insist on Bourke’s paying as much on account of the renewal fines as would purchase one, otherwise, that he would insist on payment of the entire, or evict the lease, or words to that effect. And saith, deponent did, immediately after such conversation, write to the said Milo Bourke, unless he did then, without delay, remit 200 guineas, as he best recollects and believes, on account of the fines due for said lands, to deponent, deponent would discontinue to receive the Nash’s profit rent ; but saith, said Bourke did not remit one shilling more than his usual payments of the head rent and some part of Nash’s profit rent.” And, in his cross examination, the witness made the following statement with respect to the renewal fines : “ Saith, that prior to the month of May 1793, deponent was directed by Edward Brabazon, deceased, either to apply for or enforce the payment of the renewal fines and arrears of rent, if any arrears were due, on the lands in the pleadings mentioned, from the Nash family and said Milo ; saith, he recollects to have received such instructions subsequent to 1st November, 1799, but does not recollect to have received any such instructions in the interval between May, 1793, and November, 1799 ; does not recollect that any person was present when he received such instructions or directions ; believes he answered on both such occasions that he would do as he was so directed ; saith that it was [10] in consequence of deponent’s application to Milo Bourke according to the first directions he received from Edward Brabazon on the subject, that a meeting took place on the 1st of May, 1793, between said Edward and Milo at Tara, where an account was stated of the payments made by said Milo on account of the rents of the lands in the pleadings mentioned ; saith deponent hath no recollection, nor does he believe that said Edward, on any occasion, complained to deponent, or in his presence, that no proceedings had been taken for the recovery of the said rents or fines, or made any complaint of that or a similar nature to deponent’s knowledge or belief.”

The amount of this evidence, as understood in the House of Lords, was that Edward Brabazon had accepted some money, part of the profit rent, on account of the renewal fines, but that he had not agreed that the whole should be gradually liquidated by payment to him of the profit rent, and that he had on the contrary insisted upon payment of the fines in a different mode, but without effect. The Court below, however, seems to have been of opinion that if Edward Brabazon accepted from Bourke any part of the profit rent on account of the fines, he thereby bound himself to accept the whole in that mode of payment, and had waived the forfeiture ; and that the cause hinged upon the point whether Edward Brabazon had or had not thus accepted money from Bourke ; and the Court tendered an issue to the defendant (Appellant, Barrett) to try that question, which issue Barrett declined to accept ; and the Court seems therefore to have de-[11]-cided as if the question had been tried, and the verdict had been against him. The decree was as follows : “ That the Appellant having declined to accept an issue to try and inquire whether Edward Brabazon, in the pleadings mentioned, did at any time, and when, receive any and what sums of money out of the lands comprised in the lease of 23d Dec., 1713, for or on account of the renewal or septennial fines due under said lease ; that it appears to the Court, that William Brabazon, in the pleadings mentioned, and the said Edward Brabazon, were respectively in receipt of the rent of £102 10s. a year, in pleadings mentioned, from the 10th day of Dec., 1782, to the 30th Dec. 1799, first in discharge of the rent and arrears of rent due to them, and next in and towards satisfaction of the renewal and septennial fines, and the interest thereon ; therefore let the officer inquire and report the amount of all sums so received by the said William and Edward Brabazon out of the said lands during the period aforesaid, and let him apply the same as received, first in discharge of rent and receiver’s fees, and arrears of rent due, and then in discharge of the renewal and septennial fines and interest thereon ; and let him strike a balance on the foot of such fines, septennial fines, and interest, on 27th February, 1801 ; and in taking such accounts of fines, and septennial fines, and interest, (the parties admitting that Brabazon Ponsonby, Earl of Besborough, died on the 15th July, 1758, and that Chaworth Brabazon, Earl of Meath, died 14th May 1763, and that Edward Brabazon, Earl of [12] Meath, died 22d Nov., 1772 ; and it appearing that the said tenant has twelve months time to nominate, a new life in the place and stead of any life named in said lease of the 23d Dec., 1713, that

"should happen to fall, and so from time to time upon all subsequent renewals), let the officer charge one fine of £25 with interest from the 15th July, 1759, and another fine of £25 with interest from the 14th May, 1764, and another fine of £25 with interest from the 22d Nov., 1773: and so, at the end of every eight years from the then periods last-mentioned, let him charge additional fines of £25 each with interest; and let the officer distinguish and report how much of the balance which will appear to be due for renewal and septennial fines, and interest thereon, upon the said 27th day of Feb., 1801, according to the directions aforesaid, is composed of renewal and septennial fines which became payable to the said Earl of Meath, the lessor during his life-time, with interest for the same, and how much thereof is composed of renewal and septennial fines which became due in the time of William Brabazon during his life-time, with interest for the same, and how much thereof is composed of fines which became payable to the said Edward Brabazon during his life-time, with interest for the same, and how much thereof is composed of fines due to the Defendant, Roger Barrett (the Appellant), in his own right, as the devisee of the said Edward, and reserve all equity between the parties, and all further directions until the return of the report."

[13] The officer having made his report, a final decree was pronounced on the 24th June, 1812, whereby the Appellant was ordered to execute a renewal of the lease to Mary Nash, widow, and Richard Harold, the surviving trustee named in the will of James Nash deceased, etc. From these decrees Barrett appealed.

Sir Samuel Romilly and Mr. Roupell for the Appellant; Mr. Hart and Mr. Wetherell for the respondent.

Lord Eldon (C.). In this case the Court of Exchequer pronounced a decree reciting "That Barrett having declined to accept an issue to try and inquire whether Edward Brabazon, in the pleadings mentioned, did at any time and when receive any and what sums of money out of the lands comprised in the lease of 23d Dec., 1713, for or on account of the renewal or septennial fines due under the said lease, etc.:" and, afterwards, a decree was pronounced, giving Bourke the benefit of the act usually called the Tenantry Act. The Court below, therefore, proceeded on this issue as an essential part of the case; and they seem to have thought that, as the Appellant had declined to accept it, the case was to be taken as if the issue had been tried and found against him; and on that ground they gave relief. On looking at the bill and the answer, and at the evidence of Kirby; and considering with whom he was connected at the time of the latter part of these proceedings, and with whom he had been before connected; and considering the evidence altogether, and the whole circumstances of the case, I am of opinion that no such issue ought to have been directed; and, if I rightly understand the Tenantry Act, though that issue had been tried and found against the Appellant, it would not have been conclusive against him.

Looking at the Tenantry Act only, I cannot, in that view of the case, consider this as a case of mere neglect; and it would be mischievous not to distinguish between cases of mere neglect, and cases of wilful neglect. The tenant was in possession, and knew the *cestui que vies*; and he transacts with his intermediate landlord, paying him the fines, while no care was taken to pay what was due to the original lessor. In this case also a demand was made, and not acceded to; and it cannot be considered as a case of mere neglect.

I have stated the grounds of my opinion very shortly, because the reasons and principles on which it is founded will probably be stated and explained at large, and much better, by a noble Lord who presided for some time in the Court of Chancery in Ireland.

Lord Redesdale. I am clearly of opinion that the decrees ought to be reversed. The issue had no tendency to decide the case. The issue was, "whether Edward Brabazon, in the pleadings mentioned, did, at any time and when, receive any and what sums of money out of the lands comprised in the lease of 23d Dec., 1713, for or on account of the renewal or septennial fines due [15] under the said lease." That was a question which would not decide the case; for, though some sums had been paid to Edward Brabazon on account of the fines, that would not decide whether there was such neglect on the part of the tenant, as ought to deprive him of the benefit of renewal. The issue has not been proposed according to the case contended for on the part of the Respondent; that is, a case of contract, and that, such being the agreement entered

into between him and Brabazon, the representatives of Brabazon were bound to renew according to that agreement. That has been contended on the part of the Respondent. The issue, however, is not of that description, but one which has no tendency to decide the case.

But it is clear from Kirby's evidence that there was no such agreement. The evidence amounted only to this, that Edward Brabazon consented to apply what he received beyond the arrears of the head rent towards the discharge of what was due to him on account of the fines. But there was no contract that he would not call for the fines in any other manner; and it appears, from Kirby's evidence, that he did, in fact, call for the fines in another manner: so that the ground on which the Court of Exchequer proceeded is not a just ground. The only question is, whether the tenant, having clearly lost his legal right, ought to have the relief which, by the practice of the Courts of Equity in Ireland, was given, before the Tenantry Act was passed; for the true meaning of the Tenantry Act is to declare what was the Equity of Ireland before the statute. It is merely a declaratory act. The act itself recites [16] what was the practice of the Courts of Equity in Ireland before it passed. When the case was one of simple neglect, it was relievable. Where the case went beyond simple neglect, it was not the practice in Equity to relieve.

In my humble opinion, and I have frequently had occasion to consider this act, the meaning of it is, that the moment a demand is made, the neglect, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect, and becomes wilful. Lord Clare had the same view of the meaning of the act (*Truman v. Waterford*, 1 Scho. Lef. 451.) "Reasonable time," he says, "within the act shall be deemed only 'that time which is necessary to give the tenant full opportunity for ascertaining when 'the *cestui que vies* died, for computing the amount of the fines due, and for preparing the leases. The precise time cannot be defined.'" That I take to be the true meaning of the act; and it must depend upon the particular circumstances of each case, whether the tenant has applied for renewal within the proper time. It has been contended that some precise time ought to be fixed. But the circumstances are so various that it would be doing great injustice to the tenants to fix any precise time. Every case is different in its circumstances; and a singular circumstance in the present case is, that the only person who had the means of making up the account is agent for the lessee, and had been agent for the lessor; and he had in his possession all the documents necessary for the purpose of making up the account, and no other had them. He therefore, and no other, was competent to make up the account, [17] and he might have done it in a short time. In the case of *Jackson v. Saunders*, (*ante*, 2 Dow, 437), I was of opinion, and that opinion was confirmed by the decision of this house, that four months, or from four to five months, was, under the circumstances, an unreasonable time: and the circumstances there were, the frequently calling for the fines before a formal demand made. In looking at the act, it does not appear that any formal demand is necessary; but, the party having made it, the time is to be computed from the period of that demand: and the prior demands are waived by the subsequent formal demand if the fines are paid within a reasonable time after that demand. But then, I think, it is to be considered what former demands were made with reference to the point of neglect, and the question what is a reasonable time after the formal demand.

In this case it appears from the evidence of Kirby, who stood in the singular situation which I have before mentioned, that demands were made several years before, and that, on Burke's representing that he had paid the fines to the Nashes, Edward Brabazon consented to give some indulgence to Burke, and to receive the profit rent; and then Kirby states, "whereupon the Deponent or the said Edward (Brabazon) desired that the said Bourke should, as soon as he could, endeavour to make up the amount of the renewal fines; for that he, Mr. Brabazon, would not pay any compliment to the Nash family:" and yet this decree gives the benefit of the lease to the Nash Family. Brabazon had given the indulgence merely out of compassion to Burke. Nash having [18] received the fines from Burke without paying to Brabazon what he had so received, which was a fraud on the part of Nash: so that it comes to the ground on which Lord Thurlow rested in the case of *Lady Ross (Bateman v. Murray, Ridge, P.C.)*, which was misunderstood by Lord Lifford, and which, by the by, produced the Tenantry Act. The ground on which that case was decided, and which was misunderstood by Lord Lifford, was, that the agent for Lady Ross had called upon the other

lessees to pay their fines, and he himself had not paid them, though the lives had dropped, which was a fraud. So here it was a fraud in Nash, the receiving the fines from his own under-tenant, without paying them over to Brabazon. It is clear then that the Nash family would not be entitled to renewal at their own suit, and yet this decree gives it them at the suit of Burke.

All therefore we have to inquire into is, whether Burke was guilty of wilful neglect after the demand was made. The first demand was made in 1792, and no such arrangement as that contended for took place with respect to the profit rent. That appears by Kirby's evidence. Then the profit rent continues, however, to be received, and no further demand is made till shortly before the death of Edward Brabazon, when, as Kirby states, Brabazon said that he wanted a new coach, and would insist on Burke's paying as much, on account of the renewal fines, as would purchase one, otherwise that he would enforce payment of the entire: and then Kirby wrote to Burke that, unless he did then without delay remit 200 guineas, on account of the fines due for the lands, Brabazon would discontinue [19] to receive the profit rent. But Kirby says, that the money was not paid. The words are, "saith, said Burke did not remit one shilling more than his usual payments of the head rent, and some part of Nash's profit rent;" so that he did not even remit the whole of Nash's profit rent. This was in 1799. After the death of Edward Brabazon, Barrett, who became entitled, insisted upon payment, and made a formal demand, with notice. It was contended that Barrett ought to have stated the precise sum that was due. But the act does not impose any such duty on the landlord; and it would be great injustice if it did, as he is not likely to be the most cognizant of the lives and deaths, the *cestui que vies* being usually named by the lessees from among their own families, and they are bound by the original obligation to tender the sum due. The lessor often cannot know who the lives are, as they are generally persons of the family of the lessee, and unconnected with the lessor. It is sufficient for the purposes of this act that a demand has been made; and the tenant is to be judged by this question, was it mere neglect or wilful neglect in him that he did not pay the fines? If it were wilful neglect, he is not entitled to a renewal. That is the construction put upon the act by Lord Clare; and Lord Clare knew the views of the legislature when the act was passed. I am, therefore, clearly of opinion that a simple demand is all that is necessary on the part of the lessor. A contrary construction would make property of this kind almost of no value to the lessors. A lease is made for three lives; one of the lives drops; the lessor demands payment of [20] the fine; the lessee does not pay; two of the lives still remain, and the lessor cannot recover the property. How is he then to keep alive the memory of the notice and demand? He can do so only by a bill to perpetuate the testimony of witnesses, the expense of which he must pay. But this difficulty is, in fact, imposed on the landlord; and if, in addition to this, he were bound to state the precise sum due when he made the demand, an estate of this kind would be worth nothing. It has been contended that the demand ought to be made upon, and notice given to, all who are interested. I know a property of 13,000 acres in the county of Tipperary, which is covered with leases of this description, divided and sub-divided by under leases, five or six deep; and the owner has no conception of all who are interested. All he knows is who is to pay him the head rent and the fines of renewal. The demand, however, according to the construction contended for, must extend to lessees of every description. But when the act speaks of assignees, it means assignees of the whole interest: and this still leaves a difficulty where the whole interest is divided into a great many parts; the effect of which often is to make the interest of the lessor of such small value as to be scarcely saleable in the market. Your Lordships, under these circumstances, will not extend the meaning and benefit of the act beyond cases of mere neglect; and the demand is one circumstance by which wilful neglect is to be established.

In this case, a demand, though not a formal one, was made in 1799. On the death of Edward Brabazon a formal demand was made. What took [21] place? Burke suffered nine months to pass without doing any thing; and what does he do then? He comes with Kirby and makes a tender; and that, besides other objections, was not sufficient in amount. But could Kirby really have believed that Barrett would have accepted such bills as these? It was merely a delusive pretence, and not a real tender. What Barrett did was to take a memorandum of the particulars of each note and bill tendered, and cause it to be subscribed by a person present. What passed then?

Barrett said, "Burke, have you any more to say?" and was answered, "No:" and upon this it is said that the tender was objected to merely because it was not sufficient in amount. But I take it that it was objected to altogether, not merely as being insufficient in amount, but also because the proper time was passed; and because it was a delusive, and not a real tender, and one which would not have been accepted, even if it had been in time, and to the proper amount; for it was not a tender that could be taken in payment.

This is clearly a case of wilful neglect; Burke having full time to be prepared to meet the demand; and Kirby, who had been agent to Brabazon, being agent for Burke, and having in his possession all the documents necessary for making up the account. Burke was bound to tender the fines, and the leases for execution, and one month was amply sufficient for these purposes. He was bound to offer the fines, and to present the leases for execution, for Barrett was entitled to have a tenant acknowledging the tenure, which was an important object in regard [22] to property of this kind. What was the original object of these leases? Lord Lifford says, that the object was the improvement of the lands, and the more easy recovery of the fines and rents. The original design of these leases, then, was the proper cultivation of inferior lands, and the more easy recovery of the rent, a thing which in Ireland was often very difficult. This tenure was particularly important in the disturbed state of Ireland, as the lands were by that means in the hands of persons acknowledging themselves as lessees; for it often happened that, in the course of many years, no rent was paid, and if they had been simply fee-farm rents, there would be presumptions against them which would often deprive the landlord of his property. The object therefore of this tenure was to preserve the property; and every time the lease is renewed there is an acknowledgment of the tenure; and there is also the benefit of the covenants, which is totally lost if the leases are not renewed. So that it is of very great importance that the lease should be renewed when a life drops; and this is often the chief value of the renewal, the fines being hardly adequate to the expenses of suits.

It is very important therefore that the relief should be confined to cases of mere neglect, and not extended to cases of wilful neglect; and that persons bound to pay the fines and tender the leases, should do so in a reasonable time. In the present case nine months were suffered to elapse before any thing was done, and then there was a jocular, [23] rather than a serious, tender, and nothing more was done. Nash had clearly forfeited his title by fraud, and the only one to claim was Burke, whose claim was founded merely in the indulgence of Edward Brabazon. Burke had no right, except under that indulgence, his remedy being, in my opinion, only against Nash, and not against Brabazon. I think therefore that these decrees are wrong; that Burke is entitled to no relief as against Barrett; that the issue tendered was nothing as to the merits; and that the decrees ought therefore to be reversed, and the bill dismissed.

Decrees accordingly reversed, and bills dismissed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (2D DIV.).

BLACK,—*Appellant*; CAMPBELL,—*Respondent* [May 7, 9, 1817].

The set or constitution of Inverkeithing requiring that the members of council should be resident burgesses, the clerk, at the election of a delegate for that burgh, in 1812, refused to reckon the votes of two persons whose names had been entered in the minutes, as part of the magistrates and town council, assembled for the purpose of the election, and to whom the qualifying oaths had been administered by himself, in consequence of an objection on account of non-residence; the fact of non-residence being notorious and consistent with the clerk's [24] own knowledge; and the rejection of these two votes governing the return. Complaint under the statute 16 Geo. 2, cap. 11, against the clerk, and judgment by the Court of Session, that he had incurred the penalties of that statute, on the ground

that the officer was bound by it to reckon the votes of all those whose names appeared as members of council on the burgh records, beyond which he was not entitled to look; and that *bonâ fides* was no defence. This judgment reversed by the House of Lords for want of averment in the complaint that the complainer was duly elected delegate, the statute having given the penalties to the person so elected. And also for want of sufficient evidence of that fact; the town books, with the names inscribed, the best evidence to show that those whose votes were rejected were members of council, not being produced in proof.]

[The Lord Chancellor observing, that it is a wholesome principle, in a case so penal as this, that distinct averment and clear proof should be required.]

[Lord Redesdale observing, that he very much doubted whether the true construction of the act was that which the Court below had put upon it.]

A petition and complaint under the statute 16 Geo. 2, cap. 11, was presented to the 2d division of the Court of Session, at the instance of General Campbell, of Monzie, with concurrence of his Majesty's Advocate, for his Majesty's interest, against David Black, town-clerk of Inverkeithing, stating, that at the election, in 1812, of a delegate for Inverkeithing, for choosing a member to serve in Parliament for that district of burghs, David Black, the clerk, had refused to make out the commission to the complainer, who had been chosen by the majority of the magistrates and town council, assembled for the purpose of electing a delegate; and had given the commission to General [25] Maitland, who had not been chosen delegate by the majority, and praying the penalties of the statute against the clerk for this violation of its enactments.

The facts of the case, as averred in the petition and complaint, and as they appeared in the minutes of election, and from the admissions in the pleadings, were these.

On the 15th Oct. 1812, the magistrates and town council of Inverkeithing, assembled for the purpose of choosing a delegate or commissioner, for the election of a member to serve in Parliament for the district of burghs, to which Inverkeithing belongs. The Appellant, the common clerk of the burgh, entered or marked in the minutes the names of the magistrates and council assembled on that occasion, and administered the oaths required to be taken by the electors of the delegates; and among those whose names were so marked, and to whom the oaths were so administered, were Captain John Montgomerie and Mr. John Gulland.

In the course of the proceedings Sir John Henderson, one of the council, objected to the votes of Captain John Montgomerie and Mr. John Gulland, and of Duncan and Alexander Montgomerie, for non-residence, referring likewise, with respect to the three Montgomeries, to a decision of the Court of Session, in Feb., 1807, finding that they had no right to be councillors; and he called on the clerk, not only not to receive their votes, but also not to call their names in the course of any vote which might that day take place in the council. General Campbell, who was then Provost of the burgh, objected to the votes of Sir John Henderson and three [26] others, and protested that their names should be erased from the list, and that their votes should not be received, and, if received, that they should be null and void. The objection to one was, that he lay under sentence of fugitation and outlawry; to another, that he had not for a long series of years acted as a member of the council; to a third and fourth (Sir John and Mr. Bruce Henderson), generally, that they were not duly qualified to vote. The answers, as they appeared on the minutes, were, as to the first individual, the production of an extract of an act and warrant of the Court of Justiciary, reponing him against the sentence; as to the second, that the objection was frivolous; and, as to the third and fourth, that the objection was too general.

The summoning officers, on being examined in the usual manner as to their having warned the members of council to attend, stated, that they had served the summons on Mr. Gulland, at his house at Bellknows, and on Captain John Montgomerie, at the distillery. It was asserted in the pleadings, and not denied, that Bellknows and the Distillery were without the burgh, that Bellknows was the usual place of residence of Mr. Gulland, and Chatham of Captain Montgomerie.

The clerk did not give any deliverance as to the objections by General Campbell. His judgment on the objections by Sir John Henderson, as it appeared on the minutes, was as follows, "Which protests, answer, reply, and duply, having been considered by

“ the clerk, he finds, that no evidence of the alleged decree of the Court of Session
 “ [27] has been produced sufficient to authorize him to strike off the names of Mr.
 “ Duncan Montgomerie, and Mr. Alexander Montgomerie, from the Council roll.

“ He is, however, decidedly of opinion, that the objection stated against the votes
 “ of Captain John Montgomerie, and Mr. John Gulland, founded on their non-residence
 “ within the Burgh, (which is a circumstance of notoriety, and consistent with his own
 “ private knowledge,) is a good objection, and that they are not legal councillors of this
 “ Burgh. He would therefore have no hesitation in setting aside both their votes, if
 “ it was clearly competent to him to determine that matter ; but not being satisfied, that
 “ it is his duty, as returning officer, to judge of the validity of the votes which may be
 “ tendered to him upon the present occasion ; resolves not to call for, but to mark the
 “ votes which may be tendered under protest by Captain John Montgomerie and Mr.
 “ Gulland, reserving for consideration, when he shall decide in whose favour the com-
 “ mission is to be made out, the legal effects of such votes, and whether or not the
 “ same ought to be received ; declaring, that notwithstanding his own conviction of the
 “ real invalidity of any votes to be tendered by Captain Montgomerie or Mr. Gulland,
 “ he shall reckon them before making out a commission in favour of a delegate, if, after
 “ due consideration and advice, he shall find, that it is not strictly competent to him,
 “ as clerk of the burgh, to decide the question of their legality or illegality, and to
 “ reject them accordingly.”

[28] The names of Captain John Montgomerie and Mr. Gulland not being called, there appeared thirteen votes for General Maitland, and twelve votes for General Campbell. Captain Montgomerie and Mr. Gulland then came forward and voted for General Campbell “ protesting that they ought to have been called by the clerk, and
 “ ought now to be added to the list of those who voted for General Campbell. Where-
 “ upon General Campbell protested that he was duly elected delegate of this Burgh,
 “ and required the clerk immediately to make out a legal commission in his favour, and
 “ thereupon took instruments : and Sir John Henderson protested that General
 “ Maitland was duly elected delegate by a majority of votes, and required the clerk
 “ immediately to make out a legal commission in his favour, etc.”

The set or constitution of the Burgh of Inverkeithing as far as it appears material to the present question is in these words : “ The council consists of fifteen persons at
 “ least ; viz. the Provost, two Baillies, the Dean of Guild and Treasurer, and ten or
 “ more inhabitant Burgesses. They proceed in their election thus : Upon the 29th
 “ Sept., yearly, the magistrates and old council meet in the forenoon within their
 “ tolbooth ; and when these of the old council who are desirous of an ease have
 “ demitted their offices, they choose as many new councillors in their room to keep up
 “ the number ; and first they elect the provost, then leets five of the council, and
 “ choose two out of them bailies of the ensuing year ; next leets three and chooses the
 “ dean of guild ; and last, [29] two, and chooses the treasurer : all swearing the oaths
 “ *de fidei* and secrecy, etc.” These were pointed out as peculiarities in the constitution of the burgh ; 1st, that the number of councillors is unlimited ; 2d, that there is no annual election of the whole council, though there is an annual election of magistrates, the councillors once chosen continuing for life, unless they resign or become disqualified ; 3d, the councillors must be burgesses having residence within the burgh.

The clerk intimated his intention to apply to Mr. Adam (now the Lord Chief Commissioner) for advice whether he ought to reckon the votes of Captain Montgomerie and Mr. Gulland, and requested the counsel who had attended the election on the part of General Campbell, and the agent who attended on behalf of General Maitland, to go with him to Mr. Adam. The former declined going, and then the clerk went alone ; and having laid the minutes of the proceedings and circumstances of the case before Mr. Adam, he, in conformity to the advice received, rejected the votes, and made out the commission in favour of General Maitland ; and thereupon the petition and complaint was presented by General Campbell.

It is to be particularly observed that there was no averment, in the petition and complaint, that General Campbell was duly elected delegate. The books or records of the burgh were not produced to show that the names of Captain Montgomerie and Mr. Gulland were there inserted as members of council, and that General Campbell was duly elected ; and there was no distinct admission of these facts on the [30] part of the clerk ; the circumstances of his having entered the names of Captain Montgomerie

and Mr. Gulland in the minutes, and his having administered the oaths to them, not being considered by the House of Lords sufficient to constitute an admission that they were members of council.

The clause on which the complaint was chiefly founded was the 26th of the statute 16 Geo. 2, cap. 11, which provides, "That at every election of commissioners for choosing burgesses for any district of burghs in that part of Great Britain called Scotland, the common clerk of each borough within the said district, shall make out a commission to the person chosen by the major part of the Magistrates and Town-Council assembled for that purpose, which Magistrates and Town-Council shall take the oath of allegiance, and sign the same, with the assurance, and shall take the other oaths appointed to be taken at such election, by this or any former act, if required; and the said clerk shall affix the common seal of the burgh thereto, and sign such commission, and shall not on any pretence whatsoever, make out a commission for any person as commissioner, other than him who is chosen by the majority as aforesaid; and if any common clerk of any borough shall neglect or refuse duty to make out, and sign a commission to the commissioner elected by the majority, as aforesaid, and affix the seal of the burgh thereto, or if he shall make out and sign a commission to any other person who is not chosen by the majority, or affix the common seal of the burgh thereto, he shall for every such offence for-[31]-feit the sum of £500 sterling to the person elected commissioner for the said burgh, as aforesaid, to be recovered by him or his executors in the manner herein after directed; and shall also suffer imprisonment for the space of six calendar months, and be for ever after disabled to hold or enjoy the said office of common clerk of the said borough, as effectually as if he was naturally dead."

And a subsequent clause declares, "That every penalty or forfeiture by this act imposed in that part of Great Britain called Scotland, shall, and may be sued for, and recovered by way of summary complaint, before the Court of Session, upon thirty days notice to the person complained of, without abiding the course of any roll; which said complaint the Court of Session is hereby authorized and required to determine; as also to declare the disabilities and incapacities, and to direct the imprisonment as herein provided."

The judgment of the Court of Session (May 22, 1813), was as follows: "The Lords having advised this petition, with the answers, replies, and duplies, and writs produced and referred to, sustain the complaint: Find, that the Respondent, David Black, has forfeited the sum of £500 sterling, and decern against him for payment thereof to the complainer; order the said David Black to be imprisoned for the space of six calendar months, and declare him for ever disabled to hold or enjoy the office of common-clerk of the burgh of Inverkeithing, as effectually as if he was naturally dead: find him liable in the expences of this complaint; allow an account thereof to be given in, and remit [32] to the auditor to tax the same and report." And to this judgment their Lordships unanimously adhered (Jan. 15, 1814), on advising petitions with answers. From this judgment the clerk appealed.

The Court was unwilling to carry the imprisonment into effect until the appeal should be determined, lest the judgment should be reversed: and the complainer agreed not to call for the imprisonment in the mean time.

For the Appellant it was contended that in cases of burgh elections for delegates the statute afforded no fixed rule for the guidance of the officer; that there was no roll in any burgh in Scotland to which the officer might refer, as there was in cases of elections of members for counties; and that from the peculiarity of the set of Inverkeithing, where there was no annual election of the whole council, it was impossible there could be such a roll; that the clerk was therefore under the necessity of exercising his judgment, and of deciding, attending to the constitution of the burgh, whether the persons objected to were legally members of the council; that by the constitution of the burgh residence was an essential qualification for a councillor; and that a person, though regularly admitted, and though the councillors were for life, by becoming non-resident ceased, *ipso facto*, to be a councillor; that in a case in 1745 reported by Lord Elchies (No. 22 v. Burgh Royal), the Court expressly found "that by the set of this burgh councillors behoved to be residing burgesses;" and it had always been understood to be the law that the mere circumstance of non-residence operated as a disqualification. Objections on that ground had [33] been made in 1760, 1774, and

1791, and the answer had uniformly been a denial of the fact, the relevancy not being disputed. The set and practice would have been sufficient; but the point had been adjudged by the Court of Session and House of Lords in the case of Haldane v. Holborn (Kames, Sel. Dec. v. Citation). There was another authority to the same effect in Bankton, in his work published in 1752. The decision of the second division in Clarkson's case, 14th May, 1814, was different; but when the return in this case was made, the clerk had the authority of the Court of Session and House of Lords in his favour; and also a judgment of the Court in 1807, ordering the name of Captain Montgomerie to be struck out of the list of councillors on account of non-residence. (— v. Montgomerie, (case of Inverkeithing,) 1807. *Vid.* Wight, p. 338.—Case of Elgin, 1771.—Young v. Johnston, 1766.) The town clerk having been called upon to exercise his judgment, acted throughout *boni fide*, and this was a good defence, even though his decision were erroneous; and had been so held in cases less favourable to the returning officer, as in the case of Culross, arising from the annual election of 1803. The present case was essentially different from that of Gordon v. Forbes, not only because it was incontrovertibly clear from the very statute under which Forbes acted as a commissioner of supply that he was not qualified, but also because Forbes was not bound to act, and Black was. This was not a singular example of a case not provided for by the statute; there were many others, such as that of Gordon v. Rose in 1768, referred to by Wight and Bell, and that of Glass v. Magistrates of St. Andrews in 1754. That the clerk had in this case acted *boni fide* was evident from the whole [34] proceedings. The fact of non-residence was clear, and had been admitted in the pleadings on both sides. The objection of non-residence had indeed been made on former occasions, but the clerk was not bound to decide upon it till it became material to the return; and for the same reason the entry of the names in the minutes, and the administration of the oaths by the clerk, was no admission on his part that the parties were members of council. As to General Campbell's objections they were not specific, and it was therefore not necessary to give any decision upon them. The clerk then did give the commission to him who had the majority of legal votes. But supposing the clerk not to have the right to act as he had done, General Campbell had himself called upon him to exercise his judgment, and reject votes as bad for non-residence; and the complaint was therefore barred *personalī exceptione*. It was also argued that this being a penal statute the strictest construction ought to be applied, and that, as the complaint was in the nature of a criminal prosecution, it was necessary that a criminal purpose should appear before the penalties could be incurred.

For the Respondent it was argued that the act 16 Geo. 2, cap. 11, applied to all the burghs in Scotland; that there was a particular provision as to the county of Sutherland, but none as to the burgh of Inverkeithing, and that those who prepared the act must have been well acquainted with the constitution of Inverkeithing (Bell v. Magistrates of Inverkeithing, 1777). If the act did not apply, the rights and privileges of the councillors of this burgh were at the mercy of the clerk. The notion [35] that the defect in the act was to be supplied by the judgment of the clerk was founded on a single expression in the set, that the councillors must be inhabitants; and it was said that they must be so not only when admitted, but that by their non-residence they *ipso facto* ceased to be councillors. But the import of the clause in the constitution, declaring that the council was to consist of fifteen persons who must be inhabitant burgesses, was by no means clear; and many instances might be cited from the records of the burgh of persons admitted and acting as councillors who did not reside within its precincts. The case in 1745, from Lord Elchies, was too shortly stated to be considered as an authority, and that of Haldane v. Holborn reported by Lord Kames under the title Citation, depended on a principle which had no application to the present question. It might be doubted also whether councillors regularly admitted, whose election remained unchallenged for two months from the period of admission, could be removed by the magistrates at a subsequent annual election, or by the Court of Session, upon the ground of a supervenient disqualification; the councillors being for life by the set of the burgh. And though in one judgment of the Court of Session in 1807 a different rule was adopted, that was a single judgment reclaimed against, and was no authority. But supposing that a councillor must be resident within the precincts, and by non-residence became disqualified, his name must remain on the record till expunged by the council or Court of Session, according to the mode pointed out in the judgment of

1807; and the clerk [36] was not entitled to look beyond that record. But supposing this mode of redress under the statute to be incompetent, the question recurred whether the enrolment of the councillor was to be held null *ipso jure*, and whether the nullity might be declared by the fiat of the clerk. The doctrine was adverse to every principle of the law of Scotland, in which no instance could be pointed out of effect being given to an irritancy of a vested right, without a declarator. The clerk had no right to look beyond the record, and was bound by the statute to reckon the votes of all whose names appeared there. The statute had clearly ascertained who were the magistrates and town council, or persons by whom the delegate was to be chosen; that they were those persons who had been enrolled by the votes of a majority of magistrates or other persons, who by the constitution of the burgh had a voice; and that upon that roll or book or list they must remain till ordered to be struck off, and till they were struck off either by the magistrates themselves at a subsequent annual election (for it was possible to conceive a burgh where this might be competent), or by an extracted decree of the Court of Session, upon an application under the statute; that the title of the elector of a delegate consisted in the entry of his name in the burgh record under the keeping of the town clerk, and that every man whose name was to be found there, entered as a magistrate or councillor, must be admitted and inserted at the meeting for election; that in the present case Captain Montgomerie and Mr. Gulland were admitted, entered in the minutes, and qualified; and that no [37] exertion of the mental faculty was required or permitted on the part of the clerk, but to count the votes of this meeting, which constituted the town council assembled. The duty of the clerk was clear and imperative. He was bound to call all the names which stood on the record or books of the burgh as councillors, without taking upon him to judge or determine whether they ought to be there or not; and by entering the names of Captain Montgomerie and Mr. Gulland on the minutes, and administering the oaths to them, the clerk had in this case admitted that their names stood in the books as members of council. The statute 16 Geo. 2, cap. 11, applied to all the burghs in Scotland, and the difference between the phraseology of that statute and of those previously in force (2 Geo. 2, cap. 24, § 3, and 7 Geo. 2, cap. 16, § 8), particularly the omission in the last statute (16 Geo. 2, c. 11, § 35) of the words "to the best of my judgment" in the oath of the returning officer, and of the word "wilfully," in the clause imposing the penalty for neglect to return the person duly elected, was relied upon in support of the proposition that the clerk was bound by the record without any further exercise of judgment. The duty of the clerk was clear and imperative, and *bona fides* was in this case no defence; and upon that principle the case of *Gordon v. Forbes* had been decided. But the clerk had never before rejected votes on the ground of non-residence, though the objection had been made at former elections, and it was clear therefore that he had not acted *bona fide*. The opinion of Holt, Ch. J. in the case of *Ashby v. White* (Sta. Tri. Oct. Ed. vol. 14, p. 789), relative to the duty of a returning officer, was quoted. The [38] object of the act was to deprive the clerk of all judgment respecting the votes; his duty being confined to looking at the council book; and if the names of the persons claiming to vote appeared there as members of council, he was bound to reckon them. (Lord Eldon, C. Must not the town books be produced to prove that General Campbell was duly elected commissioner? That must be proved, as the penalty is given by the statute to the person duly elected commissioner. In a case of this kind you must be held to strict proof.) It appeared from the minutes that he was duly elected. (Lord Eldon, C. If this statute affects a person whether he acts *bona fide* or not, and there are such acts both in England and Scotland, then we may have to determine here that the clerk has incurred the penalties of £500 fine, and six months imprisonment, and incapacitation, even though he might have acted *bona fide*; and the act says that these may be sued for and recovered by way of summary complaint. If a subject in this country were made liable to such penalties, and his acting *optimâ fide* were no defence, though the penalties might be sued for by summary complaint, yet we would take care that it should contain all the averments necessary to make out the case. If such a petition had been presented here it would have required averment that Captain Montgomerie and Mr. Gulland were part of the magistrates and town council assembled, and held that character; and that General Campbell was duly elected delegate by the majority, as the penalty of £500 is given to the person elected commissioner. And we would re-[39]-quire not only that the

averments should be nice and precise, but we would also require strict proof; and I suggest that to Mr. Erskine, that he may consider whether there is averment, or evidence, or admission enough to support this judgment.) Mr. Warren. There are two averments in the petition and complaint: 1st, That General Campbell had the majority of votes. That appears by the minutes. 2d, That the commission was not made out for General Campbell. That does not appear in the minutes, but it is admitted by Black; for he answered without objecting, and the whole of his reasoning proceeds on the supposition that the commission was not made out for General Campbell. If he had objected it would have been proved. (Lord Eldon, C. If this had been a case in the law of England, could there have been any proceeding without the production of the commission itself?) Not in England. (Lord Eldon, C. Then suppose this a proceeding in England, would not the judgment be wrong on another ground? Suppose it bad as to the imprisonment, I take it that if it is bad in part it would be bad in the whole. But here nothing is said as to the place where the imprisonment is to be, nor when it is to commence. Now I take it that in England you cannot order an imprisonment to commence *in futuro* except where you are ordering two imprisonments at the same time.) Certainly if this had been an English proceeding, these objections would have been unanswerable. (Lord Eldon, C. We could not proceed a step here without the production of the town books.) Mr. Erskine. We produced authentic extracts. (Lord [40] Eldon, C. I take it to be clear that it is not sufficient that the clerk entered the names in the minutes, and qualified them by administering the oaths, as he might be mistaken; and here, in order to prove that they were councillors, it would be necessary that the books should be produced. We are here upon a statute as severe in its penalties as can well be.) Mr. Erskine. I can only state that we have evidence here as far as Black himself held it to be material, and in the pleadings by Black our statement was acquiesced in as true. He would have been heard on the competency, as well as on the merits. (Lord Eldon, C. There is no averment, evidence, or admission, that I see, that these names were taken from the council books. Lord Redesdale. You ought to have proved two things: 1st, That General Campbell was duly elected commissioner; 2d, that Black made the return contrary to the majority of legal votes. Lord Eldon, C. Who are the magistrates and town council? those that appear as such on the books. But there is no evidence that these names were there, equal to the best evidence. Lord Redesdale. By the constitution of the burgh you should prove that they were inhabitant councillors, in order to show that you were duly elected. Lord Eldon, C. Where in the pleadings does it appear that these names were on the books? It is clear that all in the sederunt were summoned, and that the names were taken down. But is it proved that those summoned and present were town councillors?) Mr. Erskine. Our averment is that all these names in the sederunt were in the record; and that is not contradicted. (Lord Eldon, C. Where is that [41] averment in the complaint?) Mr. Erskine. With respect to the terms of the judgment, a second petition might have been presented below as to the time of commencement and the place of imprisonment. The reason why we did not insist upon it was, that the clerk might not be deprived of the benefit of his appeal.

In the reply, the point of want of sufficient averment and proof, first suggested by the Lord Chancellor, was insisted upon. In a case so perilous as the present, the defender was perfectly justified in allowing the complainer to go on proving as he chose, without stating any objection while the defect might be rectified; and then, if the judgment should be against him, taking advantage of the defect upon appeal to a higher tribunal.

Sir Samuel Romilly and Mr. Murray for the Appellant; Mr. Warren and Mr. Erskine for the Respondent.

(May 10, 1816) Lord Eldon (C.). This case arose out of the conduct of Mr. Black, who your Lordships will recollect was town clerk of the burgh of Inverkeithing, and the petition and complaint which I have now before me states, "That by an act passed in the 16th year of his late Majesty entitled 'An act to explain and amend the laws touching the elections of members to serve for the Commons in Parliament for that part of Great Britain called Scotland, and to restrain the partiality and regulate the conduct of returning officers on such elections,' it is declared by the 22d section that [42] whereas at the election of members to serve in Parliament for the districts of boroughs in that part of Great Britain called Scotland, it often happens that more

“persons than one claim to be admitted to vote as commissioners for the same borough, which furnishes pretences to the clerks of the presiding boroughs for partially making false and undue returns: For remedy thereof, be it enacted by the authority aforesaid, that at the annual election of magistrates and councillors, and in all the proceedings previous to the election of the magistrates and councillors for the succeeding year—” (Recites the 22d, 23d, and 24th sects.)

The petition and complaint then proceeds to state the 26th section of the act. But first I would call your Lordships' attention to the previous provisions which regulate the elections for counties; and there undoubtedly the legislature has prescribed, to the person who is to collect the votes, a clear and intelligible rule of conduct, from which if he deviates, it is his own fault; since the rule is so clear and plain that he cannot mistake it: for it is enacted, “that at every election of a commissioner to serve in parliament—” (reads sect. 12 and sect. 13, except the last part relating to equality of votes). So that there being a roll of persons who are to be taken as electors, if their names are upon that roll, the plain rule, by which he is to regulate his conduct, is to allow the vote of every man who is upon the roll, without taking upon him to decide whether the name is properly inserted or not; and, on the other hand, to refuse the vote of every person whose name is not upon the roll.

[43] Your Lordships will observe, that by the 22d sect. of the act, which I have before read, it appears to be taken for granted, that there is in every burgh in Scotland an annual election of all the magistrates and councillors, which, as I find from these proceedings, is said not to be the case with Inverkeithing.

Then by the 26th section, it is enacted, “that at every election of commissioners, for choosing burgesses for any district of boroughs in that part of Great Britain called Scotland, the common clerk of each borough within the said district, shall make out a commission to the person chosen commissioner by the major part of the magistrates and town council assembled for that purpose; which magistrates and town council shall take the oath of allegiance, and sign the same, with the assurance, and shall take all the other oath appointed to be taken at such election, by this or any former act if required: and the said clerk shall fix the common seal of the borough thereto, and sign such commission, and shall not on any pretence whatsoever make out a commission for any person as commissioner, other than him who is chosen by the majority as aforesaid: and then comes this very strong and severe clause, which I am about to read to your Lordships: “and if any common clerk of any borough shall neglect or refuse duly to make out and sign a commission to the commissioner elected by the majority as aforesaid: and affix the seal of the borough thereto, or if he shall make out and sign a commission to any other person, who is not chosen by the majority, or affix the seal of the [44] borough thereto, he shall for every such offence forfeit the sum of £500 sterling:” but that forfeiture is, in the express language of this clause, “to the person elected commissioner for the said borough as aforesaid, to be recovered by him or his executors in the manner hereinafter directed, and shall also suffer imprisonment for the space of six calendar months, and be for ever after disabled to hold or enjoy the said office of common clerk of the said borough, as effectually as if he was naturally dead.”

The rule here given to the clerk is, that he is to grant a commission to the person who has the majority of the magistrates and town council assembled, and that he is to withhold the commission from him who has not that majority; and he is to do, and forbear to do, these respective acts at the hazard, not only of forfeiting £500 to the person elected commissioner, but also of suffering six months imprisonment, and that sentence of degradation and infamy which disables him to hold or enjoy the office of common clerk of the burgh as effectually as if he were naturally dead.

Notwithstanding all that one has read in these papers, and heard at the bar, respecting the difference between the language of the above mentioned clause, and that of the penal clause in 7 Geo. 2 (cap. 16, sect. 8), and the difference between the words of the oath to be taken by the returning officer as prescribed in 16 Geo. 2 (cap. 11, sect. 35), and the words of the oath to be taken by him as prescribed in 2 Geo. 2 (cap. 24, sect. 3)—I say, notwithstanding all we have heard as to the language of former acts of parliament, one of which says, that if the returning officer “shall wilfully annex to [45] the writ any false or undue return, etc.” he shall forfeit £500; while the other requires the officer to swear that he “will return such person or persons as, according

“to the best of his judgment, shall appear to him to have the majority of legal votes;” and notwithstanding the observations made respecting the omission, in the act 16 Geo. 2, of the word “wilful” in the penal clause, and the words, “according to the “best of my judgment,” in the oath—it is impossible, I think, not to regret that, when this act of parliament was made, which distinctly pointed out the rule with respect to counties, the clerks of burghs were left to regulate themselves by this direction, that they were to return according to the majority of magistrates and town council assembled, the statute itself giving no direction by reference to the roll of those annually elected, and much less by reference to the records of such a burgh as Inverkeithing, where there is no annual election; and that if they committed a mistake they were to be liable in the penalty of £500, and six months incarceration, and rendered incapable of holding the office of town clerk as effectually as if they were naturally dead. One cannot help regretting that an act, so penal in its consequences, was not rendered so plain, that he who runs might read, and he who read must understand his duty, as is done with respect to those who are to perform this duty in county elections. However, it is not so in the act; and yet if this be the right construction which they put upon it, the clerk, in case of mistake, is liable not only to this forfeiture of £500, to the penalty of [46] six months imprisonment, and incapacitation for life, but also to a prosecution for perjury. Where an act of Parliament is so frightfully penal as this is, I trust, I do not go too far when I say, that in no part of this kingdom can it be permitted that a person should be found to be so liable upon loose pleadings, and on proof which does not contain the essence of the crime charged.

I now proceed to state this petition and complaint, which I protest I cannot read without pain. No court in this part of the island, I am sure, would permit such matter as I am now about to read to remain on its records; and I say so the more readily, as your Lordships have heard it stated at the bar, that it was a surprise upon one of the judges who had signed it. If this act shuts out altogether the question of *bonâ fides* (and whether it does I do not mean now either to assert or deny), and renders it imperative on the clerk, whatever his own judgment may be as to the qualification, to return according to the majority of those who have the character of magistrates or councillors, whether they ought to have it or not: if such be the meaning of the act, it would be enough in this petition and complaint, charging the clerk with having incurred a penalty of £500, charging him with an offence for which he was liable to be imprisoned for six months, with a crime which rendered him liable to infamy and incapacitation, and to a prosecution for perjury; temperately and soberly to have stated that such persons were convened for the purpose of choosing a delegate, that he did not return according to the majority, and that the consequences of [47] the law attached upon him. The mistake of the clerk in thinking that he ought to exercise his judgment as to who were or were not councillors, if it was a mistake, seems to have been so common among the persons present, certainly among the principal persons, that it might have led him, who preferred the complaint, to have done so in terms as moderate and temperate as the necessity of the case would allow. But instead of that the petition and complaint proceeds thus:—“These severe but necessary penalties, thus enacted “by the legislature against the partiality, fraud, and malversation, of the common clerks “of burghs in matters of election, have hitherto in general been found sufficient to “achieve the objects for which they were intended; and it was to have been expected “that the example which was recently made by your Lordships, etc.,” then referring to what had happened to the town clerk of another burgh, whose name I will not mention, because I hold it to be one of the most sacred duties of a judge, when a person has undergone the punishment of the law, and the law has done with him, never to mention that man’s name if that will do him any farther prejudice. “But in the late “election for Inverkeithing, a striking example has been afforded of a public officer, “who, disregarding alike the provisions of the statute, and the solemn warning given “by your Lordships, and who, totally unrestrained by the obligation of his oath, the “fear of disgrace, and of condign punishment, has, after mature consideration, and “with his eyes open, incurred the whole penalties of the law, and subjected [48] him- “self, over and above, to a criminal prosecution, and the consequences of deliberate “perjury. The misguided and the guilty individual who has thus had the audacity “and wickedness to expose himself to the vengeance of the law is David Black, town “clerk of Inverkeithing: and against him the complainer, impelled by a sense of the

"duty which he owes to himself, to the community of which he is a member, to the independent burghs whom he has the honour to represent in parliament, and to the public at large, now calls on your Lordships to award to the fullest extent the penalties of the statute. In order that your Lordships may be more fully able to appreciate the motives—" (This is a proceeding, observe, in which the complainer contends that the motives are not a proper subject of judicial consideration :)—"which could have induced an individual to pursue a line of conduct which must be attended with consequences so fatal to his fortune and his reputation : it is proper to mention, that, at the late general election, there were two candidates for representing in Parliament that district of burghs to which Inverkeithing belongs, viz. the Honourable Lieutenant-General Thomas Maitland, and the complainer. The former of these was supported in his canvass by those partizans in the vicinity of Inverkeithing, and by other individuals of greater note, whose predilections, it is notorious, accorded with those political sentiments which the said David Black has continually and openly avowed. At the last Michaelmas election the greater part of the council, amounting to [49] twenty-seven in number, were cordial in supporting the interest of the complainer. But from the extraordinary zeal and activity with which the canvass was carried on" (this is pleading!) "by those indefatigable individuals with whom the complainer had to contend, and particularly by the Earl of Lauderdale (a peer of the realm), Lord Maitland, and Mr. James Gibson, writer to the signet; thirteen members of the council, previous to the day of electing the delegate (which took place only a fortnight afterwards), were induced to rally round the standard of General Maitland. Fourteen members of council however remained steady in the interest of the complainer; and hence it was obvious that the whole enterprise on the part of the General must prove abortive, unless, either by open force or secret fraud, the legal majority should be deprived of its due influence in the approaching election. From the eruptions" (this is pleading!) "which were, during the canvass, frequently observed to be made from the coal-pits in the neighbourhood, by a class of men whose services upon such adventures your Lordships are not to be informed had more than once been resorted to, apprehensions were entertained that the contest was to be decided by those friends to the freedom of election. But a recollection of what such an appeal to the bowels of the earth had formerly cost some of the individuals at present engaged, seems to have prevented a repetition of that controlling and decisive argument. The latter mode of warfare was accordingly at length resolved on, which, [50] though attended with less danger, both to the purses and the persons of the leaders, was in its result equally powerful. Fortunately for the success of their measures, they had an ally who had both the means and the inclination to serve them. This was no other than the said David Black, whom the result has proved to have been a willing and ready tool, prepared to go all lengths in advancing the views of those who had thus determined to avail themselves of his assistance." And then, after some other circumstances, it goes on to state the minutes of sederunt, and a list of the magistrates and councillors present, as to whom it is only necessary to mention the names of John Montgomerie and John Gulland. There had been some proceeding against them in the Court of Session, to remove them from the situation of councillors of this burgh; and an interlocutor for removing them had been pronounced; but against that a reclaiming petition had been presented, and the judgment did not become final; and I think the fair conclusion is, that they were not removed by that proceeding.

Then it has been said that the clerk administered the oaths to these persons, and that therefore he must be guilty of this offence.

The meeting being thus constituted, Sir John Henderson entered an objection to the votes of General Campbell, Duncan Montgomery, Alexander Montgomery, and Mr. Gulland, and called upon the clerk, not only not to receive the votes of these four persons, but also not to call their names in the course of any vote that might that day take place in the council. The answer to this is stated in the [51] minutes to which I refer your Lordships. And then there follows, in the petition and complaint, this assertion—"That there is an omission in the minutes is therefore unquestionable; but it is obviously of no consequence whatever, as let the pleadings, which the parties interested might make, be what they would, David Black was bound himself to have known the limits of his own duty, and to act accordingly." Granting

them that, still the complainer was bound to show that he had been duly elected commissioner.

The petition and complaint then proceeds :—"From what transpired during this discussion, the complainer has already mentioned, that he saw very well that David Black was prepared to go all lengths, and that he had determined to act as if he had been appointed by law, not for the purpose merely of receiving the votes of the magistrates and town council assembled, but to judge of the validity of the votes of which that assembly was composed, and under that usurped character to give effect to the objections which had been stated to the votes of four of the individuals in the complainer's interest. In this situation he thought it advisable, in order that the corrupt determination of this individual to promote the views of his political partizans might be more glaringly exposed, to state similar objections to a number of individuals who were much more obnoxious thereto than those against whom Sir John Henderson entered a protest, satisfied, that if his suspicions were well founded, David Black would [52] either repel or pass them over altogether." It was on this conduct of the complainer that it was contended that he himself, by proposing objections similar to those proposed in behalf of General Maitland, had done that which had a tendency to mislead the clerk, of whose conduct he complained, and that he was barred *personali exceptione*.

The judges however got over this. According to the notes which I have before me, one of them said, "At first I was stumbled by it, but I think General Campbell just said, 'Since you are to exercise such a power, do it fairly.'" Another says, "As to the personal objection to General Campbell, I should think if his motion had misled Black, or contributed so to do, it would have barred the complaint. But I think that is not in the nature of things, and that plainly he was not misled." Another said that, "Had General Campbell been the first to come forward, and led Black into error, the objection would have barred his complaint. But it was the other party who led, and then General Campbell was right to make his objection." And the Lord Justice Clerk says, "General Campbell only assisted in misleading." But with respect to this point of personal exception, if the proceeding had been by one of the parties against the other, it might be a material question who was the first to object, and who led the other into error. But it must be recollected that this is a proceeding by one of the parties against the clerk, and what signifies it to him which of them began to mislead, if the other contributed to do it? [53] General Campbell might, I think, with great propriety have said, "I call upon you to pay no attention to these objections, but, if you do attend to them, I have objections of the same kind to which I call upon you likewise to attend, giving you notice however that you ought to pay no attention to such objections on either side." But if General Campbell made his objections without any explanation, then he in some measure concurs in misleading the clerk; and perhaps the best answer is, the admission of Mr. Black in page 21 of the Answers, that he was not in fact so misled.

It is immaterial whether the clerk was the political friend or enemy of either the one or the other of the parties, or had no political partialities at all. We have nothing whatever to do with that.

It appears that Mr. Black, for his own satisfaction and direction, took the opinion of a gentleman of the name of Adam, whom we have all along known, and who had certainly great practice in the law of Scotland at this bar. Some of the judges very truly and properly stated that Mr. Adam was a good English lawyer; and if Mr. Adam was not then a good Scotch lawyer also, I hope the judges are by this time convinced that he has since improved in Scotch law; and I trust that this difficulty will not arise again. But Mr. Black having thought proper to consult this gentleman, who, besides his extensive practice in Scotch law at this bar, had great experience in election cases; Mr. Adam gave him a reasoned opinion, which as Mr. Black says, led him to make the return which he did make; [54] that is, led him to think that, by the constitution of this burgh, a councillor by ceasing to be an inhabitant ceased to be a councillor, and that therefore he might reject these votes, which he accordingly did, and gave the commission to one who was stated in these proceedings not to have the majority of the magistrates and town council; and thereupon the present action was brought.

The judgment is, "That the Respondent, David Black, has forfeited the sum of

“ £500 sterling ; and decern against him for payment thereof to the complainer. Order the said David Black to be imprisoned for the space of six calendar months, and declare him for ever disabled to hold or enjoy the office of common clerk of the burgh of Inverkeithing, as effectually as if he was naturally dead.”

An objection was made by one of your Lordships, that as the imprisonment, which was part of the judgment, was put off *sine die*, the judgment could not be sustained. The answer was, that, by the practice in Scotland, application might again be made to apply the judgment, and that then the court fixed the time and place of imprisonment. This is altogether irreconcilable to our notions of law ; but, supposing that to be consistent with the law of Scotland, there is another difficulty, which, though I do not mention it as one on which your Lordships are to act, is a difficulty which I cannot at this moment answer ; that is, that though the principle may apply to a case where the judgment is for imprisonment only, I doubt whether it ap-[55]-plies to a judgment which gives the fine and imposes the incapacitation, but postpones the imprisonment. Suppose that however to be reconcilable to the law of Scotland.

But it is a wholesome principle in a case so penal as this, that we (always recollecting that we are sitting here at present as the Court of Session) should require distinct averment, and clear proof, to the utmost extent to which they may by the law of Scotland be required. Now it ought, I think, to have been distinctly alleged and clearly proved, that the complainer was duly elected commissioner ; and that could be made out only by evidence or admission of the other party, that the fourteen persons in his (the complainer's) interest were of the body of the magistrates and town council ; and that again, unless admitted by the other party, could be made out only by the production of the roll, made up at the last election in those Burghs where there is an annual election, or the records of the burgh where there is no annual election, if this burgh cannot be considered as out of the operation of the statute.

Having taken every possible pains to understand this case by reading these papers, and attending to the able arguments at the bar, and having particularly asked the gentleman who argued the case for the Respondent to point out where this distinct averment and clear proof appeared, I have not been able to find them : and I am as much bound to act according to my own judgment, as Mr. Black was bound to have exercised no judgment of his own, supposing that to be the true construction of the [56] statute. I do not think that taking the names of the persons assembled, and putting them down in the minutes of sederunt, and the administration of the oaths, which is all that he admits, are sufficient for the purposes of this proceeding. He no where admits, “ these are persons whose names are on the records of the burgh, but I think they ought not to be there.” He only put down the names of those assembled, who had been summoned by Green the summoning officer, and who had come in consequence of that summons. But to make him liable in such a proceeding as this, it ought to be shown that he admitted that these were persons whose names were on the records ; or otherwise, that fact ought to have been established by the production of the records themselves ; and without this, it is not proved that the complainer was duly elected by the persons who were the majority on these records.

Suppose an officer, who had to perform the duty at a county election, had refused to admit the vote of one whose name was upon the roll ; if he, by that refusal, became liable to the penalties of this statute—and one cannot well see why, in that case, he should not—can a court of justice find him liable without averment that the name of the person whose vote was so refused was on the roll, and without the production of the roll to show that his name was actually there ?

Then, whether these votes were or were not improperly rejected, and without going into that ; for want of sufficient allegation, and particularly for want of sufficient proof that the complainer was duly elected [57] commissioner, which resolves itself into another proposition—for want of proof that the names of the persons, whose votes were so rejected, were on the record, my opinion is, that the judgment cannot be sustained.

Lord Redesdale. I have but a few words to add to the observations which have fallen from the noble Lord, in which I perfectly concur. The legislature meant that the person who should be duly elected commissioner might bring the action ; and that the person guilty of the described offence should be liable in certain penalties. The consequence is, that this being a criminal proceeding, the acts must be distinctly alleged

and clearly proved, which are necessary to entitle the party to bring the action, and to entitle the court to inflict the penalty.

It does not appear to me that the legislature, though it gave permission to proceed in this summary way, at all intended to dispense with as much precision as would be required in a more solemn and protracted mode of proceeding. But, in looking at the proceedings in this case, there appears no distinct allegation, nor any thing resembling distinct allegation, that the complainer was duly elected commissioner, and, if it is not alleged, it is not in issue.

Then supposing it to be alleged, is it proved? I have found no evidence to prove it as it ought to be proved; for it is clear that it could be legally proved only by the production of the town council books, and it is admitted that they were not produced; so that it stands on the evidence of the minutes taken at the time of election, which are not sufficient to prove the fact that the complainer was duly elected commissioner.

The same proof is necessary to show, that the persons who voted, or offered to vote for the complainer, formed the majority of the body of the magistrates and town council, of which there is no proof. I think, therefore, that these proceedings loosely begun were as loosely carried on; that what ought to have been alleged was not alleged; and that what ought to have been proved was not proved; and that the Court therefore could not properly give judgment according to the act of parliament.

But though there had been distinct allegation and clear proof that the complainer had been duly elected commissioner, I very much doubt whether the true construction of the act is that which the Court below has put upon it; for the statute has not drawn the same line for the conduct of persons in Black's situation, as it has done for the conduct of returning officers in county elections. In county elections a clear line is drawn; and the officer, by adhering to the prescribed rule, acts without peril. But here the officer is to seal the commission to the person elected by the majority of the magistrates and town council: but then the statute has drawn no line by which the officer is to determine who are the majority of the magistrates and town council; and therefore it appears to me that the strictness of the statute does not apply to such cases as this. [59] And if the constitution of this burgh of Inverkeithing is, in fact, such as it is represented in these proceedings to be, Black seems to have done no more than he was entitled to do: for your Lordships will observe, that, in order to support this action, it should have been alleged that the complainer was duly elected commissioner by the major part of the magistrates and town council; and, in order to show that he was thus duly elected, he must have stated what was the constitution of the burgh; and the act has regard to the constitution of the burghs, and proceeds on the supposition that different burghs have different constitutions. Why then, if it ought to have been alleged and set forth what the constitution of this burgh was, it must then have appeared, that every councillor ought to be an inhabitant of the burgh; and then the question would have been raised, whether a councillor, by ceasing to be an inhabitant, was not, by the constitution of this burgh, to be considered as *ipso facto* dismissed from his situation of councillor, and whether the clerk was not justified in rejecting the votes of persons in that situation. That at least is a question which still remains to be tried.

Then when it is considered that, with respect to county elections, a clear line is drawn by the statute for the conduct of the returning officer, and that with respect to burgh elections no such line is drawn, the interpretation, which the Court below has put upon this statute, is one which your Lordships will be but little inclined to adopt, if it can possibly be avoided. It seems to have been the intention of the legislature, that the acts, which would [60] subject the clerk to the statutory penalties, should be acts done in breach of his oath. In the section, which relates to the perjury (sect. 39), it is enacted that, "if any person shall presume, wilfully and falsely, to swear and subscribe any of the oaths required to be taken by this act, and shall thereof be lawfully convicted, he shall incur the pains and punishments of perjury." That leaves it doubtful at least, whether the legislature did not mean that the acts subjecting the clerk to the penalties should be done wilfully and falsely, which seems necessary in order to constitute the crime of swearing wilfully and falsely, that is, corruptly, or meaning to swear that which one knows not to be true. So that it is, at least, doubtful whether the Court below has not put a construction on this statute with respect to the common clerks of burghs which it cannot well bear.

But whether that is so or not, it appears to me, that there is a failure, both of allegation and proof, that the complainant was duly elected commissioner; that what ought to have been averred is not averred; and that if it had been averred, it is not proved; and on that ground, I think, the judgment cannot be sustained.

Judgment of the Court below reversed.

[61] ENGLAND.

APPEAL FROM THE COURT OF CHANCERY OF THE GREAT SESSIONS OF WALES FOR THE COUNTIES OF CARMARTHEN, PEMBROKE, AND CARDIGAN, THE COUNTY OF THE BOROUGH OF CARMARTHEN, AND TOWN AND COUNTY OF HAVERFORD-WEST.

KENSINGTON (Lord),—*Appellant*; PHILLIPS (JOHN),—*Respondent*

[March 3, 27, 1817].

[Mews' Dig. viii. 760. Applied in *Pritchard v. Grey*, 1820, 1 Jac. & W. 396, 403, 404. The Courts of Great Sessions of Wales were abolished by 11 Geo. IV. and 1 Will. IV. c. 70.]

[Agreement in writing in 1800, between A. and B. for a lease to B. of a farm belonging to A., for three lives generally, no particular lives being named. C. purchases the farm from A., subject to the agreement, and receives rent from B., who occupied the farm under the agreement till 1808, when B. discontinued the payment of rent, because C., who had not seen the agreement till 1807, then refused to perform it. Bill by B. in 1809, for a specific performance, naming the lives of three of the tenant's children, and decreed accordingly in the Court below; and the decree affirmed in the House of Lords, with some variations respecting the performance of previous conditions by the tenant.]

[Lord Eldon, C., observing—"The estate was purchased subject to the agreement; and the equity of the case is, that the agreement should have been made good at the time of the purchase; and though it is objected that the naming of the lives now renders the performance a different thing (which is the case) from what it would have been if the lives had been originally named, since lives might then have been named, which might have dropped by this time, yet it is clear that the parties were going on as if the one had been entitled to performance, and the other had been bound to perform; so there seems to have been a mutual default. I have [62] said these few words, because I am anxious that this should not be understood as a decision, that under such an agreement as this, a party may lay by as long as he pleases, and then apply with effect for a specific performance. It is only on the particular circumstances of the case, taking it out of a general rule, that the decision is founded."]

[Notwithstanding the alterations made in the decree, as to the conditions to be performed by the tenant, he was allowed £100 costs, the Appellant not having called for the proper provisions in that respect below; and the tenant having been considerably harassed with expenses, in the course of the suit, and with actions for use and occupation.]

The bill in this case, filed in the autumn of 1809, by the Respondent, Phillips, against the Appellant, Lord Kensington, in the Court of Chancery of the great sessions for the counties of Carmarthen, Pembroke, etc. stated that, in 1800, Susannah Meares, who had then an estate for her life in a farm called Haroldstone in the parish of Haroldstone-west, in the county of Pembroke, with power to grant a lease or leases

thereof for three years, agreed to execute a lease for three lives of this farm to Phillips, at the rent at which the same should be valued by Charles Hassall: and the valuation having been made and reduced into writing, the agreement was written at the foot of the valuation in these words: "8th July, 1800, agreed to let the above to John "Phillips, on lease for three lives, at the yearly rent of £140; subject to such allowances, conditions, and restrictions, as to ploughing and otherwise, as shall be advised "and directed by Mr. Charles Hassall; the repairs of the farm and premises of Haroldstone-west being first made and completed, pursuant to the covenant for that "purpose contained in the last existing lease thereof." The agreement was signed by George Meares (who was entitled to the reversion in fee of the farm) as agent for his mother, Susannah Meares, and by the Respondent. Phillips, who had previously occupied the farm under a lease, which expired in 1800, continued to occupy under the agreement, and paid rent to Susannah Meares. The mother died in 1802; and the son, George Meares, having come into possession, sold and conveyed the lands, subject to the agreement, to Lord Kensington. Phillips paid the rent to his Lordship up to Michaelmas 1808, and then discontinued the payment, the Appellant having refused to perform the agreement, and having given the Respondent notice to quit, and brought an ejectment against him: and the bill prayed that Lord Kensington might be directed, by decree of the Court, to execute to Phillips a lease of the farm for the lives of three of his (Phillips's) children, Elizabeth, Lettice, and Martha; that the covenants might be settled and declared, the Plaintiff (Phillips) submitting to perform the agreement on his part; and for an injunction. Lord Kensington in his answer admitted that he purchased, subject to an agreement for a lease, but had not seen the agreement in question till 1807; and submitted to the Court, whether the agreement was in its nature one of which performance could be demanded with effect, especially after such a lapse of time, without any tender of a lease or draft. Witnesses were examined, from whose evidence it appeared that some improvements [64] had been made by Phillips on the farm since 1800; and that it was understood by the parties to the agreement, that the lease was to be for the lives of three of the tenant's children.

The Court, on the 27th August, 1812, declared that the Respondent was entitled to a specific performance of the agreement in the said bill mentioned, bearing date the 8th July, 1800; and they ordered and decreed the same to be specifically performed accordingly: and the Respondent by his said bill submitting to perform the said agreement on his part, and upon the Respondent making and completing the repairs of the farms and premises at Haroldstone-west, in the said agreement mentioned, pursuant to the covenant for that purpose contained in the last existing lease thereof, it was ordered, that the Appellant should make and execute to the Respondent a proper lease of the premises comprized in the said agreement, for the joint and several lives of Elizabeth Phillips, Lettice Phillips, and Martha Phillips, in the said bill mentioned, according to the terms of the said agreement: and it was ordered, that such allowances, conditions, and restrictions, as to ploughing and otherwise, respecting the due and proper mode of cultivating the said farm, as should be advised and directed by Mr. Charles Hassall in the said agreement named, should be inserted in the said lease: and it was further ordered, that it should be referred to the Register of the said Court to settle such lease, in case the parties differed about the same: and it was ordered, that the Respondent should execute a counterpart of such lease: and it was further ordered, that it should be referred [65] to the said register to tax the Respondent his costs of that suit, and that the same, when taxed, should be paid to the Respondent by the Appellant: and it was further ordered, that the injunction granted in that cause should be continued.

From this decree Lord K. appealed.

Sir S. Romilly and Mr. Hart (for the Appellant.) This decree cannot be right; for nothing is more settled than this, that, when a party comes into a Court of Equity for a specific performance, he must show on the face or from the terms of the agreement itself, what the interest is which he claims. The agreement says, "a lease for three lives," but what three lives? It is not more certain than a lease for years without stating the number of years. And this is the more important, as the interest is, in its nature, one which must depend on contingencies. If the lives had been recently named, one of them might have died next day, and none of them might now have been existing. It is essential that the particular lives should appear in the agreement. But then, 2dly, it was not till a lapse of nine years that the Respondent put himself in a situation to incur

the risk. Mears indeed, in his deposition, says, that the three lives were to be three of the Respondent's children. But suppose this parole (extrinsic) evidence admissible, it left it uncertain which three of the children. The way they argue it is that, in these cases, it is understood that the lessee is to name any lives he thinks proper. But there is no authority for that. The effect of this is to give the tenant a lease for ten years, [66] and three lives after: he, perhaps, naming lives not *in esse* at the time of agreement, or waiting till the dangers of very early life were passed. No case has been found in the least resembling this in its circumstances. But where an estate has been sold at a price to be named by a person who dies before it is named, it has been decided that it is an agreement which cannot be carried into execution. Then the Respondent ought to have made certain repairs as a condition precedent before he could properly claim the lease: and the Court by its decree impliedly admits that this had not been done, for the decree directs the lease to be granted upon its being done. The Court therefore decides that point in our favour, and yet decrees performance. The Appellant applied to the Court by motion to have the arrears of the £140 rent paid into Court, but without success, though that rent, was at all events payable. And then there was no provision in the decree for payment of the rent, though it is the rule of Courts of Equity to make complete decrees. In these respects the decree is at least materially defective, if not totally wrong.

Mr. Leach and Mr. Jos. Martin (for Respondent.) Phillips the tenant enters into this executory contract with Mears. Lord Kensington admits in his answer that he had notice of the contract, that he purchased the estate subject to the agreement, that in 1800 he promised a lease accordingly, if it was a good agreement, and that till 1807 he did not know that it was otherwise and that the lives were [67] not named. Lord Kensington therefore never disputes the contract, and he cannot say that it was waived or abandoned by the tenant, who, as appears in evidence, was expending sums in improvements, which he never would have done, except upon the faith that the contract would be executed. The tenant was paying rent under the agreement, and Lord Kensington, admitting that he had notice of the agreement, must on the principles of equity be presumed to know the contents of it. What then is this legal defect? It is left uncertain, it is said, who is to name the lives. But it is not uncertain; for by the principles of law, when the agreement is to give a lease for lives, it is the same as if it were added "to be named by the lessee." The principle is clear. Every deed is to be taken most beneficially for the grantee. Where there is a lease for life, it is for the life of the lessee; and where there is a lease for nine, or seventeen, etc. years, the option is in the lessee. But supposing the contract to be sufficiently certain, they say there was delay. That was the appellant's fault. But suppose it were negligence on both sides; if the Appellant saw the tenant cultivating the ground, as a person would not do unless upon the faith of the contract, he is bound. The delay, it is said, gives the tenant an advantage which otherwise he would not have. True, that is an inconvenience. But why did you not apply to him to name the lives? Even at law, where there is a lease with covenant to pay rent on a certain day, or that the landlord may re-enter, he must make a demand, and that on the day. The Appellant might have relieved himself from the inconvenience [68] and if, on demand, the lives had not been named, he would have been discharged. Thus if it were mere negligence. But the Appellant admits that the tenant applied to him for a lease. Then it is objected in point of form that the tenant had no title to sue till he made the repairs. But the Appellant does not deny in his answer that they were made, and at any rate there was no issue on that point, nor any question below about it. Then they say that the Court refused to order payment into Court of the rent of £140; and made the payment no term in the decree. But the Court did not think it necessary, the injunction merely preventing the landlord from taking possession, and leaving him free in other respects. To be sure, it would have been a proper term in the decree that the rent should be paid before execution of the lease. But did they ask it? Mears states that it was understood that the lives were to be three of the tenant's children. But he was not bound to name them till demand. (And with reference to the alleged uncertainty of the term as a supposed ground for refusing specific performance—*Clinan v. Cooke*, 1 Scho. Lef. 22. *O'Herilly v. Hedges*, 1 Scho. Lef. 123.—*Lindsay v. Lynch*, 2 Scho. Lef. 9, were cited.)

Sir S. Romilly (in reply.) The nature of the objection has been misunderstood, for we have no dispute as to who should name the lives, but what the lives were. And in

that respect the contract is as uncertain as if it had been a lease for years without mentioning the number. The cases cited depended [69] on the Irish Tenantry Act, or the principles of equity in Ireland as to these leases before the act, under which renewals were decreed on the terms of paying septennial fines and interest. As to the question of laches, the landlord was not bound to apply to the tenant to name the lives; and, as to the condition precedent, they say that the point was not in issue. But suppose the Defendant had stated in his answer that he did not know whether the repairs were done or not, it was incumbent on the Plaintiff to prove it. But it was in reality denied that the repairs were done, and the decree imports that they were not done. As to the rent in arrear, it was not surprising that the Appellant had not asked that the payment should be made a term of the decree, when the Court had before refused to interfere with respect to the rent. Here is a lease without a period limited. The agreement is to let to Phillips for three lives at a certain rent, and subject to certain conditions as to ploughing, etc. Phillips might then perhaps have the right to name the lives. But as he neglected for so long a time to do so, it is sufficient ground for refusing a specific performance now. It may be said that this may be the subject of reasonable compensation. But, if law refuses that mode of adjustment where there is unreasonable delay, so ought equity. There is no evidence that Phillips tendered any life. And here we are to consider that, if the lives had been named in due time, not one of them might have been in existence at this time. 2dly, The contract is merely conditional, On completing certain repairs, etc. you shall have a lease. Yet there is no evidence that Phillips [70] did complete these repairs. That however might perhaps be the subject of compensation, but how could the chances of life be calculated?

Lord Redesdale. This was a bill for specific performance of a contract for a lease. And the decision of the Court below appears to be well founded, that under the particular circumstances of this case the contract should be performed, provided Philips the tenant had performed his part. The contract is to let for three lives at £140 rent, certain repairs being first made, in terms of a covenant to that effect.

It has been objected that this decree does not provide for putting the premises into a proper state of repair, and that, unless this were done, the contract was not to be performed. So far there is some ground of objection to the form of the decree. Another objection is, that there is no provision for the payment of the rent in arrear. It appears that Lord Kensington has brought actions for rent, and has recovered certain sums, and what he has so recovered must be brought into the account for rent: and I think the decree ought to have made some provision respecting the payment of rent.

I propose then to your Lordships to declare, that under the particular circumstances of this case, Phillips is entitled to a specific performance of the contract, and that the Court below be directed to inquire whether the repairs have been done; for certainly they ought to be done prior to the delivery of the lease: and that, if not already done, in case they should not be done within a reasonable time, to be limited by the Court, the bill be dismissed with his costs to the Appellant; for if Phillips [71] does not do that, he is not entitled to have the agreement performed: and in case it should appear that this has been already done, that it should be referred to the officer of the Court to inquire what rent was due, and what sums had been paid in respect of rent, and that the account should be carried on till the making of the lease; and that Phillips should pay what was due before he got his lease, so as to provide for that object.

Then the only further consideration is that of costs. No doubt the Court below was not desired to make these additions, and some costs ought to be allowed. The Respondent has been a good deal harassed, with the expenses of this suit, and with actions for use and occupation; and I propose, therefore, that £100 costs be allowed, which is less than the actual expence.

Lord Eldon (C.). I entirely agree in that proposition under the particular circumstances of this case. The purchase was made subject to the agreement between the tenant and the former owner. The person who was concerned for Lord Kensington in the purchase of the property, knew that there was such an agreement; and I think the law would justify me in saying, that, the tenant being in possession, the purchaser was bound to know the nature of his title, and the demand to which he was subject. Here however it was in fact known, as the estate was purchased subject to the agreement; and the equity of the case, therefore, undoubtedly is, that the agreement should have been made good at the time of the purchase: and though an objection [72] is made

that the naming the lives now renders the performance a different thing (which is the case) from what it would have been if the lives had been originally named, as the lives if named at first might have dropped by this time, yet it is clear that the parties were going on as if the one had been entitled to performance, and the other had been bound to perform: so that, not using the words in any offensive sense, there seems to have been a mutual default here. I have said these few words because I am anxious that this should not be considered or understood as a decision, that, under such an agreement as this, a party may lay by as long as he pleases, and then apply with effect for a specific performance. It is only on the particular circumstances of this case, taking it out of a general rule, that the decision is founded. But under these particular circumstances I think the decree, subject to the proposed variations, ought to be affirmed with £100 costs.

Decree affirmed accordingly, with alterations as above.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERT GEORGE STEEL,—*Appellant*: ROBERT STEEL, and Others,—*Respondents*
[June 18, 24, 1817].

[3 Scots R. R. 359.]

[Entail, with restrictions upon the heirs and members of tailzie. Held by the House of Lords, affirming a deci-[73]-sion of the Court of Session, that the institute was not included in the word members, as used in this particular entail; the word appearing to be used in the same sense as the word heirs, and the case being therefore within the principle of decision in the Duntreath case.] [Edmondstone v. Edmondstone, ii. Pat. App. 255.]

By a deed of entail, executed 6th March, 1790, George Steel, of Baldastard, gave, granted, and disposed, with and under the conditions, provisions, and declarations, prohibitive, irritant, and resolute clauses therein inserted, his estate of Baldastard to and in favour of himself in life-rent, for his life-rent use only, and to George Steel his nephew, and Harriet Applin his spouse, in conjunct fee and life-rent, and the heirs whatsoever of the body of the said George Steel in fee; whom failing, to his own nearest heirs and assignees whatsoever; whereby George Steel became disponee or institute under the deed. The procuratory of resignation was granted in terms of the above dispositive clause, but declared to be also "under the conditions, prohibitory, "irritant and resolute clauses, powers, and faculties after expressed, and appointed to "be inserted in the charters, saisines, etc. of the foresaid lands in all time coming, and "to be observed by all my heirs and substitutes above named." The deed then, after providing, *primo*, that, in case the estate should devolve on heirs female, the eldest daughter should succeed without division, proceeded with the prohibitory, irritant, and resolute clauses as follows:

"*Serundo*, That every person and heir, whether male or female, who shall succeed "to the foresaid [74] lands, etc. and their heirs and successors whatsoever, shall "immediately upon their succession, assume and take, and afterwards bear and carry, "the surname and arms of Steel of Baldastard: *Tertio*, That it shall not be leisome or "lawful to any of the said heirs or members of tailzie, or their descendants, who shall "succeed to his estate, to bruick or enjoy the same, or any part thereof, by any right or "title whatsoever, other than this present deed of entail: *Quarto*, That it shall not be "leisome or lawful to, or in the power of all or any of the said heirs, to alter, innovate, "or change the order of succession above laid down, nor yet to do any other act or deed,

“directly or indirectly, whereby the same may be any ways innovated or changed, nor
 “yet to grant tacks for any space longer than nineteen years, nor to accept of any tack-
 “duty under the present rental, at least not without a regular roup, publicly advertised
 “in the Edinburgh newspapers: *Quinto*, That it shall not be in the power of all or any
 “of the said heirs or members of tailzie, or their successors, to sell, dispone, wadset, or
 “impignorate all or any part of the lands or estate before-mentioned, nor to grant bonds
 “or infestments of annual rent or annuity furth of the same, or any other right,
 “redeemable or irredeemable, which may in any ways affect or burden said estate, or
 “any part thereof, or to contract debt, or commit treason, nor to do any other fact or
 “deed of omission or commission, either civil or criminal, whereby the lands and
 “estate above-disposed, or any part thereof, may anyways be burdened, incumbered,
 “apprised, [75] adjudged, affected, evicted, or become caduciary, escheat, or forfeited;
 “nor shall the lands and estate aforesaid, or any part thereof, be subject or liable to any
 “debts or deeds, civil or criminal, of all or any of the said heirs of tailzie and substi-
 “tution, or their heirs, contracted or done before or after their succession to the lands
 “and others above-mentioned; all which debts, acts, and deeds are hereby declared void,
 “in so far as they may affect all or any part of said estate: *Sexto*, That the said George
 “Steel and Harriet Applin, and the whole other heirs and members of tailzie above-
 “mentioned, and their heirs and successors who may happen to succeed to the said
 “lands and estate, shall be bound and obliged to pay to Ann Applin, presently residing
 “with me, daughter of William Applin, clerk in the East India House at London,
 “deceased, an yearly annuity of £100 sterling after my decease, at two terms in the
 “year, Whitsunday and Martinmas, by equal portions, beginning the first term’s
 “payment thereof at the first term of Whitsunday or Martinmas that shall happen after
 “my death and so furth thereafter during her life-time, with a fifth part more of
 “penalty, in case of faillie, and annual rent from each term’s payment, till payment of
 “the same; which annuity is hereby declared to be a real burden on the foresaid lands
 “and estate during the subsistence thereof: *Septimo*, That the whole heirs and members
 “of tailzie above-mentioned, and their heirs and successors who shall happen to succeed
 “to the said lands and estate, shall become bound, as by their acceptation [76] hereof
 “they become bound and obliged, to perform and observe every one of the different
 “clauses and articles before-mentioned: declaring always, as it is hereby expressly
 “provided and declared, That in case all or any of them shall contravene and do on the
 “contrary hereof, or of any of the conditions, provisions, and obligations before specified,
 “or omit and neglect the fulfilling and observing the same, such person or persons so
 “contravening, or omitting and neglecting, shall, immediately upon such contravention,
 “lose, tyne, and amit all right, title, and interest which they have or can pretend to by
 “this present deed, and the succession to the foresaid lands and others shall immediately
 “devolve upon and descend to the next heir-substitute, by this present right, in the
 “same manner, though descended of the contravener’s body, as if they had been
 “naturally dead, or not mentioned herein; and the person so succeeding upon such
 “contravention, may take up their titles to the foresaid lands and others, by declarator,
 “adjudication, or any other manner competent by law, without being liable to the
 “contravener’s debts or deeds, but subject always to the whole clauses, prohibitory,
 “irritant, and resolute above mentioned, etc.” In a subsequent part of the deed the
 “entailer authorized “George Steel and Harriet Applin, or any other member of this
 “entail,” to apply to the Court to have it recorded.

The entail was registered on the 11th March, 1790, and the entailer died on 24th June, 1790. On his death, George Steel and Harriet Applin the conjunct fiars made up titles to the estate; and on [77] the 24th Nov. 1791, the institute, with the consent of Harriet Applin his wife, executed a trust-deed, whereby he gave, granted, assigned, and disposed the estate to Robert Steel his brother (father of Respondent Robert Steel) and three other persons, upon trust, to sell the same, and dispose of the money in payment of his debts and for other purposes; and he, by the same deed, appointed the trustees guardians to his children. The institute George Steel died on the 15th March, 1792, and the trustees on 25th Sept. 1792, exposed the estate to public sale at the upset price of £7000. No offer was made at the auction; a circumstance ascribed by the Appellant (eldest son of the institute) to the generally received opinion that the title was defective, so that a public auction could afford no fair criterion of value. The estate was afterwards purchased, at the upset price, by private bargain, in trust for Robert Steel, one of

the trustees to sell, and a guardian to the Appellant, who was then a minor. Robert Steel possessed till his death, and then it devolved on his eldest son Robert Steel the Respondent, who, in 1806, sold it to Robert Clark, writer in Perth, who again sold it to George Greenlaw, writer to the signet.

Robert George Steel, the son of the institute, after all these sales had taken place, raised an action of declarator of irritancy and reduction against the eldest son of the original purchaser, and against the subsequent purchasers, and surviving trustees, concluding to have it found and declared that the institute and his wife, by executing the trust-deed, had for-[78]-feited all right to the estate, and that it now belonged to the pursuer; and concluding also for reduction of the trust-deed, and subsequent transmissions of the estate. Memorials on the merits having been ordered and given in, the Lord Ordinary pronounced an interlocutor, to which the Court adhered, finding that the prohibitions in the entail were not applicable to the institute or disponent, and assolvied the defenders, and decerned. From this judgment the pursuer appealed.

The question was, whether the word members, as used in the restrictive clauses of this entail, did or did not comprehend the institute.

For the Appellant, it was argued that in the Duntreath case the House of Lords had determined that the institute or disponent was not included in the term heir, which technically implied in law the person who takes by service, as distinguished from the institute or fiar who takes by the dispositive part of the deed. But here there was an essential distinction, because the prohibitory, irritant, and resolute clauses were laid, not merely on the heirs, but also on the members of tailzie; and in order to bring this case within the principle of the Duntreath case, it would be necessary to show that the term heir and member were in law co-extensive and synonymous. The contrary however was clear from the language of conveyancers and the best institutional writers, by whom the term member was used as including, or applying to, the institute. That it was so used by conveyancers appeared from the entails of Castlehill, recorded 29th June, 1711; Dumbarnie, 2d [79] July, 1712; Robroystown, 21st July, 1725; Glook, 27th January, 1731; Skelmorlie, 12th July, 1704; Tushielaw, 22d Jan. 1715; Lamington, 30th July, 1726, and others; and that it was so used by institutional writers appeared from the marginal note or title to the case of *Erskine v. Balfour Hay*, which is in these words "The first member of an entail being a disponent is not bound by the "restrictions laid on the heirs of entail," and this title being transcribed into the dictionary was sanctioned by the authority of Lord Kames. The authority of Sir G. Mackenzie was still more decisive: for he expressly laid down that the term member was a technical generic term, including the institute as well as the heir. His words were "The proprietor tailzies his lands in Scotland in favour of a certain person who "is called the institute or first member of tailzie; whom failing, to the rest that are "called substitutes. Institutes and substitutes being terms borrowed from the civil "law, and expressed by us in the first, second, and third member of tailzie." It had been contended that in this entail the word members was a redundancy, and that the entail meant no more by it than he did by the word heirs. But it was manifestly the entailor's intention that the institute should be bound by the fetters, and the question was whether, though the word heirs was not sufficient, the word members was not large enough to comprise the institute. It was true the word members was employed in a passage of the Duntreath entail; but the reason why it had not there the effect of extending the restriction to the institute was, that the only clause in which [80] the term occurred was one by which the efficacy of the entail could not be protected: the prohibitory irritant and resolute clauses being there directed solely against the heirs. But the present case was exactly the reverse; for though in some unimportant passages the word member was omitted, yet the prohibitory, irritant, and resolute clauses against selling, etc. applied to the members as well as heirs. The irritancy at the end of the fifth clause clearly applied not merely to the member of the sentence immediately preceding, but to the whole; and by the seventh or resolute clause the whole heirs and members were bound to observe every one of the clauses and articles before-mentioned, or to forfeit the right in case of contravention. It had been objected also that the restriction, in the third clause, was directed against "members, etc. "who should succeed, etc.," and that the institute was not a successor. But "succeed" applied to purchase as well as to descent, *ex gratia*, a singular successor. The only clause in which the restriction was directed against heirs only was that (the fourth)

against altering the order of succession, which was not here in question; and by the seventh clause the whole heirs and members were bound to observe every one of the clauses and articles before-mentioned. In *Syme v. Dixon*, 1809, it was held that a resolute clause extended to the institute under the words person or persons: and fetters might be raised (in a way quite different from implication) by reference, as in the cases of *Lawrie v. Spalding*, 1764, and others. In the sixth clause the institute was particularly named; but the use of the word "other" there [81] showed that the entailer (if the intention were to be considered) understood him to be included in the general expression "heirs and members." Here too the conditions and limitations came before the grant to the institute, and it was not so in the *Duntreath* case.

For the Respondents it was argued that the estate was sold twenty-five years ago by the institute without objection, under the opinion of the most eminent counsel. The principle was established in three cases before the *Duntreath* case, and in that case the Court of Session seemed to recede (*Ross* (case of), 1742. *Leslie* (case of), 1752. *Erskine v. Balfour Hay*, Feb. 14, 1758. *Duntreath* case, Dec. 24, 1769); but the House of Lords set it up again, and that was followed by seven cases decided on the same principle, which was now inflexible. The question was, not whether the entailer intended to include the institute, but whether he had expressly included him. The first point they insisted upon was that the word member strictly included the institute. Though that were made out, it would not be sufficient, for the word was not used in the irritant clause, and as this was a question between heirs, the strictest construction must be applied. Not one of the authorities mentioned, except the marginal note or title to the case of *Erskine v. Hay*, showed that the word members meant any thing further than the heirs of the entail. For the question still remained whether the institute was a member of entail. The entails referred to by them made the institute a member by including him expressly by name in the entail, or the same question might have arisen upon them as on this entail. Mackenzie spoke of the institute as the first member of entail, but that meant only that [82] he was the first member, if so nominated. That observation did not apply to the note in *Erskine v. Hay*; but in the case itself there was no such expression as first member of entail, and the note was no good authority. There was no substantial distinction between this and the *Duntreath* case, unless it could be made out that there was a substantial difference between the words "I dispoise, under condition, to A. B.," and "I dispoise to A. B. under condition." Then followed the cases of *Gordonstown*, *Wellwood*, *Marchioness of Titchfield*, *Miller v. Scott*, *Menzies v. Menzies*, etc. Besides, there were parts of this entail from which it appeared that the entailer understood the institute in a sense different from that of heirs or members, as in the passage where he speaks of heirs or members who shall succeed, etc.; for though in a general sense "succeed" may apply to a purchaser or institute, yet technically it means one who is to inherit. Besides, in this entail, the irritant clause (sect. 5) must be confined to the last member of this long sentence. Still there was reason to believe that the entailer considered the institute as included; but the rule was clear, plain, and positive, that he must be expressly mentioned.

Mr. Leach (in reply). The *Duntreath* case was clear law, but the judgment of the House of Lords there was that the institute was not bound under the word heir. (Lord Eldon, C. The difficulty with me is how, if the institute was not comprised under the word heir, he could be fettered at all.) True, but it was there held that heir meant a person taking [83] by service and not as dispoisee. But what is the meaning of the term member? That had not been the subject of judicial controversy, and the works of lawyers and conveyancers on this subject were the best possible source of information; and when the Respondents said that these were no authority, they left the word without any meaning at all. But from the works of institutional writers and conveyancers it appeared that the word member applied to the institute not in a popular sense, but in legal technical language. The institute then being included in the word members, the prohibitory, irritant, and resolute clauses applied to him as well as to the other members, and the cases cited on the other side had no application to the present case.

Mr. Leach and Mr. Brougham for the Appellants; Sir S. Romilly and Mr. Adam for the Respondent.

(June 27, 1817) Lord Eldon (C.). As to the particular circumstance here that the purchase was made in trust for one of the trustees to sell, that is not made a ground of

proceeding in this cause, and I give no opinion upon the case in that view of it : and then the question depends solely on the entail.

The Duntreath case has settled the point that entails are *strictissimi juris*, and that, whatever the intention of an entailer may be, fetters are not to be imposed by implication : and it is to be lamented that, after that point had been so settled in the Duntreath and other cases, a deed of entail, framed in 1790, should still have been made so as to leave [84] the matter in this situation, that, although a doubt can hardly be entertained that the entailer intended to include the institute or disponent, the intent has not been clearly and unequivocally expressed.

With respect to that case of Duntreath I have only two observations to make : 1st, that I was not a little startled at that decision ; and, 2dly, that the decision having been once made, it must not now be shaken. But it is a very remarkable circumstance that in the Entail Act, 1685, there is no word under which the institute can be fettered at all, unless under the words heirs of tailzie : and yet it has been decided that if you fetter the heir only, in the prohibitory, irritant, and resolute clauses ; if in any of these clauses the word heir only is mentioned, the institute is not included in the fetters of the entail : and the question now is, whether the institute is fettered as a member of tailzie.

Now after it has been so often decided that the institute or disponent cannot be fettered by implication, that principle having been once solemnly settled, it ought not now to be got rid of by nice, thin, and shadowy distinctions. Having regard then to that principle, and to what, as Lord Kenyon expressed it, is to be found within the four corners of the instrument : we are to consider whether, if the entailer intended to fetter the institute, he has clearly and unequivocally expressed that intention.

The interlocutor of the Lord Ordinary was this :—"The Lord Ordinary having considered the memorial for Robert George Steel, pursuer, with the counter-memorial for Robert Steel and other defenders, and whole particulars, finds, 1st, that, [85] in 1790, George Steel disposed his lands, of Baldastard, to and in favour of himself in life-rent, for his life-rent use only ; and to George Steel his nephew, and Harriet Applin his spouse, in conjunct fee and life-rent, etc. whereby the said George Steel, jun. became disponent or institute under the said deed : 2d, finds, that the procuratory of resignation was granted in terms agreeably to the above dispositive clause ; but declared to be also under the conditions, provisions, etc. which are appointed to be inserted in the charters, sasines, etc. of the foresaid lands, in all time coming, and to be observed by all my heirs and substitutes above named," etc.

There your Lordships observe, the words are—"all my heirs and substitutes," and though I do not say that an institute may not be included in the word "members" of tailzie ; yet it must be clear that the entailer so intended it ; and there he uses the words "heirs and substitutes," which has a tendency to show that he had in view, in this instrument, his heirs and substitutes only. "3dly, finds, that, by the fifth clause of the entail, it is declared, that it shall not be in the power of all or any of the said heirs, or members of tailzie, or other successors, to sell, disponent, wadset, etc. and the irritant clause, following this prohibitory clause, is directed against all debts, acts, and deeds of all or any of the said heirs of tailzie and substitution, or their heirs." Now it was very ably contended at the bar, and in a manner which might carry conviction to my mind, if I had not been obliged to guard it by the rules of law, and to give [86] a judicial opinion, that the entailer meant that these prohibitions should extend not merely to the substitutes, but also to the institute : but I cannot in this instance apply that construction ; for when the entailer says, "that it shall not be in the power of all or any of the said heirs or members of tailzie, etc." he seems to give the construction which he intended should be put upon these words, by the words which he uses in the previous part of the deed. "4thly, finds that in the sixth clause of the entail, where an annuity is granted to Ann Applin, the aforesaid George Steel, and Harriet Applin his spouse, is contradistinguished to the other heirs and members of tailzie." There George Steel is named in contradistinction to other heirs and members ; and as to the word other, that form of expression occurred and was argued upon in the Duntreath case : but the argument did not there prevail. "5thly, finds, that under these circumstances the expressions in the entail, of 'heirs or members,' and of 'heirs and members' of tailzie, cannot be held to apply to George Steel the disponent or institute ; but that the expressions 'heirs or members,'

“or ‘heirs and members,’ must be held as synonymous terms,” (that is, with heirs and substitutes mentioned in the first part of the deed): “and therefore, that in consequence of the principles acknowledged in the cases of Duntreath and Wellwood, and other decisions of the Court, the prohibition against selling or executing other deeds, contained in the foresaid entail, cannot be held as applicable to the said George Steel as “institute or disponee, etc.”

[87] Agreeing in these findings of the Lord Ordinary and the Court, I think the result under this instrument is such as they have found it to be; and it appears to me that other passages in this instrument lead to the same result. I propose therefore to find that, under the particular circumstances mentioned in the Lord Ordinary’s interlocutor, and adverting also to the whole of the circumstances as they appear in this instrument (I am anxious to have these words introduced), the word “members,” as used in this deed, does not include the institute—and that the judgment should be affirmed.

Judgment affirmed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

RITCHIE,—*Appellant*; MAGISTRATES OF CANONGATE, and Others,—*Respondents*
[June 27, 1817].

[The magistrates of Canongate, upon a certificate on oath by a physician, that the life of a debtor, confined in their gaol by the Appellant, was in imminent danger, permitted his liberation from the gaol to some house within the burgh, on his giving bonds with two sureties to conform to the conditions of the act of sederunt, 1671, by residing in some house within the burgh, and on no account going beyond the jurisdiction of the same, and returning to prison on recovery of his health, or when required, under penalty of paying the debt. A parti-[88]-cular house within the burgh was assigned for the residence of the debtor; but he never was there, and was frequently seen at his house in Surgeons’ Square and other places without the burgh, apparently in good health. The Appellant commenced an action against the magistrates for the debt, on the ground that the debtor’s residing out of the jurisdiction of the burgh of Canongate was an escape, which made the magistrates liable. The Court below decided in favour of the magistrates; and this decision was affirmed in the House of Lords, both on the general ground that the circumstances were not such as rendered the magistrates liable under the act of sederunt, and also upon certain specialties in this case.]

[The Lord Chancellor stating, that he would have had some difficulty in saying that the magistrates were not liable on the general ground, if the construction, as to this point, to be put on the act, had not been, in some measure, settled by the decisions in the cases of *Forbes v. Magistrates of Canongate*, and *Fordyce v. Magistrates of Aberdeen* in 1792.]

The material facts of this case were these:—on the 6th July, 1808, Wight was imprisoned for debt (£300) in the Canongate gaol by Ritchie, and after the lapse of the requisite time, Wight commenced a process of *cessio bonorum* against his creditors. This was opposed; and Wight, after being confined about five months, on the 13th Dec. 1808, presented a petition to the baillies of Canongate to be liberated under the act of sederunt, 1671, which was accompanied by a certificate from a physician, that the life of the prisoner was in imminent danger from the confinement. The physician having sworn to the truth of the certificate, copies of the petition and deposition were served upon Mr. Ritchie; and, no answer or objection having been made, the magistrates, on the 15th Dec. 1808, pronounced an [89] interlocutor of liberation in the usual form, viz.: “The

“baillies having considered this petition, with the deposition of the physician and execution of service, admit protestation against the aforesaid Mr. Alexander Ritchie, writer to the signet, for non-appearance, and answering the same. In respect of the physician's deposition, grant warrant to the keepers of the tolbooth of Canongate to permit the petitioner's liberation therefrom, to some house within the burgh, for the recovery of his health, pursuant to the act of sederunt, 14th June 1671, on his lodging with the clerk a bond to restrict and conform himself agreeably to the conditions and limitations of the said act, and to return to prison on the recovery of his health, or when required, under penalty of payment of the debt for which he is detained in prison, as also to indemnify and freely keep the burgh and magistrates, of all damages, costs, or expenses, whatever, anent the premises.”

Of the same date, a bond of caution was granted by Archibald Wight, and by John Craw, writer to the signet, and John M'Tavish, writer in Edinburgh, as his sureties. After reciting the aforesaid petition, the deposition of Dr. Mitchell, and the interlocutor of the magistrates, the bond proceeds thus: “We the said John Craw and John M'Tavish judicially enact, bind, and oblige ourselves and our heirs, jointly and severally, in the burgh court books of Canongate enacted, that the said Archibald Wight shall, during his temporary releasement for the recovery of his health, restrict and conform himself agreeably to the terms and con[90]ditions of the said act of sederunt, by residing in some house within the burgh, and on no account going beyond the jurisdiction of the same; and immediately on recovery of his health, or when required, shall return to and surrender himself prisoner within the said tolbooth, under the penalty of forfeiting and paying the debts for which he stands imprisoned and arrested, amounting to sums between two and three hundred pounds sterling money: as also to indemnify, free and harmless keep, the magistrates and burgh of Canongate of all costs, damages, or expenses whatsoever, in, by, through, or anent the premises: and the said Archibald Wight enacts and binds himself and his heirs, not only duly to perform the premises on his part, by a strict observance of the conditions and limitations of the said act of sederunt, and returning to prison upon reconvalescence, but also to relieve and freely keep his said sureties, and their foresaids, of all loss and damage whatever in the premises: and all and each of us do hereby subject ourselves to the jurisdiction of the Canongate, and nominate the court-house thereof as a domicile whereat either of us (being for the time resident without the said jurisdiction) may be legally summoned and charged to the performance of the premises or any part thereof.”

Wight was accordingly liberated without objection; and ten days after this liberation, viz. on 24th Dec. 1808, he was found entitled to the benefit of the process of *cessio honorum* by interlocutor of the Court of Session. On the 19th of January, [91] 1809, Mr. Ritchie applied by his agent, Mr. Grant, and obtained a copy of the bond of caution granted by Mr. Wight and his sureties to the magistrates, on his liberation. When this copy was furnished, the assistant clerk of the Court of Canongate, who is keeper of the prison records, desired Mr. Grant to say, “whether he wished Mr. Wight to be returned to prison;” and told him that a memorial was ready to be presented to counsel for advice on the part of the magistrates. Mr. Grant in reply desired that nothing might be done till he gave notice, and declared that he, on the other hand, would take no step without giving previous notice to the magistrates.

In Feb. 1809, Mr. Ritchie, having borrowed the caption from the Canongate gaol, reclaimed against the interlocutor in the process of *cessio honorum*; and ultimately the *cessio* was refused, both by the Court of Session and House of Lords; and on the 8th of May, 1809, intimated to the magistrates of Canongate, under the form of a protest, that they had suffered Wight to escape, and were liable in payment of the debt. On the 12th May, Wight surrendered himself, but was not then received, the gaoler not thinking that he had power to receive him without having the caption in his possession. On the 13th May, Mr. Ritchie returned the caption, and Wight was reincarcerated; but on the 24th May, 1809, he was again liberated in terms of the act of sederunt.

In the mean time Mr. Ritchie, on the 10th May, 1809, raised an action against the magistrates, setting forth in the summons, “that by an act of [92] sederunt of the Lords of Council and Session, dated 14th June 1671, it is enacted, that hereafter it shall not be lawful to the magistrates of burghs, upon any occasion whatsoever, with-

“out a warrant from His Majesty’s Privy Council, or the Lords of Session, to permit any person incarcerated in their tolbooth for debt, to go out of prison, except only in the case of parties sickness, and extreme danger of life, the same being always attested upon oath under the hand of a physician, chirurgeon, apothecary, or minister of the gospel in the place; which certificate shall be recorded in the town court books; and in that case, that the magistrates allowed the party only liberty to reside in some house within the town during the continuance of his sickness, they being always answerable that the party escape not, and upon his recovery to return to prison: and the Lords declare, that any magistrates of burghs, who shall contravene the premises, shall be liable in payment of the debt for which the rebel was incarcerated. That notwithstanding the said Archibald Wight was so incarcerated in manner foresaid, yet true it is and of verity, that George Rae, fishhook-maker, Canongate, and Joseph Brown, baker there, baillies of the said burgh thereof, the Right Honourable William Coulter, Lord Provost of the city of Edinburgh, Peter Hill, John Turnbull, Archibald Campbell younger, and Alexander Manners, Esq. baillies of the said burgh, suffered the said Archibald Wight to escape out of prison, without payment of the debt above specified, or a charge to set at liberty to that effect; and that [93] the said Archibald Wight has accordingly, for many months past, being going at liberty in perfect health, and residing without the jurisdiction of the burgh of Canongate; whereby the said magistrates, not only as magistrates, but also they themselves personally, and their heirs and representatives, and also their successors in office, are liable to the said Alexander Ritchie in payment of said debt, interest, and expenses.”

And concluding, “that it ought and should be found and declared by decret of the Lords of Council and Session that the said defenders (Respondents) suffered the said Archibald Wight to escape out of prison, at least permitted him to go out, without payment of the foresaid debt, or a charge to set at liberty, and the same being so found and declared, the said defenders not only as magistrates, but as individuals, and their successors in office, ought and should be decerned and ordained, conjunctly and severally, to make payment to the pursuer (Appellant) of the foresaid principal sums and interest since due and till payment, etc.”

The truth of the allegations in the summons being denied by the magistrates, the Lord Ordinary, on the 8th July, 1809, ordered the pursuer to give in a condescendence of the facts, which he averred and offered to prove in support of his action; and the following condescendence was accordingly given in.

“1st. That Archibald Wight, late starch manufacturer at Ormiston, was incarcerated at the instance of the pursuer (Appellant) within the tolbooth of [94] Canongate, in virtue of a legal diligence, for payment of the debt mentioned in the libel, upon the 6th July, 1808.

“2d. That the defenders (Respondents) allowed the said Archibald Wight, contrary to law, and to the act of sederunt relative to the custody of prisoners, to go out of gaol without payment of the debts for which he was so imprisoned, as is specifically stated in a protest against the defenders, produced in process and here referred to.

“3d. That the said Archibald Wight has accordingly for many months past been going at perfect liberty, residing without the jurisdiction of the burgh of Canongate, and has never slept one night in the house appointed for his residence within the jurisdiction of the Canongate.

“4th. That the said Archibald Wight has been seen at Portobello, Leith, and other places without the said jurisdiction, in apparently good health: and,

“5th. That upon many days the said Archibald Wight was out of the jurisdiction of the magistrates of Canongate; and particularly upon Saturday last, the 16th Dec. 1809, the said Archibald Wight was seen in the Parliament House attending at the bar of the inner house, instructing counsel at the advising of his process of *cessio bonorum*.”

The Lord Ordinary, on the 6th Feb. 1810, allowed both parties a proof, and witnesses were examined on the part of the pursuer.

Mrs. Greig, in whose house a room had been taken for Wight’s residence, deponed, “That she knows Ar-[95]-chibald Wight, and that there was a room taken for him by a woman from the Canongate jail, where he was then incarcerated, in the deponent’s house: that Wight never took possession, nor ever was in the room taken for him: that the room was kept open for him for five or six weeks: that about three weeks

“after the room was taken for him, the deponent went to the gaol, where she was informed he was to be that evening, and enquired of him whether or not he meant to keep the room? and why he did not take possession? to which Wight replied, that it was no business of hers whether he possessed it or not: that she would be paid her rent, and that gently: that she has never, to this day, received a sixpence for the rent: that she recollects of waiting again upon Wight at his own house in Surgeons’ Square, upon two different occasions: that upon the first of these she did not see Wight: that upon the second she went between nine and ten in the morning, and found him in bed: that she got nothing from him, and that she cannot specify at what time these meetings took place, but they were within six months subsequent to the time the room was taken for him.”

John Gow, painter, “recollects dining with Mr. Wight after his liberation, and, as he thinks, very early in the month of January, 1809: that Mr. Wight then received deponent at dinner in his own house, in Surgeons’ Square; but whether Mr. Wight at that time slept there or not the deponent cannot say: that, to the best of his recollection, he left Mr. Wight’s house between [96] eight and nine o’clock that evening, and that Mr. Wight was then in his own house: that in spring, 1809, he recollects of being in company with Mr. Wight in a house at the back of the Fountain Well: that this might be in the month of March, or thereabouts.”

Margaret Turnbull depones, “That she recollects seeing Wight in Surgeons’ Square after the time he was imprisoned, and that she cannot precisely say, whether it was before or after Christmas that she saw Mr. Wight as above, but that she saw him often.” And James and Walter Lockhart stated the same circumstance.

The Reverend Joseph Robertson depones, “That upon two occasions subsequent to Wight’s liberation on the bill of health, the deponent was in company with him at Morris’s tavern, opposite to or at the back of the Fountain Well: that upon the first of these occasions, the deponent left Wight in Morris’s: that upon the second they came away together, when Wight told the deponent that he was going home to his own house in Surgeons’ Square: and parted from him with that intention: that upon another occasion, also subsequent to Wight’s liberation, the deponent met him coming down a small close near the foot of the Cowgate, as from Surgeons’ Square: that he knows Wight to have been a second time incarcerated, but that these meetings all took place prior to his second incarceration: and that the two meetings at Morris’s happened very soon after his liberation upon the bill of health: that all these times Wight appeared to the deponent to be in good [97] health:” and that upon another occasion, the date of which he did not specify, he “met Wight at the foot of the Canongate, opposite to the Abbey, who then told him that he had been at Leith the preceding day: and that if the deponent would accompany him there at that time he would give him a bottle of wine: which invitation the deponent declined, and he did not see Wight at that time leave the Canongate.”

John McGregor depones, “That he recollects having met Wight in the High School Wynd, after a liberation which he obtained upon a bill of health, and prior to his second incarceration: that he met him several times in Surgeons’ Square, also all previous to his second incarceration: that he recollects of meeting Wight in company with Mr. Pattison, near St. Leonard’s Hill, also previous to the second incarceration.”

Hamilton Robertson depones to his recollection of meeting Wight “on two occasions after his liberation, once opposite the Fountain Well, and once upon the South Bridge, and of remarking that he was then beyond the bounds.” But adds, “that he cannot say how long this was after his liberation.”

It was not disputed that Surgeons’ Square, the Fountain Well, and South Bridge, were without the particular jurisdiction of the Canongate: but it was remarked that the evidence was defective as to dates, and that for any thing that appeared it might apply to the period between the date of the interlocutor in the *cessio*, and the reclamation.

The Magistrates gave in evidence the written pro-[98]-ceedings respecting Wight’s liberation, the protest against them, and several documents relative to Wight’s *cessio bonorum*, in order to show that Wight’s health, after his surrender, was such as rendered it necessary again to liberate him. The borrowing of the caption, by Ritchie, in February, and the other facts, as above stated, were proved by these writings, or were admitted by the Pursuer.

The cause having come before the Lords of the first division, the Court, on the 6th July, 1813, sustained the defences, assoilzied the defenders, and decerned, and found the pursuer liable in expenses; and, after advising a reclaiming petition with answers, they adhered to this interlocutor. From this judgment the pursuer appealed.

The Reasons of Appeal, given in the Appellant's case, were these:

All the authorities of the law of Scotland are agreed, that a debtor, liberated from prison on account of sickness, remains under the custody of the magistrates; and they are responsible for his custody during that time, and must have him guarded.

Lord Stair, in his *Institute of the Law of Scotland*, (B. 4, T. 47, S. 22), says, "It will not be a relevant defence, or reason of suspension, for magistrates suffering prisoners to escape, that they will yet take the party, albeit he be in as good condition as when he escaped, or that upon testificates of physicians they suffered the prisoner, for his health, to go out to take the air, or to go to a private house; albeit in either case there were two to guard him; for the Lords, by act of sederunt, June 14, 1671, [99] prohibited the magistrates, of Edinburgh to suffer prisoners to go out without particular warrant, or the magistrates of other burghs, not far distant, except in the imminency of death. And where such warrant is granted, the magistrates ought to choose the place of the prisoner's abode, that the same may be secure, and guards attending. Like as, they do declare, that if magistrates let prisoners go out upon any other pretence, although they restore them to prison, they shall be liable for the debt; for *squalor carceris* is an interest of the creditor to cause the debtor to satisfy or to discover his means, which magistrates ought not to prejudice them in," (Bankton, B. 1, S. 10, s. 198, 202. Erskine, B. 4, T. 3, s. 14).

That this was the law of Scotland before the act of sederunt, 1671, appears from various decisions of the Court before the act was passed.

The following cases are reported by Haddington and Gosford before the year 1671.—"A magistrate setting at liberty a party incarcerated for debt, will not evite payment thereof by re-entering him to prison; because the incarceration is a kind of punishment of his rebellion, and presumeable that thereby he might have been induced to make payment if he had not been eased by being set at liberty" (Dict. vol. 2, p. 169. Haddington, July 23, 1605. *Nisbet v. Drummond*).—"A person in prison being sick, and having the same attested under the hand of a doctor of medicine, was allowed to be transported to a house in the town, upon caution, to be a true prisoner there, and to return to prison upon recovery" (*Ibid.* Dec. 1609, Lord Applegirth supplicant).—"A magistrate suffering a prisoner for debt to lie out of the tolbooth, though he was in [100] *extremis agens*, and died, was found liable for the debt, seeing he ought to have had a warrant from the Lords for that effect. Here it was proved, that formerly they had suffered him to lie several nights out of prison" (Gosford, July 14, 1668. *Paplay v. Magistrates of Edinburgh*).

The act of sederunt therefore declared the law, and was intended to put magistrates of burghs against undue laxity in the custody of debtors.

This appears from the act of sederunt itself, and the decision of the Court in a case which occurred at that time, (*Town of Brechin v. Town of Dundee*, 14th July, 1671,) reported by Lord Stair and Lord Gosford, and thus abridged by Lord Kaimes: "Magistrates of a town being pursued for allowing their prisoner to go abroad frequently out of their tolbooth into the street and taverns, it was found no relevant defence that the prisoner was always guarded; for the Lords were of opinion, that magistrates of burghs have only power to let prisoners come out of their tolbooth, under a guard, in the extreme hazard of their life by sickness, and not without testificates by physicians, or skilled persons, upon oath, bearing the party's condition to require the same, and that without great hazard, they could not suffer delay to make application to the Council or Session."

The principles laid down by Lord Stair and other authorities on the law of Scotland, have been enforced by the Court in various cases: Fullarton and Kennedy against Magistrates of Ayr, 7th March, 1781; Shortbread against Magistrates of Annan, 8th June, 1790; Gray against Magistrates of Dumfries, 7th December, 1780; Purdie, etc. against [101] Magistrates of Montrose, 29th June, 1786; Wilson against Magistrates of Edinburgh, 8th July, 1788.

It is clear that, in point of fact, Wight was under no custody or restraint. He never went to the lodging appointed for him, and does not appear to have been within

the jurisdiction of the Canongate, unless when he visited the jail for his own amusement.

OBJECTION 1st.—That Wight's application on account of sickness was intimated to the Appellant; and he did not oppose it, or insist on a guard.

Answer 1st.—The custody of a debtor is with the Magistrates, not with the creditor; and as the Appellant gave no consent to his liberation, the responsibility remained with them.

Answer 2d.—The Magistrates transferred the debtor to a lodging within their jurisdiction; the creditor had therefore a right to expect that he should be confined in that lodging, and not allowed to go at large, and reside beyond the jurisdiction.

OBJECTION 2d.—That prisoners who are sick will not be benefited by being removed from prison, unless they are allowed to use exercise, and go freely about.

Answer 1st.—This doctrine (which is not that of the law of Scotland) would put it in the power of magistrates with the assistance of false certificates, to put an end to imprisonment for debt altogether under pretext of sickness.

Answer 2d.—Supposing, but not admitting, that in certain cases on cause specially shown, prisoners may be allowed to take exercise for recovery of their health, there must in that case be a guard, and the [102] debtor must not exceed the precise limits appointed for that purpose, and necessary for his health.

Answer 3d.—Wight did not take exercise for recovery of his health; but went to taverns, and resided in his own house, beyond the jurisdiction of the magistrates.

In the case for the Respondents, two cases, those of *Forbes v. Magistrates of Canongate* (Jan. 31, 1793, not reported) and *Fordyce*, were stated, upon which the Respondents particularly relied; and, as these cases were not reported, the statement is here transcribed at length, together with the observations on the cases cited for the Appellant.

Alexander Robertson, a prisoner for debt, in January, 1790, applied for liberation, producing merely a certificate, on soul and conscience, by Mr. James Arrot, surgeon, and Dr. Henry Cullen, physician, that, for the preservation of his life, he needed "free air," "in a situation where proper care and medicines might be administered." His petition was answered, and the prayer of it was objected to, on the grounds that by the act of sederunt, the certificate should "be upon oath," and that "the magistrates should only "give liberty to reside in some house within the town," and with a protest in writing that the creditors did not give any consent even under the conditions of the act of sederunt. These objections were renewed by written minute, when the caution found was intimated, the sufficiency of which likewise was not admitted. But the magistrates "in respect of the attestation, and the certificates of the petitioner's indisposition, "granted warrant to the keeper of the tolbooth of Canongate, to liberate the petitioner "in [103] terms of the act of sederunt." In this deliverance they made no special appointment for his residence within the burgh; and it proceeded upon no deposition or examination of any medical person in their presence, and in the face of written objections repeatedly urged upon these grounds. Robertson, however, chose his own lodgings, and changed these from one house to another in the Canongate; but, during nine months, only frequented these lodgings when he had company to entertain there; and was seen daily at the most public places of resort, such as the Parliament-house, Leith races, etc.; and went in perfect freedom to Gogar, Inveresk, Bonnington, and other places within a forenoon's ride of Edinburgh; and commonly spent his afternoons in drinking parties, and his nights out of the limits of the burgh of Canongate. While he was going on in this course, the pursuer raised his action against the magistrates, on the 17th of August, 1790. But this measure produced no step on the part of the magistrates, or change in the habits of Robertson. All this was fully proved. Confessedly too, during the whole nine months, at the close of which this course of dissipation terminated in his death, the magistrates had taken no charge of him whatever. But upon the other hand it was likewise admitted that the incarcerating creditors took as little; and did never apply for his reincarceration, or for any inquiry as to the state of his health.

Nevertheless it was strenuously contended by the pursuer in that case (as in the present) that the magistrates were bound to guard the prisoner constantly, and keep him in custody at some house [104] within the burgh, during the whole period of his liberation, and that their failure to do so amounted in law to an escape. No question

was ever more fully argued. The interlocutors of the Lord Ordinary assoilzieing the defenders were reclaimed against. On advising the first petition with answers, a condescendence was ordered. The deliverance on this condescendence with answers "repelled the objection as to the certificate not being upon oath, but allowed a proof." Both parties reclaimed, and the Court, upon these papers and minutes of debate, "ordained the parties to prepare interrogatories either by mutual agreement, or at the sight of the Court, to be transmitted to the clerks of the most considerable royal burghs in Scotland, respecting what has been the general practice thereof in liberating persons confined for civil debts, in terms of the act of sederunt, labouring under dangerous diseases, whether such liberations do proceed upon certificates granted by their medical attendants upon soul and conscience, or upon oath taken before the magistrates."

By agreement of the parties, these inquiries were extended to many other burghs, and were made by interrogatories in these terms :

"1. In liberating a prisoner confined for debt in the case of sickness, what evidence do you require of the state of his health? Send copies of the form of that certificate from your records."

"2. Do you assign the prisoner any particular place of residence during the continuance of his indisposition? Or upon what terms do you grant his liberation?"

[105] "3. Do you take any security or bond of caution from the prisoner at his liberation? What is the nature of the security? Transmit a copy thereof."

"4. Do you take any charge of, or make any inquiries after, the conduct and behaviour of the prisoner during his being out of prison? Do you place him under any guard?"

"5. Has any alteration taken place in the manner and form of certificates, or part of the procedure, of late years? If so, point the same out, and transmit copies of both old and new forms."

"6. Do you make any difference, or in any manner of way vary your proceeding, certificates, or bond, where there is opposition on the part of the creditor to the liberation of the debtor, or where there is no opposition?"

Answers were obtained on all of these points, and a proof at large was also taken. With respect to the form of the certificate, it appeared that the Court itself had recently before appointed liberation in the case of a Mr. Rankin from Falkirk, on a certificate of Mr. Alexander Wood, surgeon, upon soul and conscience, and that the practice of the burghs was various. As to residence, one half of the burgh answered that they "were not in use to fix any house for the residence of the debtor." In the other half it appeared that they sometimes pitched upon the doctor's own house, "whether within the burgh or not;" sometimes upon other houses within the burgh. All without a single exception answered, that it was "not the practice to keep any guard on, or take any charge of, the debtor after he was liberated, or to make any in-[106]-quiry into his conduct;" and no fewer than thirty cases were stated to illustrate the practice of the burgh of Canongate itself.

With respect again to the actual conduct and habits of Robertson, the proof fully established the whole particulars which have been already stated upon the case, which was fully pleaded in mutual memorials. The Court sustained the defences and assoilzied; and a long and able petition against this interlocutor was refused without answers.

The Respondents have had access to notes, from which it appears that the distinguished Judge then in the chair was of opinion that, "the form of certificate had in practice been various, and that it would be wrong in the Court to put too narrow and rigid a construction upon the act of sederunt; for the power of the Court to introduce such a regulation, and to throw the load off themselves upon the burghs, might be doubted." His Lordship indeed observed, that the chief "difficulty of the case arose from the circumstance that the agent of the creditors had required the certificate to be sworn to, yet this was overlooked;" but he also remarked that "the situation of magistrates is hard, and the act of sederunt ought to be re-considered. The oath required by the act of sederunt must for the most part be extra-judicial, *i.e. ex parte*, as intimation is not necessary, nor is any precise form of an oath prescribed. The practice of the Canongate is material. Prisoners for debt are oftenest confined there. Either a new act of sederunt should be made, laying down the forms more precisely, or a clause introduced in the pro-[107]-posed act of parliament for burgh reform, or

“new bankrupt act. The prisoner ought to be removed to a certain house named; and if country air is necessary, why may not a house in the country, as near to the burgh as possible, with a garden or certain other grounds, be fixed upon, with concurrence of the sheriff or substitute? And if caution cannot be found to the extent of the debt, let him and his friends at least pay or find security for indemnifying the magistrates of the expense of a guard.”

The Lord Justice Clerk (McQueen) inclined to think, that squalor is “out of the question, and confinement within the burgh not necessary; as the very purpose of the liberation is, that the prisoner may recover health. It is enough to find sufficient security to recommit him when required. The hardship on magistrates would be intolerable if otherwise.”

“Lord Henderland concurred, and likewise founded his opinion upon the circumstance that the creditors did not apply to recommit him.”

Lord Esgrave and a majority of the other Judges were of the same opinion; but Lords Dreghorn, Craig and Abercromby, thought that the magistrates had failed in their duty, “particularly as to the neglect of the oath, and not appointing a place of residence, and in taking no step after the summons was executed.” These, however, it will be recollected, are circumstances as to all of which the Respondents, in the present case, have acted most correctly.

The second and only other case which, so far as [108] the Respondents have discovered, was ever tried on this point, was that of Dr. Dingwall Fordyce against the Magistrates of Aberdeen, likewise decided in the year 1793 (not reported), after that of Forbes. It was reported to the whole Court by the Lord Justice Clerk, Ordinary, upon a proof and informations drawn by Lord Newton, and Lord Meadowbank, then at the bar. From the proof, it was established that Ross, a butcher in Aberdeen, the debtor, imprisoned in the tolbooth of that burgh, had been liberated without the consent of Dr. Fordyce, his incarcerating creditor; that he went home to his own house and trade during his liberation; and, upon one occasion, was at Inverurie in Banffshire, thirty-three miles from Aberdeen; upon another occasion had been at Overhills in the parish of Belhelvie, six miles from Aberdeen, and had staid two days there attending a cattle market; and that he was habitually and constantly, not only free from any guard or restraint, but living and employed as he would have been when at large in perfect health. Nevertheless, the Court, upon the same considerations which dictated the judgment in the previous case of Forbes, not only assolized the magistrates of Aberdeen, but found them entitled to expenses of process.

It will not be overlooked in this case, that the matter at present in question is the meaning of an act of sederunt, or rule of Court. The judgments in these two cases were precisely upon the same point which is at issue in the present case, and given in favour of the defenders, in cases stronger than the present for the pursuers. It was peculiarly the pro-[109]-vince of the Court of Session to interpret the meaning of their own rule of court. From the words of the act of sederunt, and from the practice which, it appears from these cases, had been had under it, it seems to be abundantly clear, that these cases were well decided.

But even if the decisions in these cases had been more doubtful, and had introduced a practice consonant to them, the Respondents conceive that the magistrates of royal burghs were entitled to look to these cases, as having given the true interpretation to the act of sederunt; and that if a pursuer, as in the present case, had sustained no injury whatever, the courts of law would have hesitated to give judgment in his favour in a case so highly penal, where magistrates had only acted in conformity to decided cases.

But the Respondents submit that it is not necessary for them to argue their case thus: they found upon no new practice introduced since these cases were decided, but upon the true sense and meaning of the act of sederunt, and the practice which all the burghs have had under it, downwards to this day.

On the other hand, the Appellant founded upon several cases, decided before the date of the act of sederunt: Nisbet v. Drummond, Haddington, 23d July, 1605; Lord Applegirth, supplicant, 1st Dec. 1609; and Poplay v. Magistrates of Edinburgh, 14th July, 1668. In the first of these cases it was found that, if a magistrate liberated a person confined for debt, it did not excuse the magistrate that the party re-entered himself to prison; this had no [110] relation to a case of liberation for ill-health. In

the second of them, a liberation was permitted on account of bad health, the party being ordered to be "transported to a house in the town, upon caution to be a prisoner there, and to return to prison upon recovery." In the third of them, the magistrates of Edinburgh appear to have been found liable for a debt, having released the debtor *in extremis*, who died out of gaol.

In these cases there is nothing hostile to the argument maintained by the Respondents; besides, the matter has since been regulated by the act of sederunt.

The Appellant founded also upon the before-mentioned case of the Town of Brechin v. Town of Dundee, which occasioned the making of the act of sederunt, particularly upon that part of the case which mentioned, "that magistrates of burghs have only power to let prisoners come out of their tolbooths under a guard, in the extreme hazard of their life by sickness." It is sufficient also upon this, to refer to the act of sederunt itself; when it regulates the mode of enlarging prisoners on a bill of health, it says nothing of the necessity of a guard.

The Appellant also founded upon a passage in Lord Stair's *Institute* on this point, in which his Lordship says (B. 4, tit. 47, § 22), that "the Lords, by act of sederunt, 14th June, 1761, prohibited the magistrates of Edinburgh to suffer prisoners to go out without particular warrant, or the magistrates of other burghs not far distant, except in the imminency of death: and where such warrant is granted, the [111] magistrates ought to choose the place of the prisoner's abode, that the same be secure, and guards attending." The Appellant stated that this doctrine of Lord Stair's was the more worthy of attention, as his Lordship had been appointed President of the Court of Session recently before this act of sederunt was made.

It is not necessary to say any thing of the authority which is due to the opinions of that most eminent person; but in several particulars he does not state this act of sederunt accurately: it says nothing as to the "magistrates of Edinburgh, or the magistrates of other burghs not far distant," to whom, in his Lordship's view, the act of sederunt had been confined; nor does it say any thing of the "place of the prisoner's abode being secure, and guards attending." It is sufficient as to this to say, that universal practice has explained the act in this respect.

The Appellant also referred to a *dictum* of Lord Bankton on this subject. His Lordship, treating of a prisoner liberated on a bill of health, says (B. 1, tit. 10, § 198): "And if he is returned to prison on his convalescence, the magistrates are free; but if he escape they are liable for the debt, because they ought to have had a guard upon him to prevent his escape: and this is settled by act of sederunt." It appears strange that the Appellant should have relied on this passage; in the first part of it, it is clear that his Lordship considered that there was no escape if the person liberated was "returned to prison on his convalescence." According to Lord Bankton's view, the magistrates in this case "are [112] free." It cannot be disputed that Wight was returned to prison even before his convalescence. With regard to the latter part of it, which mentions that "the magistrates ought to have had a guard upon him to prevent his escape," and that "this was settled by act of sederunt," it appears that his Lordship had implicitly followed Lord Stair as to this: it has already been noticed that the act is silent as to this point of a guard.

The Appellant also founded on a passage in Erskine, B. 4, tit. 3, § 14, on this subject, to which the Respondents implicitly subscribe.

The Appellant also referred to a case of Fullarton and Kennedy v. the Magistrates of Ayr (Fac. Coll. 7th March, 1781), where in a circumstantiated case (very indistinctly stated in the report) the magistrates had been found liable for the debt of a person liberated on a bill of health. It is impossible to discover upon what grounds that case was decided; but it seems clear that there was one good ground for decision against the magistrates, the not remanding the debtor to prison on his recovery. The facts of the present case were very different.

The Appellant also founded upon the cases of Gray v. the Magistrates of Dumfries, 7th Dec. 1780; Purdie and Co. v. the Magistrates of Montrose, 29th June, 1786; Wilson v. Magistrates of Edinburgh, 8th July, 1788; and Shortbread v. Magistrates of Annan, 8th June, 1790; but none of these have relation to the case of liberation on a bill of health, but to ordinary cases of imprisonment. As such they can have no application here.

The Appellant also founded upon certain cases [113] relating to liberation of

debtors on account of ill health, but of a class totally different from the present. These were the cases of Charles Stewart v. the Magistrates of Edinburgh, 20th Nov. 1799, and Macqueen v. the Magistrates of Dundee, in 1798 and 1799 (not reported). These cases relate to the question, what degree of freedom the magistrates of burghs can be compelled to allow to debtors liberated on account of ill health. It is obvious that this is a matter of extreme delicacy. In the first of these cases, the magistrates had sent a person liberated for ill health to the house of the captain of the town-guard, where he had a private room; in the other case Macqueen had been unable to obtain a *cessio bonorum*, and the magistrates of Dundee having reason to suspect that he meant to leave the country, though obliged to liberate him, guarded him in a private house. In neither case did the Court interfere to give explicit directions to the magistrates.

The Appellant also referred to the cases of Lindsay, 27th Nov. 1797; Donaldson, 6th Feb. 1798; and Mackenzie, 9th March, 1799, for the purpose of showing what species of imprisonment will entitle a person to obtain a *cessio bonorum*. The Respondents do not find it necessary to enter into these cases; they have been well decided, and have no relation to the present case.

The Appellant also urged, that the magistrates of Canongate themselves had put the same construction on the act of sederunt that the Appellant contended for; that they had assigned him a particular house to reside in; and that the bond of caution [114] stipulated that he should reside within the burgh, and not go out of the jurisdiction. These points, however, relate to the question what the magistrates are entitled to require from the prisoner before undertaking the responsibility of his liberation on a bill of health. But the question of their liability must be judged of upon other and very different grounds; upon the meaning of the act of sederunt, the usage had under it, and the authority of decided cases, all which the Respondents consider to be clearly with them.

Mr. Leach and Mr. Abercromby (for the Appellant.) The act was made in consequence of the case of the Town of Brechin v. the Town of Dundee, 1671, and was declaratory of what the law was, and intended to explain more distinctly the magistrates' duty, without doing away that distraint which was a means of recovering the debt. The Judges however thought themselves bound by the two cases of Forbes and Fordyce. The decision in the case of Forbes was most extraordinary, for the Court appeared to have thought that the magistrates might give any liberty to the prisoner, preventing only his escape out of the kingdom; and this was what they considered as the meaning of the act. In the present case two of the Judges were for the defendants, on the ground of the act of sederunt, independently of the authority of the cases; two of the Judges were for the pursuer, and one Judge (the President) was for the pursuer on the principle, but thought that as a Judge he was bound by the two cases. The President was astonished at the decision in the case [115] of Forbes, and, among his able observations on that case, asked why, if the magistrates had no more to do than to prevent the prisoner's escape out of the kingdom, they took him bound to reside within the burgh? If there were specialties in the case, the Judges had not decided upon them, but entirely on the general principle. The meaning of the act was clear, that the prisoner should reside within the burgh; and on the evidence it was an undoubted fact that Wight had never resided in the place appointed for him within the burgh. They gave no answer to that, but that the non-residence might have taken place during the six weeks from the time of the interlocutor in the *cessio*, and the time of the reclamation by the Appellant. This was a singular statement, because then the sureties were discharged; and how came they to call upon him to render himself to prison, and he to do so? But there was no necessity to reason from this inference, for Wight was not entitled to his discharge under the interlocutor till extract of the decret, which however never was executed, as it was opposed with success. It was true that the Appellant's agent was asked whether he wished that Wight should return to prison, and he answered, no: but did that excuse the manner in which Wight was at large out of prison? As to the promise to give notice, that was fulfilled by the protest; and as to the borrowing of the caption, the letters of caption were required in order to be stated in the action; and it was not necessary that the magistrates should have them for the purpose of bringing the prisoner back again, as he was bound under the obligation to return when [116] called upon. The true question was, whether it was the meaning of the act of sederunt that magistrates should be at liberty entirely to

release prisoners on the ground of ill health. The law on this subject was the same before as it was after the act of sederunt, but a laxity had taken place in practice, which occasioned that act. The same laxity however seemed to have taken place lately, which appeared to be sanctioned by the case of Forbes, a decision made in direct contradiction of the act. (Lord Eldon, C. When the Court made an act of sederunt, and then declared in these cases what the meaning of its own act was, was it for a gaoler to say, No, you don't mean that?) That was a circumstance which rendered it of great consequence to appeal this case.

Sir S. Romilly and Mr. Simpson (for the Respondents.) There were two views to be taken of this case: 1st, on the general principle; 2d, on the specialties. The Court below had decided on the general question, not thinking it necessary to advert to the specialties. If the judgment of this house should turn on the general principle, the present case was most important, not only with respect to the liberty of the subject and the responsibility of magistrates, but with regard to the state of the general law of the land. It was for their Lordships to determine, whether, where a point of law was laid down in a long train of decisions, and acted upon for a long course of years, it was not to be considered as settled till that point came to be decided by the House of Lords, leaving it uncertain [117] what the law was in England as well as in Scotland. *Fytche v. Bishop of London*, was the only case in which it had been said here that the law was unsettled till settled by the House of Lords. There was no case but that, in which this House had acted on such a principle; and the decision had been received with great surprise by the whole profession, and considered as a solitary instance not likely to occur again. (Lord Eldon, C. Lord Thurlow and Eyre, Ch. J. said they did not mean to contradict the decisions. The way in which they argued was, that there was no such train of decisions.) It was certainly too strong to say, that the decision of the House proceeded on that principle. But here the case of Forbes had been decided more than twenty years ago; and it had been acted upon uniformly till the year 1813, when it was questioned in this case. The Court too there decided upon its own act of sederunt. Then what their Lordships were called upon to say was, that the decisions of the Court below, interpreting their own act of sederunt, were of no authority till sanctioned by this House, which was to tell them the meaning of their own act. The long acquiescence in these decisions was equivalent to confirmation by this House; and the decision in the case of Forbes went further than the present, for it did not appear that there a certificate on oath was required, or that a house was appointed. They must argue that, if the prisoner was out of the jurisdiction one yard (that is, out of the precincts of the town, for the act did not there mention the word burgh, and town had no clear meaning, and was not a *nomen juris* in Scotland), the magistrates were [118] liable for the debt. Attending then to the terms of the act they had to consider what the situation of the magistrates would be, if their construction were to prevail. By the act, the magistrates were bound to enlarge the prisoner upon evidence that his life would be endangered by confinement. And it signified nothing that the sickness was produced by the intemperance of the prisoner himself, if, in fact, his life was in imminent danger. Besides, there was no evidence that the magistrates were in any way apprized of his being out of the burgh. It would be a most extraordinary law which would compel the magistrates to set the prisoner at liberty, and then to be answerable for his escape. The act was of a penal nature, and ought to be construed strictly. The magistrates were not to permit the prisoner "to go out of prison, except in case of the party's sickness and extreme danger of life, etc., and that in that case the magistrates "allow the party only liberty to reside in some house within the town." How could it be said that in this case the magistrates allowed him any other liberty? They did not allow it. A man did not allow what he had no notice of; and the magistrates had no notice of the debtor's non-compliance with the conditions till two days before the commencement of the action. All that the act required was mentioned in the bond. They did not contend for a guard; and Bankton said, that if the debtor returned to prison the magistrates were free, and here he did return. The Judges in the case of Forbes took the precaution to get answers from the magistrates of different burghs, as to what had been [119] done under the act; and the answers were that they had not been in the habit of employing any guard, or making any inquiry, whether the debtor complied with the conditions. It must therefore be the business of the creditor to observe him, and to give notice to the magistrates that he did not comply with the conditions of his

release, and had forfeited his title to the indulgence. The case of Fordyce followed, in which it was proved that the debtor was thirty-three miles from prison. The law therefore on the general principle had been settled, and it was no longer open to this House to question it. But secondly, though the opinion of the House should be against the Respondents on that point, yet the Appellant was precluded by his own acts from succeeding in his action. The debtor was at large on the 19th of January; and then the Appellant's agent, when asked whether he wished that Wight should be returned to prison, desired that nothing might be done till he gave notice, and promised that he would take no step without giving previous notice to the magistrates. All complaint was thus waived until notice; and immediately upon notice by the protest, Wight was called upon, and did surrender himself; and the goaler refused to take him, as the Appellant had taken away the original caption, which by the law of Scotland it was necessary for him to have as his authority for keeping the debtor in custody.

Acts of sederunt were now with great propriety limited to matters of judicial form, and any alteration in the law must be made in another manner. All that the creditor could require was that the [120] debtor should be confined on his convalescence, and that during his release he should reside near enough to be subject to the observation of the creditor. The bond and caution were the security of the magistrates, with which the creditor had nothing to do. They might relax if they chose. All the creditor could require was that the debtor should be imprisoned on convalescence. By the act, the residence must be limited to the town, which was a loose word, as town was not a *nomen juris* in Scotland. It was not the meaning that the debtor should not breathe the air of the country. If at any time of the day he was within the limits, the word reside was complied with. The sole criterion of escape was, the debtor's not returning on convalescence; and in no case were the magistrates liable if he did return on convalescence: the essential point was the sickness, and, in the cases cited on the other side, that circumstance was wanting. The precedents, since the time the act was made, were decidedly in favour of the Respondents. The evidence amounted only to this, that Wight was, during the period of his release on account of ill health, in some places out of the burgh, particularly in Surgeons' Square, which was however within the jurisdiction of the magistrates of Edinburgh, the superiors of the Canongate.

Mr. Leach (in reply.) Their Lordships were called upon to give a general construction to the act, but were not called upon to reverse a train of decisions. There was only one case to be reversed; and that was one where the Court, instead of looking at the act, sent to the gaolers to ascertain the practice. [121] The act said there must be a certificate on oath; that case decided that the magistrates might discharge without oath. The act said that the debtor must reside in a house within the burgh; that case decided that the magistrates might permit him to go any where. The object of the act was to remedy the mischief of too much indulgence. The magistrates were restrained from suffering persons in their custody to go out of prison except only in case of sickness and extreme danger of life; and if they granted this indulgence except with the conditions prescribed by the act, they were to pay the debt. This was the true principle: it was not an obligation upon, but a permission to the magistrates to grant this indulgence upon certain conditions; and what were the conditions? The magistrates were "to allow the party only liberty to reside in some house within the town during the "continuance of his sickness, they being always answerable that the party escape not." But now it was said that the magistrates might allow the party to go wherever he pleased within the kingdom. Where was the hardship that the magistrates should pay the debt, in case the party did not comply with the conditions? They might appoint a guard at the prisoner's expense, or take proper security, which they did in this instance. Even their own interlocutor showed that the debtor ought to be confined to a particular house within the burgh, and that if he was out of the burgh it was an escape. They did assign him a particular house within the burgh, but their keeper did not confine him there. He never was there. It was all mere mummery. It was impos-[122]-sible to look at the act without being convinced that this one judgment in 1793 was in direct contradiction to it. (Lord Eldon, C. Does it appear what the law of Scotland is on this subject, where there is a recapture before action brought?) The action commenced with the protest on the 10th May, 1809, and the debtor was not then in prison. They said indeed that they could not then imprison him, as the Appellant had taken the caption from them. But there was nothing in the objection: for the debtor

was taken bound to return when required ; and at any rate the caption, though in the hands of the Appellant, might be considered for this purpose as in the hands of the gaoler, and might have been actually in his possession if necessary. The debtor was never called upon to return till after the protest had commenced the action. With respect to the specialties they were not considered in the Court below as affecting the case. The debtor had been at large ten days before the interlocutor in the *cessio*, and the escape had been perfected before that judgment. But at any rate a debtor was not entitled to his discharge under it till the decret was extracted, and so it had been decided. Then they said that, after the 19th January, he was out by the Appellant's permission. But where was the permission ? The agent asked for a copy of the bond and caution, and found that the debtor was bound not to leave the jurisdiction. That being the case, the agent said he did not wish that Wight should be returned to prison, and promised to take no step without notice. That proceeded on the supposition that the conditions were to be complied with, and did not dis-[123]-charge the magistrates from the performance of their duty under the act of sederunt.

(July 27, 1817) Lord Eldon (C.). This is an appeal in which it is contended that the magistrates of Canongate are answerable to the Appellant for a debt due to him from a person of the name of Wight, in consequence of their having allowed Wight to escape out of their custody. I do not mean to state the circumstances of the case at length ; but the Court below thought that under the act of sederunt, 1671, the Respondents were not liable ; and yet I should have some difficulty upon that point, if the construction of the act had not been in some measure settled by prior decisions.

It appears that, before the act of sederunt was made, magistrates were, by law, bound to great diligence in the confinement of prisoners ; but by the humanity of some and the negligence of others, the practice became a good deal relaxed ; and in consequence of that circumstance this act of sederunt was made.

"The Lords considering, that albeit by the law magistrates of burghs are obliged to detain in sure ward and firmance persons incarcerate in their tolbooths for debt ; yet hitherto they have been in use to indulge prisoners to go abroad upon several occasions, and it being expedient that in time coming the foresaid liberty taken by magistrates of burghs should be restrained, and the law duly observed, therefore the said Lords do declare, that hereafter it shall not be lawful to the magistrates of burghs upon any occasion whatsoever, [124] without a warrant from his Majesty's Privy Council, or the Lords of Session, to permit any person incarcerate in their tolbooth for debt, to go out of prison, except only in the case of the party's sickness and extreme danger of life ; the same being always attested upon oath under the hand of a physician, chirurgeon, apothecary, or minister of the gospel in the place" (the persons holding these characters being therefore made judges of the fact) ; "which testificates shall be recorded in the town court books. And in that case, that the magistrates allow the party only liberty to reside in some house within the town, during the continuance of his sickness ; they being always answerable that the party escape not, and upon his recovery return to prison. And the Lords declare that any magistrates of burghs who shall contravene the premises, shall be liable in payment of the debt for which the rebel was incarcerate."

Your Lordships perceive, therefore, that, upon such an attestation of sickness and extreme danger of life, the magistrates are to allow the prisoner liberty to reside in some house within the town, during the continuance of sickness, they being answerable that he escape not.

Wight had been incarcerated in the Canongate gaol, and, in consequence of the certificate upon oath of a physician, that his life was in imminent danger, had been liberated on the security of himself and two sureties, that Wight, during his temporary releasement for the recovery of his health, would restrict and conform himself agreeably to the terms and conditions of the said act of sederunt, [125] by residing in some house within the burgh, and would on no account go beyond the jurisdiction of the same, and that he would return as soon as he recovered his health, or when required ; and the Appellant insists that the magistrates, in their proceedings with respect to Wight, contravened the provisions of the act of sederunt.

Setting aside the specialties of the case, it appears that Wight was liberated, and remained out of custody for about nine months ; and that during that period he had been spending his time sometimes in taverns, at other times in the gaol, and had been

sometimes seen out of the jurisdiction of the burgh. Now, whatever opinion might have been entertained as to the proper construction of this act if the point had come before us twenty-two or twenty-three years ago; yet now, when the construction to be put upon it has been settled, by the Court which made the act, in two previous decisions, and has been acquiesced in since 1793, it is rather too much to say that the judgment in this case ought to be reversed upon that ground. Your Lordships will observe that this is not an act of parliament, but an act of sederunt, an act of the Court itself; and, in 1793, two cases, depending on the construction of this act, came before the Court, *Forbes v. Magistrates of Canongate*, and *Fordyce v. Magistrates of Aberdeen*. And there the persons liberated paid as little attention to the obligations of their bonds as Wight is alleged to have done here: and yet, in these cases, the Court, construing its own act, held that the Magistrates were not liable; and when the magistrates have been so [126] instructed by the Court twenty-two or twenty-three years ago, and have acted on these instructions ever since, it seems to be too much now to depart from that principle. Upon that ground, therefore, and also upon the special circumstances of the case, independent of the general principle, it appears to me that the judgment in this case ought to be affirmed.

With respect to the special circumstances, the Appellant knew that Wight was out of prison; he allowed him to obtain his *cessio bonorum* without opposition; * he himself took away and kept the letters of caption for some time; and one strong fact is, that when the Appellant, by his solicitor, Mr. Nathaniel Grant, applied for a copy of the bond of caution granted by Wight and his sureties to the Magistrates of Canongate upon his enlargement under the act of sederunt, and when the keeper of the prison records desired Mr. Grant to say "whether he wished Mr. Wight to be returned to prison," Mr. Grant in reply "expressly desired that nothing might be done till he gave notice, and declared that he on the other hand would take no step without giving previous notice to the magistrates." And yet it appears that he raised this action before he gave the magistrates notice that he wished that Wight should be re-incarcerated.

But on the general principle it is impossible to place the magistrates of burghs in this state, that [127] they should be liable for an escape when acting in conformity to the construction which the Court put upon its own act; and if any alteration in the mode of proceeding in cases of this nature is necessary, it is more fitting that it should be made by act of parliament operating in future, than to say that those who were acting on the law as laid down twenty-two or twenty-three years ago by the Court of Session without question till this time, should be held liable for the debt as in case of an escape. It appears to me therefore that upon both grounds the judgment ought to be affirmed.

Judgment affirmed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MACDOWAL (ANDREW),—*Appellant*; BUCHAN (JOHN),—*Respondent*
[June 2, July 2, 1817].

[A person employed as a gentleman's general law agent in purchasing lands, making payments, in conveyancing and expediting titles, receives, in behalf of his employer, the rents of a small detached property let to inferior tenants, without any written commission as factor, and under circumstances which showed that it was not expected that he should compel payment of the rents by ultimate diligence, as in the case of a country factor, though

* Meaning, that no objection to the *cessio* was made till after Wight had been found entitled to it by interlocutor of 24th December, 1808. That interlocutor was afterwards reclaimed against, and the *cessio* was ultimately refused both by the Court of Session and House of Lords. (*Vid. ante*, vol. ii. p. 377.)

he charged factor's fees. A considerable arrear of rent having accrued due, and several of the tenants having become insolvent, the son of the original em[128]ployer calls upon the agent for payment of the amount of the rents lost during the time of his management by such insolvency; as he might have compelled payment by incarceration, sequestration, and a roup of effects, but neglected to do so. Held by the House of Lords, affirming a decision of the Court of Session, that, under the particular circumstances of the case, the agent was not liable for the rents so lost.]

[But the agent having been called upon by his employer for a general account, and not having kept his accounts in such a state that they could be readily produced, and the delay having been the immediate cause of bringing an action for an account, though the sum justly due was less than the sum claimed, and the decision below in favour of the agent was affirmed above, it was so affirmed without costs.]

John Macdowal, of Logan, in 1773, became proprietor of about 110 acres of land, called Bankton, in East Lothian. At that period these lands were occupied partly by old servants of Lord Bankton, from whom Mr. Macdowal had the property, who were considered as kindly tenants; and the remainder was let by Mr. Macdowal in small patches to labouring people, who earned their subsistence chiefly as carriers of the produce of the neighbouring potteries, salt-works, etc. to Edinburgh.

The Respondent, Mr. Buchan, was nearly related to Mr. John Macdowal, and was, for many years, employed by him as a conveyancer and cashier, in paying claims against him, in lending his money, in making purchases of land for him, and in expediting titles to his different estates. The general employment of the Respondent was of a more important nature than that of a country factor, and it [129] did not appear that he would have accepted of the factorship of Bankton, with the obligation to enforce payment of the rents from the small tenants by the use of ultimate diligence. But Bankton being at no great distance from Edinburgh, the tenants were directed to pay their rents to the Respondent; and he continued for several years to uplift such of the rents as could be obtained without a strict administration, which Mr. John Macdowal did not insist upon. The Respondent had no written commission as factor, and the property was managed chiefly by Mr. Cadell, a friend of Mr. John Macdowal, who resided in the neighbourhood. The Respondent, however, charged factor's fees.

From the description of tenants who occupied Bankton, and the lenient administration adopted in regard to them, the rents were not regularly paid; but the Respondent did not execute ultimate diligence against them by incarceration, sequestration, and a roup of effects; and when he settled accounts with Mr. John Macdowal, in 1781, the arrear of rents for Bankton amounted to £266. The same system of management was however persisted in by Mr. John Macdowal till 1785, when he determined to adopt a plan of strict administration with respect to this property, and granted a written commission or factory to Mr. Adam Bell, writer in Edinburgh, for that purpose.

It appeared from some correspondence between Mr. John Macdowal and Mr. Buchan, that the former imputed some blame to the latter for his loss of his Bankton rents, but that he at the same time considered these arrears, which it became impossible to recover, as lost to himself, and not as money [130] which the Respondent was bound to make good. The Respondent, for some time subsequent to 1785, continued to act as the agent of Mr. Macdowal in his general and more important concerns. Some years afterwards, Mr. John Macdowal called upon the Respondent for a general settlement of accounts. It appeared that the Respondent had not kept his accounts in such a way that they could be immediately prepared; and a considerable delay having taken place, Mr. John Macdowal, in 1794, raised an action against the Respondent, calling upon him to account "for the sums put into his hands and intronitted with by him."

The account was at length produced, and the admitted balance paid, after which the process fell asleep. In 1799, Mr. John Macdowal died; and his son, the Appellant, having intimated an intention to waken the action, the Respondent consented that it should be considered as awakened. Objections were then given in, and the accounts and objections were referred to an accountant, who made a report, to which no objection was made for two years by either party. The Appellant then again awakened the process, and gave in objections to the Report, the chief of which was, that the

Respondent had not been charged with such of the rents of Bankton as had been lost, during the time of his management of the Bankton property, by the insolvency of the tenants. The ground of this objection was, that the Respondent, having been factor on the property, had neglected to use the proper means to compel payment of the rents. The answer was, that the Respondent was factor only, in the sense of agent or receiver, and not in the sense of administrator; [131] that it was clear from all the circumstances of the case that the Appellant's father never intended, during the time of the Respondent's management, that the tenants who occupied Bankton should be subject to a strict administration, and was well aware, from the general nature of the Respondent's business, that he never would have undertaken the management on such terms; also, that the summons called for an account of such sums only as the Respondent had received. The following authorities were quoted with respect to the duties of factors.

Mr. Erskine says (Book iii. tit. 3, sect. 37), "In improper mandates, when salaries are either expressly given or presumed from circumstances, the mandatory, conformably to the general rule of the Roman law, *præstat culpam levem*, is obliged to act with the diligence and discretion which a man of prudence uses in his own affairs:—Macbridge, January 1, 1680; Gibson, July 18, 1710:—and consequently if, through any neglect in the execution of his commission, a damage shall arise, he is liable to make it up to his employer, or other person who suffers by it. New Coll. II. 2.—This is the case of factors, whether granted by the Court of Session on sequestrated estates, or by private persons with salaries annexed to them."

"A factor must either do diligence, or acquaint his constituent with his reasons for not doing it; and in a case where a factor gave such notice, and his constituent gave no orders for diligence, but left it to his discretion, the Lords found that the factor could not be held negligent in the event of the debtor's insolvency:—Kilk. February 8, 1740; Mac Caul *contra* Vareils." (Dict. vol. ii. p. 132. *Voce* Diligence.)

[132] "A merchant whose estate consisted of accounts and book debts to the value of £20,000, having left Balbedy tutor-testamentary, the Lords found this defence relevant to purge the tutor's negligence to pursue all the debtors in the account-books, viz. that he had employed the defunct's nephew, who had been his apprentice, to draw out a list of such of the debts as he thought were resting, which list was acquiesced in by the relict, who had a share of the free gear; and that he had pursued on the said list, and that many of the persons inserted therein as debtors had assuozied themselves by their oaths, which was the only means of probation then competent, whereby the pupil saved much unnecessary expense that would have been laid out in pursuing more of the debtors, whom there was no probability to overtake:—Pirias and Garpin against Balbedy, Feb. 1682."

The Court, by interlocutor, 26th June, 1812, repelled the objections to the Report, and, upon reclamation, adhered to that interlocutor. From that judgment Mr Macdowal appealed.

The case was heard in the House of Lords on the 2d June, 1817. Sir S. Romilly and Mr. Brougham for Appellant; Mr. Leach and Mr. Adam for Respondent.

(July 2, 1817.) Lord Eldon C. (after stating the case). The items are many in number, which rendered it necessary to take some time to examine them with attention. I have done so, and it is my humble advice that the judgment should be affirmed; for under the particular circumstances of the present case, [133] I think Buchan is not answerable as he would have been if he had been acting strictly in the character of factor, and had not on the contrary been acting on principles which displaced the obligation, that would attach upon him by the general principles of law as applicable to factors.

But it was insisted also that the judgment should be affirmed with costs. I cannot, however, concur in that; for though the just demands against Buchan were less than the claims insisted upon by the other party, yet from the relation in which he stood with respect to the father, he ought to have kept accurate accounts always ready to be produced; and the contest has, in some measure, arisen from his failure in that duty. I propose therefore that the judgment be affirmed, but without costs.

Judgment affirmed accordingly.

ENGLAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

DORAN,—*Plaintiff* (in Error); O'REILLY, and Others,—*Defendants* (in Error)
[March 7, 1817].

[Mews' Dig. viii. 538. S.C. in Courts below, 3 Price, 250; 7 Taun. 244.]

[Debt in K. B. and demand made in lawful money of Great Britain, founded upon a judgment of the supreme Court of Jamaica obtained in an action of assumpsit in that Court for so much Jamaica currency,—the declaration in K. B. stating that this amounted to so much in British money. Final judgment by default against the Defendant, and error brought in the Ex. Ch.; and there, the errors not being argued, judgment affirmed, and thereupon error in Dom. Proc. Held that [134] the demand being made in lawful money of Great Britain, and the Defendant below having suffered judgment to go against him by default, he had himself assessed the amount, and that there was no occasion to send the matter to a jury by writ of inquiry.]

[Count in the declaration for interest upon the forbearance of money on request: This is well laid, a promise to pay interest being implied.]

[Where errors are argued in Dom. Proc. without having been argued below, and judgment is affirmed, though the alleged errors may be well worthy of consideration, the House will make the plaintiff in error pay the costs of the proceedings there, as if the case had not been argued at all in that House.]

This was an action in debt commenced by the Defendants in error in the Court of King's Bench in 1815, to recover from the Plaintiff in error the sum of £4934 11s. of sterling British money, due to them upon and by virtue of a certain judgment obtained by them against the Plaintiff in error in the supreme Court of Judicature in and for the Island of Jamaica, before the chief Judge and his associates Judges of that Court, in a suit for non-performance of certain promises and undertakings made by the said Plaintiff in error to the Defendants in error. The first and second counts in the declaration in the action in K. B. at Westminster, founding on the foreign judgment, were as follows:

" London (to wit). Thomas O'Reilly, George Young, William Gordon, John
" Murphy, and James Farrell, who have survived James Westerman May, their late
" partner now deceased, complain of William Doran, who hath survived Daniel
" Robinson now deceased, being in the custody of the marshal of the Marshalsea of our
" Lord the now King, before the King himself, of a plea [135] that he the said
" William Doran render to them the said Thomas, George, William Gordon, John, and
" James Farrell, the sum of fifty-four thousand pounds of lawful money of Great
" Britain, which he the said William Doran owes to, and unjustly detains from them.
" For that whereas the said Thomas, George, William Gordon, John, James Farrell,
" and James Westerman, heretofore and in the life-time of the said James Westerman,
" to wit, the first Monday in October, in the fifty-first year of the reign of our sovereign
" Lord the now King, and in the year of our Lord one thousand eight hundred and
" eleven, in a certain court of our said Lord the King, called a supreme Court of Judi-
" cature, held for our said sovereign Lord the King, at the town of Saint Jago de
" la Vega, in the county of Middlesex, in and for the island of Jamaica, and within
" the jurisdiction of the said Court, to wit, at London, in the parish of Saint Mary-le-
" Bow, in the ward of Cheap, on the day and year aforesaid, before the Honourable
" John Lewis, Esquire, Chief Judge of the said Court, and his associates, then sitting
" Judges of the same Court, in a certain action in the said Court brought by the said
" Thomas, George, William Gordon, John, James Farrell, and James Westerman,

“ against the said William Doran, and the said Daniel Robinson, for the non-perform-
 “ ance of certain promises and undertakings by the said William Doran and Daniel,
 “ before that time made to the said Thomas, George, William Gordon, John, James
 “ Farrell, and James Westerman, by the consideration and judgment of the same Court
 “ recovered against the said William Doran and the [136] said Daniel, the sum of five
 “ thousand six hundred and seventy-five pounds two shillings and six pence current
 “ money of Jamaica aforesaid, which in and by the said Court was then and there
 “ adjudged to the said Thomas, George, William Gordon, John, James Farrell, and
 “ James Westerman, for their damages which they had sustained in that behalf, and
 “ also five pounds seven shillings of like current money for their costs and charges by
 “ them about their suit in that behalf expended to the said Thomas, George, William
 “ Gordon, John, James Farrell, and James Westerman, by the Court there of their own
 “ assent adjudged ; whereof the said William Doran and Daniel were convicted, which
 “ said judgment still remains in the said Court in full force, not in any way reversed,
 “ annulled, paid off, or satisfied, to wit, at London aforesaid, in the parish and ward
 “ aforesaid. And the said Thomas, George, William Gordon, John, and James Farrell,
 “ in fact say that neither the said Thomas, George, William Gordon, John, James
 “ Farrell, and James Westerman, or either of them, in the life-time of the said James
 “ Westerman, or the said Thomas, George, William Gordon, John, and James Farrell,
 “ or either of them, since the decease of the said James Westerman, have as yet
 “ obtained any execution or satisfaction of and upon the said judgment so recovered as
 “ aforesaid ; and that the said damages, costs and charges so recovered as aforesaid,
 “ amount in the whole to a large sum of money, to wit, to the sum of five thousand
 “ pounds of lawful money of Great Britain, to wit, at London aforesaid, in the parish
 “ and ward aforesaid. Whereby and by [137] reason of the said last mentioned sum
 “ of money still being and remaining wholly unpaid, an action hath accrued to the said
 “ Thomas, George, William Gordon, John, and James Farrell, to demand and have of
 “ and from the said William Doran the said last mentioned sum of five thousand
 “ pounds, parcel of the said sum above demanded. And whereas also the said Thomas,
 “ George, William Gordon, John, James Farrell, and James Westerman, heretofore and
 “ in the life-time of the said James Westerman, to wit, on the said first Monday in
 “ October, in the said fifty-first year of the reign of our said sovereign Lord the now
 “ King, and in the said year of our Lord one thousand eight hundred and eleven, in a
 “ certain Court of our said Lord the King, called a supreme Court of Judicature, held
 “ for our said sovereign Lord the King, at the said town of Saint Jago de la Vega, in the
 “ county of Middlesex, in and for the said island of Jamaica, and within the jurisdic-
 “ tion of the said Court, to wit, at London aforesaid, in the parish and ward aforesaid,
 “ the day and year last aforesaid, before the said Honourable John Lewis, Esquire,
 “ chief Judge of the said Court, and his associates then sitting Judges of the same
 “ Court, by the consideration and judgment of the same Court, recovered against the
 “ said William Doran, and the said Daniel, the sum of five thousand six hundred and
 “ seventy-five pounds two shillings and six-pence of like current money of the said
 “ island of Jamaica, which in and by the said Court was then and there adjudged to
 “ the said Thomas, George, William Gordon, John, James Farrell, [138] and James
 “ Westerman, for their damages which they had sustained by reason of the non-per-
 “ formance of a certain promise and assumption then lately made by the said William
 “ Doran, and Daniel, to the said Thomas, George, William Gordon, John, James
 “ Farrell, and James Westerman, and also five pounds seven shillings of like current
 “ money, for their costs and charges by them about their suit in that behalf expended
 “ to them the said Thomas, George, William Gordon, John, James Farrell, and James
 “ Westerman, by the Court there of their own assent adjudged, whereof the said
 “ William Doran, and Daniel were convicted, which said last mentioned judgment still
 “ remains in the said Court in full force, not in any way reversed, annulled, paid off,
 “ or satisfied, to wit, at London aforesaid, in the parish and ward aforesaid ; and the said
 “ Thomas, George, William Gordon, John, and James Farrell, in fact, further say, that
 “ neither the said Thomas, George, William Gordon, John, James Farrell, and James
 “ Westerman, or either of them, in the life-time of the said James Westerman, or the said
 “ Thomas, George, William Gordon, John, and James Farrell, or either of them, since
 “ the decease of the said James Westerman, have as yet obtained any execution or satis-
 “ faction of and upon the said last mentioned judgment so recovered as last aforesaid, and

“ that the said last mentioned damages, costs, and charges, so recovered as last aforesaid, amount in the whole to a large sum of money, to wit, to the sum of five thousand pounds of like lawful money, to wit, at London aforesaid, in the parish and ward aforesaid, where-[139]-by and by reason of the said last mentioned sum of five thousand pounds still being and remaining wholly unpaid, an action hath accrued to the said Thomas, George, William Gordon, John, and James Farrell, to demand and have of and from the said William Doran the said last mentioned sum of five thousand pounds further parcel of the said sum above demanded.”

Then followed counts for goods sold and delivered, money borrowed, money paid, money had and received, interest, and on an account stated. The count for interest was in these terms: “ And whereas also the said William Doran, afterwards, and after the death of the said James Westerman, to wit, on the first day of October in the year of our Lord one thousand eight hundred and fifteen, at London aforesaid, in the parish and ward aforesaid, was indebted to the said Thomas, George, William Gordon, John, and James Farrell, in the further sum of two thousand pounds, of like lawful money for money before that time and then due and payable from the said William Doran to the said Thomas, George, William Gordon, John, and James Farrell, for interest upon and for the forbearance of divers other large sums of money, before then due and owing from the said William Doran and Daniel, during the life of the said Daniel, and the said William Doran, since the death of the said Daniel, to the said Thomas, George, William Gordon, John, James Farrell, and James Westerman, in the life-time of the said James Westerman, and to the said Thomas, George, William Gordon, John, and James Farrell, since the death of the said James Westerman-[140]-man, and by the said Thomas, George, William Gordon, John, James Farrell, and James Westerman, in the life-time of the said James Westerman, and since his death, by the said Thomas, George, William Gordon, John, and James Farrell, forborne to the said William Doran and the said Daniel in his life-time, and to the said William Doran, since the death of the said Daniel, at their special instance and request for divers long spaces of time, before then elapsed, and to be paid by the said William Doran, to the said Thomas, George, William Gordon, John, and James Farrell, when he the said William Doran should be thereunto afterwards requested; whereby, and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said Thomas, George, William Gordon, John, and James Farrell, to demand and have of and from the said William Doran the said last mentioned sum of money, further parcel of the said sum above demanded.”

The Plaintiff in error having suffered judgment to go against him by default, final judgment was signed on the 11th January, 1816, for the debt demanded, and £22 damages and costs. Upon this a writ of error was brought in the Exchequer Chamber, where, general errors only having been assigned and not argued, the judgment was affirmed on the 13th November, 1816. The Plaintiff in error then brought a writ of error returnable before the Lords in Parliament, which, with a transcript of the record, was brought up on 28th January, 1817; and the Plaintiff assigned the general error, and a special error not insisted upon. The House took the cause [141] for hearing out of its course, as it usually does where it is apprehended that the writ of error is brought merely for delay, and the agents having been ordered to attend, and asked whether they were ready to proceed to hearing, and it having been stated on the part of the Plaintiff, that he had additional errors to assign, and a short day having been appointed for assigning the errors, the hearing was fixed for the 7th March, 1817. The errors, as stated in the case for the Plaintiff in error signed by Mr. Richardson, were these:

“ The Plaintiff in error humbly conceives that the declaration and judgment in this case will appear erroneous to your Lordships.

“ He contends that the action of assumpsit is in its form and nature an action of tort, though founded upon contract—and that damages given for a tortious breach of promise cannot be converted into a debt by the judgment of any court of foreign judicature; that the judgment in an action of assumpsit given by such court of foreign judicature, is indeed good *primâ facie* evidence of the breach of the promises and undertakings therein complained of, but that it is no evidence of any debt subsisting between the parties to such action, nor of the amount of the same.

"Also that debt cannot be maintained for the value of foreign money, or for other demand, which in its nature is wholly uncertain in amount, and can only be ascertained by the finding of a jury.

"Also, that if debt can be maintained for a demand which in its nature is wholly uncertain in its amount, judgment ought not to be entered up [142] for such amount as the Plaintiff may choose to suggest, nor ought it to be final in the first instance, but a writ of inquiry ought previously to issue to ascertain the amount, and judgment should be entered up accordingly.

"Also, that by the law of the land interest is not demandable on the forbearance of money though forborne on request, without a special contract for the same; and that such contract, or the grounds from which it may be implied, ought to appear upon the face of the declaration.

"Also, that the manner in which money becomes due and owing ought to appear on the face of the declaration, that the Court may be enabled to judge whether interest be demandable for the forbearance of the same; and that it is too general and altogether uncertain to state that money is due and payable for interest upon, and for the forbearance of money due and owing, without stating on what account."

Mr. Richardson (for Plaintiff in error). One of the errors, and it goes to the whole record, is, that a general judgment ought not to have been entered up till a writ of inquiry had been issued to ascertain the amount of the sum due. The proceedings in the Courts, in actions of debt, have varied. Formerly it was necessary to state the contract with precision, and the exact sum; and if there was a variance between the sum laid in the declaration and the sum really due, the Plaintiff failed altogether. There was no occasion at that time for the inquiry. But ever since the case of *Aylett v. Lowe*, 2 Blac. R. 1221, any sum may be recovered not [143] exceeding the sum claimed, and so it was held also in *McQuillin v. Cox*, 1 H. B. 249. It was then no longer necessary to state the exact sum, and the amount became as indefinite in debt as in assumpsit. This alteration, making the sum really due as indefinite in debt as in assumpsit, was attended however with this inconvenience, that the amount must be assessed at the trial; and in a judgment by default, or upon demurrer, an inquiry is necessary. There are cases where a writ of inquiry has been directed in debt; *Blackmore v. Fleming*, 7 T. R. 446; and there is no decision that it is unnecessary (*Id.* also *Emery v. Fell*, 2 T. R. 28.—*Bonafous v. Walker*, *ib.* 126.—*Lord v. Houston*, 11 East, 62).

Another objection is, that the cause of action in the foreign Court is assumpsit, and the judgment of a foreign Court in such an action is not a sufficient ground for an action of debt in this country. In *Walker v. Witter*, 1 Doug. 1; the ground of action in the foreign Court was itself debt.

Another objection is, that the recovery is in foreign money, and the Court cannot, without evidence, know the amount in British money. There is a difference in the practice of the Courts with respect to foreign and British money, and foreign and inland bills of exchange. With respect to British money and inland bills of exchange, where the amount is simply a matter of computation, the Court refers it to the Master, to calculate and ascertain the amount of the sum due. But with respect to foreign bills and foreign money the Courts direct a writ of inquiry: *Maunsell v. Massareene* (Lord), 5 T. R. 87. Such was the course adopted in early times also, in regard to foreign money, as appears from *Bagshaw v. Playn*, Cro. El. 536; where it was held to be error that no inquiry was executed, [144] as the value of Flemish money was not known to the Court. (Lord Eldon, C. Did the Plaintiff there claim in Flemish money?) He claimed £47 Flemish money, amounting to £40 English. (Lord Eldon, C. What did the Defendant plead?) He pleaded *plene administravit*, which is not to the present purpose; but the judgment was set aside. (Lord Eldon, C. The Court will ascertain the amount by its own officer now.) No, not in questions as to foreign money and foreign bills of exchange; nor in any case except where the amount is a matter of mere calculation. In *Cunning v. Munro*, 5 T. R. 87, a case of proclamation money of an American State, the Court would not send it to the Master to fix the value of foreign money, but directed an inquiry; and thus the Court acted in *Maunsell v. Massareene*, in the same page, so that the distinction was supported by the modern as well as the ancient cases. In *Rands v. Peck*, Cro. Jac. 617, which was an action of debt, for that the Defendant owed to the Plaintiff 600 guilders *monete Poloniæ*, and that the value

was £220 *legalis moneta Angliæ*, etc., the Jury found that the value was £220 English, the value not being otherwise known to the Judges.

Then with respect to the count for interest, no contract is shown ; and debt does not lie for interest on the forbearance of money on request. It must be founded on contract in some way or other, and no such thing appears here. In *Seaman v. Dee*, 1 Vent. 198, it was decided on the authority of Lord Hale, that interest could not be recovered in debt, unless upon contract, and that the proceedings must be by assumpsit and damages. I am [145] aware that some doubt has been thrown on that doctrine, by what Lord Kenyon said in *Herries v. Jameson*, 5 T. R. 553 ; but it was not overruled in that case, nor was it necessary there that it should be overruled.

The result of the whole then is, that in actions of debt, the amount of the sum really due is as indefinite as in assumpsit ; that there exists the same reason for directing an inquiry in debt as in assumpsit ; that the Court ascertains the amount by reference to the Master only in cases where it is a matter of mere computation ; that all the reasons which apply to cases of tort and assumpsit apply to cases of debt, and that the same inquiry ought to have been directed, at least with respect to the foreign money counts, as to which the proposition is supported, not merely by the reason of the thing, but also by decided cases.

Mr. Littledale (for Defendant in error). There is no case in which a writ of inquiry has been directed in an action of debt, where the demand has been in lawful money of Great Britain ; and Mr. Richardson himself in *Taylor v. Capper*, 14 East. 442, admitted that he had not been able to find any instance of it. He relied on two cases, *Bagshaw v. Playn*, Cro. El. 536, and *Rands v. Peck*, Cro. Jac. 617. But in the former the demand was in Flemish money, and as the judgment must be for Flemish money, it was thought that a writ of inquiry should have been directed to ascertain the value. But even in actions for foreign money it has not been thought necessary always to direct an inquiry. In a case (*Davidgs v. Wychalls*), cited in *Bagshaw v. Playn*, where debt was brought [146] for £20 English, and the Plaintiff declared on £22 Portuguese, value £20 English, the judgment for £20 was held right without an inquiry. As to the case of *Rands v. Peck*, in Cro. Jac. 617, the demand there was in Polish money ; and as the judgment must be for Polish money, the value was found by a jury. In *Draper v. Rastall*, Cro. Jac. 88, referred to in *Rands v. Peck*, the action was for £39, for that the Plaintiff had sold to the Defendant three northern clothes for £66 *moneta Flandriæ*, amounting, *tempore emptiõis*, to £39 *Angliæ* ; and, on motion in arrest of judgment, for that the demand ought to have been for £66 Flemish, according to the contract, it was held that the demand in English money was well made, and, if made contrary to the truth, the Defendant might have pleaded in abatement ; and that, as it was admitted on the record that so much was due in British money, no further inquiry was necessary. So that the distinction is whether the demand is or is not made in British money ; and the demand, in these cases, may be well made in British money ; for, even in the common action of assumpsit, *Harrington v. Macmorris*, 5 Taunt. 228, it was held to be no variance that the allegation was a loan in British money, and the proof a loan in foreign.

What then is the principle with respect to the directing of writs of inquiry ? In 5 Com. Dig. Debt, (A.) 8, it is stated that Debt may be brought for a *quantum meruit* with an allegation that the worth is so much : *Vaux v. Mainwarring*, Fort. 197 ; *Bloome v. Wilson*, Jones (Sir T.), 184. So that it has been the practice to bring debt on a *quantum meruit* with an allegation that the worth [147] was so much ; and how is it that it was not thought of to direct a writ of inquiry for a jury to ascertain how much was due ? The truth is, that a writ of that description is not necessarily directed in any case. It is merely an inquest of office to inform the conscience of the Court, for the judges themselves may assess the damages : 1 Roll. Abr. 571–573, *et ibi cit.* *Ley v. Folliot* (Lord) ; *Brookes' Abr. Damages*, pl. 54–194. There are an infinite variety of cases in the old books where this language, that the justices may assess the damages, is held ; and it has been also held in more modern cases, as in *Holdipp v. Otway*, 2 Saund. 106. I am aware that the case is not directly in point, and I mention it only with reference to the language. And, even so late as the early part of his present Majesty's reign, *Wilmot*, Ch. J. said in *Bruce v. Rawlins*, 3 Wils. 61, 62, that the judges might assess the damages. That is the principle on which the Court refers it to the Master to ascertain the sum due, because the judges may take the matter out of the hands of a

jury when they please. Mr. Richardson says that they direct an inquiry to ascertain the value of foreign money. They usually do, but they may refer that too to the Master if they think proper. The reason why the Court directed an inquiry in the case of *Cuming v. Monro*, 5 T. R. 87, was, that the proclamation money being at one time of no value at all, the Court wished to ascertain its value at another time. But all this goes to the discretion of the Court; and the doctrine, that the value of foreign money ought always to be ascertained by a jury, is contrary to the whole current of authority.

[148] As to the objection that debt cannot be maintained on a foreign judgment in *assumpsit*, the case of *Walker v. Witter*, 1 Doug. 1, is an authority for me on that point. But then it was said, the action in the foreign Court there was itself debt. What does it signify whether it was debt or *assumpsit*? The forms of the declarations are nearly the same, and Buller, J. says, in *Walker v. Witter*, that the old cases show that wherever *indebitatus assumpsit* is maintainable, debt is also: and he quotes *Slade's case*, Co. R. (vol. 2. p. 93, Oct. Ed.). Neither is it necessary that the consideration of the foreign judgment should appear, though it does appear upon our declaration (*Vid. Plaistow v. Van Uxem*, 1 Doug. 5, n.).

With respect to the count for interest, Mr. Richardson says, that a special contract ought to have been averred. But that is not necessary. It may be expressed or implied, and the practice is to state the matter as it really is, and it is sufficient if it appears that there is a contract. The forbearance of money is considered in the usury acts as a contract for interest, and the forbearance creates a contract. Hale's doctrine in *Seaman v. Dee*, 1 Vent. 198, would go the length of establishing that interest could never be recovered as such, but only by way of damages: and Lord Kenyon says, in *Herries v. Jameson*, 5 T. R. 553, that the reasons given for the doctrine go rather the other way.

The judgment therefore, I submit, ought to be affirmed on the whole declaration, or at least on some of the counts.

Mr. Richardson (in reply). I do not deny that debt may be maintained for any sum that may be liquidated; and, if the Plaintiff overvalues, the [149] Jury may mitigate. Mr. Littledale says, that in some cases of foreign money the Court did not think it necessary to direct a writ of inquiry; but there was an averment that so much was due in British money. The ground therefore was, that the Court knew the value, and did not want the assistance of a Jury. It is clear that a writ of inquiry may be directed in an action of debt, and it has been done in modern cases, as in *Blackmore v. Flemyng*, 7 T. R. 446; and it has been held that it may be done in action of debt on specialty, in order to ascertain the interest, so that there is express authority that the writ may issue in actions of debt. As to the case of *Draper v. Rastall*, Cro. Jac. 88, a Jury intervened there, and the sum due was found in a formal way. But Mr. Littledale finds *dicta* in the ancient books that the Judges may themselves assess the damages. But that is only in cases of *mayhem*, and there the Court may fix the damages, *super visum corporis*. That however rests on a different principle from that upon which other cases depend. There are *dicta* also confining the discretion of the Judges to matters of mere computation. The observation of Wilmot, Ch. J. was a mere *obiter dictum*. As to the question of interest, it is true that the usury act (12 Anne, st. 2, cap. 16) states the forbearance of money as a consideration for interest: but it is not called a contract, and there is no case where it has been so called. It does not appear that the law always supposes that the forbearance of money due imports a contract to pay interest: and the authority of Hale in *Seaman v. Dee*, 1 Vent. 198, has not been over-ruled.

[150] March 7, 1817. Lord Eldon (C.). Although errors are brought before your Lordships, without having been argued in the courts below, if there is error the Plaintiff in error is entitled to your Lordships' judgment. At the same time I repeat, not however stating it as at all reflecting upon either of the two most learned persons who have argued the cause here, that this House always takes that circumstance into consideration, not so as to influence its judgment with respect to the case itself, but with reference to our practice as to costs. For if a party suffers his cause to pass without argument through the Courts below—and the question here was well worthy of their attention—and assigns his errors only two or three days before the cause is brought to hearing in this House, he must, by our practice, pay the costs of the proceedings here.

With respect to the case itself my opinion is, that, ably as the errors have been argued on the part of the Plaintiff in error, they have not been established. I think

the demand was made in lawful money of Great Britain, and that the defendant below himself assessed the amount, and there was no occasion to send the matter to a jury. And as to the point of interest, I think that sufficiently laid in the declaration to imply a promise to pay, and that, on that point also the Defendant in error is entitled to your Lordships' judgment. I propose, therefore, that we should give judgment, as if the case had not been argued in this House at all, that is, to give the Defendant in error his costs of the proceedings here.

Judgment affirmed, with £140 costs.

[151] Judgment at the same time affirmed in another cause (not argued) of the same nature, relating to the same subject, and between the same parties, with £140 costs.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

BAYNE,—*Appellant* ; FERGUSON AND KYD,—*Respondents*

[March 24, 26, June 23, 1817].

[B., F., and K. become co-partners in a joint adventure in land. A third person (Lord L.), for whom K. is factor, is anxious to purchase a part of the co-partnership land called Hilton, at £19,441, and applies to certain monied relations to furnish him with the means of effecting the purchase. B. is aware of the anxiety of Lord L. to purchase Hilton, but K. does not communicate to B. the steps taken by Lord L. with that view. F. (K. concurring) persuades B. to agree to offer the lot to Lord L. at £19,000, in order to bring him to a decision ; and B. and F. offer it at that price to K., who accepts it for himself without any objection made by his co-partners, B. however, understanding the offer and acceptance to be for Lord L. Lord L. does not accept the offer at that time, and K. sells the lot at £19,000 to F. without any communication with B.—F. sells pieces of the lot to M. and Lord L., without any interference by B., and then sells the remainder to Lord L. at a price which makes up for the whole lot the sum of £22,311, instead of £19,000. B. brings his action for a share of the increased profits, alleging that his consent to offer the lot at £19,000 was obtained by fraud and concealment, on the part of his co-partners, for the purpose of excluding him from his share of those profits. F. examined on oath, states that he did not consider himself legally bound to allow K. to participate in the profits, but that he had a feeling of honour on the subject, K. having promised, in case F. should be obliged to sell the lot at a loss, to bear a part of that loss. Judgment below for the Defenders, affirmed above, but without costs.]

[152] [The Lord Chancellor and Lord Redesdale being of opinion that, although the circumstances might raise a suspicion of unfair dealing, B. by his own conduct in not interfering at all with the sales by F. of pieces of the lot to M. and Lord L. taken in connexion with his conduct at the time of the offer to and acceptance by K., was precluded from the relief which he prayed.]

The Appellant had brought this action against the Respondents to recover a share of certain profits made upon a joint adventure in land, from which his co-partners had, unjustly as he alleged, attempted to exclude him.

In the beginning of August 1808, the Respondents, Messrs. Kyd and Ferguson, purchased the estate of Carselogie, in Fife, from Sir John Hope's trustees at the price of £44,000, payable by instalments, £10,000 at Candlemas, 1809 ; £10,000 at Martinmas, 1809, and the remaining £24,000 at Martinmas, 1811. Before this purchase took place, Lord Leven, to whose property a lot of the estate called Hilton lay contiguous, was very anxious to purchase that lot separately, and directed Kyd, who was his factor,

to consider the value of Hilton, and state his opinion upon it. Kyd, in a letter to his Lordship, dated the 14th July, 1808, stated that he thought Hilton worth £19,332, but that they asked £19,850, and that it was not worth while to break off for £500 on such a purchase. This projected separate purchase, however, did not take place: and then Kyd and Ferguson resolved to purchase the whole estate as a speculation. Lord Leven agreeing to take Hilton off their hands. It was expected that the whole might be purchased for [153] £43,000, in which case Lord Leven was to take Hilton at £19,000. The price of the whole being £44,000: the proportion for Hilton was raised to £19,441, and then Lord Leven, who, without objecting to the account of the price, became apprehensive that he could not provide the money to pay it, expressed to Kyd his desire to be relieved from his engagement. Messrs. Kyd and Ferguson consented: and notice being given that Hilton was to be sold, the Appellant, Bayne, came forward and offered £18,500 for it. The Respondents would not accept that sum, but offered it at £19,000, which Bayne refused to give. Then it was proposed to Bayne, or by him (for it was stated one way in the one case, and the other way in the other), that he should become a partner in the adventure, and on the 6th or 8th of August, 1808, he was admitted a partner accordingly.

It appeared by a letter from Lord Leven to Kyd, dated 4th August, 1808, that his Lordship had not then abandoned all thoughts of purchasing Hilton, though he had been desirous of being released from the obligation; and on the 11th August, 1808, his Lordship wrote to Kyd, that in the belief that he might still have the refusal of Hilton, he had written to Messrs. Thorntons (bankers, London, relatives of his Lordship) to ascertain whether they would assist him with the two first instalments, if not the whole sum, to enable him to make a purchase every way desirable for him; and, on the 13th August, his Lordship wrote to Kyd that the plan and valuation (made by Kyd as above, 14th July, 1808) were before the Thorntons; and that if they listened to the proposal, it would be cruel to be disappointed.

[154] On the 15th August, 1809, about a week after the Appellant had become a partner, he was, in the course of a conversation with the Respondent, Ferguson, informed, in general terms, of Lord Leven's anxiety to purchase Hilton, but was not then informed that the plan and old valuation had been laid before the Thorntons. In the course of that conversation it was agreed between Bayne and Ferguson, that Hilton should be offered to Lord Leven at £19,000, Bayne being informed by Ferguson that Kyd was of the same opinion; and the following memorandum or missive was written out by Ferguson, and signed by him and Bayne, and addressed by Ferguson to Kyd.

"It is our opinion, that Hilton should be sold, with its proportion of freehold effeiring to the rent, for £19,000: the price to be payable as follows, viz. £3000 at March 1809, and the balance at the time of the last payment to Sir John Hope: reserving our right to straight marches, on receiving land for land, quantity and quality considered. This offer to be binding for a week from this date. Cupar, 15th August, 1808. (Signed) JOHN FERGUSON, WILL. BAYNE. Cupar, 15th August, 1808."

On the day following, Mr. Kyd returned an acceptance in these terms: "Cupar, 16th August, 1808. Messrs. Bayne and Ferguson,—Your offer of Hilton of yesterday I accept, and am, Gentlemen, your most obedient servant. (Signed) JAMES KYD."

It was admitted, on all hands, that this offer was made with a view to a sale of the property to Lord Leven, though Kyd accepted it as if made to himself. Bayne did not at that time object to this ac-[155]-ceptance, conceiving, as he afterwards alleged, that Kyd was acting in the affair merely as the agent of Lord Leven. His Lordship did not take advantage of that offer; and, on the 19th or 20th August, 1808, Kyd applied to Ferguson to purchase the lot at £19,000, which Ferguson agreed to do. No intimation of that transaction was given at the time to Bayne. On the 22d of August, Ferguson sold a small portion of Hilton to one Martin: but the minute of sale was subscribed by Kyd instead of Ferguson, which was accounted for by the circumstance that at that period the whole estate was vested in Kyd, to whom alone the conveyance had been made. About ten acres of Carselogie, not included in Hilton, were at the same time sold to Martin, and about that part of the transaction Bayne was consulted. On the 24th August, 1808, Ferguson sold thirty acres of Hilton to Lord Leven. These sales of Hilton were publicly known: but Bayne did not at all interfere in them, nor was he consulted respecting them.

In October, 1808, Lord Leven again intimated to Kyd his anxiety to purchase the remainder of Hilton; and, on the 11th Nov. 1808, he did actually purchase it, at a price which made up, for the whole of Hilton, the sum of £22,311, instead of £19,000, at which it had been offered in the missive to Kyd.

Bayne insisted that he was entitled to a share of the profits, derived from this increased price, and on the 3d May, 1809, brought an action against Ferguson and Kyd to compel them to pay him that share, contending that it was evident, from the circumstances, that the missive of the 15th August, [156] 1808, had been obtained from him by fraud and collusion between Kyd and Ferguson, particularly by the concealment of Lord Leven's application to the Thorntons. Ferguson and Kyd rested their defence on the missive. The defenders being examined upon oath in the course of the proceedings, in consequence of a reference for that purpose, they stated there was no agreement nor understanding between them, at the time the missive was given, that they were to participate in the profits of the purchase; and Kyd deponed that he had no expectation at the time of his examination of sharing in the profits; and Ferguson deponed that he did not consider himself legally bound to allow Kyd a share of the profits, but that he had a feeling of honour on the subject, Kyd having promised, in case he (Ferguson) lost by his purchase of Hilton, to bear a share of the loss.

The Court of Session decided in favour of the defenders, adhering to the interlocutor of the Lord Ordinary (Newton), May 14, 1811, in which it was found that, if Bayne understood the offer of the 15th August, 1808, to be merely an authority to Kyd to dispose of the lands to a third person, he ought to have declared so when he received the acceptance, which showed that Kyd understood it in a different sense. From that judgment Bayne appealed.

Sir S. Romilly and Mr. Abercromby for the Appellant; Mr. Leach and Mr. Stephen for the Respondents.

(June 23) Lord Eldon, C. The question here is, whether [157] the Court of Session was right in determining that Bayne was not entitled to a share of certain profits obtained on a joint adventure in land, in which he was concerned with Kyd and Ferguson. It will be in your Lordships' recollection that the Appellant, and the Respondents Kyd and Ferguson, were partners in the purchase of a certain estate, including a property called Hilton. This property had, it appears, been offered to Bayne by the other partners at £19,000, and had been refused by him at that price, and it was therefore thrown into the mass of the partnership property. It will be in the recollection of some of your Lordships also, that by a missive, signed by Bayne and Ferguson, the Hilton property was offered—I say, offered, as that appeared from the terms of the missive and acceptance to be considered as the nature of the transaction—to Kyd for £19,000; and it was a question, whether the offer was made to Kyd merely as factor for Lord Leven, on his Lordship's account, or for his own benefit if he chose so to accept it at that price.

It will be recollected, that Kyd was factor to Lord Leven, and that a correspondence had been carried on between them relative to the purchase of Hilton by his Lordship. Lord Leven, though anxious to have the property, had not found the means to provide the purchase money; and when the missives passed, it remained in a sort of suspense whether he would purchase or not. I observe, it is contended, and I believe rightly contended, that, according to the law of Scotland, if a person standing in such a situation as Kyd's, accepted the offer and gave such a missive, though he accepted it on behalf of another person, whether that other person completed his contract or not, he would be bound to take it, if the other partners chose that he should be so bound.

Lord L. did not take advantage of the offer, and then Kyd sold the property to Ferguson for £19,000, and Ferguson says, that he was a *boni fide* purchaser at that price. But by sale of a small part of the property to one Martin, and another small part, and afterwards the residue, to Lord Leven, it turned out that a profit of between £3000 and £4000 was made of it beyond the sum of £19,000; and then Bayne insisted, that the transaction of the missives was affected by concealment and management on the part of the Respondents in such a manner that it could not, consistently with the law of partnership, exclude him from his share of the profit made by the sale of this property which formed, if I may so call it, a part of the partnership stock. I cannot disguise from your Lordships that when the cause was heard, whether the

circumstances would authorize a judicial opinion to that effect or not, I could not avoid entertaining a good deal of suspicion that all was not so fair as it should be on the part of the Respondents. Such having been the impression on my mind, it became my duty carefully to consider whether that impression was well founded. I have carefully and repeatedly considered this case, and, upon the whole, I am of opinion that, connecting the missive and acceptance with the conduct of Bayne after Ferguson was acknowledged as the owner, this is a case in which the Appellant, whatever may be the real character of the proceedings of the Respondents, is precluded by his own acts from [159] having the relief which he now claims on the ground of fraud and concealment. But, on the other hand, it is impossible for me to dismiss certain reflections from my mind, so as to leave me at liberty to advise your Lordships to give costs.

Lord Redesdale. I entirely concur in what the noble Lord has said. A., B., and C. unite as partners in an adventure. A. and B. make an offer to C. as attorney for a stranger, D.; and C., without informing his partners whether he had made the offer to D., chooses to take it as an offer to himself. A. concurs in that, but B. does not. If the case stood there, the decision would clearly be wrong. I have scarcely a doubt that the transaction was fraudulent on the part of the Respondents; but Bayne has, by his own conduct, precluded the relief which he claims. I have thought it right to say this much, because with reference to the general principle the Judgment below would be wrong.

Judgment affirmed, without costs.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GEDDES,—*Appellant*; PENNINGTON,—*Respondent* [June 9, 16, 1817].

[*Mews' Dig.* xii. 499, 515. 3 Scots R. R. 365.]

[G. purchases from P., a horse-dealer, a horse warranted "a thorough broke horse for a gig," P. representing at the time that the horse had been sent to him to be sold, [160] by a gentleman from England. For about two months from the time of the purchase G. himself has no opportunity to drive the horse in a gig, but during that interval the horse is often driven in a gig by others, and performs well. Then G. himself, on two occasions, drives the horse in a gig, on both of which occasions the horse performs ill, kicking out behind and running forcibly to the side of the road, and at one time overturning the gig in a ditch. P. refusing to take back the horse, G. brings his action for the price and damages. It appeared in evidence that P. had got the horse from a Mr. A. of Leith, who parted with him on account of his having, on one occasion, when driven in a gig, without any apparent cause, kicked out violently behind and broke the gig. But it was also proved that the horse, while in the possession of A., of P., and of G. himself, as above mentioned, had been very often driven in a gig, and on these occasions found steady and safe. It was in evidence likewise that G. had lashed the horse and checked him at the same time, on the occasion when his gig was overturned. No other evidence was given as to G.'s experience or skill in driving. Judgment below for P. the horse-dealer, a majority of the Judges being of opinion upon this evidence that the horse did answer the warranty at the time he was sold, and that his bad demeanor in the hands of G. was owing to want of skill in the driver; and, the Lord Chancellor being of that opinion, the Judgment was affirmed above, but without costs.]

[The Lord Chancellor observing, that, if the horse answered the warranty at the time he was sold, the misrepresentation as to the place from which he came would not invalidate the sale; but that it was a material circumstance with respect to the question of costs.]

The Appellant having purchased a horse from the Respondent, a horse-dealer in Glasgow, received from him the following warranty, dated 6th May, 1811: "Sir, I have this day received from your son, Mr. Archibald, £84 sterling, the price of my dark bay horse sold you; I warrant this horse sound, free from vice and every blemish; he is quiet in harness and sure-footed, and a thorough [161] broke horse for either gig or saddle." The Appellant kept the horse two months, and then applied to the Respondent to take him back again, alleging that he did not answer the warranty, not being a proper horse for a gig; and, upon the Respondent's refusal to take back the horse and return the price, the Appellant brought his action before the magistrates of Glasgow for the price and damages. The Respondent having answered that the horse did satisfy the warranty, a proof was allowed, and the amount of the evidence was this:

The Respondent had represented to the Appellant, at the time of the purchase, that the horse had been sent to him by a gentleman from England, with instruction to sell him, whereas in point of fact the Respondent had purchased him at £60 from a Mr. Anderson of Leith Walk Foundry. Mr. Anderson had bought the horse for the purpose of running him in a gig, and was well satisfied with him for some time; but at the end of about two months from the time when Anderson had purchased him, while walking with the gig slowly down a hill, he, without any apparent cause, kicked out behind and broke the foot-board to pieces, then galloped furiously down the hill, and on turning an angle sharply the gig was upset. When Anderson sold the horse to the Respondent he distinctly mentioned the accident, and told him that from that circumstance he considered the horse as unfit for a gig; but that he would answer well for double harness or as a riding horse. The Appellant had been employed for two months after purchasing the horse from the Respondent in such a manner that he had no opportunity himself to drive the horse in a gig. [162] But when he did so employ him, the horse on one occasion kicked and plunged violently, and on another occasion, while going down hill, he started on passing a cart, upon which the Appellant whipped and checked him at the same time; the horse then went off at a canter, ran to the side of the road, and overturned the gig in a ditch. It appeared however that in the interval between the time when the Appellant purchased the horse and the above-mentioned occasions, the Appellant's children and others had gone out in a gig drawn by this horse, and that the horse had then been perfectly steady and safe; and it was also proved that the horse, while in the Respondent's possession, had been often driven in a gig, both up and down hill, and on a level road, and had always on these occasions performed well. There was no evidence to show that the Appellant had experience or skill in driving.

The magistrates of Glasgow were of opinion that the horse was not a proper one for a gig at the time he was sold, and decided in favour of the Appellant; but the cause having been brought by advocacy before the Court of Session the Lord Ordinary and the Court gave judgment for the Respondent with £215 costs; three Judges out of five, being of opinion that the bad demeanor of the horse, when driven by the Appellant, was owing to want of skill in the driver. From this Judgment Geddes appealed.

With reference to the time that elapsed before the horse was returned, and in order to show that in England it was held sufficient if the horse was returned in a reasonable time, or as soon as conveniently might be, after the defect was discovered, the cases of *Fielder v. Starkin*, 1 H. Black, 17.—*Adam* [163] *v. Richards*, 2 H. Black, 573.—*Buchanan v. Parnshaw*, 2 T. R. 745.—*Curtis v. Hannay*, 3 Esp. R. 82, were cited.

(June 16, 1817) Lord Eldon (C.). In this case, which is certainly somewhat difficult to deal with, it is stated that a sum of £215 has been awarded as the costs of one of the parties, and the question is no more than this, whether a horse answered the warranty given by Pennington to Geddes in this letter, in which he says, "I have this day received from your son Mr. Archibald £84 sterling, the price of my dark bay horse sold you: I warrant this horse sound, free from vice and every blemish. He is quiet in harness and sure-footed, and a thorough broke horse for either gig or saddle."

It has been admitted on all hands that the horse was sound, and free from vice, except as afterwards mentioned; and that he was quiet in harness if along with another horse. But the question is, what was the demeanor of this horse in a gig. My noble predecessor could have better dealt with this case: and I wish it had fallen to his lot, and not to mine, to advise your Lordships in the decision of it. But as it is, I must deal with it as well as I can.

It seems that three of the Judges below were of opinion that this was a good horse for a gig. And one of them said that it was very indiscreet to whip a horse and check him at the same time, and that in his judgment the whip ought to have been applied to the man rather than to the horse. Pennington had represented that this was one of two horses sent to him from England to be disposed of, which was not the fact. One of the Judges says that this was no-[164]-thing at all: and I agree with him so far, that, if the warranty is answered, a misrepresentation as to the place from which the horse was procured will not suffice to set aside the sale. But then the misrepresentation may be a material consideration with respect to costs. Another Judge seems to think that, on account of this misrepresentation, Pennington could not successfully defend the action. That I conceive not to be correct if it is made out that the horse answered the warranty.

The Appellant kept the horse two months. I have not had experience of late in courts of law; but I understand that, in this country, the time within which a horse ought to be returned in cases of this kind depends very much upon the period when the defect is discovered.

But the principal question here is, whether the accident was owing to vice in the horse, or want of skill in the driver. And as to that, I think that the three Judges below were right. But still it is a doubtful case, and on that account, it may be improper to give the Respondent the costs of the appeal: and another reason for not giving costs is, the improper misrepresentation, for the object of it must have been to prevent inquiries which might lead to the rejection of the horse. But that misrepresentation will not invalidate the transaction if the horse was a fit horse for a gig at the time he was sold. I propose therefore to your Lordships to leave the matter as it is, without giving costs to either side. My noble friends (Lords Redesdale and Erskine) concur with me in this view of the case.

Judgment affirmed. No costs on either side.

[165] ENGLAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

BURDETT (Bart.),—*Plaintiff* (in Error); ABBOT (Speaker, H. C.),—*Defendant* (in Error): and BURDETT (Bart.),—*Plaintiff* (in Error); COLMAN (Sergeant at Arms),—*Defendant* (in Error) [July 2, 7, 1817].

[*Burdett v. Abbot*, Mews' Dig. i. 811, 908; v. 640; x. 272, 273; xii. 1178. S.C. in King's Bench, 14 East, i. (1811), in Ex. Ch. 4 Taun. 402 (1812). Considered in *Stockdale v. Hansard*, 1839, 9 Ad. & E. 129, 167, 185, 231; *Bradlaugh v. Erskine*, 1883, 47 L. T. 618, 620; *Bradlaugh v. Gossett*, 1884, 12 Q. B. D. 271; *Howard v. Gossett*, 1845, 10 Q. B. 359, 374, and, on the point as to breaking open the outer door, in *Harvey v. Harvey*, 1884, 26 Ch. D. 644. See also *May Parl. Prac.*, 10th ed., 75; 8 How. St. Tr. 14. *Burdett v. Colman*, Mews' Dig. ix. 709; x. 273; xi. 445; xii. 1179. S.C. in K. B. 13 East, 27 (1810), 14 East, 163 (1811). Considered (*arguendo*) in *Stockdale v. Hansard*, 1839, 9 Ad. & E. at p. 74.]

[To an action of trespass against the Speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the message of the Plaintiff (the outer door being shut and fastened), and

arresting him there, and taking him to the Tower of London, and imprisoning there: it is a legal justification to plead that a Parliament was held which was sitting during the period of the trespasses complained of: that the Plaintiff was a member of the House of Commons: and that the House having resolved, "that a certain letter, etc. in Cobbett's *Weekly Register*, " was a libellous and scandalous paper, reflecting on the just rights and " privileges of the House, and that the Plaintiff, who had admitted that the " said letter, etc. was printed by his authority, had been thereby guilty of a " breach of the privileges of that House;" and having ordered that, for his said offence, he should be committed to the Tower, and that the Speaker should issue his warrant accordingly; the Defendant as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the execution of such warrant belonged, to arrest the Plaintiff, and to commit him to the custody of the Lieutenant of the Tower: and issued another warrant to the Lieutenant of the Tower to receive and detain the Plaintiff in custody during the pleasure of the House; by virtue of which first warrant the Serjeant at Arms went to the messuage of the Plaintiff, where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose and demand made of admission, he, [166] by the assistance of the said soldiers, broke and entered the Plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody under the other warrant by the Lieutenant of the Tower.]

[And to a similar action against the Serjeant at Arms, a similar plea, with variations, however, adapted to his situation, is a legal justification.—(*Vid.* 14 East, 163.)]

[The Lord Chancellor considering it as clear in law that the House of Commons have the power of committing for contempt, and that this was a commitment for contempt.—(Lord Erskine concurring.)]

FIRST CAUSE.

This was an action of trespass by Sir F. Burdett against the Speaker of the Commons. The declaration was as follows.

Sir Francis Burdett complains of the Right Honourable Charles Abbot (having privilege of Parliament) of a plea of trespass; for that the said Charles heretofore, to wit on the 6th April, 1810, and on divers other days and times between that day and the day of exhibiting this bill, with force and arms, etc. broke and entered a certain messuage of the said Sir Francis, situate in the parish of St. George, Hanover-square, in the county of Middlesex; and on one of those days, to wit on the 9th of April, in the year aforesaid (the outer door of the said messuage being then, and there shut, and fastened), with divers soldiers, and men armed with offensive weapons, forcibly, and with strong hands, broke open a certain window, and two window-shutters of and belonging to the said messuage of the said Sir Francis, and through the same broke [167] into and entered the said messuage, and made a great noise, disturbance, and affray, in the said messuage: and with force and arms made an assault on the said Sir Francis, and laid hands upon him, and forced and compelled him to go from and out of his said messuage, into a certain public street there, and also then and there forced and obliged him to go into a certain coach, in, and through, and along divers other public streets and highways to a certain prison, called the Tower of London, and there imprisoned the said Sir Francis, and kept and detained him in prison there, without any reasonable or probable cause whatsoever for a long space of time, to wit from thence hitherto; contrary to the laws of this realm, and against the will of the said Sir Francis: whereby, he, the said Sir Francis, during all the time aforesaid was, and still is hindered from transacting his lawful affairs, etc. to wit at the parish aforesaid and county aforesaid. And also for that the said Charles heretofore, to wit on the day and year last aforesaid, with force, and arms, etc. made another assault upon the said Sir Francis, to wit at the parish, etc. and then and there seized and laid hold of the said Sir Francis with violence, and forced and compelled him to go in, through, and along, divers public streets to a certain prison, called the Tower of London, and then and there imprisoned

the said Sir Francis, and kept and detained him in prison there without any reasonable or probable cause whatsoever, for a long space of time, to wit from thence hitherto; contrary to the laws of this realm, and against the will of the said Sir Francis, whereby, etc. And also for that the said Charles heretofore, to wit on [168] the day and year last aforesaid, with force and arms, etc. made another assault upon the said Sir Francis, to wit at the parish aforesaid, etc. and then and there imprisoned the said Sir Francis, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long time, to wit from thence hitherto; contrary to the laws of this realm, and against the will of the said Sir Francis. There was a fourth count for a common assault.

The Defendant pleaded, first, not guilty, to the whole trespasses charged. And secondly, he justified the breaking and entering of the Plaintiff's house by the proper officer (whilst the outer door was shut and fastened), for the purpose of arresting and imprisoning the Plaintiff, under the Speaker's warrant of commitment, for a breach of the privileges of the House of Commons, after audible notification of the purpose, and demand of admission, without effect: and the subsequent arrest and imprisonment of the Plaintiff, in execution of such warrant, stating that a Parliament was held, and was sitting at the time of the trespasses complained of, and that he, the Defendant, and the Plaintiff, were members of the Commons House of the said parliament; that the House resolved, "that a letter signed, 'Francis Burdett,' and a further part of a paper entitled, " 'Argument,' in Cobbett's *Weekly Register*, of March 24, 1810, was a libellous and " scandalous paper, reflecting on the just rights and privileges of that House; and that " Sir Francis Burdett, who had admitted the letter and argument to have been printed " by his authority, had been thereby guilty of a breach of the [169] privileges of that " House;" and it was thereupon ordered by the House "that the Plaintiff be for his " said offence committed to the Tower; and that Mr. Speaker do issue his warrants " accordingly;" that the Defendant being such Speaker, in pursuance of the resolutions and order aforesaid, issued his warrant, reciting the resolution and order of the House to the Serjeant at Arms to arrest the Plaintiff, and deliver him to the custody of the Lieutenant of the Tower; such warrant requiring all peace officers and others to assist in the execution thereof: which warrant was delivered to the Serjeant at Arms to be executed in due form of law; that he, as such Speaker, issued another warrant, reciting the resolutions and order of the House to the Lieutenant of the Tower, therefore requiring "that the said Lieutenant of his Majesty's said Tower, or his Deputy, should " receive into his custody the body of the said Sir Francis Burdett, and him safely keep " during the pleasure of the said House:" which warrant was delivered to the said Lieutenant to be executed in due form of law; that the Serjeant at Arms went to the Plaintiff's house, where he then was, to execute the warrant, and with an audible voice notified his purpose, and demanded admittance to execute his warrant; and, because the outer door was kept shut and fastened against him, and was refused by the Plaintiff to be opened, he, with the assistance of soldiers and armed men, broke into the house and arrested the Plaintiff, and conveyed him to the Tower, in execution of the first mentioned warrant; that the Lieutenant of the Tower received and detained the [170] Plaintiff there, by virtue of the last mentioned warrant, etc. There was a third plea, the same as the second, only omitting to justify the breaking open the door, and, at the conclusion of this plea there was a traverse of guilty in any other manner than by the making, signing, issuing, and delivering, of the said warrants as such Speaker as aforesaid, in pursuance of the resolutions and order aforesaid, in manner and form as is in this plea before alleged, etc.

The Plaintiff joined issue to the country on the first plea of not guilty, and demurred generally to the second and third pleas: and the Defendant joined in the demurrers. Judgment, in E. T. 1811, for the Defendant.

SECOND CAUSE.

There was another action against Colman, the Serjeant at Arms. The declaration was in trespass for an assault and false imprisonment of the Plaintiff, by the Defendant, acting in execution of the Speaker's warrant, and the form of the counts was the same as in the action against the Speaker. The pleas also were, like those in the former action, the general issue of not guilty, and two special pleas of justification: the one justifying the arrest and imprisonment of the Plaintiff, under the Speaker's warrant.

and the breaking of the house, the outer door being shut and fastened against the officer, for the purpose of executing such warrant, and the execution of it by the assistance of soldiers and armed men; the other similar to it, only omitting to justify the breaking of the house; the [171] only difference between the justification pleaded by this Defendant, and that pleaded by the Speaker, being that these justificatory pleas contained a distinct allegation, that the Defendant at the time of the trespasses complained of, was Serjeant at Arms of the House, and omitted so much of the former pleas as related to the warrant addressed to the Lieutenant of the Tower.

The Plaintiff, after joining issue to the country on the plea of not guilty, instead of demurring as before, replied specially to the second plea, that the Serjeant at Arms executed the warrant by breaking the Plaintiff's house and arresting him "with a large military force of our said Lord the King, then and there armed with dangerous and offensive weapons, to wit, etc. the same military force being then and there used by him the said Francis John, against the said Sir Francis, in and for the execution of the said first mentioned warrant in the same plea mentioned, and with such military force so armed and used as aforesaid, as was improper, excessive, and unnecessary, for that purpose, etc., and in an unreasonable manner, and more violently than was necessary or proper," etc. There was a similar replication to the third plea, omitting the breaking and entering the house.

The Defendant rejoined to the replications to the second and third pleas, taking issue on the excess, and issues were joined on both these rejoinders.

The cause was tried at bar before the Court of King's Bench, in E. T. 1811, when a verdict was found for the Plaintiff on the general issue, and [172] for the Defendant on the two other issues; and judgment was given for the Defendant.

The Plaintiff brought his writs of error in the Exchequer Chamber, assigning for error in both cases that the justificatory pleas were not sufficient in law to bar the action, and that judgment ought to have been given for the Plaintiff, or a *venire de novo* awarded to try the first issue. The judgments having been affirmed in the Exchequer Chamber, in E. T. 1812, the Plaintiff brought writs of error in *Dom. Proc.* assigning the same errors. The verdict in the second cause, it was alleged, had only negatived the fact of excess of military force, and the question of law still remained, whether it was lawful to employ a military force without a necessity and the circumstances from which it arose, stated in pleading.

Mr. Brougham, for Plaintiff in error (after stating the pleadings generally). I am relieved from much of the argument, not only by the fulness of the discussions below, but also by the admissions of the Judges, which amount to a recognition of the fundamental principle contended for by the Plaintiff, viz. that where another matter comes before a court of law, and a question of privilege arises incidentally, the Court must deal generally with the question of privilege. But it is said that when the House of Commons has resolved that a publication is a libel and a breach of privilege, and has committed the individual, and an action is brought, and the resolution and order of commitment are pleaded, the Court cannot call on the House of [173] Commons to set forth the alleged libel, that it may judge whether it is a libel or breach of privilege. I mean to contend that courts of law, if they deal with questions of privilege at all, must go to the full extent.

That courts of law have some jurisdiction over these questions of privilege appears from the case of *Donne v. Walsh*, 4 Pryn. Parl. Writs, 743, in which the Court not only took cognizance of privilege of Parliament, but decided against the privilege claimed for the members, of not being impleaded during the sitting of parliament: and also from the case of *Rivers v. Cossins*, 4 Pryn. Parl. Wr. 755, in which the Court of Exchequer, with the advice of all the other judges, agreed that a member might be impleaded, though, as appears from Atwell's case, Rot. Parl. No. 35, the House of Commons still persisted in their claim of exemption from being impleaded (17 Ed. 4, 5 vol. Rolls Parl. 131, Hat. 43). But in the next claim of privilege, *Roo v. Sadcliffe*, 1 Hats. 51 (1 H. 7, Parl. Roll. 104), the claim was confined to freedom from arrest or imprisonment, the exemption from being impleaded being given up. In these cases the House of Commons proceeded by writ of *supersedeas*.

There are other cases in which the courts examined whether the privilege claimed really existed, as in the cases of the *Duchess of Somerset v. Earl of Manchester* (16 Car. 2), 4th Pryn. Reg. 1214; and *Benyon v. Evelyn*, 14 Car. 2, Roll. 2558. It is

well known that the celebrated judgment of Sir Orlando Bridgeman, in the latter case, is in favour of my argument (1 Show, P. C. Oarth. 137). He says, "that resolutions or votes, in either House of Parliament, in the ab-[174]-sence of the parties concerned, are not so conclusive in courts of law; but we may, with due respect, notwithstanding these resolutions, may we must give our judgment according, as we upon our oaths, conceive the law to be, though our opinion shall fall out to be contrary to those resolutions or votes of either House." In the case of the King v. Knollys, Lord Holt says, "but admitting that it," viz. *lex parliamenti*, "were a particular law, yet if a question arise determinable in the King's Bench, the Court of King's Bench must determine it;" and then he cites Benyon's case. This is admitted by the Counsel for the Defendants, and by the Judges, particularly by the Chief Justice of the King's Bench (14 East. 128). An extreme case had been put, and such may be properly put in a question like this *inter apices juris*. Suppose the House of Commons were to direct the Speaker to issue his warrant to put a man to death. The Chief Justice says, "the question in all cases would be whether the House of Commons were a court of competent jurisdiction for the purpose of issuing a warrant to do the act. You are putting an extravagant case. It is not pretended that the exercise of a general criminal jurisdiction is any part of their privileges." And then he says, not blinking the question, "When that case occurs, which it never will, the question would be, whether they had general jurisdiction to issue such an order, and no doubt the courts of justice would do their duty;" and that cannot be denied if there remains any settled law in the country. He afterwards says, after stating the opinions of Wright [175] and Dennison, justices, in Murray's case (1 Wils. 299): "I agree with Wright, and Dennison, that it need not appear what the contempt was; but I am not prepared to say, with them, that we could in no case judge of it, or that there might not appear such cause of commitment as, coming collaterally before the Court in the way of a justification pleaded to an action of trespass:" the way in which this question comes—"the Court might not be obliged to consider and to pronounce to be defective" (14 East. 148). This distinction, by the way, between a question coming directly and coming collaterally before the Court is one which we take in our argument. The Chief Justice afterwards says (14 East. 150), "but if it," viz. the House of Commons, "did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice: I say that in the case of such a commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require."

These may suffice as to the concessions in point of principle, admitted also by the Defendant, and the course of defence which he has adopted. If the House of Commons, which for the purposes of this argument I may identify with the Defendants, had pursued a consistent course, they would have said, this is a matter of privilege which we alone are [176] competent to determine. We will not answer any charge, we will not appear, much less plead to any action, because, if we do, we are compelled to put our privileges before the Court below. But they have taken another course, and involved the matter in inextricable difficulty. Whether the individual has been rightly punished is a question which they refuse to try; but the question they raise is, whether the Commons' House of Parliament has privilege, or a certain class of privileges. What has happened upon this! The Court of King's Bench has considered the subject of privilege, and decided in their favour: and the judgment has been affirmed in the Exchequer Chamber, and now the matter is brought here: so that the House of Commons, which denies that the courts of law can determine upon a question of privilege, carries the question through all the courts, and now before the other House, whose supremacy is denied, except as to the precedence of individual members. It is something in a question of this kind *inter apices juris* to show that every step they take leads to absurdity.

It is admitted then that courts of law may discuss and decide whether a general class of privileges belongs to the House of Commons or not; that they may discuss whether the House has the power to commit for all contempts, for all breaches of privilege, for all libels. And I may go a step farther, and take it from the admissions,

that the resolution of the House of Commons is not in all cases conclusive, that such a class of acts is a breach; and if so, the courts must deal with the question, not [177] only whether the House has the class generally, but must inquire into the particular case, so far at least as to enable them to judge whether it is right in the House of Commons to claim the class. The House of Commons at one time claimed for its members and their servants the privilege of being exempt from being impleaded, which was denied by the courts. Suppose that claim were revived, the courts would deny it. And if, on the face of a warrant of commitment, any thing should appear obviously absurd, or contrary to law, or beyond the jurisdiction of the House of Commons, as that a person was committed because he trespassed on the fishery of a member of parliament, a case not likely to have occurred, but which did occur; or that A. B. and C. D. should be put back to back on a horse, and, with a label specifying the offence, ride in this manner round Charing Cross, which also did happen; or, which did not happen, if the House of Commons should order A. B. to be put to death; if these things should appear on a return to a writ of *habeas corpus*, the Court would take cognizance of the case, and give relief or redress. This follows from the admissions. Another conclusion from the admissions is, that privilege is not so delicate a subject that it must not be mentioned out of doors, and that the courts have dealt with them sometimes rather roughly. Then if the courts would so deal with them, on account of any thing appearing on the face of the warrant, it would be manifestly absurd to say that the Commons could defend by involving themselves in obscurity. If it is possible that the Court would deny the claim, if it appeared [178] on the face of the warrant and return, then the particular matter must be set forth, lest the House of Commons should do that, *per indirectum*, which they could not do directly.

I now come to inquire into the grounds on which it is contended that the House of Commons have the privilege now in question, of determining whether a particular act amounts to a libel, and such a libel as entitles the House of Commons to punish by imprisonment. They say that it is necessary for self-protection, to enable them to perform their functions, and to remove obstructions; and that this can be effected in no other way than this, that the House itself should have the power to punish; and it is relied on that the House of Commons is a court of record. That the House of Commons is not a court of record I shall afterwards show. At present I apply myself to the question of necessity generally. And, first, if it be inconvenient that they should not have this power, the inconvenience is not all on one side. There is no redress against their wrong, no impeachment against them, nor can any of their members be questioned in any other court for what he has done in parliament. That is not the case with the courts below. Their judgments are liable to be reversed, not, I admit, in cases of contempt. But then, if the judges abuse the power, they are cognizable in another way: they may be impeached; they may be removed by address of the two Houses of Parliament; and before the Revolution they might be removed by the Crown; so that the House of Commons is above controul, the judges are not. Besides, the courts proceed by [179] known forms, and the accused is heard on the same terms as the accuser. But in the House of Commons the accused is judged in his absence. A vague accusation is preferred. The accused is heard and ordered to withdraw; and then, after he is withdrawn, the greater part of the charge is brought forward against him; and then they give judgment, and execute it by their own officers. The prerogatives of the Crown are defended in the courts, and its servants have no privilege in that respect more than any other subject. Where, then, would be the inconvenience, though the House of Commons should be compelled to say yea or nay to the particular charge, when they admit that they are bound to answer generally? No inconvenience would result from it, except by a failure of the Court to do them justice, and then error might be brought. But the judgment might be affirmed in the House of Lords. I say it is not in their mouths to use that argument; for they accuse us of putting extreme cases. And besides, I can show that the abuse on their part has existed, while no instance can be shown in which the courts have been remiss in maintaining their privileges; and this leads me to the authorities on which the claim rests.

They rely upon an uninterrupted train of precedents, a long course of practice, and the enjoyment of the right. Now the earliest case of commitment for libel on the whole House is that of Hall, in the 23d of Eliz. 1 Hats. 93 (D'Ewes Journ. 291, 4 Inst.

23). He was imprisoned, fined, and expelled. The commitment was for six months, and further, till a revocation and retraction of the slander. But as this was thought too inde-[180]-finite, they added, after sentence, such a retraction as should satisfy six members, etc. So much for this doctrine of privilege, which is to be used only as a shield against the crown and the subject. Then there is a *hiatus*, and this uniform stream of decision stops for three-fourths of a century. And then come the long parliament privileges, which I suppose will not be quoted as precedents. They called any power they chose to assume a branch of their privileges. They assumed the King's authority over the army, and made use of it against his person; and whoever questioned their power was dealt with as Hall was (Clar. Hist. Rebel. vol. i. 212).

Then came the case of Pitman, and the riding round Charing Cross, for arresting a member's servant in violation of a privilege not now claimed. It appears that after the Restoration the same notion of privilege prevailed in the House of Commons. I refer to the proceedings of the two Houses with respect to the case of Shirley v. Fagg (27 Car. 2, 6 How. St. Tr. 1121), upon the occasion of an appeal from the Court of Chancery to the House of Lords, by Dr. Shirley against Sir John Fagg, a member of the House of Commons. A multitude of conferences took place. The House of Commons maintained that the appeal was a breach of their privileges, and denied that appeals lay from courts of equity to the House of Lords. They imprisoned the serjeants and barristers who had, contrary to an order of the House of Commons, pleaded for Crispe in an appeal by Crispe against Dalmahoy, a member of the House, for a breach of privilege (Crispe v. Dalmahoy, *Vol.* 6 How. St. Tr. 1144. *Vol.* also Hale v. Slingsby, *ib.* 1130, 1187). The House of Lords decided the cause, notwithstanding this claim of [181] privilege. It may be said that there the question was decided only by the other House. But why then did they plead in this instance? For, by the course which they have adopted, they have brought the subject under the cognizance of the courts below before it came to you. When it was contended that the present claim of privilege was contrary to Magna Charta, which provides that no one shall be imprisoned, unless by the lawful judgment of his peers, or by the law of the land, it has been said that none but fanatics and drivellers in law could argue in this way, since the law of parliament was part of the law of the land. But that can hardly appear so wild and fanciful, when it is considered that your Lordships then, taking notice of the imprisonment of the counsellors at law, and the attempt of the Commons to controul your judgments, and obstruct the execution of them, represented this as "a transcendent invasion on the right and liberty of the subject, and against Magna Charta, the Petition of Right, and many other laws which have provided that no freeman shall be imprisoned, or otherwise restrained of his liberty, but by due process of law. This tends to the subversion of the government of this kingdom, and to the introducing of arbitrariness and disorder" (6 How. St. Tr. 1153).

It appears then that this current of decisions has not been uniform, and that the claims of privilege have not been regularly admitted: that the claim for the servants of members has been abandoned: so that privilege may be stretched a little on one day, and reduced on another; that there are no [182] prescriptive privileges: that they may be lopped off, sometimes by the House itself, but more frequently by the courts to whose decisions the House of Commons has bowed. Other extravagant claims have been made. It was at one time claimed that the goods of members should not be taken in execution during the sitting of parliament (Apsley's case, 17th Edw. 4). That was abandoned. And, on the other hand, they have sometimes, doing what they would now consider as below their dignity, applied peaceably for a writ of privilege, which came from the Crown; and thus they made application to the Crown to support their own privileges against it.

In Hall's case they fined, and the Ch. J. of the King's Bench seems to think that they may yet fine. But in Bur. 1336, there is a *dictum* by Lord Mansfield that they could not fine, and that seems now passed from. Then as to the act 1 Jac. 1, cap. 13, so little was it clear that a member, even when arrested in execution, might legally be set at liberty by privilege of parliament, that it was thought necessary by that act to give security to the Sheriff against any action for delivering out of execution any such privileged person.

There are other cases on which perhaps the House of Commons may rely: but the only one I shall in this place mention, is a recent one from the Journals of the Com-

mons, which is a very great privilege curiosity (Griffith's case, 1759). Admiral Griffith, a member, complained that certain persons had trespassed on his fishery. The House of Commons, having no doubt of its jurisdiction, proceeded to try the [183] cause like an action of trespass, though more clumsily than a court of law would have proceeded. The accused were found guilty, not of a trespass, but of a breach of privilege, and were ordered to stand committed; and afterwards, on their humble petition, after being reprimanded on their knees, they were discharged, paying their fees! So much for the *lex parliamenti, ab omnibus querenda, a multis ignorata, a paucis cognita*: of which law of parliament Ch. J. De Grey says, "I wish we had some code of the law of parliament; but till we have such a code, it is impossible we should be able to judge of it." And another Judge (Gould) says, "the *lex et consuetudo parliamenti* is known to "parliament only" (Crosby's case, 1771, 3 Wils. 188; 2 Blac. R. 754). Thus then, from Admiral Griffith's case, it appears that so recently as the end of the last reign, the House of Commons carried notions of privilege so far as to hold plea of a trespass. I pass from these precedents to the decisions of the courts of law.

The Aylesbury case (2 Ld. Raym. 1105, 1111) is one on which they particularly rely; which is well known to have been decided in favour of the House of Commons, against the opinion of Lord Holt, Ch. J. The question arose on a return to a *habeas corpus*, sued out by Paty and others, who had been committed by the House of Commons for a breach of privilege, by bringing actions against the constables of Aylesbury for refusing their votes at an election. Holt thought they should be discharged, observing (14 How. St. Tr. 857), "that this was not such an imprisonment as the free-men of England ought to be bound by; and that it did highly concern the people of England [184] not to be bound by a declaration of the House of Commons in a "matter that before was lawful." That is the case of the Aylesbury men. They also rely upon Murray's case, and that of *Rex v. Flower*, 8 T. R. 314 (1 Wils. 299), for the acknowledgment of their power by the courts of law. I have this observation to make on all of them; that they brought the question of privilege directly before the Court upon returns to writs of *hab. corp.*, so that if the Court had liberated, there would have been a direct and immediate conflict of jurisdictions. We do not contend that there ought to be such a contest. One court committing, another cannot liberate. But where the question of privilege comes incidentally before a court of law, the Court may determine it, and no conflict takes place. When an action of trespass is brought in the proper court, it must not be stopped by an incidental question of privilege. The principal part of the present case is trespass, which the Court of King's Bench may try, and the House of Commons cannot; and, if an incidental claim of privilege is set up, the Court must deal with it as it would with an incidental question of prize or marriage, though properly determinable in the Admiralty or Ecclesiastical Courts; and that disposes of all the cases upon returns to writs of *hab. corp.* in which, if the Court had interfered, there would have been a direct conflict of jurisdictions. Vaughan, Ch. J. in his judgment in *Bushell's case* (Vau. R. 135, 6 How. St. Tr. 999, 1004), cites two cases from Moor, 839 (cases of Astwich and Apsley. *Vid.* 14 East. 70), in the 9th of Eliz. and 13th of James I. in which the Court of King's Bench, upon returns to writs of *hab. corp.* stating contempt of the Court of [185] Chancery, liberated the prisoners. But we admit that now, if one Court commits for a contempt, another will not liberate. But does it follow that if a person is wrongfully committed he can have no redress? We admit that this is the first instance of such an action, but a case may be put where the distinction would be taken and acted upon. The Crown has the authority over the army, and delegates that authority to an officer; the officer arrests a soldier illegally, *ex gr.* for that he refused to obey an illegal order. The soldier sues out a writ of *hab. corp.* and the return is—imprisoned for disobedience of orders. The Court would refuse to liberate. But might not the soldier bring an action for the false imprisonment? It would be his duty to disobey; he would have been punishable if he had obeyed: and for that false imprisonment he might maintain his action, though the Court would not on such a return order his liberation. This doctrine is recognised by Lord Kenyon in *Rex v. Suddis*, 1 East. 306. Now the case is stronger for the Crown, because the interference between officer and soldier is a matter of peculiar delicacy. Though the courts, therefore, will not interfere where their interference would produce a conflict of jurisdictions; why should not the wrong doer answer in damages? Let there be in this instance the same remedy as for the soldier. One might figure such an absurdity that it would be

impossible to refuse redress. Suppose those men who were imprisoned in Admiral Griffith's case had brought an action against him for breaking and entering their close, and he pleaded the decision of the House of Com-[186]mons. To be sure the House might imprison them for bringing the action, but how could the Court allow that sentence to be conclusive as to the right of property? It was said by one of the Judges (Bayley, J. *Vid.* 14 East. 129, 160) below, that if privilege of parliament were examinable in the Court of Queen's Bench in such a manner as that it ought to have been averred as a traversable fact, that the party had been guilty of the contempt or breach of privilege; the fact would be examinable, not merely in the King's Bench, but in every inferior court in which trespass could be brought, even in the County Court. That, however, is only *idem per idem*; for from the course actually adopted by the Commons, the inferior Courts might have the cognizance of their privileges, and the County Court might have had to try this great cause.

This brings me into the argument founded upon the circumstance that the House of Commons is a court of record. I abandon the argument that the House cannot commit for contempt, as not being a court of record, or at least I do not push it so far as it has been carried. But the circumstance of its being a court of record has been relied on below, and I submit it is no court of record (14 East. 159). It has no regular form of proceeding; and if its law is known to few, as Lord Coke said, its practice is known to none. In Oates's case (10 How. St. Tr. 1163-4) the Court of King's Bench would not admit the House of Commons to be a court of record, and refused evidence which would have been admitted if that House had been a court of record. The entry in the journals of the House of Lords of the reversal of a judgment, is evidence of that reversal (Jones v. Randall, Cowp. 17); that [187] being its record, as a court of judicature. But the House of Commons is no court of record: no writ of error can be brought in that House; and neither its journals nor those of the House of Lords are records (Rex v. Arundel, Hob. 110); for though, as Lord Holt says, the House of Lords be a supreme court of record, yet every vote there passed is not an act of judicature, unless the proceedings in order to it had been judicial (Rex v. Knollys). It is true Coke says in 4th Inst. 23, that in his opinion the parliamentary journals were entitled to the authority of records, and he refers to 6 Hen. 8, cap. 16. But that proves no such thing. It prohibits the absence of any of the members without licence entered of record in the clerk's book; but that is merely a loose way of stating what stands to the House of Commons in place of a record. In the case of Rex v. Creevey (1 M. & S. 273), it appeared that Mr. Creevey had published a correct account of a speech of his in the House of Commons for his constituents. An action was brought for a libel, and a verdict given against him. A motion was made for a new trial, on the ground that the House of Commons was a Court of Judicature, and that the publication of its proceedings was allowable, on the same principle as the publication of the proceedings of other courts of justice; and the case of Curry v. Walter, 1 B. P. 525, was cited. But a new trial was refused.

But, supposing the House of Commons to have this power, the Plaintiff's privilege of parliament ought to exempt him (*Vid.* Wilkes's case, 2 Wils. 159). I refer to the cases of Walker v. Grosvenor (Earl of), 7 T. R. 171, and that of [188] Catmur v. Knatchbull (Sir E.), 7 T. R. 448. The case of Brearton, 1 Hats. 131, is also in point; and one still more in point occurs in the same vol. After this it will be hard for the Commons to contend that their own members have not the privilege of exemption from commitment for contempt.

Now I come to the question of excess. It is clearly laid down by Sir F. Pemberton in the proceedings relative to the case of Jay v. Topham (12 How. St. Tr. 821) that the Court would inquire whether there was excess or impropriety in the execution of the order of the House. Two things are here complained of as excessive or improper in the manner of executing the order of the House:—1st, the breaking open the outer door; and, 2dly, the using a military force. As to the breaking open the outer door, the authority of Semayne's case (5 Rep. 91. Cro. El. 908. Moor, 668. Yelv. 28) falls from under their feet, though the Judges below relied on it. The reliance is on the words in the report on Cro. El.; "that Williams agreed with the opinion of Yelverton and "Fenner *in omnibus*, that the Sheriff might not break any man's house to take "execution, unless in the Queen's case, or for a contempt." The House of Commons was well advised to resort to the report in Cro. El., for Coke says nothing about the

contempt; and as to the opinion of Yelverton, he himself must have best known what he said, and hear what he says, “unless it be on a *capias utlagatum*, which is the “Queen’s suit for the contempt of the party, it is not lawful for the Sheriff to enter the “house unless it be open, etc.” This then is no authority for them. Then with respect to the employment of a military force, [189] that is open to us on the pleadings, and we say it was illegal. It has been said that the soldiers were bound to assist in executing the warrant as well as other citizens. But the record alleges that it was a military force of our Lord the King. And in Horne’s case it was said by De Grey, Ch. J. (Cowp. 682), “the King’s troops may, like other men, act as individuals, but they can be “employed as troops by the act of the government only” (Cowp. 682). That is the objection in my argument. The allegation is, that they were soldiers of our Lord the King, and therefore they were employed as the King’s troops, and not as citizens in red coats. Now why do I contend that the warrant could not legally be executed by soldiers? —1st, the law does not recognise soldiers as such, and so it was argued in the defence of Lord Russel’s innocency, by Sir R. Atkins, who says (9 How. St. Tr. 730-1), “to seize “and destroy the King’s guards. The guards! What guards? What or whom does “the law understand or allow to be the King’s guards for the preservation of his “person? Whom shall the Court that tried this noble Lord, whom shall the Judges “of the law that were then present upon their oaths, whom shall they judge or legally “understand by these guards? They never read of them in all their law books. “There is not any statute law that makes the least mention of any guards. The law “of England takes no notice of any such guards, etc.” King Henry VII. was the first who set up a band of gentlemen pensioners as a guard about his person; and the laws and constitution of these kingdoms, as Blackstone observes (Com. 408), know no such state as a perpetual [190] standing soldier, bred up to no other profession than that of war. It is well known that the army exists only by suffrage from year to year; and so jealous is the law of the interference of the military, that the troops are removed from assize towns when the Judges arrive there. And so it is when elections take place; so little does the House of Commons like soldiers, except on particular occasions. The King’s troops, therefore, existing by suffrage only from year to year, cannot be proper instruments for executing the orders of the House of Commons. The command of the militia, as well as that of the regular army, is by law in the Crown; and how is the House of Commons to proceed when they employ soldiers? (13 Car. 2, cap. 6.) They cannot command the assistance of the troops by their own authority. They must apply to the Crown, and then what becomes of their privileges? They have only their mace and Serjeant at Arms. “They keep a hawk” (the Serjeant), as Roger North says in his *Examen*, “and must every day provide flesh for their hawk!” (561); and he holds his place by patent from the Crown. When a body claiming a power has not means to exercise that power, it is a strong argument to show that it has not the power; as, if a court could not enforce a *venire*, it would be a strong argument to show that it could not try by jury. And so, here, as the House of Commons has not the means of enforcing the service of the King’s troops by its own authority, it is a strong argument against their right to execute their orders by the assistance of soldiers. They claim their privileges as a protection against the crown, and yet they say they will enforce their [191] orders by means of the King’s troops. The execution of their orders by the aid of a military force is therefore inconsistent with their own argument, and this is one more of the difficulties in which the case has been involved.

Mr. Courtney. The points to be considered in this case, as it appears to me, are these:—1st, Whether the House of Commons has the power of committing for contempt, as a breach of privilege. 2dly, Whether the warrant is a good ground of commitment. 3dly, Whether it has been executed in a proper manner.

1st, Whether the House of Commons has the power of committing for contempt as a breach of privilege. It can only have it by immemorial usage, by statute, or statutory recognition, or from necessity, as being inherent in its existence. I am not driven to show that parliament had not that power from time immemorial. It is enough for me to show that the House of Commons had it not. But the House of Commons had itself no existence till after the time of legal memory, till the reign of Hen. III. as was stated below. They attempted to meet this argument in this way: they said that the House of Commons, though it had no separate existence till after the time of legal memory, sat as a collective body with the King and Lords. But there is no evidence of that, so that

this argument as to their having the power from time immemorial falls to the ground. And how do the facts agree with the assumption? They cannot go back further than the reign of Elizabeth as to the exercise of the power. If that were not a sufficient answer, it [192] might be said that if they had the power when they sat with the Lords and King, it does not follow that they have it when separate. Each member may not have the powers which belonged to the whole body, and the House of Commons certainly has not a separate legislative power. 2dly, They have no such power by statute. They have indeed relied on two acts of parliament; but when these are examined, the argument founded upon them falls to the ground. The act, 4 Hen. 8, cap. 8, was passed upon the occasion of the imprisonment of Strode for something which he had done in parliament, and the extent of it is no more than to give personal immunity to the members for things done in discharge of their duty. The other act, 1 Jac. 1, cap. 13, which they say is a statutory recognition of this privilege, after enacting that, when a member of parliament, arrested in execution, should be set at liberty by privilege of parliament, the party might again take him in execution after the privilege of that session of parliament should have ceased, contains this proviso; "Provided always that this act, or any thing therein contained, shall not extend to the diminishing of any punishment, to be hereafter, by censure in parliament, inflicted upon any person which shall hereafter make, or procure to be made, any such arrest as aforesaid." Now, giving this its most extended meaning, it only applies to punishment, to be inflicted for arresting members during the sitting of parliament; and the House of Commons must have that power to preserve its existence. The third ground is that of necessity, and that appears to me [193] to be the formidable ground: for it is impossible to deny that a body, such as the House of Commons, must have immunities and privileges, and complete self-protection; which implies all the power that is necessary to make it effectual. But it has been justly and wittily said, that power is a sword, privilege a shield: and, as to the assumption of power, there is hardly any thing that may not be construed into a breach of privilege, or any power that may not on that ground be assumed. I refer to what Lord Clarendon says (Hist. Rebel. vol. i. p. 212), "After the act for the continuance of the parliament, the House of Commons took much more upon them, in point of their privileges, than they had done, and more undervalued the concurrence of the Peers: though that act neither added any thing to, nor extended their jurisdiction, etc. etc. But now that they could not be dissolved without their own consent, etc. they called any power they pleased to assume to themselves a branch of their privileges, and any opposing or questioning that power a breach of their privileges, which all men were bound to defend by their late protestation, and they were the only proper judges of their own privileges. Hereupon, they called whom they pleased delinquents, received complaints of all kinds, and committed to prison whom they pleased, which had never been done or attempted before this parliament, except in some apparent breach, as the arresting a privileged person, or the like."

I would also admit the power of the House of Commons to commit for contempt, that is, for con-[194]-tempt properly so called, distinguishing the legal from the popular sense of the word. The legal meaning is an actual or constructive obstruction of process. In common language it means contumely. Where there is a legal contempt, or an actual or constructive obstruction to their proceedings, the House of Commons has the power, not vindictively to punish the offence *qua* offence, but to abate the nuisance. But there the power ends where the necessity ends. We do not contend that immunity ought to be given to libels, but that the House of Commons ought not to be judges in their own cause. The House of Commons has no criminal jurisdiction, or, if it has the power to punish an offence as such, it is an anomaly in the history of our courts that such a power should belong to a body which cannot apportion the punishment to the offence. Take the present offence for instance. A libel may be the most atrocious, or it may be the most trifling of personal affronts. And yet see the situation of the House of Commons: if the most atrocious libel against it should be published on the last day or the last hour of its sitting, it can imprison the libeller only for that day or hour. But there is no such anomaly if the power exists merely for the purpose of removing obstruction.

2dly, Whether the warrant is a good ground of commitment. Besides other objections, it does not pretend to commit for a contempt, but for a breach of privilege; and that was a libel, and a libel on a past proceeding of the House, as appears by the record, and could not therefore have been an obstruction of a present proceeding. The mere naked

[195] fact here is the admission that a paper called a libel was printed by the Plaintiff's authority; and, I submit, the libel should have been set out on grounds of justice; for if it appears that it is no libel, you will not lend your judgment and authorities to the injustice. The House of Commons should, therefore, have shown the grounds of their proceeding. But the warrant does not even state that the Plaintiff is guilty; it only states that the Plaintiff, having admitted that the paper which the House of Commons resolved to be a libel was printed by his authority, was thereby guilty of a breach of privilege. How could the admission make him guilty of a breach of privilege? Then there is no allegation in the warrant of the publication of the libel; and the libel cannot therefore be a breach of privilege, for it might have been all along in his table drawer for any thing that appears on this warrant. It has been argued that no other court will relieve, because the Plaintiff was committed for a contempt. I have already said that it is not a commitment for contempt; but suppose it were, there are in Moore's Reports, 839, 840, a number of cases (Apsley's and others), which show that the rule contended for is laid down too broadly, and that other courts will sometimes interfere in such cases. Ch. J. Vaughan says, in Bushell's case (Vau. Rep. 135; 6 How. St. Tr. 999), "that the cause of the imprisonment ought, by the return (to a *hab. corp.*) to appear as specifically and certainly to the Judges of the return, as it appeared to the Court, or person authorised to commit, else the return is insufficient." But it could not so appear by a return founded on this warrant. It may be, [196] and has been argued, that your Lordships cannot take cognizance of the question, whether it is or is not libel, breach of privilege, or contempt, in the particular instance, that being settled by the resolution of the House of Commons (9 Com. Jour.). But in Fitzharris's case your Lordships refused to receive an impeachment against him. The House of Commons said this was illegal, and resolved that the proceeding in any inferior court would be a breach of privilege. But Fitzharris was tried by the Court of King's Bench, convicted, and executed. This shows that your Lordships may investigate whether there is a breach of privilege or not, notwithstanding their resolution (8 How. St. Tr. 223).

In Fitzherbert's case, 35 Eliz. (D'Ewes Jour. 482), there being then a doubt how a member, who had been arrested, should be relieved, Coke, who was then Speaker, said, "First, this writ of privilege must go from the body of this House made by me, and I to send it into the Chancery, and the Lord Keeper to direct it. Now before we make such a writ, let us know whether by law we make it, or whether it will be good for the cause or no. For my own part, my hand shall not sign it, unless my heart assent to it. And though we make such a writ, if it be not warrantable by law, and the proceeding of this House, the Lord Keeper will and must refuse it." This was an acknowledgment that the Lord Keeper had authority to inquire into the matter, whether a breach of privilege or not. And so it appears also from the case of Richard Coke (1584), 1 Hats. 96, upon whom a subpoena out of Chancery had been served; and the Commons [197] being of opinion that their privileges were concerned, sent a deputation of some of their members to the Lord Chancellor, who answered, "that he thought the House had no such privilege against subpoenas as they contended for, and that he would not allow any precedent in the House of Commons to that effect, unless they could show that they had been allowed and ratified by the precedents in Chancery." Another authority is that of Lord Holt in the case of *Rex et Reg. v. Knollys*, who said that their resolution would not make that a breach of privilege which was not so before. Your Lordships ought, therefore, to be put in a situation to consider whether this is a breach of privilege. Then there are these critical objections to the warrant:—1. That it does not allege that the libel was printed by the authority of the Plaintiff, but only that he, having admitted the fact, was thereby guilty of a breach of privilege. How the admission can be tortured into a breach of privilege I cannot understand:—2. That it does not allege that the libel was published by the Plaintiff:—3. That the word "reflecting, on the just rights," etc. was equivocal, for he might have reflected upon them favourably. In an indictment for obtaining money on false pretences, if it is alleged that the Defendant unlawfully, knowingly, and designedly, pretended so and so, by means of which pretences he obtained the money; what doubt could there be that this was a charge that the pretences were false; yet they say that it is not sufficient, but you must proceed to negative the pretences to be true (*Rex v. Airey*, 2 E. R. 30). I might ask whether, if this nicety is required in [198] indictments, it ought not *a fortiori* to be required in such a penal execution as this.

3dly. Whether the warrant was properly executed. And, first, with respect to the breaking open the outer door, Semayne's case, for the reasons already stated, is no authority whatever for it. It is only where the King has an interest that the outer door can be lawfully broken open; and Treby, Ch. J. in a note to Dyer, says, "By the common law no house may be broke open by the officer of the King, at the suit of a common person, otherwise at the suit of the King. But now by 21 Jac. 1, cap. 19, § 8, concerning bankrupts, the commissioners may break open the house of another for the debt of the debtor: and if bankrupts convey their goods to their neighbour's house, the commissioners cannot, but the Sheriff may, break open the house, because he is the sworn officer of the King. The commissioners may break open the booth or shop of another to get at the bankrupt's goods." The act gives the commissioners power to break open, not only shops and warehouses, but also houses and chambers; and yet, though the power is so distinctly given, the house can be broken open only by the King's officer. The only ground on which this is justified, is, that the public is a party, and that it is for the benefit of the commonwealth; but these words, in order to have such an effect, must be held to imply something beyond an ordinary expediency—something of a moral necessity. But as long as the Plaintiff confined himself to his house, he could not obstruct the proceedings of the House of Commons: if he came out, the [199] warrant might be executed; so that there was no necessity in this instance for breaking open the door. Secondly, with respect to the employing a military force, I need not add any thing to what has been said already. The jealousy of the constitution is very strong as to the interference of soldiers in the execution of process, and pervades the whole frame of our municipal law. The Sheriff, or the officers of the Houses of Lords or Commons, have a right to the services of individuals, whatever be the colour of their coats. That is clear. But the House of Commons has no power to call on soldiers as a body under their officers, and acting as the servants of the Crown.

Lord Eldon (C.). (July 7, 1817). The Counsel for the Plaintiff having been now heard, I propose to your Lordships that the Counsel for the Defendants should not be heard, until we shall have received the advice of the Judges on the following question, viz. "Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication generally without the particular circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of *habeas corpus*, the return setting forth the warrant, stating such adjudication of contempt generally; whether in that case the Court of King's Bench would discharge the prisoner, because the particular facts and circumstances, out of which the contempt arose, were not set forth in the warrant."

[200] The question being handed to the Judges, and they having consulted among themselves for a few minutes, Lord Ch. Baron Richards delivered their unanimous opinion that in such a case the Court of King's Bench would not liberate.

Lord Eldon (C.). That this is a case of very great importance none will dispute: but at the same time I do not think it a case of difficulty. If I did, I should be anxious to hear the counsel for the Defendants before proceeding to judgment. But in my view of the case, considering it as clear in law that the House of Commons have the power of committing for contempt; that this was a commitment for contempt; that the general nature of the contempt, if that was necessary, was sufficiently set forth in the warrant; and being of opinion that the objections in point of form have not been sustained, unless any other Noble Lord should express a wish to hear the Counsel for the Defendants, I shall now move that the judgment of the Court below be affirmed.

Lord Erskine. When this matter was first agitated, I understood that the House of Commons intended to pursue a very different course. I was therefore alarmed. I expressed myself, because I felt, with warmth. I have changed none of the opinions which I then entertained; I then said that the House of Commons ought to be jealous of such privileges as were necessary for its protection. My opinion is that these privileges are part of the law of the land, and upon this record there is nothing [201] more than the ordinary proceeding; the Speaker of the House of Commons, like any other subject, putting himself on the country as to the fact, and pleading a justification in law; for this was not a plea to the jurisdiction, but a plea in bar. This course of proceeding gave me the most heart-felt satisfaction; for if the judgment had been adverse to the Defendants, the House would no doubt have submitted. It would be a

libel on the House of Commons to suppose that it would not. Therefore, by this judgment, it appears that it is the law which protects the just privileges of the House of Commons, as well as the rights of the subject.

The case has been argued with great propriety; but it was contended that it was not alleged in the warrant that the libel was published by the Plaintiff. But it is alleged that the paper was printed by his authority. And if I send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, and he does print and publish it in that publication, then I am the publisher. The word "reflecting," standing separately, would not be sufficiently distinct. But the warrant recites that the letter had been adjudged to be a libellous and scandalous paper, reflecting on the just rights and privileges of the House of Commons; and the meaning there must be, arraigning the just rights and privileges of the House.

I myself, while I presided in the Court of Chancery, committed for contempt, in a case in which a pamphlet was sent to me (*ex parte* Jones, 13 Ves. 237), the object of which was, by partial representation, and by flattering the [202] Judge, to procure a different species of judgment from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The House of Commons, whether a Court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again. So much I thought it necessary to say, feeling strongly for the dignity of the law; and, have only to add, that I fully concur in the opinion delivered by the judges.

The Counsel were called in, and informed that the House did not think it necessary to hear Counsel for the Defendants. And then, without further proceeding, the judgments of the Court below were affirmed.

ENGLAND.

IN ERROR FROM KING'S BENCH.

RANDOLL, and Others,—*Plaintiffs* (in Error); DOE, on the several demises, and on the joint demise, of ROAKE, and Others,—*Defendant* (in Error) [May 2, 7, 16, 1817].

[Mews' Dig. xiv. (*Doe v. Nowell*) 1526. Followed in *Riley v. Garnett*, 1849, 3 De G. & Sm. 629, 632. Commented on in *Price v. Hall*, 1868, L. R. 5 Eq. 399, 403; *Patching v. Barnett*, 1880, 49 L. J. Ch. 665, 668; *Pearks v. Moseley*, 1880, 5 A. C. 714, 721.]

[Devise of freehold estates to J. R. nephew and heir at law of testatrix for life; and on his decease "to and amongst his children lawfully begotten, equally " at the age of [203] twenty-one, and their heirs as tenants in common: " but if only one child shall live to attain such age, to him or her, and his " or her heirs, at his or her age of twenty-one years: and in case my said " nephew shall die without lawful issue, or such lawful issue shall die " before twenty-one," then over. Held by the Court of King's Bench, and judgment affirmed in Dom. Proc. that the children of J. R. took a vested remainder.]

In the month of June, 1811, the Defendants in error brought an ejectment in his Majesty's Court of King's Bench, for the recovery of certain dwelling-houses, with the appurtenances, in the parish of Christ Church, in the City of London, which, under the will of their great Aunt Sarah Trymmer they became entitled to on the decease of their late father John Roake. The demises in the ejectment are laid on 1st June, 1811; the Plaintiffs in error entered into the common rules on defending as landlords, and pleaded the general issue. The trial of this cause was suspended for some time,

during the pendency of another ejectment upon the same title, for premises in the county of Surrey, in which a special case had been made at the summer assizes, 1811, but was not argued till May, 1813, when judgment was given therein for the now Defendants in error (*Doe v. Nowell*, 1 Maul. Sel. 327). Shortly after the above-mentioned determination, the proceedings in this ejectment were renewed, and the issue therein, coming on to be tried at the adjourned sittings after Easter Term, 1813, a special verdict was found, with the usual formalities; and as no point of form occurred, the following abstract of the verdict will suffice.

[204] Sarah Trymmer, widow, being seized in fee of the premises in question, duly made and published her last will in writing, dated 6th June, 1783, executed and attested as the law requires for passing real estates; and thereby, after, (amongst other things) giving a certain specific bequest to John Roake, her nephew, she gave and devised the tenements and hereditaments therein mentioned (whereof the premises in question are parcel) in the following words:

"I give and devise all my freehold estates in the City of London and County of Surry, or elsewhere, to my said nephew, John Roake, for his life, on condition, that, out of the rents thereof, he do, from time to time, keep such estates in proper and tenantable repair. And on the decease of my said nephew John Roake, I devise all my said estates (subject to and chargeable with the payment of £30 a-year to Ann, the wife of the said John Roake, for her life, by even quarterly payments) to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs as tenants in common; but if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one. And in case my said nephew John Roake shall die without lawful issue, or such lawful issue shall die before twenty-one, then I devise all the said estates (chargeable with such annuity of £30 a year to the said Ann Roake for her life, in manner aforesaid) to and among my said nephews and nieces, Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such [205] of them as shall be then living, and their heirs and assigns for ever."

The special verdict then finds, that Mrs. Trymmer died seized on 4th December, 1786, without having revoked or altered her will, leaving the said John Roake, the first devisee, her heir at law; who at the time of Mrs. Trymmer's decease was a widower without issue, and who upon such decease, entered and became seized as the law requires by virtue of the devise. That on 10th May, 1787, the said John Roake being so seized, married Elizabeth Rippen, and the four lessors of the Plaintiff (two of whom were born before, and the other two subsequently to the execution of the deed or levying of the fine hereinafter stated) are the lawful issue of such marriage, and the only children of the said John Roake. It is then found, that on the 5th November, 1789, an indenture of that date was duly executed, purporting to be made between the said John Roake (whose wife was also a party to the release) of the one part, and one Richard Nowell of the other part, being a deed for leading the uses, of a *fine sur couzance de droit*, of the premises in question; with a declaration, that such fine, when levied, should enure to the use of the said John Roake, his heirs, and assigns. That a fine was levied thereof accordingly, as of Michaelmas Term in the same year, in his Majesty's Court of Common Pleas at Westminster; and proclamations were had and made thereon in due form of law. The special verdict goes on to state indentures of lease and release, dated 22d and 23rd June, 1790, from the said John Roake and his wife to [206] one John Bell, conveying the premises in question, as far as they lawfully could or might, for a valuable consideration in money, unto the said John Bell; who entered, and afterwards made his will, executed and attested as the law requires for the passing of real estates; and having thereby given and devised the same premises to the now Plaintiffs in fee-simple, departed this life without revoking or altering such will; whereupon the now Plaintiffs entered as his devisees. That the said John Roake, the first devisee in the said Sarah Trymmer's will, died on the 13th February, 1803, leaving the several lessors of the now Defendant surviving him; of whom the two first named lessors attained the age of twenty-one years, before or upon 25th August, 1810, the two others being still under age, and that after an actual entry by the now Defendants' lessors on 1st June, 1811, the present ejectment was brought on 8th June in that year. Upon this special verdict, judgment was given (without argument) in the Court of King's Bench in favour of the now Defendants' lessors. A Writ of Error having been

brought in the House of Lords, the Plaintiffs assigned general errors, and the Defendants pleaded *in nullo est erratum*.

Mr. Leach (for Plaintiffs in error). The whole question turns upon this, whether the testator meant to give any thing to any one till he or she attained the age of twenty-one. If the will had stopped with the words "to and amongst his children lawfully begotten, equally at the age of twenty-one, and their heirs, as tenants in common," I pre-[207]-sume no lawyer would question that this would have been a devise to a person or persons at twenty-one, and that no estate vested till twenty-one. This case has been considered as coming within the principle of Boraston's case in Coke (3 Rep. 19. 1 P. W. 170), and of Bromfield v. Crowder, 1 B. P., N. R. 313, decided below in 1814, and affirmed in this House in 1815. But in considering the expressions of the will, your Lordships have to determine on the whole, whether this was intended as a condition, precedent, or subsequent. The universal rule of construction with respect to wills is, that the intent is to be collected, not from particular expressions, but from the whole of the will taken together; so that it is unnecessary to refer to any particular class of cases, as that is the universal rule. Then the testatrix having in this case given an estate at twenty-one, and not till twenty-one, we have to consider whether from the whole of the will any intent can be discovered contrary to the import of that expression. The will proceeds thus: "but if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one years;" that is, if more than one, they shall take equally at twenty-one; if only one, then that one shall take the whole at twenty-one. Is not this then a still stronger expression of contingency? The second clause not controlling the first, but expressing with more precision the intent before indicated. Then follows "and in case my said nephew shall die without lawful issue," then over. Is there any thing in the terms of this devise over to show an intent that any of the children should take before [208] twenty-one? Lawful issue may be considered as meaning children. It would be useful to the Plaintiff in error if the words could be taken in a general sense, as the father then would have taken an estate tail. But I cannot contend for that meaning, as the subsequent expression shows that the testatrix by the word issue here meant children. Then read it, "in case my said nephew shall die without children," I give it over; and then follow the words on which the question turns, for unless the subsequent expression controls the previous words, the first expression prevails, "or such lawful issue (children) shall die before twenty-one," then over. They say that the words "or such lawful issue should die before twenty-one," control the meaning of the previous part of the will, and that the testatrix must, by necessary implication, be presumed to mean that the children should take before twenty-one, and upon that depends the case of the Defendants in error. But if there is any principle more settled than another in the construction of wills, it is this, that no implication arises in favour of any one merely from an estate limited over to another on his death, unless it is given over on his death to the heir at law (*Vid. Fawlkener v. Fawlkener*, 1 Vern. 22). If an estate is given over to the heir at law on the death of A. B. there is a clear intent that the heir shall not take till the death. And where is it to go in the mean time? An implication arises that A. B. shall in the mean time enjoy the estate. But if it is limited over on the death of A. B. not to the heir at law, but to a stranger C. D. the estate until the death of A. B. goes not to A. B. but to the heir at law, who takes all that is undis-[209]-posed of. It may be conjectured that the testator did not intend that the heir at law should take, but the heir takes by the rules of construction. In the case (*Qy. Doe v. Nowell*, 1 Maul. Sel. 327) on the authority of which this was decided, it is reasoned thus: if the construction contended for by the Plaintiff in error leads to absurd consequences, it will follow that such a construction could not be according to the intent of the testator. But the answer is, that this objection applies to nine wills out of ten. An ingenious lawyer may draw absurd conclusions out of the expressions of almost all wills. But that arises from the testator's having taken only a limited view of the subject; and the rule is to go by the expressed intention. I admit that such objections may be raised here; but the answer is, that the testatrix did not look to all the circumstances and consequences either in fact or in law. Her purpose, however, was that none of the children should take till twenty-one. So that the Court below decided on conjecture in that other cause (*Qy. Doe v. Nowell*), and made a wiser will; but Courts of Justice cannot properly make wills for the parties.

Mr Richardson (for Plaintiffs in error). One would think that when an estate is given at a certain age or time, the donor intended that nothing should be given unless at that age or time. That seems to have been the old law (10 Coke, Rep. p. 50), and Grant's case is there cited. (Lord Eldon, C. That was a devise to one person : but what estate in the present case would the first child take at twenty-one ? Was he to wait till the others attained twenty-one, or to take the whole, and then divest as the [210] others came of age ?) He would take and divest ; I mean to argue it in that way. Grant's case (2 Leon. 36. Cro. El. 122) was that of a devise of land to John Grant when he came to the age of twenty-five years, to have and to hold to him and the heirs of his body. Grant levied a fine at his age of twenty-one, and afterwards attained the age of twenty-five. The question was, whether the issue were barred, and the Judges were of opinion that they were ; but they considered the estate tail as *in futuro* and contingency at the time the fine was levied. I am aware that the decision there would have been the same whether the interest was vested or not ; but the Judges proceeded on the supposition that it was contingent. These words then "to and amongst his children at "the age of twenty-one," would give a contingent remainder, and the words, "but if "only one child shall live to attain such age, to him or her, and at his or her age of "twenty-one," are still stronger as words of contingency. It was supposed elsewhere that it was necessary to give a vested interest to the children of Roake to prevent the estate's going over, as it otherwise might, though they were descendants of Roake ; as suppose they all died under twenty-one, leaving twenty children, it was said to be against the intent that the estate should in that case go over, and therefore to effectuate the intent the remainder must be vested. In answer to that, I say that the remedy does not cure the defect, for if no child attained twenty-one it must go over, or if not, it must be by force of the words "in case my said nephew shall die without issue," and that will not do unless it should be held to mean an in-[211]-definite failure of issue, and in that case Roake had an estate tail.

They say that the children, as they came in *esse*, took estates defeasible on their not attaining the age of twenty-one. Now the testatrix provided for one event, that if only one child should attain twenty-one, then to that one, and if all died but one before twenty-one, that one would take the whole. Then suppose there are four children, and one dies before twenty-one, leaving children, if this was a vested interest in him before his death, his interest in the quarter of the estate would descend to his children ; and so if a second and a third should die before twenty-one, leaving children, their shares would descend. Then the fourth attains twenty-one, and he then takes out of the children the whole interest so vested in them. But suppose two die, leaving children, and two attain the age of twenty-one, the two take only the half, and the other half goes to the children, as the estate is not divested except the children of Roake should be reduced to one attaining the age of twenty-one. Such a construction is clearly contrary to the intent of the testatrix, as it is clear that she meant that those only should take who attained twenty-one, and that if only one attained that age, then he should take the whole. They say it is necessary it should vest in the children before twenty-one, to prevent its going to the Pinfolds. But it will not prevent it, for if none were to attain twenty-one, it must go over if not prevented by the word "in case my said nephew shall "die without lawful issue." When the latter clause comes to be considered, it is difficult to con-[212]-tend that the word issue can be understood as meaning any thing more than immediate children ; and if it designates immediate children, then the estate may go over so as to defeat the subsequent issue of Roake ; and if that is not the intent of the testatrix, then the words without lawful issue must be understood to mean a general failure of issue, and Roake takes an estate tail. By giving him an estate tail, the consequences will be to prevent the estate from going over to the less favoured branches, and that is the only way in which it can be prevented, and there the issue is barred by the fine.

In that class of cases commencing with Boraston's case (3 Rep. 19) and ending with Goodtitle *d. Hayward v. Whitby* (1 Bur. 228), something was done with the estate in the mean time for the benefit of the devisee or some other person, and the decision turned on that distinction. In another small class of cases commencing with that of Edwards *v. Hammond*, in Levinz (3, 132) and Shower (2, 398) which was the authority on which the case of Bromfield *v. Crowder* (Fear. *Con. Rem.* 6 ed. 245, 7. n.) was decided, the decision did not turn on that distinction. If the report of the case of

Edwards *v.* Hammond were correct as it is given in Shower, it would be distinguishable on the ground of the intent to protect the estate of the issue male. But the inspection of the roll seems to exclude that interpretation, and the report must be taken as in Levinz. According to that report it was a special verdict in ejectment, and it was stated to be a surrender by a copyholder of Borough English, to the use of himself for life, and after, to the use of his eldest son if he should attain twenty-one, provided and upon condition that [213] if he died before twenty-one it should remain to the surrenderer and his heirs, and the question was whether his attaining twenty-one was a condition precedent or subsequent. It was argued on the one side that it was a condition precedent, and that the estate was in abeyance till he attained twenty-one, and it was argued on the other side, and so held, that though by the prior words "to the use of "his eldest son if he should attain twenty-one," imported a condition precedent (from which it appears that it would have been held a condition precedent if it had stood on the prior words), yet on all the words taken together it was a condition subsequent. That was inferred from the devise over "provided and on condition that if he died "before twenty-one, etc." as if the testator meant to undo what he supposed he had before done; and the case was decided on the analogy of the case of Spring *v.* Cæsar, in 1 Roll. Abr. 415, pl. 12, and in Jones, 389. If these authorities depend upon any principle, it is this, that the Court collecting the intent from all that appears within the four corners of the will may upon the ground of the intent disregard the word "if," or any other word importing contingency, and in another case Doe *d.* Hunt *v.* Moore, 14 East. 601, the Court, not carrying the principle further, disregarded the word "when." But it is admitted that the word "if" or equivalent words, do import a contingency. And why disregard the words of contingency here? Contingent estates depend on certain accidents, such as that the life or particular estate being gone before its natural expiration, the contingent remainder cannot vest at [214] all. But the testatrix knew nothing of that, and uses the words of contingency in their ordinary sense; and why disregard these words on the ground of an intention to use them in a sense which she never dreamed of?

There are circumstances in the present case which distinguish it from those on which they rely for the Defendant in error, as so much depended there on the particular words; and your Lordships will probably not be disposed to carry the principle farther than the words in these cases will bear. The contingency here rests not merely on "at" in the first clause, but also on "if" in the second, and the remainders are therefore contingent, or Roake took an estate tail; and whichever of these is the true construction, the purchase under the fine is good. This would otherwise be a very hard case for the Plaintiff in error, etc.

Sir S. Romilly (for the Defendants in error). The question depends entirely on the technical effect of the words in the will. They speak of the hardship of their situation, but our hardship is the greater. Your Lordships, however, cannot consider the situations of the parties, your business being merely to lay down the law and to fix it, as if it were fixed by the legislature.

The question lies in a very narrow compass, and depends on a point of which the testatrix knew nothing, whether a remainder is contingent or vested. That again depends on decided cases, and the point has been settled by the highest authority in this country, and it is not competent to this [215] House, I speak with deference, to reverse its own decision. The point was also decided in another case depending on this will, Doe *d.* Roake *v.* Nowell, 1 Maule. Sel. 327, in K. B. on the authority of Bromfield *v.* Crowder, 1 Bos. Pull. N. R. 313, and though Mr. Preston with much ingenuity endeavoured to distinguish them, the Court found no substantial distinction, and Lord Ellenborough says, "I think, this case concluded by Bromfield *v.* Crowder, which was "very fully considered, etc." That case of Bromfield *v.* Crowder underwent great consideration. It was sent from the Rolls to the Court of Common Pleas, where it was argued twice by Serjeants Williams, Lens, Bayley, and Shepherd; and after as great consideration as any case ever underwent, and after the record had been consulted for the particulars of the case of Edwards *v.* Hammond, the Court was of opinion that the remainder was vested, though that case was stronger for the contingency than the present case, for it was "if the said John D. Bromfield shall live to attain the age of "twenty-one years," and not as in the present case "to and amongst his children, etc. "at the age of twenty-one years." The M. of the Rolls decreed according to that opinion,

and the decree was on appeal affirmed by the Lord Chancellor, and then the case being appealed to this House your Lordships were of opinion that it was rightly decided. In that case the testator John Davenport, after charging his real and personal estates with payment of his debts, legacies, etc., gave an annuity of £50 to his nephew and heir at law Samuel Crowder, and a legacy of £100 to his godson John Davenport [216] Bromfield, provided he lived to attain the age of twenty-one years, otherwise such legacy was not to be paid or payable. And then he devised to his wife Elizabeth Davenport, all his real estate for her life, and after her decease to his cousin Joshua Rose, his heirs and assigns for ever. Afterwards he made a codicil to his will in these words: "With regard to that part of my will where I gave my estate to Joshua Rose, and his heirs for ever, in case he survives my present wife, now I entirely revoke the above part of my will, and only give Joshua Rose my estate during the term of his natural life, in case he survives Mrs. E. Davenport; and at the decease of Mrs. E. Davenport, and Mr. Joshua Rose, or the longest liver of them. I give all my real estate of what nature and kind soever to my godson John Davenport Bromfield, son of Charles Bromfield, of St. Ann's, Liverpool, if the said John Davenport Bromfield shall live to attain the age of twenty-one years; but in case he die before he attains that age, and his brother Charles shall survive him, in that case I give my real estate to Charles Bromfield, his brother, if he lives to attain the age of twenty-one years, but not otherwise; but in case both the above-mentioned boys die before either of them attain the age of twenty-one years, then I give my real estate to John Vale, etc., and his heirs for ever." The testator died, leaving Samuel Crowder his heir at law, etc.; then Elizabeth Davenport died, and Rose entered into possession and died, John Davenport Bromfield being then an infant under twenty-one years of age. John D. Bromfield by his next [217] friend filed his bill in Chancery against Crowder, Charles Bromfield and Vale claiming the estates, and praying amongst other things, that his right to them, on the death of Rose, might be declared, and the cause was heard and reheard before M. R., Crowder contending that the remainders to the Plaintiff, Charles Bromfield and John Vale, were contingent, and limited on the life estates of Elizabeth Davenport and Joshua Rose, which determined before the events happened on which the remainders were to become vested, and that the estates therefore belonged to him as heir at law. The question was, whether the words, "I give all my real estate, etc., to my godson John D. Bromfield, etc., if the said J. D. Bromfield shall live to attain the age of twenty-one years," gave an immediate vested estate. The Judges often certify without saying anything; but this being a case of such consequence, Ch. J. Mansfield gave their opinion in open Court; and says, "The fairest construction that can be put on this will, independent of authority, is that the Plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent. With respect to the cases, that of *Edwards v. Hammond* is on all fours with the present. The circumstance of the devise over being to a stranger makes no difference, for it is clear that the testator meant no one to take his estate unless in the event of the Plaintiff dying under twenty-one. *Edwards v. Hammond* is neither opposed nor weakened by any case. No doubt the general meaning of the word 'if' implies a condition pre-[218]-cedent, unless it be controlled by other words. But in this case there is a variance between the expression and the meaning, and the case of *Edwards v. Hammond* sanctions us in giving effect to the latter. On these grounds we are of opinion that the estate vested in the Plaintiff on the death of the preceding devisees; and the expression 'All my estate' is so general as to pass an estate in fee. Besides, it would be an absurdity on the face of the will to construe it only an estate for life." Mr. Leach rested on general reasoning without discussing that case; but though he could convince your Lordships that the decision was wrong, it is now too late; the point is settled, and can be altered only by the legislature. Mr. Richardson attempted to show some distinction between that and the present case. But there is no difference that ought to affect the ground of decision; otherwise there can be no rule unless a will is exactly in the same words as others. They say "at" may be construed as "if"; I do not admit that, for "at" is more favourable for us. But at any rate "if" is the word in *Bromfield v. Crowder*. Another case, stronger for the contingency than the present, has been decided on the authority of *Bromfield v. Crowder*, *Doe v. Hunt v. Moore*, 14 East. 601. When that was first argued in K. B., *Bromfield v. Crowder* had been decided in C. P. and in Chancery, and the Court of K. B. postponed the decision till the House of Lords had

decided the case of *Bromfield v. Crowder*, and then that Court decided on the same ground. The expressions in that case of *Doe v. Moore* were, "I give and devise to J. Moore, etc. when he attains the age of [219] twenty-one years, etc." and so to James, Robert, and Charles Moore. The testator died, and, the devisees being all under twenty-one, the heirs at law brought an ejectment, and the question was, whether they took any and what estate or interest in the devised estates. Lord Ellenborough says, "On behalf of the Plaintiff it was contended that the devisee's attaining the age of twenty-one years was a condition precedent to any estate vesting in them, and that in the mean time the same descended to the lessors of the Plaintiff who were the heirs at law of the testator. And the cases of a bequest of personal estate were relied on where it has been held that a legacy given to one if, or when he shall attain twenty-one, lapses in the event of the legatee dying under twenty-one. And *Stapleton v. Cheales*, Pre. Chan. 317, *Goss v. Nelson*, 1 Bur. 226, as to what is there said by Lord Mansfield respecting legacies, and *Hanson v. Graham*, 6 Ves. jun. 239, were cited; and it was argued that there was no distinction between devises of real and bequests of personal estate in this respect. But that is not so, for the rules by which legacies are governed are borrowed all, or the greater part, from the civil law; whereas the decisions on devises of real estate have established a different rule; and according to them a devise to A. when he attains twenty-one, to hold to him and his heirs, and if he die under twenty-one, then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him; but the dying under twenty-one is a condition subsequent on [220] which the estate is to be divested, as in *Mansfield v. Dugard*, 1 Eq. Ca. Ab. 195.—*Edwards v. Hammond*, 3 Lev. 132, and *Bromfield v. Crowder*, 1 B. Pul. N. R. 313, which latter case was affirmed in the House of Lords. These we consider as authorities precisely in point, especially the last case, the pendency of which in the House of Lords was the occasion of our Judgment in this case being deferred. To which may be added *Goodtitle v. Whitby*, 1 Bur. 228, etc." *Doe v. Moore* cannot be substantially distinguished from this. The words were equivalent to those here used, but expressed the contingency more strongly. The word in *Doe v. Moore*, is "when," and in *Bromfield v. Crowder*, it is "if," both stronger for the contingency than "at," which they contend, is equivalent to "when" and "if;" and supposing it to be so, these cases are against them. No distinction has been stated applicable to the point in question, whether the remainder is vested or contingent. If your Lordships were to decide against us, you would reverse not only your own decision in *Bromfield v. Crowder*, but all the decisions that have proceeded on that authority. True, it is a question of intention, but it is also a question as to the technical effect of certain words. Mr. Richardson tries to embarrass the case by the supposition that some die before twenty-one; some not. I think the testatrix has not provided in all events for the issue of those dying before twenty-one, and the point was not in her contemplation. I think the first who attained twenty-one would take the whole and divest as the others attained that age; and if only one attained that age, [221] that he would retain the whole estate in fee to the disappointment of the children of those dying before twenty-one, leaving issue. "In case my said nephew shall die without lawful issue;" it is clear from the context that the word "issue" there means "children." Mr. L. concedes that; Mr. R. not quite; then if it means issue generally, what becomes of the devise to those attaining twenty-one? But if it means children, all is consistent. It was not intended that the estate should go over to the Pinfolds, except in the event of the nephew Roake dying without issue, or leaving issue and the survivor of the children dying before twenty-one, the Pinfolds being then living, the children having the estate in the mean time.

Mr. Marryatt. Both on principle and authority the point is clearly in our favour. It is argued to-day that Roake took an estate tail. Under what words? The devise is to him for life, remainder to his children as tenants in common in fee without preference given to the eldest. The ground is a general failure of issue under the words "in case my said nephew shall die without lawful issue." It is clear that issue there means children; and I could, if it were necessary, refer to a case where issue was held to mean sons, and not issue generally, *Foster v. Lord Romney*, 11 E. R. 594. The general result of the authorities is uniform for two centuries that when an estate of inheritance is given to a devisee when twenty-one, or at twenty-one, or if he should attain the age of twenty-one, it is a vested remainder defeasible on dying before twenty-

one. The cases are collected in Fearn, (*Con. Rem.* (6 ed. 242). [222] They cite only one case, Grant's case, 10 Coke, R. 50 f. (*Wil. Cro. El.* 122. Leon. 36), as authority in their favour; the others being cited only to distinguish them from the present. Whether that case was decided does not there appear; but it is in fact an additional authority that the estate vested immediately; for unless he had then an estate of freehold, the fine could not operate at all. This much will be sufficient with respect to the authorities, after what has been already stated. As to the intent, they say that the testatrix intended to give no interest to Roake's children till they attained the age of twenty-one, though at the time of making the will he was not married, and she contemplated the occurrences of twenty-two years after at least. The intent is to be primarily regarded; and the general intent in preference to the particular. It is said that a devise at twenty-one imports no devise till twenty-one. There is a distinction in equity as to bequests out of personal property founded on the civil law; but there is no instance in which freehold estate devised at twenty-one does not vest immediately where the testator does not intend that the heir should take.* The inconvenience of a contrary construction appears from the present case. First, the primary intent of the testatrix would be defeated, as she gave the heir merely an estate for life, and their construction would enable him to procure the dominion over the whole fee, which she never intended. Secondly, the children could not be of age for many years, and unless the remainder vested immediately, what was to become of the estate in the mean time? It was clear she did not intend that it [223] should go to the heir at law. Roake at the date of the will had no children, and in case of his dying leaving children then all under twenty-one, did she intend that they should be all excluded? Or that those who should then be twenty-one should take the whole, to the exclusion of the rest? she having said that they should all take equally. This is distinctly in opposition to the primary object of the testatrix. How is it consistent with the intent of providing for all, that only one being of age at the father's death should take to the exclusion of all the rest not then twenty-one, though they might attain it the next day or week? So that upon their construction Roake and his children would take in a way which she never intended. If it was a rule that no words should make a condition precedent against the intent of the testatrix, it was plain that she intended that the estate should not go over if Roake had any children, and that the remainder should vest immediately in the children liable to be defeated on their not attaining twenty-one.

Mr. Leach (in reply). The hardship of the case can have no influence on your Lordships' judgment, though the party purchased under the advice of the ablest lawyers in this country. But this is a case of the first consequence in the construction of wills. The particular expression must yield to the general intent as collected from the whole of the will, and it would be a novel construction that a testator did not mean what he said, because a particular inconvenience would arise. It is said that the case has been decided by this House, and that the decision must stand till controlled by the legislature. [224] But I am not satisfied that it has been decided. The case is not the same in expression as that of Bromfield v. Crowder, and then the question is whether the principle applies. And how do they apply it? They weigh the particular expressions in both cases, and say they are of equal force. But the true mode is not to weigh one expression against another, but to try whether the expressions measured by the common standard lead to the same conclusion. And then they say that there is no authority to show, that if an estate is given at twenty-one, it does not mean that it is given before. Where is the ground of that argument? If they will look at all the authorities, they will find that a gift at twenty-one, standing *simpliciter*, is no gift till twenty-one; and such is the construction in Grant's case. The plain import of the expression here is, that the children should not take till twenty-one: and there is no other expression on the face of the will which controls that.

Lord Eldon (C.) (May 16, 1817). In either view of this case it is a case of hardship. If the fine should be destroyed, some of the parties' purchasers may be damaged; and if not, then the devisees will be deprived of the estates. But in the view of hardship, we have nothing to do with it: and after a careful consideration of the special verdict, and all that appears within the four corners of the instrument, the nature of

* *Id.* also as to legacies charged on real estate, Pawlett v. Pawlett, 2 Vent. 336. 1 Vern. 204, 321. Fearn, 6 ed. 555, n.

the case, the authorities, and effect of the whole of the will, it is my humble opinion that this judgment ought to be affirmed.

Judgment affirmed.

[225] IRELAND.

IN ERROR FROM THE EXCHEQUER CHAMBER.

BISHOP OF KILDARE,—*Plaintiff* (in Error); REV. T. SMYTH,—*Defendant* (in Error) [May 9, 16, 22, 1817].

[Under the words of the charter of incorporation of the Dean and Chapter of the Cathedral Church of H. T., Dublin, ordaining that “the Archdeacon, etc. “can and may enjoy a stall in the choir, and a voice and place in the “chapter in all chapter acts,” etc.—he has a voice in all its corporate acts, and not merely in the acts of that chapter considered as the Archbishop’s council. And it seems he may vote by proxy.]

[Though in a bill of exceptions to the directions of the Judge below, the evidence given at the trial upon which the allegation of error depended, was not set out at length; but parts of it, consisting of charters, entries, etc. were merely referred to, and the record appeared, on the transcript being brought up, to be so far defective; and though in strictness the House of Lords cannot proceed upon such a record, yet upon consent of the Counsel for both parties to select such parts as they meant to reply upon, the cause was heard and decided—the Lord Chancellor stating that a special entry should be made on the journals to guard against the mischief of such a precedent.]

[*N.B.*—The evidence was printed in an appendix to one of the cases.]

This was an action of trespass on the case brought in 1810, in the Exchequer (of Pleas), by Dr. Smyth, against the then Bishop of Kildare, for a false return to a writ of mandamus, and for damages on account of the injury sustained by him in consequence of the conduct of the Bishop, who was [226] dean of the cathedral church of the Holy Trinity, Dublin, in refusing to admit Dr. Smyth to a prebendal stall of that chapter, to which he had, as he contended, been duly elected.

By a charter of 33 Hen. 8, and of 2. Jac. 1, reciting the previous charter, an ancient priory in the cathedral church of the Holy Trinity, Dublin, was changed into a dean and chapter; and by the latter charter the dean, precentor, chancellor, treasurer, and three canonical prebendaries (substituted for six vicars choral appointed by the previous charter), viz. of St. Michan’s, St. Michael’s, and St. John’s, to each of which prebends were annexed the church and rectory of the same name, were incorporated by the name of “the dean and chapter of the cathedral church of the Holy Trinity, Dublin.” It was ordained by the charters of Jac. 1, that when any of the prebends became vacant, the dean and chapter might elect any fit person to succeed, and in both charters it was ordained that “The Archdeacon of Dublin and his successors can and may enjoy a stall “in the choir, and a voice and place in the chapter in all chapter acts in the aforesaid “church of the Holy Trinity, Dublin, according to the honour and prerogative of his “dignity.”

In December, 1808 (Dr. Smyth being then prebendary of St. John’s, admitted in 1803), the prebend of St. Michan’s, the most valuable of the three, became vacant. And Dr. Smyth, and Dr. Graves (Prebendary of St. Michael’s, admitted in 1801), being candidates, at a meeting of the dean and chapter, holden on the 16th February, 1809, [227] for the purpose of election, the dean and two others voted for Dr. Graves; and the Archdeacon (by proxy) and three others voted for Dr. Smyth, the Defendant in error. In the regular course he would have been immediately installed by the chapter, and presented, under the corporate seal, to the Archbishop of Dublin, to be by him admitted to the Rectory of St. Michan’s. The Dean (Plaintiff in error) refused to

admit him or to affix the corporate seal to the presentation; and Dr. Smyth having on the 18th May, 1809, obtained a writ of mandamus, directed to the dean and chapter to admit him, the Dean, without calling a meeting, returned that Dr. Smyth was not duly elected. The presentation then lapsed to the Archbishop, and, he having died, another person was presented by patent from the Crown, and admitted and instituted to the prebend and rectory of St. Michan's.

Dr. Smyth then brought his action, laying his damages at £10,000: and the Defendant in error having pleaded the general issue, the cause was tried, and the charters, etc. were given in evidence. It was contended for the Dean, that it appeared on the evidence that the Archdeacon was not entitled to vote in the election of a prebend; that, if he had the right in person, he was not entitled to vote by proxy: and, that from the usage since 1594, the jury might presume that there was some ancient bye-law under which Dr. Graves, as the senior prebendary, was entitled to succeed to the vacant prebend. On all these points the opinion of the Judge was against the Dean, and under his directions the Jury found for Dr. Smyth, damages [228] £1600. A bill of exceptions was at the trial tendered to the directions of the Judge, and sealed by him.

Judgment having been given for Dr. Smyth in the Exchequer, and Exchequer Chamber, a writ of error was brought in Dom. Proc., and the directions given by the Judge at the trial, and excepted to, were assigned for error.

This bill of exceptions did not set out the evidence at length (and this is the chief reason for mentioning the case here); but, as it appeared on the transcript of the record, merely referred to the charters and other documents in this manner. "And upon the trial of the issue so joined as aforesaid, the Counsel for the Plaintiff, to maintain and prove his issue on his part, produced and gave in evidence a charter of the tenth May, thirty-third Henry the Eighth (prout the charter). A charter of the twelfth June, second James the First (prout the charter). An act of the ninth of William the Third (prout the act), etc. And the said counsel then and there further produced and gave in evidence the books containing the chapter acts of the said dean and chapter, etc. and read therefrom the following entries (prout entries)," etc. etc. The record, therefore, not containing the evidence as it was given before the Jury, a difficulty arose as to whether the House could give judgment upon such a record. It was contended for the Plaintiff in error, that as there was no record except this before the Court below, he could not allege diminution, nor bring the case before their Lordships in a more regular way. For [229] the Defendant in error it was contended that it was incumbent on the person tendering a bill of exceptions to take care that it should be regularly made up. He must show, that for matter appearing on the face of the record, the Defendant in error was not entitled: and if the record was not such as to enable him to show that, the judgment ought to be affirmed. It was stated, however, for both parties, that they were willing to settle by consent what parts of the evidence should be taken and relied upon.

Lord Eldon (C.). Strictly the House cannot proceed on such a record: but it may be explained by agreement between the parties. You may, therefore, agree as to what parts of the evidence you mean to take and rely upon; and a special entry may be made on the journals to prevent the mischief of such a precedent.

The cause was afterwards heard, and it was contended for the Plaintiff in error, that the meaning of the charters was, that the Archdeacon should have "a place and voice" in the chapter in all chapter acts, only when the Chapter acted as the Archbishop's Council, and not when it acted as a corporate body: that the Archdeacon was not a member of the corporation, that he was neither prebendary nor canon, and had no share in the property; and could not vote in any corporate act, such as the election of a prebendary, either in person or by proxy: that he was himself only the delegate of the Archbishop, and could not vote by delegate. [230] And then it was contended that the supposed bye-law was legal and consistent with the charters. It is unnecessary to state the arguments on each of these points at length, as the judgment turned entirely upon the ground, that "chapter acts" in the charters, meant all chapter acts whatever: and the Lord Chancellor asked whether, if the King had said that the Archbishop himself should have a seat in the chapter, there could be any objection to it. The Counsel for the Defendant in error were not heard.

Lord Eldon (C.) (May 22, 1817). The case has been as ably argued for the Plaintiff

in error as it can possibly be. But the question does not depend upon whether the Archdeacon was or was not a corporator, but upon the particular clause of this charter; which ordains that "he can and may enjoy a stall in the choir, and a voice and place in "the chapter in all chapter acts."

Lord Redesdale. I concur in that opinion. In reading the charter, I find that the Archdeacon is to have a voice and place in all capitular acts, and this is a capitular act.

Judgment affirmed.

[231] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

TOWART,—*Appellant* ; SELLARS,—*Respondent* [May 16, 1817].

[3 Scots R. R. 367. Commented on in *Laidlaw v. Laidlaw*, 1870, 8 M. 882, 885. See *A.-G. v. Parnther*, 1792, 3 Bro. C. C. 441; *Selby v. Jackson*, 1843, 6 Beav. 192; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.]

[In support of an action brought in 1808 to reduce certain deeds executed by M. between 1782 and 1799, upon the ground of the insanity of M. the granter; parole evidence given that he was quite deranged from 1781 till his death in 1804; the evidence applying to his insanity generally, and not to the particular moments when the deeds were executed. This evidence encountered by parole evidence of his general sanity during the same period; and this latter evidence corroborated by notes or receipts written by M. having reference to the contents of the deeds; and showing that he understood their nature and effect; and also by the deeds themselves, which were rational in his circumstances; corroborated also by the circumstances that the deeds were attested by witnesses of unimpeached credit, and that M. had been in 1784 served heir, and infeft in the subjects conveyed by the deeds, and had then sold part of the lands, and mortgaged the remainder, etc. these transactions proceeding on the supposition of his sanity, and remaining unchallenged. Held by the House of Lords, reversing the judgment below, that the deeds were good.]

[The Lord Chancellor observing, that supposing M. to be weak or even insane, if he was sane at the time of executing the deeds, that was sufficient to support them: and that the distance of time between the period of their execution and that at which they were challenged was a material consideration; and, that if the deeds had been bad as titles, they could not have been good as securities.]

[Lord Redesdale observing, that if deeds were to be reduced on the ground of utter incapacity, they could not stand for any purpose; that in order to discover the truth from conflicting evidence, it is proper to try it by the test of collateral circumstances, the truth of which is unquestion-^[232]-able; and that these circumstances in this case were inconsistent with the evidence of notorious incapacity in M.; and that the attesting witnesses to some of the deeds being dead, it must be taken that they would have sworn to the sanity.]

This was an action brought by the Respondent, as heir and executor to James Maitland, deceased, to reduce certain deeds which had been granted by Maitland to the Appellant, on the ground of the insanity of Maitland at the time of their execution.

Maitland, being entitled in possession to an heritable property of twenty acres of land in the vicinity of Glasgow, in 1783, executed a trust disposition of his property to his maternal grandfather, and two other persons who had been friends of his father; the purpose of the trust being to pay the granter's debts, wind up his affairs, and pay him the residue. The Appellant, who in the same year, 1783, had married Maitland's

only sister (he had no brothers), brought an action against him for his wife's share of the father's executry, which Maitland compromised for £300; and in July, 1784, the trustees, with Maitland's concurrence, upon conditions stated in a deed of May 14, 1784, divested themselves of the trust in favour of the Appellant and his wife. And in August, 1784, Maitland executed a deed of renunciation and discharge and disposition of the whole right and property in the lands to the Appellant and his wife, under the burden of paying £100 to one Armour, to whom he had mortgaged the property for that sum, and all other just demands, and of allowing him an an-[233]-nuity of £13 for his maintenance. The wife died in 1793 without issue; and, in July, 1798, the Appellant obtained from Maitland a general irrevocable disposition *mortis causa*, of the whole property heritable and moveable which he then had, or might possess, or be entitled to, at the time of his death.

In 1804 or 1805 Maitland died, and in 1808 the action was brought to reduce these deeds. The insanity being denied, a proof was allowed, and a great number of witnesses were examined on each side. Those adduced on the part of the pursuer deposed, that till 1780 or 1781, Maitland (or Maiklem) was a decent man, but from that time he became quite deranged; that he attempted to cut his own throat, and to burn the house; that he enlisted as a soldier, but was incapable of doing the exercise; that he was unfit for the common operations of field labour; that he was generally known by the name of daft laird Maiklem, and never recovered his senses. On the other hand, the witnesses for the defender, including two attesting witnesses to the deed of 1798, deposed that Maitland was of perfectly sound mind, intelligent, and even acute in business when sober, but that he was much addicted to drinking, and often intoxicated.

The Court below, by interlocutors February 3 and May 24, 1814, sustained the reasons of reduction as to the deeds of August, 1784, and July, 1798; and also reduced the other deeds challenged as titles to the subjects in question, and found that they could only be considered as securities entitling [234] the Defender to be heard in accounting. From this judgment the Defender Towart appealed.

It ought to be noticed that Sellars, not being then aware, it seems, of the existence of the deeds disposing the absolute right, in 1807, before instituting this action of reduction, had brought an action of count and reckoning against Towart for his intrusions with the rents under the devolution of the trust in 1784; which must have proceeded on the supposition that the trust deeds were valid.

Another material circumstance was that the Respondent might, as Maitland's next male agnate, have brought him in 1780, or any subsequent period, before a Jury, to have his insanity legally ascertained, if he was insane; but had never started the question till 1807 or 1808, about two or three years after Maitland's death.

As to the alleged insanity, the cases of Arbuthnot (Viscount) *v.* Sime, 1796—Douglas *c.* Douglas, 1771—Dewar *c.* Dewar, 1808—and the English case of Faulders *c.* Silk, in K. B. 9th December, 1811—were cited.

The Appellant offered in proof the deposition of his law agent, Mr. Peterson: but this was objected to:—1st, Because he was the Appellant's confidential agent:—2d, Because he had an interest in the issue of the cause, the interest being that he held an heritable security granted by the Appellant over the property, and was cautioner for loosening the arrestments which the Respondent had used in the hands of the tenants on the property pending the suit. As to this objection, the cases of Adam *v.* [235] Bruce, Kilk, 1743—Govan *c.* Young, 1752—Stewart *v.* Montgomery, 1677, Dict. vol. ii. 256—McAlpin *c.* McAlpin, September 2, 1806—McGregor *c.* McGregor, 11th July, 1801—*v.* Brand, 27th November, 1771—were cited. The Court, 10th July, 1812, refused to admit the evidence *in hoc statu*, and there was no further proceeding on that point.

The Appellant also offered in proof the deposition of Mr. Mark Reid, one of the witnesses to the deed of August 28, 1784, which had been taken in the presence of a magistrate and two witnesses in 1807; Reid being then eighty-three years of age, and in a declining state of health, and having died before the action of reduction was brought. The Lord Ordinary refused to admit the deposition or the evidence of the magistrate and witnesses as to its contents; and a petition having been presented to the Court, the Lords, June 5, 1812, “superseded, determining on the prayer of the petition

"until the state of the process should be before the Court for advising." But no further judgment was given on that point.

Sir S. Romilly and Mr. Clason for Appellant; Mr. Leach and Mr. Brougham for Respondent.

(May 16, 1817) Lord Eldon, C. (after stating the case). I do agree that this is an extremely important case; for, as on the one hand, justice is always anxious to protect persons of weak minds from their own acts; and, where insanity is established at the time when deeds are executed, will set them aside, whether in [236] their nature such as ought to be executed or not: so on the other hand, if a man of weak intellect executes a deed which would not be improper if executed by a man of the strongest mind, it is not for us to say that, because God has at one moment afflicted a person with such a malady, he shall, therefore, never be restored so as to be competent effectually to do an act which a moral and good man would think it most proper to do. The principle in our law is clear; and I do not know any difference in that respect between the principle of our law and that of the law of Scotland. I remember the case of *Faulder v. Silk*, in K. B. Dec. 9, 1811 (see 3 Camp. 125), of a gentleman who was confined for some years in a house for the reception and care of insane persons. He had a lucid interval, and made a disposition of his property which was exactly that which he ought to have made, having regard to the circumstance that he had before provided for some members, and not for other members of his family; and that which he, before his insanity, communicated to a friend, he intended to make: and he did it under a sense of his situation, and the impression that no time was to be lost, and to protect himself against a relapse. That was held to be a good deed. For the question is not, whether a man has been insane, but whether he has recovered that *quantum* of disposing mind at the time he executes the deed which ought to give it effect.

Another principle which we may safely lay down is this: if property has been disposed of twenty or thirty years before, formally, and with the concurrence and assistance of individuals of good character; and if that disposition is not quarrelled with as speedily as [237] may be, and only challenged when the parties best acquainted with the whole circumstances of the transaction are dead and gone, it is dangerous to set aside that disposition, at the distance of twenty or thirty years, upon a ground so fallible as human memory, and testimony as to the state of the person making that disposition at other moments, without at all applying to the moment when he executes the deed.

After these general observations, see what these deeds are. On the 20th December, 1783, he makes a disposition of his property, proceeding upon a narrative of Maitland. "That I am at present owing to sundry persons considerable sums of money which I am unable to repay, but which it is most just and reasonable should be paid and discharged as soon as possible; that I have no other fund for that purpose but the heritable subjects after described, from which I expect a considerable reversion will arise to me after payment of my debts: but from my particular situation, at present, I incline to trust the management of my affairs to the persons after named, my creditors and friends, in whom I have an entire confidence." What the particular situation was I do not know; the witnesses are in their graves: but one of the witnesses to the deed of 1798, in which he recites that he was apt to be made the worse of liquor, and to be imposed upon by designing persons, says that he read it over himself, took it away with him, and kept it by him for some time, and at a second meeting executed it. In the recital to this deed of 20th [238] December, 1783, he might perhaps allude to the calamity with which he had been afflicted. But if God afflicted me two years before with such a calamity, and I made a disposition of my property, reciting that I was afraid of the consequences of a relapse, whether it were the fear of imprudence, as in the *Middleton* case (2 Ves. Jun. 391), or the fear of disease; is it to be held that because a man recites that reason for doing the very thing which he ought to do, he is therefore not sufficiently recovered to render him competent to do that act? Then the narrative proceeds:—"Therefore, I do hereby with the special advice and consent of James Blair, my grandfather, etc.;" so that he was acting by the advice and with the consent of his grandfather: Glen and Scott, who in this year, 1783, had been engaged in many transactions with Maitland, making no objection; and this is no small circumstance in the absence of other evidence as to his state of mind at the moment of executing the deed. The trustees were in the first place to sell parts of the property

for payment of the granter's debts, without any control from him. That clause is not uncommon in instruments in this part of the island, and here again I refer to the case of the Chirk Castle estate.

I wish to call your Lordships' attention particularly to this fact, that at the time the deed was executed, he was aware that he had to defend suits carried on against him by this Towart; and there was a special provision in the deed, that the trustees should be at liberty to defend the two processes, one before the Court of Session, the other before [239] the Magistrates of Glasgow. This deed appears to have been executed with great particularity as to the date, the names of the witnesses, and the name of the writer of the deed. Then, with reference to this deed of December, 1783, Glen and Scott, who had been concerned with the granter in that year in certain bills of exchange, and transactions of business; and who, as far as we know, were respectable persons, are parties to it, and they are to sell and pay his debts, and give the reversion to the granter; and all this with the concurrence of his grandfather.

Then it is said that Maitland enlisted as a soldier, and was unable to do his exercise, a defect which I have known to belong to many worthy and sensible men. And they fix upon certain acts which might be material if they had applied to the moment of executing the deed.

Then the deed of 6th July, 1784, proceeding upon the narrative of the trust deed of 1783, and the purpose for which it was granted, was executed. It does not appear that Maitland himself was a party to this deed. But then consider what a man may rationally do. Blair, the grandfather, Glen, and Scott, had no authority to execute this deed of July, 1784, unless they had the consent of Maitland; and you must suppose that they were satisfied that they had his consent, unless they meant to be responsible for the acts of Towart and his wife, which, without that consent, they would be.

Then the deed of August 28, 1784, was executed; and from this it appears that Maitland was served heir to his grandfather, and duly infeft on the [240] 17th August, 1784, a circumstance of great importance, though not noticed in the reasoning; and what follows upon that? A sale of a certain parcel of the land to one Armour, and a wadset for £100 on the 18th of August. Is not this a transaction that deserved some attention? One who was supposed to be insane, served heir to his grandfather, and infeft on the 17th August, and selling and mortgaging his property on the 18th! And you are to suppose that Armour made no inquiries! Then it recites that the debts which he owed had been paid by Towart; and here be it noticed that Glen was a creditor to the amount of £144, and was paid his debt under these instruments; and then he conveys the property to his sister and her husband, subject to the payment of the £100 mortgage money, and of an annuity of £13 and £3 per annum for clothes to himself.

It was said that he would not have executed this deed if he had not been insane. Now I do not say if he had been insane the deed would have stood, though the consideration had been more than sufficient. But still that is a circumstance to be attended to; and the only evidence we have here is, that the consideration was more than sufficient. But if it had been less, he might have intended to make a gift to his sister and her husband; and a payment of this description was well enough calculated for a person in his situation, and the use which he made of money when he received it. Before the commencement of this process, all the witnesses to this deed were dead, except one of the name of Reid. Reid also died before he could be [241] examined in the cause; but he had been examined on this subject before a Magistrate of Glasgow and two witnesses. His deposition was not admitted; but the objection to it might have been waived, and there appears to have been no bad reason for insisting upon it.

We have no means, therefore, of knowing the state of Maitland's mind, except from these deeds themselves and the parole evidence, till the execution of the deed of 1798, which was a *mortis causa* disposition. This deed bears on the face of it that Maitland had favour and affection for his sister; and one of the witnesses speaks to the admission by Maitland, that he in fact had that favour and affection. The witnesses say that he read this disposition aloud, that he said he would think about it, took it away with him, and afterwards signed it. Then, as to the only instrument the witnesses to which were alive, they speak to his sanity; and, though they might have judged wrong, they must have been convinced that he was of sane mind when he executed it. This deed professes to give over all the property and all claims which he then had, or might have

at the time of his death ; and then he states that he was apt to be made the worse of liquor, and liable to be imposed upon, and therefore does this act. And is it to be said that, because he chooses to allege that reason which is the true one, therefore this and the other deeds are bad, though not quarrelled with till 1808, the Respondent being in a situation which enabled him to challenge them at a much earlier period ?

Then the case comes to this, supposing Maitland [242] to be a weak or insane man, if he was sane at the time he executed these deeds, his sanity at these moments is sufficient to sustain them. And the question is whether this mass of written evidence in support of his sanity at the moment when these deeds were executed, which cannot now have its full weight, but which must be considered as at any time very weighty, is so affected by the parole testimony of persons speaking to his condition at other times, that you can say, at the risk of what belongs to such a decision, that the deeds were executed by a man, not by one liable to be imposed upon, for that is not this case, but by a man entirely incompetent to do such an act.

It often happens in these cases, that when witnesses are describing the condition in which the man was two or three years before, there are no cases more difficult to deal with ; the witnesses on the one side describing him as being as mad as mad can be ; and those on the other side representing him as a man of the strongest and soundest intellect. Like the smuggling cases which we sometimes had in the Exchequer, where the question was, whether a vessel was within three leagues of the coast with barrels of a certain size, while the evidence on one side was that she was not three leagues from the coast ; the evidence on the other side generally was, that she was at least twenty leagues from it. So in these cases the witnesses on the one side swear that the person whose sanity is in dispute, was one of the weakest ; and those on the other side swear that he was one of the strongest minded men that ever existed. But the [243] question is not whether this man was weak, or whether he was mad when in liquor, or insane at other times ; but whether in 1817, where the deeds challenged are rational in themselves, and are not quarrelled with till the witnesses to them are in their graves, except those to the deed of 1798, who give testimony which would support that deed in any case, whether you can say that these deeds ought to be entirely set aside (for they cannot stand as securities unless they can stand as titles), at such a distance of time, and under such circumstances. In my opinion, that would not be safe, and I cannot consent that this judgment should be affirmed.

Lord Redesdale. I concur in that opinion, and I confess this case appears to me very important. With regard to the words in one of the deeds, that the trustees were to act without control, they are not uncommon in English deeds of this nature. As to the decision of the Court below, that must be varied even on its own principle. It is uncertain, for one cannot see what are the deeds impeached by it ; and it is inconsistent, because the deeds, if to be reduced on the ground of utter incapacity, cannot stand for any purpose.

The deeds are impeached by parole evidence only, which is an important circumstance ; and that evidence is applied generally, and not particularly to the time when the deeds were executed. The allegation is, that since 1781 or 1782, Maitland was utterly incompetent to execute any instrument, and that was attempted to be made out by parole evidence without any qualification whatever. But on that case the [244] Court below has not decided. On the other side there is likewise strong parole evidence.

Now in endeavouring to find out the truth from contradictory evidence, try the evidence by the test of collateral circumstances, as to which there can be no doubt, in order to ascertain how far it is consistent with these circumstances. Having gained this ground, we have all that is necessary to dispose of the cause ; for, when the evidence is so tried, it appears clear that the Respondent's evidence cannot be true, and that the Appellant's evidence may be true. The evidence of the Respondent's witnesses is inconsistent with the collateral circumstances. They represent him as utterly incompetent from 1782. Now in the first proceeding the Respondent did not quarrel with the deed of December, 1783 ; so that he then had no conception that Maitland was, at the time of the execution of that deed, in the state of mind which he afterwards attributed to him. The Respondent did not then pretend to reduce that deed, but treated it as a rational deed executed by the advice and with the concurrence of respectable persons ; and it appears that about that time Maitland was engaged in a variety of dealings, utterly inconsistent with the evidence of notorious incapacity. The deed of the 14th

May, 1784, was executed by the grandfather, and Glen and Scott, and was sustainable on the same grounds as that of 1783. Now what appears from that deed?—1. That Maitland had executed a bond for what was due to his sister. That was a distinct instrument, executed with the approbation of his grandfather and the other trustees. Do they not declare, then, that he was [245] competent? They had engaged to defend the suit, and this was a compromise of it. The persons who prepared these deeds, and who were parties and witnesses to them, were dead when this process commenced; and we must take it that they would have sworn that he was competent; for we have no right on this general testimony to assume the contrary. The same observation applies to the deed of 28th August, 1784. The parties to it must be taken to have sworn that he was of sane mind when the deed was executed, and no deed would be safe if that were not a principle of law. But the matter does not stop there. Part of the consideration in this deed is 5s. a week, or £13 a year, to be paid to Maitland. Now it is in evidence that he was in the habit of receiving this 5s. a week under this deed; and the notes he gives acknowledging the receipt written by himself are in evidence; and from them it is demonstrable that Maitland was not in the condition in which he was represented to be by the Respondent's witnesses; for these notes show that he was capable of knowing what he received and ought to receive. He writes acknowledging the receipt of what was due to him, and expresses his hope that his sister and her child are well. Is that the language of a man in such a state that he could do no rational act? This written evidence is worth a host of parole testimony, as it demonstrates that the evidence for the Respondent cannot be true.

The next point is the consideration. It has been said that the property was more valuable than the consideration paid for it; and, with reference to that, [246] it ought to be recollected that there was a diminution of ten acres sold to Armour. That too is a transaction in which other persons were concerned as well as Armour who advanced the money, and all of them are in effect witnesses of Maitland's sanity; and it was impossible they could have so acted if this man had been, as the Respondent's witnesses represented him to be, notoriously insane.

The length of time too that elapsed from 1784 till 1807 was to be considered. The value of the property might have trebled in that time, and yet Towart was suffered to remain in possession, managing and disposing of it as his own; and the effect of this decision is to impeach all these transactions. If then the consideration was equal to the value of the property in 1784, would it be justice to put an end to the transaction in 1807 or 1808, when the value was so different? The delay too had a tendency to deprive the Appellant of the means of showing that Maitland was of sound mind at the time of executing the deeds; and in that view also, the length of time is an important feature in the case.

Upon the whole, therefore, it appears to me that the decision of the Court below cannot be sustained. It is not consistent with the nature of the proceeding which impeaches these deeds on the ground of utter incapacity since 1782. But the judgment does not apply to that case, as it sustains the deeds to a certain extent. The result is, that the evidence for the Respondent is not sufficient to reduce these deeds. There is positive evidence to support them, [247] as it must be taken that the attesting witnesses would, if alive, have given evidence of the sanity of Maitland at the time the deeds were executed. There is positive evidence, therefore, of the sanity at the time of the execution of the deeds, or at least that he was sane in the judgment of the attesting witnesses; there is positive evidence of the sanity in the notes written by Maitland himself, which show that he knew and understood the nature of the transaction. There is on the one side clear positive evidence to support the deeds; and, on the other, only general evidence to reduce them, which, consistently with the positive evidence, cannot be true. This is not, therefore, a case of a doubtful balance of testimony, but the Appellant's evidence is decidedly the stronger.

Judgment of the Court below REVERSED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JOHNSTON,—*Appellant* ; CHEAPE, and Another,—*Respondents* : and JOHNSTON, —*Appellant* ; CHEAPE, and Others,—*Respondents* [June 9, 11, July 8, 1817].

[3 Scots R. R. 374.]

[Arbiter, well known to the parties for his skill in the subject of reference, acting under submissions re-[248]-citing that the parties had “confidence in him as a fit person,” and had “confidence in his judgment” to carry into effect certain improvements upon lands, and apportion the expense among the parties, refuses to communicate the notes of his opinion, or a draft of the award, before it was pronounced to one of the parties applying for such notes or draft, and refuses to receive proof of alleged material facts laid before him by the same party ; he being himself a competent judge of the subject, and chosen for that reason, and having no doubt in his mind ; the award was held good, notwithstanding such refusal : for, (per Lord Eldon, C.) an arbiter is not bound in all cases to receive evidence, whether it will have any effect on his mind or not. But even by the law of Scotland, which attaches so much value to arbitration, a refusal by an arbiter to receive proof where proof is necessary, may amount to what they would consider as a ground for setting aside an award. (*Vid. Sharpe v. Bickerdyke, ante*, vol. iii. p. 142.)]

[An arbiter has an interest in the subject of reference, and this is well known to the parties before they sign the submission ; the award is good, notwithstanding the interest.]

[Five parties agree to refer the direction of certain extensive improvements, and the apportioning of the expense among them, to an arbiter, the submission bearing that the award is to be pronounced “betwixt and the day of “ ” (omitting the usual words, next to come), “or between any farther “day to which this submission may be prorogated, and which he (the “arbiter) is hereby empowered to do at pleasure.” Three of the parties sign the submission in March, 1811. The arbiter prorogated the submission on the 8th November, 1811, and 2d November, 1812. The two other parties signed the submission, one on the 20th March, the other on the 9th April, 1813, and the award was pronounced in May, 1813, when the work was completed. One of the parties who first signed endeavours to get rid of the award on the ground that the legal time had expired, the prorogations being ineffectual because two of the parties had not signed the submission till after the date of the last of them. But held that as the party had seen the work going on in the interval between 1811 and 1813, without intimating any such objection, he must be considered as having waived it, and should not be permitted to take advantage of it after the completion of the work.]

[249] [Arbiter in his award goes beyond the limits of the submission : this does not vitiate the whole award, but the excess held *pro non scripto*, and the award good to the extent of the power.]

FIRST CAUSE.

The Appellant Johnston, in 1813, brought an action to reduce an award against the Respondents Cheape and the arbiter. The award was founded on a submission between Johnston and Cheape, empowering Thomson as arbiter to decide the proportion to be paid by each of them of the expense of deepening a drain called Rossie Drain, “from the point where it falls into the Eden up to the march between our properties at Bow-

“house Moss,” and of keeping clear the said drain “between the aforesaid points” in all time coming. The submission proceeded on a recital of confidence in Thomson as a fit person to determine the value of the operation to their respective properties, and to ascertain the proportion of the expense which each ought to pay. The reasons of reduction were in substance corruption, partiality, and interest, in the arbiter, and also excess in the award, the arbiter having charged the Appellant with the expense of deepening a part of the drain which lay beyond the points limited by the submission. The interest consisted in this, that the arbiter's own lands would be benefited by deepening the drain; and it was alleged that there was “strong reason to believe” that the arbiter was actuated by a corrupt motive arising from a private transaction or understanding [250] between him and Cheape, relative to the draining of the arbiter's own lands, by which the expense would be diminished to the arbiter in proportion as it should be diminished to Cheape in respect of the operation in question. The circumstances alleged in support of the charge of partiality, were the refusal by the arbiter to receive evidence of material facts which the Appellant brought under his view, and offered to prove, and his refusal to communicate to the Appellant the notes of his opinion, or a draft of the decree arbitral before it was pronounced. And the cases of Blair, Jan. 1738—Wallace v. Wallace, Feb. 1762—Williamson, 1776—Logan v. Lang, Nov. 1798—and Elliot v. Elliot, 1789—were cited.

In defence it was stated that the reason why the arbiter has refused to communicate his notes or a draft was, that, though often employed as an arbiter, he had never been accustomed to do so, and that he had refused the evidence because, from his own knowledge of such matters, he had no doubt as to the effect of the operation on the respective properties of the parties; that as to the matter of interest, he had no interest in the subject that was not well known to the parties when they subscribed the submission. It was denied that there was any transaction or understanding of the nature stated by the Appellant, or that there was any partiality or corruption, or any excess in the award. But if there was an excess, that might be rectified without affecting the rest of the award. (*Vid.* the next cause.)

The Court below repelled the reasons of reduc-[251]-tion and sustained the defences, and Johnston appealed.

SECOND CAUSE.

Mr. Johnston the Appellant, and the Respondents Messrs. Cheape, Wemyss, Heriot, and Buist, having lands on the banks of the river Eden, in Fife, engaged, by signing a minute to that effect in April, 1810, with a view to the improvement of their lands, to deepen the channel of the river, and remove a bridge, and erect another, and that a neighbouring gentleman well known to them all for his skill in such matters, should be empowered to execute the work, and settle the proportions of the expense: and a submission was accordingly prepared reciting the proposed objects, and then proceeding in these terms: “and having confidence in the judgment of Andrew Thomson, Esq. of Kinloch, for getting these improvements carried properly into effect, therefore we do hereby give, grant, and commit full power, warrant, and authority to the said Andrew Thomson, as sole arbiter chosen by us, to get the said bridge over the river Eden, near the village of Kettle, removed, and a new one erected to the westward of that bridge: to cause the said river to be deepened and widened at and above the said old bridge (beginning as near to it as can be done, and at the same time obtain a proper level) upwards to where the Rossie Drain falls into the said river, and to get the river between these two points embanked, and what other improvements executed he may deem necessary for completing the object in view, and that in any manner he may think [252] proper, and with power to him to enter into contracts with workmen for finishing said works, and to proportion the expense of the said improvements among us as he shall conceive just and reasonable, according to the benefit which the lands belonging to or possessed by each of us will derive therefrom, and also with power to the said arbiter to take all manner of probations, and to direct measurements and valuations to be made, and do every thing else necessary, or that he should think proper, for enabling him to decide and determine in the matter hereby submitted and referred to him; and whatever the said arbiter shall decide and determine by decree arbitral to be pronounced by him betwixt and the day of or between and any farther day to which this submission may be prorogated, and which he is

“ hereby empowered to do at pleasure : We hereby bind and oblige ourselves, our
 “ heirs, and successors, to acquiesce in, impliment, and perform, under the penalty of
 “ £100 sterling, to be paid by the party failing to the party observing, or willing to
 “ observe the same over and above performance ; and we bind and oblige ourselves and
 “ our foresaids respectively to keep the said river and the banks thereof, after the said
 “ improvements are completed, opposite to the lands belonging to or possessed by each
 “ between the above-mentioned points, and which are to be thereby benefited, in good
 “ and sufficient condition and repair in all time thereafter, so that none of the lands
 “ belonging to or possessed by any of the parties in this submission can be in-
 “ [253]-jured by neglecting such repairs, otherwise the person or persons failing so to
 “ do shall, over and above performance, pay whatever damage any of the others shall
 “ happen to sustain thereby, as the same shall be ascertained by fit neutral men.”

The submission was signed by the Appellant on the 11th, and by the Respondents, Cheape and Buist, on the 14th March, 1811. The arbiter immediately began and proceeded with the work, and prorogued on the 8th November, 1811, and 2d November, 1812. The Respondents Heriot and Wemyss signed the submission, the one on 20th March, the other on 9th April, 1813. The work being completed in May, 1813, the arbiter then made his award, which, after reciting the submission, prorogations, and execution of the works, proceeded in these terms : “ And being well satisfied with the
 “ manner in which these operations have been executed, and that the object which the
 “ parties to the submission had in view, will be completely answered, and having
 “ caused measurements of the work executed to be made and ascertained, the whole
 “ expences of the operations including interest up to the term of Whitsunday, 1813, as
 “ per a particular state thereof, signed by me of this date as relative hereto, to amount
 “ to the sum of £759 sterling ; and having frequently gone over and inspected the grounds
 “ belonging to or possessed by the said parties, which have been or may be benefited by
 “ the said operations ; having heard the parties as to their claims, having got all the
 “ information which I consider necessary for determining the matters submitted to me,
 “ and [254] having maturely deliberated upon every circumstance relating thereto, and
 “ being now well and ripely advised therein, and having God and a good conscience
 “ before my eyes, do give and pronounce my final sentence and decreet arbitral as
 “ follows, viz. I find and hereby decern and ordain that the above-mentioned sum of
 “ £759 sterling shall be paid proportionally as follows by the respective parties, being
 “ the ratio in which I am of opinion and hereby find that the lands belonging to or
 “ possessed by each of them, have already been or may be still benefited in consequence
 “ of the operations above-mentioned ; viz. The said William Johnston shall pay the
 “ sum of £535 sterling, the said John Cheape shall pay the sum of £146 sterling, the said
 “ James Balfour Wemyss shall pay the sum of £43 sterling, the said Henry Buist shall
 “ pay the sum of £22 sterling, and the said James Heriot shall pay the sum of £13
 “ sterling ; and each of the said parties shall farther pay the legal interest of the sums
 “ above-mentioned, to be paid by them respectively from and after the said term of
 “ Whitsunday, 1813, till they are paid ; and I hereby also decern and ordain the said
 “ parties, or such of them as have lands in property or possession opposite to the said
 “ river, and their heirs and successors, to keep the river and the banks thereof now
 “ that the said improvements are completed opposite to the lands belonging to or pos-
 “ sessed by each of them, within the above-mentioned points, in good and sufficient
 “ condition and repair, in all time coming, so that none of the lands belonging to or
 “ possessed by any of the [255] parties in the submission shall be injured by neglect-
 “ ing such repairs otherwise, I hereby decern and ordain the person or persons failing
 “ so to do, not only to perform these stipulations, but also to pay whatever damage may
 “ be sustained by any of the other parties in consequence of such neglect, as the same
 “ may be ascertained by fit neutral men.”

Mr. Johnston, in 1813, brought an action against the other parties and the arbiter, to reduce the award for these reasons : 1st, (Reason of style). 2d, That the award was void, the term of the submission having expired as to him before it was pronounced, and the prorogations having no effect because they could not apply to the supposed submission amongst five parties upon which the decree proceeded, two of the parties not having signed till after the date of the last prorogation. 3d, That the decree was *ultra vires*, in ordaining that the parties should keep the banks in repair in all time coming, etc. that matter not being submitted to the arbiter, but disposed of by the

agreement of the parties. 4th, That the arbiter had decided in his own favour a matter in which he had an interest, his own lands being benefited by the operations, the whole expense of which he laid on the parties to the submission, and chiefly on the Appellant. 5th, That there was strong reason to believe that he was actuated by a corrupt motive arising from some transaction or understanding between himself and Cheape. 6th, That the arbiter acted with partiality, having refused to give the Appellant for perusal a draft of the decree [256] before it was pronounced, and to receive evidence offered by the Appellant to show that his proportion of the expense ought to be but small, though the Appellant submitted to him full observations in writing containing a statement of facts leading to that conclusion.

The defences were—to the second reason, that the Appellant having signed the submission it was *jus tertii* on his part to state this as a reason of reduction. 3d, That it was by no means clear that the powers of the arbiter were not sufficiently ample for the purpose; but if not, though the clause should be held *pro non scripto*, the award would be good as to the rest. 4th, That this reason was well known to the Appellant before he signed the submission. 5th, That the character of the arbiter was an answer to this reason, and that Cheape pointedly denied any such understanding or transaction. 6th, The arbiter heard all the facts condescended upon, but did not think them of such a nature as to alter his judgment, founded on his own knowledge of the subject, and the opinions of other persons of skill, of whose assistance he availed himself.

The Lord Ordinary repelled the reasons of reduction, sustained the defences, etc. and decreed, and to this judgment the Court unanimously adhered; and Johnston appealed.

For the Appellant it was contended, 1st, that the award was null and void, because the term of the submission had expired before it was pronounced; and the present case was distinguishable from that of *Taylor v. Grieve*, Fac. Coll. 25th Nov. 1800, [257] because, although it was there decided that a submission does not expire until a year from the date of the last subscription, that subscription was within a year of the first subscription, all the parties having subscribed within a few weeks of each other, whereas here the last subscription was not within a year of the first; and, as the arbiter's power where the day is left blank is limited to a year, the submission fell, and no award could be made upon it; and the orders of prorogation were ineffectual, because the arbiter had no power to make any such order till all the parties had subscribed. 2d, The decret arbitral being a nullity, could not be homologated. 3d, That the award was *ultra vires* on the ground mentioned in the reason of reduction; and that, supposing it were not *ultra vires*, the arbiter had done injustice in leaving out of that part of the award the words "to be thereby benefited." 4th, That the refusal to receive the Appellant's evidence indicated partiality and corruption, and it had lately been decided in Dom. Proc. in *Sharpe v. Bykerdyke* (3 Dow, p. 102), that an award could not stand where an arbiter did not receive material evidence tendered; the principle of that decision was, that it was essential in the nature of an award that the arbiter should hear both sides. 5th, The arbiter had an interest in the matter which was unknown to some of those who chose him judge; and the Court below refused a diligence to produce an agreement to show that he had a direct interest, and it must be taken that he had.

For the Respondent it was contended: 1. As to the point of corruption and refusal of the evi-[258]-dence, that the evidence had been heard, although the arbiter, as he was entitled to do, acted on his own judgment (*Kirkaldy v. Dalgairns*, Jan. 1809). There might be cases where the rejection of material evidence might indicate corruption, so as to afford a ground to set aside an award; but here the arbiter was chosen expressly for his own skill in such matters, and the whole was referred to his discretion: he heard all that he thought of consequence, and decided on his own opinion. There was nothing that indicated a corrupt motive; and by the law of Scotland, if the arbiter acted *bono fide*, the award could not be set aside. The regulation of 1695, which was sanctioned by act of parliament, was directed against such cases as this. As to the case of *Sharpe v. Bickerdyke*, that was a case of falsehood, and depended on very particular circumstances. But this award might be supported even in this country. 2. As to the question of interest, it was no more than this, that the arbiter might wish to deepen his own drain, and that those operations would be of advantage to him if he did. But the parties were aware of that interest when they chose him, and the objection amounted to nothing (*Matthew v. Allerton*, 4 Mod. 226.—Comb. 218). 3. If the award was *ultra*

vires, it might be reduced *pro tanto*, without affecting the rest (*Montgomery v. Strang*, June 1798—*Kyd v. Patterson*, Fac. Coll., June, 1810). 4. That although the usual way was to insert in submissions after the blank for the day, the words “next to come,” which confined the submission to a year, these words had been omitted here. Why? because it was known that the work could not be finished, nor the award [259] made within a year; and, besides, the Appellant had seen the work going on without stating any such objection at the time; and he could not be allowed to take advantage of it after the work was finished, but must be held to have acquiesced in the validity of the prorogations.

Reply. The principle upon which the case of *Sharpe v. Bickerdyke* was decided, was, that it was essential in the nature of arbitration that the arbiter should hear both sides. An arbiter must hear both sides; and in this case the evidence was rejected, not because the arbiter had examined it and thought it of no consequence, but, because his mind was made up without it. The case of *Kirkaldy* did not apply to this question. With respect to the point of interest, an interest more remote than that which would render a person an incompetent witness, was an objection to jurors and arbiters. There was no evidence that the parties, when they signed the submission, knew of the interest arising from the agreement with Cheape; and it must be taken that there was such an agreement.

Mr. Campbell. It is not positively averred that there was any such agreement, and it is denied that there was.

Sir S. Romilly and Mr. Leach for the Appellant; Mr. Warren and Mr. Campbell for the Respondents.

Lord Eldon (C.). (8 July 1817.) The reference in the first of [260] these causes was in these terms:—“We, John Cheape, Esquire, of Rossie, and William Johnstone, Esquire, of Lathrisk, considering that our respective properties have been much improved by the deepening of the drain from the Loch of Rossie, and that it would be still more advantageous to us to obtain a further level, which we will be able to do, when the proposed alterations upon the river Eden, between the bridge over the same near the village of Kettle, and where the said drain falls into the Eden, are completed. Therefore we bind and oblige ourselves, our heirs, and successors, to bring up the said level, or such proportion of it as we, or either of us, shall think requisite, as soon as it can be accomplished, from the said point where the Rossie Drain falls into the Eden, up to the march between our respective properties at Bowhouse Moss, and to keep the same redd and clear and in good order in all time thereafter, at our mutual expense, which shall be proportioned according to the benefit accruing therefrom to our respective properties; and having confidence in Andrew Thomson, Esquire, of Kinloch, as being a fit person for determining the value which such operations will yield to our respective properties, and ascertaining the proportion of the expense thereof which each of us shall pay. Therefore we do hereby nominate and appoint the said Andrew Thomson sole arbiter between us, to decide and determine what proportion each of us shall pay of the expense of the operations already executed upon the Rossie Drain, from the point where it falls into the Eden [261] up to the march between our properties at Bowhouse Moss, and of what is to be hereafter done when the improvements upon the channel of the Eden are finished; and also in keeping redd and clear and in good condition the said drain between the foresaid points in all time coming, according to the benefit which he shall think our respective properties have derived and will obtain from such operations, with power to the said arbiter to take all manner of probation, and to direct measurements and valuations to be made, and to do every thing else necessary, or that he shall think proper, for enabling him to decide and determine in the matters hereby submitted and referred to him, and whatever the said arbiter shall decide by decret arbitral to be pronounced by him betwixt and the day of or between and any future day to which this submission may be prorogated, and which he is hereby empowered to do at pleasure, we hereby bind and oblige ourselves and our foresaids to acquiesce in, impliment, and perform, under the penalty of £100 sterling,” etc.

That was the power which the arbiter was to have; and what use he should make of it was left very much to his own discretion, at least so it would be construed in this country. This gentleman made his award, and ordained “that of the above-mentioned sum of £2105 2s. the said John Cheape shall pay £1335 2s. and the said William

“Johnston shall pay £770, being the ratio in which I hereby find their respective properties to be benefited by the operations on the drain, and as [262] the whole of the said sum of £2105 2s. has been advanced by the said John Cheape, I hereby decern and ordain the said William Johnstone to make payment to him of the said £770 with the legal interest thereof, from the respective periods when the advances were made till paid. And I hereby farther decern and ordain the said parties and their heirs and successors to pay for any future operations on said drain, and in keeping the same redd, clear, and in good condition between the foresaid points in the portions above-mentioned : and I also decern and ordain the said parties and their foresaids to acquiesce in, impliment, and perform this decreet arbitral in all respects, to each other, under the penalty of £100 sterling,” etc.

The Appellant refused to obey the award, and a charge upon the decree having been given, he offered a bill of suspension ; and, at the same time, brought an action of reduction (with which the suspension was conjoined) to reduce the submission and decree, alleging :—1. The common reason of style :—2. That the arbiter had decided in his own favour, a matter in which he was interested ; for that a considerable number of years ago the arbiter cut a drain from his own lands, passing through Mr. Cheape's property, and falling into the Rossie Drain ; so that the arbiter had burdened the Appellant with the expense of an outlet for his (the arbiter's) own drain. As to that second reason—and the second and third reasons are, as to this point, much the same—I see no ground for insisting upon that as any objection. The parties knew whom the [263] arbiter was, and he was chosen on account of his own skill in such matters ; and I see nothing in the proceedings to show that he acted corruptly or even improperly. At the same time, there can be no doubt that, even in the law of Scotland, which attaches so much value to arbitration, the refusal by an arbiter to receive proof, where proof is necessary, may amount to what even they would consider to be a ground for setting aside the award.

In the second cause, which is connected with the first, the submission was in these terms (*vid. ante*).

One question in this case was, whether the arbiter's authority to decide extended beyond the year : and another question was, whether he had any right to decide that the parties should keep the river and banks opposite their lands, which were to be benefited by the improvements, in good and sufficient condition and repair, in all time coming ; and, although the award, as to this point, followed the terms of the submission, it was insisted that it was *ultra vires*, and that they themselves were to determine what should be done after the work was completed. But it was farther contended, that even if the arbiter had authority to deal with that point, yet he had not done justice to the Appellant, because he ought to have confined that part of the award to such lands of the Appellant as were “to be thereby benefited,” his authority not extending beyond that : and the Appellant insisted that only some of his lands were benefited, whereas it was on the other hand contended that they were all benefited.

Johnston also insisted that as he subscribed the [264] submission in 1811, and as the award was not made till May 1813, the legal time had expired before it was pronounced, and that as to him it was good for nothing ; and that the objection was not removed by the prorogations, because they applied only to a supposed submission amongst five parties : and that the submission which he signed was not, at the time of the prorogations, a submission amongst five parties, some of the parties not having signed till after the date of the last prorogation : and a distinction was stated between this and the case of Taylor v. Grieve, in as much, as there the last signature was within the year. I have considered this objection, and I agree with the Court of Session in the opinion that it cannot be supported. For when one considers what was to be done, the channel of the river to be deepened, a bridge to be taken down, and another to be built ; and that he saw all this going on without making any objection at the time, I think it is reasonable to take it as if he had said that he never meant to make the objection ; and to hold that he should not be permitted to make it with effect after the work had been finished.

Then it is insisted that the arbiter acted with a partiality that indicated corruption. That, however, depends on the view which he took of his duty ; for an arbiter is not bound, in all cases, to receive evidence, whether it will have any effect on his mind or not. The submission bore that Mr. Thomson was chosen arbiter because he himself

knew the subject. But he saw all the evidence and all the inferences arising out of the circumstances; and [265] he seems to have proceeded on this ground, "taking all " these matters to be facts, yet having my own local knowledge to guide me, and all the " other circumstances in my view, I cannot adopt your conclusion." So that on all these grounds I take the judgment of the Court below to be right.

But I have one difficulty in this second case. Suppose we should be of opinion that the submission did not authorise the arbiter to decide upon the manner in which the parties were to act with respect to these improvements in future, the question will arise whether that vitiates the whole award. If I were now to give my own opinion, I must say that this part of the award might be held, as they express it, *pro non scripto*, and that the rest would not be affected; and then what I wish is, to be sure that I apply that principle as the Court below would apply it. My own opinion is, that the arbiter has so far gone beyond his powers.

(July 10, 1817). The judgment in this second cause was this. After the usual recitals, the Lords find that the arbiter, in so far as he has decerned and ordained that the said parties, or such of them as have lands in property or possession opposite to the said river, etc. should keep the river and banks thereof, etc. in good and sufficient condition and repair, in all time coming, etc. otherwise that the person or persons, failing so to do, should not only perform these stipulations, but also pay whatever damage might be sustained, etc. as the same might be ascertained by fit neutral men, had no authority so [266] to decern and ordain; but that this ought to be held *pro non scripto*, and to be considered as an excess not vitiating the other parts of the decreet arbitral; with this finding the cause was remitted to the Court of Session to vary its judgment, so far as the finding might require it to be varied; and the judgment was in other respects AFFIRMED.

In the first cause the Lords found that the arbiter had no authority, according to the terms of the submission, to decern or award that the Appellant should be charged with, or pay the following sums or charges, or any of them, viz. (stating them); but this to be without prejudice to any right of the parties to establish the charges, if they could, against the Appellant in any other mode of proceeding; and, "find that this " excess in the decreet arbitral ought not to be taken to affect its validity, farther than " as it may be necessary to rectify the same with respect to the said excess." The cause remitted to vary the judgment as far as this finding might require; and in other respects the judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DIXON, and Others,—*Appellants*; GRAHAM, and Others,—*Respondents*

[March 12, 24, June 23, 1817].

[Mews' Dig. xi. 510. See *Browne v. McClinton*, 1873, L. R. 6 H. L. at p. 469.]

[Appeal from a judgment in declarator in 1810, suffered to drop, and action of reduction brought in 1812, to re-[267]-duce the judgment in the declarator; and in 1813 one appeal presented from the judgments in both causes, and the general answer put in. Objected, when the appeal came to be heard in 1817, that it was irregular to join both causes in one appeal; and, besides, that the appeal was irregular as to the declarator, the petition not having been presented within the first fourteen days of the session. The House was of opinion that there was an irregularity in the mode of bringing the causes before it; but:—1. The objection ought to have been made in 1813, when the other parties might have put themselves right in point of form:—2. It ought to have been made by petition, to be referred to the appeal committee:—3. When a cause comes on to be heard, it is to be taken as regular: and, therefore, the appeal heard on the merits, and leave

given to the parties afterwards to set themselves right in point of form by presenting another petition of appeal in the declarator *in re pro tunc*, as if it had been done in 1813.]

[Per Lord Redesdale.—In wastes where there are no fences, the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object, that the herds may see when cattle are trespassing. A paper which might, with due diligence, be found at first, is not, in legal meaning, *noriter repertum*. Precept of seisin not to be founded upon in Court, unless it corresponds with the charter.]

An action of declarator having been brought by the proprietors of lands adjoining to Dumbarton Moor, against the Magistrates of Dumbarton, to settle the boundaries of that Moor, to which the Town of Dumbarton derived right by a charter of King James VI.; after proof taken, an interlocutor, dated 16th May, 1810, was pronounced in favour of the pursuers. On 3d July, 1810, the Magistrates reclaimed, but the petition was refused as incompetent, the time within which it was competent [268] to reclaim having elapsed. The magistrates then presented another petition, contending that the judgment was not only erroneous on the proof as it stood, but that it could be established to be wrong, *per instrumenta noriter reperta*, and that it was null and void as being *ultra petita*; upon which last grounds it was maintained that the Court was authorized to open up the judgment. It was stated in the Respondents' case, signed John Clerk and John Jardine, that the Court were fully satisfied that there was no ground for holding the decree to be *ultra petita*; and that the pretended *instrumenta noriter reperta* were of no importance to the merits, and had besides been all along in the possession of the Appellants themselves. From these interlocutors in the declarator, the magistrates appealed in 1810.

The magistrates having, besides the documents relied on in the petition, afterwards discovered in their own charter chest a precept and seisin which they thought material to the case in 1812, raised an action of reduction of the decree, which had been pronounced in the declarator, upon the allegation that there were *instrumenta noriter reperta*, which showed that it was erroneous. And they suffered the appeal from the judgment in the declarator to drop, by not entering into the usual recognizances. The Lord Ordinary, in November, 1812, pronounced an interlocutor in the reduction, finding, "That before the decret under reduction was extracted, the present pursuers gave in a long petition to the Court, craving, that upon certain alleged informalities in the proceedings, and in [269] the decret pronounced by the Court, and also on the ground of their having recovered certain documents, as to which they stated the plea of *noriter veniens ad notitiam*, their Lordships should open up the judgment they had pronounced, which was then final, but that this petition was refused by the Court; finds, that in this petition all the objections as to the informality of the proceedings, or of the decree now founded on as reasons for opening up the decree by reductions, were fully stated; and also all the documents on which they now found, except two, viz. the precept and the seisin mentioned in the condescendence, and in regard to the said precept and instrument of seisin, the Ordinary is of opinion, that the plea of *noriter veniens ad notitiam* does in no ways apply to them more strongly than to the other writs, as to which it has been repelled by the Court. And on the whole matter, repels the reasons of reduction."

To this interlocutor the Court, on the 18th Nov. 1813, adhered.

The magistrates then, in 1813, lodged one appeal from the judgments in both causes. The agent for the Respondents, though aware that the joining the two causes in one appeal would probably be considered as an irregularity, yet as the taking notice of it immediately, when the matter might be amended, would only be attended with the expense of an additional case: he thought it most for the interest of his clients to put in the general answer.

The appeal came on for hearing in the House of Lords on the 12th March, 1817, when the preli-[270]-minary objection was taken by Mr. Leach and Mr. Adam, the Counsel for the Respondents. 1st. These were in form and substance two distinct causes, having no other connexion than that they related to the same subject of property. But the questions were distinct; that in the first cause being whether the interlocutors were right on the evidence there given; that in the second cause being

whether the instruments found in the charter chest were, in the sense of the law of Scotland, *noviter reperta*. 2d, The causes were not only distinct, but they could not stand together; the Appellants contending in the original action that the conclusion was wrong; and admitting in the second action that the conclusion in the original action was right. 3d, By the law of Scotland reduction is competent in cases of erroneous judgment (Ersk. b. 4, t. 3, s. 3, 8). Then suppose three actions of reduction brought each for a distinct cause, if the reduction is part of the original cause, then one appeal may include all the reductions, though for distinct matters. 4th, Suppose the time for presenting an appeal in the original cause to have elapsed, to evade the order of the House, nothing more would be necessary than to bring a reduction on any ground, and that being part of the original cause, the whole may be brought before the House by appeal. 5th, There is a special objection also, which is this; by order of the House the petition of appeal must be presented within fourteen days from the commencement of the session, except in cases decided below, sitting the parliament, in which petitions may be presented within twenty days after the judgment. If [271] the petitions are not presented till the following session, they must be presented within the first fourteen days. In this instance the petition, with respect to the original cause, was not regular, not having been presented within the first fourteen days of the session, although, with respect to the reduction, it was regular, having been presented within twenty days from the time of judgment pronounced sitting the parliament. 6th, Another distinction is, that a declarator is an outer House cause; a reduction an inner House cause, in which the Lord Ordinary need not decide on the merits, but may make great *aristandum* to the Court. We submit, therefore, that there can be no proceeding at all on either of the causes, but at any rate none on the declarator.

Lord Eldon (C.). Although an appeal is withdrawn, I take it that it may be presented again if within the five years. The petition in this instance was presented in 1813, before the expiration of the time for appealing from the judgment in the declarator; and you, instead of calling the attention of the House to the alleged irregularity of joining the two causes in one appeal, at a time when the other parties, if wrong, might have set themselves right in point of form, put in the general answer. The objection cannot at any rate be properly made in this way, but must be taken by petition to be referred to the Appeal Committee; and then, if they are wrong in point of form, they may be allowed to set themselves right, by presenting another petition of appeal *nunc pro tunc*, as if it had been [272] done in 1813. You may, therefore, proceed on the merits now, and we may afterwards consider whether they are right in point of form; and if not, give them an opportunity of setting themselves right. I take the rule to be, that when a cause comes to a hearing, it must be considered as regular; and that, if there is in reality an irregularity, it may be rectified by petition, to be referred to the Appeal Committee.

Sir S. Romilly. The appeal in the declarator was suffered to drop, as the Court could not otherwise proceed with the reduction.

Lord Redesdale. I rather think they might, on the ground of *instrumenta noviter reperta*, and the course would have been to have presented a petition to stay the hearing of the appeal till that should be decided.

The cause was then heard on the merits; and on the 24th March the Lord Chancellor stated that he was of opinion that there was some irregularity in the manner in which the causes had been brought before the House, and leave was given to enter a separate appeal in the declarator *nunc pro tunc*.

Lord Eldon (C.) (June 23, 1817). I think the Court below was right in the conclusion that certain documents relied upon by the Appellants were not, in the sense of the law, *noviter reperta*. As to the allegation that the judgment in the declarator was *ultra petita*, if I were to give an opinion now, I must say that some injustice has been done to the town of Dumbarton. One part of the march, that from the Burn Crooks [273] to the White Haughs, is clear, and I propose to remit the cause with findings to the effect which I have stated.

Lord Redesdale. I have looked at the evidence in this case, and bestowed particular attention upon it considered as a question of boundaries.

With respect to the point as to the *instrumenta noviter reperta*, the principal paper is the precept of seisin; and it is clear that if that was in the possession of the party claiming the interest, and might with due diligence have been found by him and pro-

duced at first, it can never be used by him on the ground of being *noviter repertum*; and this paper might with due diligence have been found, as it was in the charter chest of the town. But besides that, I have great doubt on another ground whether the paper could be used, because the precept ought to follow the charter; and if it does not it cannot be used, for the Court must go by the charter.

With respect to the question of *ultra petita*, it is clear that the Court has gone beyond the claim in the pleadings, etc.

In these wastes where there are no fences the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object that the herds may see when cattle are trespassing. But in the line drawn by the Court below a different principle is adopted, etc.

Causes REMITTED for review, with findings as above.

[274] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ARNOT,—*Appellant*; STEWART,—*Respondent* [March 17, 1817].

[3 Scots R. R. 381.]

[A. a merchant in London, having an order in 1810 from B. a merchant in Perth, for goods to be shipped from London for Dundee, sends the goods to the wharf on Saturday 24th Feb. the vessel then taking in goods for Dundee, being the K. (unarmed) which had been substituted by the Shipping Company for the D. (armed), the Company announcing on the 23d and 24th Feb. to all who inquired that the K. and not the D. was to sail on the 25th (Sundays and Thursdays being the regular sailing days). A. dispatches the invoice on 27th Feb. dated on that day, with advice that the goods had been sent by the D. not naming the 24th as the day when the goods were sent to the wharf, and leaving it to be inferred from the date of the invoice that the furnishing was made on the 27th, and that the sea risk did not commence till the 1st of March. The K. sails with the goods on the 25th Feb. and is captured on 2d March by a privateer. Action brought by A. against B. for the price of the goods, and held below that he could not recover. The judgment affirmed above; the Lord Chancellor being of opinion that if B. had insured upon the representation sent him, he could not have recovered from the underwriter. (*Vid. Fac. Coll.* 25th Nov. 1813.)]

The Respondent ordered from Redfern and Co., London, by their agent the Appellant, ten puncheons of molasses to be shipped from London for Dundee. The order reached London on the 21st Feb. 1810, and Messrs. Redfern and Co. caused the molasses to [275] be sent to Miller's wharf on Saturday, the 24th Feb. to be shipped for Dundee. The vessel whose regular turn it was to sail on the next day was one called the *Defiance*. But on Friday, the 23d February, the Shipping Company, as appeared from the evidence of the clerk, had resolved to substitute a vessel called the *Kinloch*, and that was the vessel announced on the 23d and 24th, for sailing on the 25th, and which did sail on that day with the goods in question, the 25th being Sunday, a day on which the mail does not go from London. On Tuesday the 27th Feb. the invoice with advice was sent from London, dated on that day, and having at the end these words, "To Miller's wharf, for the *Defiance*, p. Dundee." The notice, instead of reaching the Respondent on the evening of the 27th, as it would have done if it had been dispatched on the 24th, did not reach him till the evening of the 2d March. On the 10th March he sent a letter to Edinburgh, directing his brokers to insure, etc., per *Defiance* from London to Dundee, stating that the invoice was dated the 27th Feb. and that he would not allow more than the usual premium; and received for answer that it

could not be done at the usual premium, as the day on which the vessel sailed had not been mentioned. The Kinloch was captured on the 2d March by a French privateer.

The Respondent having refused to pay for the molasses, the Appellant, as agent for Redfern and Co. brought an action for the price in the Court of Admiralty in Scotland, and obtained judgment for the amount; but the cause having been brought by advocacy before the Court of Session, that [276] Court ultimately gave judgment against the claim and in favour of the Respondent, and Arnot appealed.

The points chiefly insisted upon for the Appellant were, that his constituents having delivered the goods at the wharf had nothing further to do with the transaction; that the delay in sending the notice had no effect with respect to insurance, since Stewart, although he had notice on the 2d March, did not attempt to insure till the 10th; and that as these vessels often accomplish the voyage in as short a time as the post conveys letters by land, a person intending to insure ought not to wait the arrival of a letter of advice; and that as to the name of the ship, Redfern and Co. were not bound to watch the operations of the Shipping Company, or to warrant that goods entrusted to a shipping company should be conveyed in any particular ship belonging to that company, even although they intimated that it was meant to send the goods by a particular vessel; and that merchants ought to adapt, as they usually did, the form of the insurance to such accidents as the substitution of one ship instead of another, by insuring "per ship" or ships;" and the cases of *Heseltine v. Arrol*, Fac. Coll. Jan. 15, 1802—and *Elton v. Porteous*, Fac. Coll. Dec. 13, 1808—were cited.

For the Respondent it was contended that the notice sent to him was not such as to enable him to make a valid insurance, that from the date of the invoice he was led to believe that the goods were sent to the wharf only on Tuesday, the 27th Feb. and that, as Thursdays and Sundays are the days [277] on which the vessel sails from the wharf; the sea risk had not commenced till Thursday, the 2d March. If that had been the case, there was no improper delay in not insuring till the 10th, as the vessels are not considered as out of time in eight days, though they often perform the voyage sooner; that supposing an insurance had been effected, the Appellant could not have recovered from the underwriter (and it made no difference when a merchant was his own insurer) for two reasons: 1st, Because the representation must have been that the risk did not commence at soonest till the 27th February, whereas it had in fact commenced on the 25th. 2d, Because the representation must have been that the goods were sent by the Defiance, an armed vessel, whereas they were in fact sent by the Kinloch, an unarmed vessel. That Redfern and Co. having specified a particular ship, were answerable that the goods should be sent by that ship, or at least that at the time when the goods were sent to the wharf the ship specified was that in which the Company then intended to ship them; and that if they had inquired on the 24th Feb. they would have learned that it was intended to send the goods, not by the Defiance, but by the Kinloch; and the case of *Andrew v. Ross*, 6th Dec. 1810, was cited.

Mr. Leach and Mr. Harrison for the Appellant; Sir S. Romilly and Mr. Adam for the Respondent.

(March 17, 1817.) Lord Eldon (C.). Being of opinion that if the Respondent had insured upon this representation [278] he could not have recovered from the underwriter, I propose to your Lordships to affirm the judgment.

Judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHEPPARD,—*Appellant*; WATHERSTON, and Others,—*Respondents*
[March 7, 24, 1817].

[3 Scots R. R. 383.]

[Contract for purchase of lands, 100 acres arable, 700 acres pasture; the purchaser's entry to commence at Whitsunday, 1807, and that he is to

have right "to the crop and year 1807," and disposition, assigning "the "rent for crop and year 1807." The farm at the time of the sale in possession of a tenant at a rent payable one half at Candlemas, the other half at Lammas, in each year. Held that the seller, not the purchaser, was entitled to the rent payable by the tenant at these two terms in 1807. *N.B.*—The purchaser obtained possession of the grass and houses at Whitsunday, 1807, and of the arable land after the separation of the crop from the ground in that year.]

On the 31st Dec. 1886, the Appellant purchased the lands of Kirktonhill from the Respondent, Elizabeth Watherston and her husband for £7000, of which £2000 was to be paid at Whitsunday, 1807, and £5000 in five years thereafter, but bearing interest from Whitsunday, 1807. In the con-[279]-tract of sale it was declared "that the said "Robert Sheppard's entry to the said lands is to commence at Whitsunday, 1807, and "that he is to have right to the crop and year 1807, and in all time thereafter."

At the date of the agreement the lands, consisting of 700 acres pasture, and 100 acres arable, were in possession of a tenant, the Respondent, John Harvey, under a lease from Elizabeth Watherston and her husband, for nineteen years, commencing at the term of Whitsunday, 1803, as to the houses, yards, and grass, and at the period of the separation of the crop of 1803 from the ground as to the arable lands, at the yearly rent of £238, payable one half at the term of Candlemas (2d Feb.), the other half at Lammas (2d August), 1804, for the first year's crop, "or in full of the first year's rent, "and so forth, yearly and termly thereafter during the currency of this tack." The Appellant, on the 15th Jan. 1807, purchased the lease from the tenant, who renounced the benefit of it "for all the years thereof to run from and after the term of Whitsunday first, in so far as respects the houses, yards, and grass, and after the ensuing "crop is separated from the ground in so far as respects the arable lands, and he binds "himself, etc. to leave the premises then patent to the said R. S. etc."

On the 15th of May, 1807, the Appellant obtained a regular disposition of the lands, containing an assignment "of the rents, mails, and duties of the said lands due and payable for and forth thereof, for crop and year 1807."

[280] The Appellant obtained possession of the houses and grass at Whitsunday, 1807, and of the arable land after the separation of the crop from the ground. Harvey paid the rent due from him at Candlemas and Lammas, 1807, to Elizabeth Watherston and her husband. The Appellant insisted that he was entitled to it as the rent for the crop and year 1807; and in 1809 brought his action against Elizabeth Watherston and her husband, and against Harvey, for that rent, offering a deduction for the pasture lands, of which he received possession at Whitsunday, 1807.

The defence for Harvey was that he had been only four years in possession, and had paid four years' rent: and the defences for the other parties were that the Appellant had entered into possession of the farm, which they alleged was chiefly a grass farm, at Whitsunday, 1807, and ought not to be allowed to possess the land and claim the rent over and above: and 2dly, that as the crop was sown before the term of the Appellant's entry, that crop by universal practice fell to be reaped by the Defenders. And they insisted that, in all cases of grass farms having a Whitsunday entry, crop 1807 did not mean the corn crop of that year with the pasturage of the year preceding as its appendage, but the grass crop of that year with the corn crop of the following year as its appendage, and that there was nothing in the contract which excluded the rule of law; and that the division of rents in parts proportional to the profits of the different crops was a thing unknown in the practice of Scotland: and *Campbell v. Campbell, Kilk. 11th June, 1745*—[281] *Kerr v. Turnbull, Elch. 3d July, 1760*—and *Elliot v. Elliot, 28th Nov. 1792*—were cited.

The Court of Session, by several interlocutors from June, 1810, to 2d July, 1813, decided in favour of the Respondents, and thereupon the Appellant appealed.

The cause was heard in the House of Lords on the 7th March, 1817, and on 24th March, 1817, the judgment of the Court below was AFFIRMED, the Lord Chancellor observing that he should have doubted whether the Court below had rightly construed the words "crop and year 1807," if these words had not acquired the meaning which they put upon them by the usage of Scotland. But as they were better acquainted with the usage in Scotland, it would be hazardous to reverse the judgment. Still consider-

ing it, however, as a case of some doubt and difficulty, he did not advise their Lordships to give costs to the former proprietors.

Judgment AFFIRMED, with £120 costs to the tenant.

[282] SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DALGLIESH, and Others,—*Appellants*; DUKE OF ATHOL, and Others,—*Respondents* [June 16, 20, 1816].

[3 Scots R. R. 384. See *Hay v. Magistrates of Perth*, 1863, 4 Macq. 535, 547.
See Salmon Fisheries Act, 1862, ss. 8, 11.]

[Salmon fishing with stake-nets held to be illegal.]

The fishings of all the Appellants are situated in that part of the Tay where the sea ebbs and flows.

About thirty years ago, a mode of salmon fishing was introduced upon the shores of the Solway (the Scottish statutes regulating salmon fishing did not apply to the Solway), which, from the nature of the apparatus employed, is termed stake-net fishing. In its most improved form, it is practised in the following manner. In rivers, or friths where the sea ebbs and flows, a row of stakes is driven from high to low water-mark, for the most part obliquing down the river, or forming zigzags in that direction. The stakes are from four to six feet asunder, and are fastened together at the top, the middle, and the bottom, with strong ropes. Over these ropes a net is extended, the upper part of which is usually about the level of the highest flow of the tide. The meshes of the net measure from ten to twelve inches in circumference; that is to say, each side of the parallelogram measures from two and a half to three inches. In this manner a complete barricado is formed, from high to low water-mark, through which no salmon or grilse can penetrate. In this barricado, at convenient distances, openings [283] are left, which lead into enclosures of several acres in extent, surrounded with netting exactly similar to that which forms the barricado. The openings are from twenty to thirty yards in width; and across the top of them a net is fixed, which rises and falls with the tide; and which, of consequence, acts as a valve to prevent the fish which have entered with the tide from getting out when it ebbs. The enclosures vary in size and shape according to the nature of the ground. At the angles, openings are left which lead into smaller enclosures, provided each with a net valve of the kind already described; and, in this manner, a labyrinth is formed, out of which no fish that enters can extricate itself. The enclosures are termed by the fishermen courts or yards; and the barricado which conducts the fish into them is termed the leader. In this manner, it is scarcely possible that a salmon ascending the river between high and low water-mark should not either be detained in the yards, or entangled in the meshes of the leader. It is usual also to take advantage of the natural hollows, or to form artificial excavations behind the leader, where fish descending the river are left at the fall of the tide.

In 1797 the stake-net mode of fishing was introduced in the Tay at Sea-side, fifteen miles below Perth; but the Earl of Kinnoul and other superior proprietors having in 1799 brought an action of declarator, this mode of fishing, at least in that part of the river, was in 1801 declared to be illegal by judgment of the Court of Session, which was affirmed on appeal by the House of Lords. But the fishings of the Appellants being situate considerably below Sea-side, where the Tay is an arm of the sea, [284] they maintained that the statutable prohibitions did not extend to their fishings; and they continued to fish with stake-nets.

The Respondents as proprietors in the higher part of the river, in 1804, brought an action of declarator against all the proprietors of salmon fisheries along the Frith of Tay, setting forth in the summons:—"That by the common law of this realm, the proprietors

“ of salmon fisheries are not at liberty to exercise the same, or to take salmon otherwise
 “ than by net and coble, where the tide ebbs and flows, or in a way sanctioned by
 “ immemorial usage; and that by several acts of Parliament, particularly by an act of
 “ the first Parliament of James I. passed in the year 1424, intituled, ‘ Of cruives, yairs,
 “ and Saturday’s slop;’ the act of the tenth Parliament of James III. passed in the
 “ year 1477, intituled, ‘ Anent cruives;’ the act of the first Parliament of James IV.
 “ passed in the year 1488, intituled, ‘ Anent cruives;’ and the act of the ninth Par-
 “ liament of Queen Mary, passed in the year 1563, intituled, ‘ Anent cruives and zairs;’
 “ and other acts of the Parliament of Scotland, the taking of salmon in waters where
 “ the sea ebbs and flows, by means of cruives and zairs or yairs, or other machinery, is
 “ prohibited, and all cruives or zairs so situated, or set upon sand, or schaulds or shoals,
 “ and upon the water sands, are ordained to be put away: that nevertheless the Right
 “ Honourable George Lord Kinnaird, the Honourable William Maule of Panmure,
 “ Alexander Wedderburn, Esq. of Wedderburn, James Morrison, Esq. of Naughton,
 “ William Dalgliesh, Esq. of [285] Scotseraig, — Anderson, Esq. of Balgay, John
 “ Berry, Esq. of Tayfield, and Archibald Campbell Stewart of St. Ford, Esq. alleging
 “ themselves to be proprietors of the salmon fisheries, and to have right to fish salmon
 “ in the said water of Tay opposite to their respective properties in the counties of
 “ Perth, Fife, and Forfar, have, within these few last years, by themselves, and persons
 “ employed or authorized by them, erected yairs or stake-nets, or other machinery of
 “ the nature of yairs, upon the sands opposite to their said respective estates in the
 “ said counties of Perth, Fife, and Forfar or Angus, between the high and low water-
 “ mark, and have thereby taken great quantities of salmon, and destroyed the fry of
 “ such salmon, and other fishes, contrary to law, and to the great hurt and prejudice of
 “ the pursuers, and to the injury of them and all the other proprietors of salmon
 “ fisheries in the upper and higher parts of the said river of Tay; and that Francis
 “ Charteris, Earl of Wemyss, and others, alleging themselves to be proprietors of, or to
 “ have right to salmon fishings in the said river or water of Tay, have likewise either
 “ erected, or threaten to erect yairs or stake-nets, or machinery similar to those above
 “ complained of, upon the sands opposite to their respective properties within the
 “ counties aforesaid.” And the summons concluded, “ That therefore it ought and
 “ should be found and declared, by decree, etc. that the said defenders have no right
 “ by themselves, or others employed or authorized by them, to erect or use the yairs,
 “ stake-nets, or machinery aforesaid, or other machinery of the same nature, for the
 “ pur-[286]pose of catching salmon or other fishes in the said river of Tay; and the
 “ said defenders ought and should be decreed and ordained, by decree foreshaid, to
 “ desist and cease from using the said yairs, stake-nets, and other machinery, and to
 “ demolish and remove the same, and to pay to the pursuers the sum of £20,000
 “ sterling, in name of damages sustained by them.”

After a proof allowed and taken as to the alleged diminution of the produce of the
 upper fisheries, the alleged destruction of salmon fry and injury to the breed of salmon
 in the river by the stake-nets, and as to the limit between the river and the estuary of
 the Tay, and a variety of other proceedings, the Court on the 7th March, 1812, pro-
 nounced this judgment: “ The Lords having resumed consideration of the state of this
 “ process, and advised the same, with the mutual memorials for the parties, writs
 “ produced, proofs adduced, and former proceedings, they sustain the title of the
 “ pursuers to insist in this action for having such yairs, stake-nets, and other machinery
 “ of the same nature, removed, as have been placed within the high water-mark, for
 “ the purpose of catching salmon or other fishes, opposite to lands bounded by the river,
 “ frith, or water of Tay, on those sides or parts where such yairs, stake-nets, or other
 “ machinery are placed, and as far down as Drumly Sands, without prejudice to the
 “ rights of such of the Defenders as have fishings in the sea: repel the defences, and
 “ find and declare, that the Defenders have no right, by themselves, or others employed
 “ by them, to erect or use yairs, stake-nets, or other machinery of the same nature, for
 “ [287] the purpose of catching salmon or other fishes within the aforesaid bounds:
 “ decree and ordain the Defenders to desist and cease from using the yairs, stake-nets,
 “ and other machinery complained of, and to demolish and remove the same: and
 “ prohibit and interdict them from erecting or using in future the machinery aforesaid,
 “ or other machinery of the same nature, for the purpose of catching salmon or other
 “ fishes within the said bounds; and decree accordingly: find the defenders liable in

"damages and expenses to the pursuers," etc. From this judgment the Appellants appealed.

With respect to the facts which were the subject of proof, the Appellants contended that they had made out their assertions that the stake-nets were prejudicial neither to the breed of salmon in the river, nor to the produce of the upper fishings, while the Respondents contended that the evidence proved the contrary. But the Respondents further contended that, although all these facts were conceded to the Appellants, the stake-net mode of fishing was, notwithstanding, illegal, and that the Respondents were entitled to prevent it.

In combating this latter proposition the Appellants insisted upon the following points: 1st, Though various statutes prohibit cruives, zairs, and all machinery, "in salt waters, where the sea ebbs and flows,—in rivers that have course to the sea," and "within flood mark of the sea;" and though "they are prohibited to be set on sands" and shoals far within the water," and, in general, "upon the water sands;" yet the prohibitions do not extend to the stake-net apparatus, on account of its [288] peculiar construction. The legislature had two objects in view; namely, to prevent the destruction of red and black fish, or fish immediately before and after depositing their spawn; and to secure the safe passage of the fry to the ocean. But as the stake-nets are always removed during the breeding or forbidden season, they cannot destroy red or black fish; and as they are wrought on a mesh of three and a half or four inches in diameter, they cannot intercept the fry. As the construction is without the purview, so it is also without the letter of the statutes; for stake-nets confessedly bear no resemblance to cruives; they are essentially different from yairs, which are close dykes or pallisadoes, affording no passage to the fry, and they do not answer the description of any other prohibited engine.

2d, The situation, as well as the construction of the stake-nets, exempts them from the operation of the statutes, which, in so far as they contain an absolute prohibition of cruives and yairs, apply neither to rivers unaffected by the tide nor to the sea, but only to the intermediate space where the salt water meets the fresh, and where the fry in their way to the sea stop until they are habituated to the new element. But this point is far above the highest of the Defenders' stake-nets, which are erected on the shore of the sea, where salmon fry are never to be seen.

3d, All the statutes admitting a construction different from that which they contend for, were either expressly enacted as temporary regulations, or have fallen into desuetude.

Lastly, The Respondents have no title to insist [289] in an action for enforcing the statutes with regard to salmon fishing, which are regulations of police for the benefit of the public at large, not of private individuals interested in the fishings, and the execution of which, therefore, is entrusted to the public prosecutor alone. Neither have they any interest to enforce these statutes, because the stake-nets do not diminish the produce of the upper fishings, that part of the river being as well stocked with fish at present as it was before the erection. And this action is carried on for no purpose but that of preventing the market from receiving a greater supply of wholesome fish, and thereby injuring the monopoly of the Respondents, a purpose inconsistent with the public interest, etc.

On these points it was contended for the Respondents:—1st, That the preservation of the breed, as a source of national wealth, was not the sole object of the legislature in framing the laws for regulating salmon fishing; but that the private interest of individual proprietors was also contemplated; and they referred to the regulations of the mid-stream and Saturday's sloop, and entered into a particular examination of the purview and enactments of the statutes. The stake-nets were yairs of the most destructive kind; but, even if they were not, the argument for the Appellants would not be improved, because the statutes applied to every species of fixed machinery.

2d, The prohibition was directed against machinery in waters where the sea ebbs and flows, and *flumen* or *fluvius* in Latin, *aqua* in low Latin, a river in English, and a water in old English and [290] Scotch, do not exclusively denote a fresh water stream, but apply to every stream, from its source, to where it falls into the main ocean, *mare altum*, including the whole æstuary, *intra fauces terre*; and in support of this position the Respondents referred to many authorities in the English statute book, Hale *De Jure Maris*, etc.; and in Scottish authors from Jac. 1 of Scotland, to the end of the 17th

century; in the Scottish statute books, and in Scottish charters; and the cases of *Leslie v. Ayton*, Dict. vol. 2, p. 359—and of *Gairlies v. Torhouse*—were cited.

3dly, The leading prohibition against cruives and yairs in waters where the sea ebbs and flows was clearly in force, and was so stated by Stair, Bankton, and Erskine. (b. 2, t. 6, s. 15). The statutes in general were admitted to be in force, and the statute, 1469, cap. 38, although temporary at first, and that of 1563, cap. 68, to which statutes the plea of desuetude had been applied, were continued by the general re-enacting statutes, or referred to in subsequent statutes, as existing acts. And the cases of *Fraser v. Duke of Gordon*, Sel. Dec. p. 316—*Gween v. Lady Innis*, and *Prior of Pluscardine v. Laird of Innis*, Balf. Prac. p. 545—*Heritors of Don*, 1693—*Colhoun v. Duke of Montrose*, 1793, 1804—*Queensberry (Duke of) v. Marquis of Annandale*, 1771—were cited.

4thly, With respect to the allegation that the Respondents had no title to insist in the action, the analogies of law, the practice in actions on the fishing statutes, and several express decisions, proved the contrary.

[291] The following note of what the Lord Chancellor said was taken by one of the Counsel who argued the case in Dom. Proc.

(June 16, 1816.) Lord Eldon (C.). He thought the judgment was right, but that it would be necessary to make one alteration in it.

He was of opinion that these stake-nets fall within the meaning of the word yairs used in the statutes; he thought likewise there were other words in these statutes which would comprehend them, as nets, within the prohibitions enacted.

The judgment, therefore, was right, except that in one passage it was worded with some degree of obscurity, which it was necessary to remove. The passage is this, viz. “without prejudice to the rights of such of the Defenders as have fishings in “the sea.” These words in their natural import would mean that the judgment was not to apply at all to such of the Defenders as have fishings in the sea, which is certainly very different from what the Court intended. What the Court meant was, that the judgment did not apply to the sea fishings of any of the Defenders.

He did not see the use of having these words in the judgment at all; for the summons has no reference to any fishings in the sea, but is limited to those in the river and water of Tay.

It had been stated that there was a petition in Court praying that the judgment might be extended as far as the bar of the river; and he had that petition in his hand. He thought that to shut out the inquiry which that petition prays would be wrong; and the more so, because he had himself come to an opinion that the water of Tay, within [292] the meaning of these statutes, does extend farther than the Drumly Sands, and down to the bar.

The Order of the House was as follows:—

(June 20, 1816.) “Ordered and adjudged that the interlocutor complained of be “varied by inserting after the words ‘as far down as’ the words ‘the east end of’ and “by leaving out after the word ‘sands’ the words ‘without prejudice to the rights of “such of the Defenders as have fishings in the sea.’ And the Lords find that the “river, frith, or water of Tay, extends at least as far down as the east end of Drumly “Sands; and it is declared that no judgment ought to be given with respect to any “rights of fishing claimed in the sea: and it is declared that this judgment is to be “without prejudice to any application, made, or to be made to the Court of Session, “for the purpose of ascertaining whether the river water or frith of Tay doth not “extend farther to the eastward than Drumly Sands; and in case the Court shall find “that such river, water, or frith, doth so extend, nothing in this judgment contained is “to prevent the Court from making any such order as may be just and according to “law, touching or relating to any yairs, stake-nets, and other machinery of the same “nature, within the high water mark placed for the purpose of catching salmon or “other fishes opposite to any lands to the east of Drumly Sands which shall be found “to be bounded by the said river, frith, or water of Tay: and it is further ordered and “adjudged that with these variations and declarations the said interlocutor complained “of be—AFFIRMED.”

[293] SCOTLAND.

APPEALS FROM THE FIRST AND SECOND DIVISIONS OF THE COURT OF SESSION.

MONTGOMERY, and Others,—*Appellants*; CHARTERIS (EARL OF WEMYSS),—*Respondent*; and DUKE OF BUCCLEUCH,—*Appellant*; MONTGOMERY, and Others, etc.,—*Respondents* [Feb. 3, 5, 7, 10, 13, 14, 17, 18, 21, July 9, 1817.]

[Mews' Dig. x. 1643. See *Queensberry's (Duke of) Trustees v. Earl of Wemyss*, 2 Dow, 90; 1 Bli. 339; 3 Scots R. R. 141, 542; and *Ker v. Roxburghe (Duke of)*, 1813, 2 Dow, 149.]

[Whether a fifty-seven years' lease is struck at by the prohibition to alienate in an entail? Whether the taking of grassum is struck at by the prohibition to alienate, and the proviso against diminution of the rental? Whether there may be a fraud on an entail, distinct from what is prohibited? Whether a lease for thirty-one years; or, in case that should not be good, for the longest of certain alternate periods from twenty-nine to nineteen years, for which the granter should be found by the Court of Session, or House of Lords, to have power to make a lease, may be a good lease for the restricted periods of twenty-one or nineteen years, notwithstanding the indefinite ish? etc. etc.]

In the Neidpath, or March entail, there is, among other prohibitions, a prohibition to alienate: and with respect to leases, there is a clause that it shall be lawful and competent to the heirs of tailzie, to set tacks during their own life-times, or the life-times of the receivers thereof, the same being set without evident diminution of the rental. In the Queensberry entail there is a proviso, that the [294] heirs shall not set tacks nor rentals for any longer space than the settler's life-time, or for nineteen years, and that without diminution of the rental, at the least for the just avail at the time.

The late Duke of Queensberry had, some years before his death, granted several leases of farms forming part of the Neidpath, or March, and the Queensberry, entailed estates, at low rents (not less, nominally, than the rents at which the lands had been previously let), and taking large grassums. The Earl of Wemyss was the next substitute heir, entitled to succeed to the Neidpath or March estate; and the Duke of Buccleuch the next heir, entitled to succeed to the Queensberry estate. Actions were brought by the Duke himself, by his trustees after his death, by the heirs of entail, and by several of the tenants; the object of all of which was to have the judgment of the Court upon the question, whether the leases, or any, and which of them, were or was valid. With this view, certain particular cases were selected for litigation and discussion, in each of which the principles of decision, it was expected, would govern and decide a class of cases. It had been before decided by the Court below, and the House of Lords, in the Wakefield case (2 Dow, 90), that a ninety-seven years' lease was bad as being an alienation.

With respect to the Neidpath or March estate, the first case, that of Easter Harestanes, was a case of a fifty-seven years' lease, at £74 rent, and £310 grassum. This was, by the Court below, held bad, on account of the long duration, which brought it within the prohibition to alienate.

[295] The second case, the case of Whiteside, was that of a life rent lease (permitted by the entail), taken without grassum, upon the surrender of a fifty seven years' lease, with a considerable grassum, the rent remaining the same as before. With reference to this and the next class of cases it is to be observed that there were contracts between the Duke and the tenants, thus surrendering their leases, by which the Duke bound himself to give them longer leases for grassums, if it should be found that he had the power.

The next case (or class), the case of Edstoun, was that of a thirty-one years' lease; or, in case that should be found beyond the power, then it was to be a lease alternately for twenty-nine, twenty-seven, twenty five, twenty-one, or nineteen, years—"whichever

“ of the said several terms of years short of thirty-one years, the Court of Session, or “ House of Lords, should find to be the longest period of those above specified, for “ which the Duke had power to grant a valid lease.” This lease also was granted without grassum upon the surrender of a fifty-seven years’ lease with grassum, the rent remaining the same as that under the fifty-seven years’ lease.

These Whiteside and Edstoun leases were held by the Court below to be bad, on account of the grassum taken on the fifty-seven years’ leases, for which they were substitutes, grassum being a diminution of the rental and an alienation of the profits : and they were held bad also on the ground of fraud on the entail, in which the tenants, as appeared by the contracts, were implicated. The [296] Court below appears not to have considered the above indefinite kind of lease as any objection to the validity of a lease for the restricted periods of twenty-one or nineteen years. From these decisions the trustees of the late Duke appealed.

The late Duke of Queensberry also granted several leases of farms on the Queensberry estate for nineteen years, taking large grassums. These leases were divided into four classes :—1st, Leases granted to the tenants in those tacks which were current, or to strangers, under the burthen of the current tacks : and with obligations in both cases to grant a new lease for nineteen years, annually, during the Duke’s life :—2d, Leases granted under a similar obligation to renew, where the current leases had expired :—3d, Leases granted without an obligation to renew, but where the current leases were not near their natural expiration :—4th, Leases without obligation to renew, and not granted till the previous leases had expired. Upon a declarator by the trustees of the late Duke of Queensberry before the second division of the Court, all these leases were sustained, the second division of the Court considering grassum as no objection. From that decision the Duke of Buccleuch appealed.

The cases of some of the tenants were brought separately, both before the Court below, and the House of Lords ; but the above general statement will, it is apprehended, be sufficient in this place. A more detailed statement of the cases, and proceedings, and of the material clauses in the entails, will be found in the Lord Chancellor’s speech. It [297] is not deemed expedient in the actual state of the proceedings to go at all into the argument at present.

Mr. Leach and Mr. Jeffray for the Heirs of Entail ; Sir S. Romilly and Mr. Cranston for the Trustees ; Mr. Moncrief for the Tenants.

Lord Eldon (C.) (July 9, 1817). Your Lordships’ attention has been called, in the discussion of the various cases which are in controversy between the Heir of Entail, the present Lord Wemyss, and the executors and disponees in trust of the late Duke of Queensberry, and the several tenants, either by particular action or otherwise, who may be represented as having interests in the questions under your Lordships’ consideration, to the decision of cases which may, I think, be represented as cases of considerable difficulty ; but I am sure they may be represented as cases of importance, at least, altogether unexampled by any that have fallen within my observation in the course of my professional life.

My Lords, When I so state the points to your Lordships which are now under consideration, I am impressed undoubtedly with the notion that this House never had a more important duty to discharge than it is called upon now to discharge. The consequences of your Lordships’ decisions upon these causes, to the parties immediately interested, are very weighty and very important. The parties interested have now at stake a property of very great value ; but it is not only with reference to the value of the interest your Lordships are to decide, [298] when you think it proper to come to a decision upon these causes ; but your Lordships are now to establish principles of decision, which must in a great measure settle the law of Scotland, so far as it has hitherto been considered as unsettled, in respect of entails ; and if, on the one hand, your Lordships feel any degree, if I may so express myself, of judicial uneasiness in disappointing the dispositions made by the late Duke of Queensberry, you have, on the other, to recollect that your decision must affect the powers and interest of every owner of an entailed estate in Scotland, where his powers and interests are not defined in express terms, and that if you can establish the acts, which are now complained of as done in prejudice of the entail by the late Duke of Queensberry, you may probably be thought to establish principles that may open to the destruction of most of the entails in Scotland, not only affecting patrimonial interests, but, if we were at liberty so to view any cases which

come before us in judgment, affecting very much the political state of the country. But I put that out of the question.

My Lords, We are bound, unless I misunderstand this case, whenever we come to the decision of it, to determine what opinions we ought judicially to adopt among those, various as they appear to me to be, which are stated by the lawyers, and delivered by the judges. The present case has this circumstance belonging to it, all the present cases, I should say, have this circumstance belonging to them, that your Lordships have to determine, whether the first division of the Court of Session, [299] which has held most of the acts of the late Duke of Queensberry, the subjects of consideration before your Lordships, to be utterly null and void; or the second division of the Court of Session, which has, as it appears to me, in substance and effect, held those acts to have perfect legal validity, is right.

My Lords, There are two deeds of entail, under which the Queensberry family claim. The one has been distinguished, I think, in the course of the discussions at the bar, by the name of the March or Neidpath entail; and, upon the construction of that entail, questions arise in several different cases. The first of those cases is that of the Duke of Queensberry's executors, together with a Mr. Alexander Welsh, who is a tenant under a lease of a farm called Easter Harestanes; and the questions in that case, are, first, Whether the lease granted by the Duke of Queensberry for a term of fifty-seven years is bad, as an alienation prohibited by the entail of that estate? and, secondly, Whether the lease is bad on account of a grassum or fine having been taken by the lessor?

My Lords, In the consideration of this case, the Court below, that is, the First Division of the Court of Session, have thought that it was not necessary to give much of attention to the second of those questions, namely, whether the lease was bad on account of a grassum or fine having been taken by the lessor, that Court being of opinion, that a lease for fifty-seven years, if granted without a grassum, was to be considered as being an alienation, prohibited by the deed of entail, it being a lease of [300] more than ordinary endurance, that it did not operate, as they call it, as location, but in fact amounted to an alienation of the property; and if the Court was right in so holding upon the circumstance of the duration of that lease, it becomes unnecessary to consider, in that particular case, the second question, whether the lease was bad on account of a grassum or fine having been taken by the lessor; and if your Lordships should be of opinion, that that lease having been granted for fifty-seven years, is not a lease which can be considered as being granted according to the powers of the entail, when your Lordships decide upon that case, it will not be necessary to give attention to the circumstance, that a grassum or fine was paid.

My Lords, Since the case was decided, however, as I understand the matter of fact, in the Court of Session in Scotland, an Additional Case, by which I mean an additional printed case, an additional representation upon the subject, has, by your Lordships' leave, been laid upon your table; and that case contends, that, though a lease for ninety-seven years in the case of Wakefield was held by your Lordships some little time ago to be bad as an alienation, yet this lease, being for an inferior term, fifty-seven years, ought not to be considered as an alienation, and more especially as there has been an usage in Scotland of granting leases for fifty-seven years, not only by heirs of entail, but by proprietors of estates held in pure fee; and that therefore that usage, if the principles of administration are to be applied in these questions to the granters of leases of entailed estates, is very material to be considered on the question, whether there has been an ordinary and due administration. My Lords, besides that, the additional case argues, that a plea may be maintained for this tenant for fifty-seven years, under the statute of 1449, a statute which, your Lordships will recollect, sustains the interest of a person claiming under a lease, declaring him, as it were, to have a real right in lands as against singular successors, against any persons who took the estate, he paying the like duties as were paid to the grantor of the lease; and it is submitted, that that statute of 1449 would protect this tenant, whatever construction is put upon the deed of entail. My Lords, the additional case also insists, as the original case had done, that there is an essential distinction between a fine or grassum, and rent; that taking a grassum is not diminishing rent; and that therefore if this lease is not bad in point of duration, as the original case insisted, it cannot be considered as invalid, in consequence of the original lessor having taken a fine or grassum.

I have taken the liberty to mention to your Lordships what I consider to have been insisted upon by this additional case, because it will be obvious, that, if the tenant could be protected in this case by the act of 1449, the same protection may be contended for in other cases, and it does not appear to me that that point was insisted upon in the Court below, to the extent of enabling us to determine absolutely and clearly what would have been the judgment of the Court below upon that point. My Lords, I do not hesitate to state to your Lordships, that I entertain an opinion upon it which I will not be con-[302]-sidered however at present as delivering in judgment, but I apprehend it may be made out, that, although the statute of 1449 has the effect which it is contended in this case that it has, generally speaking, yet, it will be difficult to contend that, if the grantor by an entail has not power to make a lease for fifty-seven years (I am not now saying whether he can or not in this case), the succeeding heir of tailzie can meet with an answer from the lessee of the person who went before him in the enjoyment of the entailed estate, under the act of 1449. The act of 1685 *quoad hoc* must perhaps be taken to be a repeal of the act of 1449, if the lease which is made by the heir of entail is not otherwise a good lease, and does not otherwise give a valid title. I will not farther discuss that at this moment.

My Lords, The next case is the case of the Trustees of the Duke of Queensberry and the Earl of Wemyss, and a person of the name of William Murray, tenant in a farm called Whiteside. My Lords, with respect to this farm called Whiteside, which appears to have been let at a particular period, together with another farm called Fingland, and another called Flemington, I pass over at present, and perhaps not meaning to resume the consideration of some circumstances. I pass over them, because I understand it to be the wish of both parties that such circumstances should be passed over, namely, that Whiteside, Fingland, and Flemington were let together for a gross or cumulo rent of, I forget what sum, I think somewhere between £200 and £300; and that afterwards these [303] three farms having before been so let together, were let separately, and then a question might arise, at least a question would have arisen in our law, whether the letting them separately, though the three different rents constituted the same quantum of rent, which was reserved upon the grant of the lease when the three were let together, was a letting at the old rent? and perhaps it would be very difficult, in matter of English law, to say it was so, because there is an essential difference between one rent of the amount of three, and three rents of the amount of one, and the respective rents so constituted. I understand, however, that it was intimated, I think by Mr. Leach, that that should be passed over.

The objections then in this case are, that there had been a lease granted to the tenant for fifty-seven years, upon which a grassum was received; that that lease for fifty-seven years, upon which a grassum was received, an alarm being taken about the validity of such leases, was in effect renounced, and the present lease taken: but that the present lease, under the circumstances, under which it took effect, was in truth nothing but a substitute for the former lease, and, being a substitute for the former lease, and a grassum having been taken for the former lease, that the latter lease, a substitute for the former, is also to be considered as affected by the same objections, arising out of the fact of payment of a grassum, as would have applied to the first lease. There are likewise intimations given, that this tenant, and that in truth all the tenants, were in conspiracy with the late Duke of Queens-[304]-berry, to defeat the entail, to commit a fraud upon the entail, a notion which I observe the Judges of the First Division have adopted; and one material consideration with respect to this case I will notice whilst it occurs to me, is, that I think the Judges of the Second Division have not, fully at least, adverted to the case put upon fraud. It is, however, to be considered also, whether the pleadings, such as they are, authorize the Courts to look at the case in that view: whether there are in the pleadings, allegations enough to authorize them so to look at it, whatever may be the real nature of the case, and especially with but few of the tenants before the Court. If the second lease is to be considered as a substitute for the first lease, and, because the first lease was affected by the grassum, the second lease must be considered as affected by the grassum, this case necessarily involves, in that view of it, the duty of considering what is the effect of grassum in a lease of this sort. I mention here, too, because it is also a material circumstance, not only with respect to this lease of Whiteside, but with respect to other leases, that it is insisted further, on the part of the tenant, that, if this lease could be

affected, either upon the ground of grassum, or upon any other ground that operated an irritancy, yet that irritancy may be purged; and that introduces a question into this case, which is,—Whether the irritancy, which is admitted might be purged, if purgation of it had been sought during the life of the grantor of the lease, could be purged when the grantor of the lease no longer exists.

My Lords, The next case, which you have had [305] opened to you, is a case of Lord Wemyss on the one side, and on the other a person of the name of Symington, who is a tenant of a farm called Edstoun. My Lords, this is a lease which was granted by the Duke of Queensberry, in consequence of the doubts entertained as to his leases in general, by reason of the controversy in the Wakefield case. This is a lease by the Duke of Queensberry for thirty-one years (not under the statute of 10th George the Third, which grants the power of leasing, under certain restrictions and limitations, for thirty-one years,) with this proviso, that if the Court of Session or the House of Lords shall think it was *ultra vires* of the Duke of Queensberry to grant for thirty-one years, the lease shall be considered, as being a good lease for twenty-nine years, for twenty-seven years, for twenty-five years, for twenty-one years, or for nineteen years, or for the longest of those periods for which the Court of Session, or the House of Lords, should think it good. When this lease was granted, the Duke of Queensberry at the same time entered into agreements, or it was fully understood by him and the tenants, that if leases for fifty-seven years could be effectually sustained, they were to have such leases, notwithstanding this transaction. My Lords, the First Division of the Court of Session found, that this lease (I think that was their first interlocutor) might be sustained for nineteen years, and for no longer time; that it was competent to the Duke of Queensberry to make a lease with those alternate periods; and that although it was impossible, at the moment it was executed, to de-[306]-termine what, in point of endurance, was the bargain between the parties, if the lease was to have an ish to be settled by the Court of Session, or if the parties did not like that, by the House of Lords, yet the Court was of opinion such a lease was a good lease, and they would have been disposed (so they state, I think, in effect, in their interlocutor) to have maintained that lease as a good lease for nineteen years, if it had not been that the tenant had mixed himself with that system of management, which they look upon as fraud upon the entail, and that therefore, as they express it in their interlocutor, he had no equity to have a lease for nineteen years. My Lords, upon what particular ground they found that the lease would have been good for nineteen years, I am not able to learn from the papers before us. I take for granted they must have gone, in some measure, upon a notion, that, as upon a species of *præsumpta voluntas*, an heir of entail may make a lease for nineteen years (whether with grassum is another question), the Duke of Queensberry could, in this manner, make a lease for nineteen years; and it is the law of Scotland, as I understand it, upon this head of *præsumpta voluntas*, that a nineteen years' lease being considered (whether tacks of longer endurance can or cannot be said so to be) to be an act of necessary and ordinary administration, necessary for the cultivation of the land, such a lease is good. The Court seems to hold that doctrine somewhat upon the principle, which the courts of law in England applied to leases granted by tenants in tail before the statutes about their leases. The courts in Scot-[307]-land, I understand, held the nineteen years' lease to be good, as of the ordinary endurance, upon the grounds of good policy and husband-like management of the estate: the Judges in England held a lease made by a tenant in tail for a term that endured beyond his life to be not *ipso facto* void, but voidable, if the heir of entail chose to have it avoided. My Lords, having in their first interlocutor determined that he had a right to a nineteen years' lease, if it was not affected by that, which they state, as barring the equity to have the nineteen years' lease, they resumed consideration of the matter, and, still abiding by the principle that he had not any equity, they found that he might have been entitled to a twenty-one years' lease: and they state the principle upon which they held that he might have been entitled to a twenty-one years' lease, that it was a lease of a duration according to the custom of the country.

The question, therefore, my Lords, in that case, will be, whether, attending to all the circumstances that had taken place between the Duke and the tenant of Edstoun, prior to the grant of the twenty-one years' lease, and attending (if the allegations in the pleadings will permit you to attend) to the circumstances that have taken place between the Duke and the other tenants, so as to bring them all into concert on the head of

collusion or fraud, and attending also to the circumstances of the uncertainty of the duration of the lease, until the Court, by its judgment, should give certainty to that which was uncertain, and attending also to the obligation [308] which the Duke came under, in case leases of longer duration could be sustained, to grant leases of longer duration, whether this lease ought to be sustained, either for nineteen years, or for twenty-one years, or any term under thirty-one years.

My Lords, the other two cases, which relate to the March or Neidpath estate, are, the cases of Flemington Mill and the leases of Crook. I do not think it necessary to take up your Lordships' time in stating the particular circumstances of those cases. They do not appear to me to be of considerable moment, certainly not of value, though they may be of moment as to value to the persons claiming the interest, considering their situation of life: but they involve likewise the point of grassum, and the question, whether there is or is not a diminution.

Now, my Lords, upon these cases, thus briefly stated to your Lordships, I beg leave, with your permission, for the purpose of enabling me to represent to you the ideas of the First Division of the Court of Session, to call your Lordships' attention to the interlocutors that were pronounced by that Court. The first interlocutor pronounced by the Lord Ordinary was to this effect: "The Lord Ordinary having considered the memorials for the parties, and whole cause, repels the reasons of declarator, assoilzies from the conclusions of the libel, and decerns; reserving to the pursuer his recourse, upon the warrandice in his tack, against the Duke of Queensberry and his repre-[309]-sentatives, in the event if the said tack should be set aside as *ultra vires* of the grantor, and regular process brought for that effect"—the operation of this interlocutor being to deny to the tenant of Harestanes a right to a judgment in his favour in his action, and to assoilzie Lord Wemyss from that action of declarator; reserving to the tenant the benefit of the warrandice against the assets of the late Duke of Queensberry and his representatives, in case the tack should be set aside as *ultra vires* of the grantor, in a regular process brought for that effect. They were of opinion that this tack could not be maintained against Lord Wemyss, and therefore they dismissed that action of declarator: but there must be, as I understand, an action of reduction to get rid of the tack itself, and if, in the action of reduction of the tack, the pursuer should succeed, then would arise the benefit of that part of the interlocutor to the tenant, by which his recourse upon the Duke of Queensberry and his representatives is reserved.

This came, my Lords, in different forms before the whole Court; and they likewise sustained the defences in the process of declarator at the instance of Alexander Welsh against the Earl of Wemyss and others, substitutes under the deed of entail, and assoilzied the said defenders from the conclusions of the libel, and then remitted to the Lord Ordinary in the usual manner.

My Lords, Here it is necessary for me to mention, that the Earl of Wemyss had brought an action of declarator against the late Duke of Queensberry and the tenants of the estate, that action of [310] declarator being levelled against William Duke of Queensberry, a tenant of the name of Anderson, another tenant of the name of Tweeddie, another tenant of the name of John Murray, another tenant of the name of Welsh, another tenant of the name of Hutchison, another tenant of the name of James Murray, and several other tenants, including the tenants of Whiteside, Flemington Mill, Fingland, Wakefield, and Edstoun, all tenants and possessors of the said tailzied lands and estates, stating, that "it ought and should be found and declared, by decree of our said Lords, that it was not competent to, nor in the power of the said William Duke of Queensberry, to set or grant any tacks or leases of any part of the entailed lands and estate before written, to endure for any longer term or period than his own life, or the life-time of the tenants receivers thereof, except in terms of, and under the provisions of the acts of 10th Geo. III. for encouraging the improvement of lands in Scotland held under settlements of strict entail; nor to grant any tack of the said lands and estate in consideration of fines or grassums, and thereby diminish the rental." My Lords, I take the liberty to lay some emphasis on these words "and thereby diminish the rental,"—because one of the most considerable questions in this cause is, whether that species of diminution of rental which has taken place here is a diminution of rental within the meaning of these deeds, "And that all such tacks or leases so granted, either for a longer period than prescribed by the said entail (unless they are in the [311] terms of the act of Parliament), or upon payment of grassums

“ by the tenant, are void and null, and shall be of no force or effect in prejudice of the pursuer, as heir of the entail aforesaid.” The Court of Session having sustained the interlocutor of the Lord Ordinary which assolizied Lord Wemyss from the action of declarator, it then goes on to say, “ that with respect to the process of declarator at the instance of the Earl of Wemyss against the late Duke of Queensberry and John Anderson, and others, tenants of the tailzied lands and estate of Queensberry and others, the Lords remit the process to the Ordinary, to hear parties on the conclusions of the same as applicable to the cases of the several defenders, and to do therein as he shall see just.”

My Lords, Such being the judgment in the case of Easter Harestanes, I have only again to repeat, in one short word, that it appears to me, that the Court have decided that case purely upon the length and duration of the fifty-seven years' term. There can be no doubt however, when you look to the principles upon which the Court have proceeded in the other cases, that if it had been necessary for them to have decided upon the point of grassum, the First Division of the Court would have held that the taking of grassum operates a diminution in the rental, and that the diminution of the rental thereby, is a diminution of the rental prohibited under this deed of entail.

My Lords, With respect to the case of Whiteside, they enter more particularly in their interlocutor into the grounds, on which they have held that opinion which I have last stated ; and as there is [312] some little difference, I think, between the interlocutor of my Lord Ordinary and the interlocutor of the Court, I think it will not be improper to state to your Lordships both these interlocutors. The first interlocutor of the Lord Ordinary bears date the 14th day of June, 1814, and it states, “ That having advised the condescendence and answers in the process of declarator, and also the condescendence and answers in the process of reduction, at the instance of the Earl of Wemyss and March against William Murray, and whole processes, conjoins this process with the declaratory action between the parties depending before the Lord Ordinary, in as far as the declarator is applicable to the present case : Finds it stated in the condescendence, and not denied in the answers, that the whole farms, whereof the leases are now under reduction, were formerly let by the late Duke of Queensberry for fifty-seven years ; and, with an exception stated by the defender of the lands of Flemington and Crook, under burthen of grassums, the interest of which bore a considerable proportion to the yearly rent : Finds it admitted in the answers, that in or about the year 1807, many of the tenants holding leases for fifty-seven years renounced their leases, and took new ones for periods equal to the terms unexpired of the old ones, but without paying any grassums for their new leases ; and that soon afterwards, the tenants of all the farms as to which the present discussion relates, whether they had got new leases of the nature above mentioned, or had continued to possess on their fifty-seven years' leases, executed renunciations, and accepted of the existing leases, for which they paid no grassums ; as also, that when the tenants renounced their former leases, and took the present ones, contracts were entered into betwixt them and the Duke's commissioner, Mr. Tait, as stated in the condescendence : Finds, That although it be stated by the respondent, that, depending on a contingency not explained, but said not to have existed, these contracts never were acted upon, yet they afford evidence to show, that the new leases were, with the exception of the term of endurance, a *surrogatum* or substitute for those which had been renounced : Finds, That the rents payable under these renounced leases must, of necessity, have been, from the inconvenience and loss arising to the tenants from the advance of money, a consideration of the doubts of the powers of the lessor, held out in the contracts and other circumstances, have suffered a greater reduction than the amount of the interest of the sums paid in the name of grassum : Finds, That the entail founded on by the parties in this cause contains a clause by which it is expressly provided and declared, that notwithstanding of the irritant and resolute clauses above mentioned, it shall be lawful and competent to the heirs of tailzie therein specified, and their foresaids, after the death of the said William Duke of Queensberry, to set tacks of the lands and estate during their own life-times, or the life-times of the receivers thereof, the same being always set without evident diminution of the rental : Finds, That the rent payable under the renounced leases, diminished as it was by the payment of grassums, [314] cannot be considered as constituting a fair rental, such as is implied in the above clause : Finds, That the lease under reduction, though it might be supported by the first part of that clause,

“ as granted for the life-time of the receiver, is cut down by the concluding part of it, “ being set with evident diminution of the rental : Repels the defences.”

Your Lordships observe in this interlocutor some of these are findings in a question between the pursuer and this particular tenant, having nevertheless relation, not to the acts merely of this particular tenant, but to the acts of all the tenants who have renewed their leases in like manner : and it concludes with what may be stated as in the judgment of the Lord Ordinary a proposition of law, that the fact being—that the original lease was granted for the life-time of the receiver, and the fact being—that the new lease is to be considered as a substitution for the old one, the new lease is to be affected by the circumstance of a grassum being paid for the old one, and that the grassum so affects both the new and the old lease, as to operate, within the intent and meaning of this deed of entail, such an effect upon the rental, as shall amount to that diminution of the rental which is prohibited by the deed of entail.

My Lords, This came under the review of the Court of Session, and they altered in some measure the finding. They say, “ They find, That the entail in question contains “ a strict prohibition against alienation ; but a permission to grant tacks of the said “ lands and estate during their own life-times, or the life-times of the receivers thereof, “ the same being always set without evident diminution of the [315] rental : Find, “ That in the year 1769, the petitioner's father obtained a tack of Whiteside for nine- “ teen years, at a rent of £109, for which he paid a fine or grassum of £132 18s. 10d.” (a grassum very little exceeding a year's rent, which was £109) : “ Find, That in the “ year 1775, the petitioner's father obtained from William Duke of Queensberry a tack “ of the farm of Fingland for twenty-five years, at the rent of £50 10s. for which he “ paid a grassum of £480. Find, That in the year 1788, he renounced this lease, of “ which twelve years were to run, and obtained a new lease, for fifty-seven years, of the “ said farm of Fingland, and also of the farms of Whiteside and Flemington, at the “ rent of £266 16s. 4d.” This £266 16s. 4d. it will be in your Lordships' recollection, was the compounded amount of the three rents of Fingland, Flemington, and Whiteside, with the addition of the cess, and rogue and bridge money, amounting to £11, odds, for which he paid a grassum of £400, this grassum being declared to be (not declared upon the face of the lease, but declared in a collateral paper and memoradum) a grassum for Whiteside and Fingland only. And I mention this, because a question arises in another case, that of Flemington, whether it was competent to the Court of Session, or competent to the parties, who were disputing before the Court of Session, to allege that, the grassum, by force of that collateral paper, must be taken to be for two farms, if it did not so appear on the face of the tack. They “ find, That in the year “ 1807 the petitioner's father renounced the said tacks, and took new tacks to himself “ and sons for their [316] life-times, at the rents payable under the tacks renounced : “ Find, That this current tack must be held merely as a substitute for the former ones, “ and subject to any objections, on the ground of grassum, diminution of rental, or “ otherwise, which were competent against the tack renounced : Find, That in estimating “ the rents of Whiteside and Fingland, the value of the fines or grassums paid at the “ commencement of the former tacks ought to have been added to the annual rent : “ Find, That this was not done, and that the new rent was made the same as the old “ rent, *plus* the cess and bridge-money : Find, That this was not equal to the value of “ the grassums taken, and therefore that the said last tack of Whiteside and Fingland “ was set with evident diminution of the rent, and in violation of the said clause in the “ entail : And further find, That the conversion of part of the new rent into a fine or “ grassum of £400 was to the manifest prejudice of the succeeding heirs of entail, and “ operated as an alienation *pro tanto* of the uses and profits of the estate : therefore, “ although the said tacks in point of endurance do fall within the permission of the “ entail above referred to, find that they are struck at by the clause prohibiting alienation, as well as by the condition in the said permissive clause against evident diminution of the rent ; therefore in the process of declarator repel the defences, and in the “ process of reduction repel the defences, sustain the reasons of reduction, and reduce, “ decern, and declare accordingly, so far as concerns the said tacks of Whiteside and “ Fingland : But in regard no grassum appears to have [317] been taken for the farm “ of Flemington, and that by the tack renounced the rent has been raised, they so far “ sustain the defences in the process of declarator.” With respect to this last proposition in this interlocutor, they afterwards reverse it, as not coming properly before them.

My Lords, Such being the case with respect to Easter Harestanes and Whiteside, as it may be proper to call your Lordships' attention to every circumstance in a case of this great importance, the finding in the interlocutor with respect to Edstoun is in these words: "The Lords having advised," and so on, "Find, That a tack of the lands and farm of Edstoun was granted to the petitioner, to commence at Whitsunday, 1792, for the period of fifty-seven years, at the rent of £155 7s. for a fine or grassum of £300: Find it admitted in the petition, that doubts having been entertained of the validity of the above lease, the petitioner, along with most of the other tenants on the estate," and your Lordships will permit me to repeat these words, "along with most of the other tenants on the estate," that the Court find as a fact, but whether that fact is founded on sufficient pleadings and evidence, may be a very different consideration, "along with most of the other tenants on the estate, renounced the said tack from and after Whitsunday, 1807, and obtained a new tack at the same rent for thirty-one years, or for several alternative periods, down to nineteen years, according as the Duke should be found to have powers to grant tacks under the entail: Find, That this current tack must be held to be merely a substitute for the former tack, [318] and subject to any objections, on the ground of grassum or otherwise, which were competent against the tack renounced: Find, That the conversion of any part of the rent which at the time might have been obtained for the farm, into a price instantly paid, was to the manifest prejudice of the succeeding heir of entail, and operated as an alienation *pro tanto* of the uses and profits of the estate, and therefore find that the said tack is struck at by the clause in the entail prohibiting alienations: Find, That in estimating what was the rent paid under the former lease, the value of the grassum paid at the commencement of the former lease ought to have been added, and that this not having been done, the rent payable under the new lease was in evident diminution of the rental: Find, That the whole circumstances under which the tack was granted, taken in connection with the relative contract entered into between the Duke of Queensberry and the petitioner and other tenants, again to prolong the tacks to fifty-seven years, or even to ninety-seven years, if found competent, together with the fact, that all the tenants renounced their tacks under similar circumstances and conditions nearly at the same time, do indicate a fixed plan on the part of the Duke to defeat and defraud the entail as far as possible; and that the petitioner and the other tenants did lend themselves to, and co-operate with the Duke in the said fraudulent scheme: Find, That the tack in question, and others now before the Court, were not entered into in the fair, rational, and husbandlike administration of the estate, but for the purpose [319] of forestalling the rents and profits thereof, which would otherwise have belonged to succeeding heirs of entail, and thereby enriching the Duke at their expense, by enabling him to draw from the estate more than the value of his own life-rent-interest in the fruits of it: Find, That the permissive clause in the entail, to grant tacks for the life-time of the grantor or receiver, does not bar the heir in possession from granting tacks for any definite period which does not amount to alienation, and that the tack in question might therefore have been restricted to the period of nineteen years, being the period then and now most usual in the practice of the country, and analogous to the period" (according to the language of this interlocutor) "fixed by the statute of the 10th of George III. when no improvements are stipulated. But in respect that the tack is otherwise objectionable on the grounds above specified, and that the tenants on that account have no claim in equity in support of their tacks, find, that the said tack cannot be restricted to any shorter period than that for which it was originally granted." Your Lordships therefore observe, that in this finding there are adjudications of law of very considerable consequence: first, That the conversion of any part of the rent which at the time might have been obtained for the farm, into a price instantly paid, operated as an alienation *pro tanto* of the uses and profits of the estate; and the question in law about it would be, whether the finding is just in law which immediately followed this, namely, "that the said tack is struck at by the clause in the entail prohibiting alienations;" and [320] which, in other words, is a finding, that an estate taken at the old rent with a grassum, is the alienation of the future uses, and is an alienation within the meaning of the words, within the prohibitory, irritant, and resolute clauses in this entail.

Then they proceed to state, that the whole circumstances under which the tack was

granted, taken in connection with the relative contract entered into between the Duke of Queensberry, and the petitioner and other tenants, again to prolong the tack to fifty-seven years, or even to ninety-seven years, if found competent, together with the fact, that all the tenants renounced their tacks under similar circumstances and conditions nearly at the same time, do indicate a fixed plan on the part of the Duke to defeat and defraud the entail as far as possible. That introduces a consideration of much moment: We have heard of much difference of opinion as to what is to be the nature of the construction to be put upon the words of an entail,—Whether it is *strictissimi juris*, or to be a sound and reasonable construction; but there appears to have been no difference upon this point, that there may be a fraud upon the entail—at least in the opinions of those eminent lawyers, whose opinions they have stated in the printed cases as authority, which undoubtedly they are not, strictly speaking, but which are of great value to us, as giving us information as to what is considered to be the law of Scotland. In stating their notions as to grassum, they make a saving, if the entail is defrauded, reducing it in each case to the question—what is a fraud upon the entail, a question extremely difficult to solve, if an heir of en-[321]-tail, in Scotland may do any thing which he is not prohibited from doing, and he may commit a fraud on the entail by acts which he is not in words prohibited from doing.

This, my Lords, is a very material part of this interlocutor, as it appears to me with reference to some observations I shall have to make on the Duke of Buccleuch's case. I just refer to it now, because it may enable me to carry your Lordships along with me, when I come to state the proceeding on the part of the Duke of Buccleuch, and these Executors and Disponees in trust. That is a proceeding by the Executors and Disponees in trust, by way of action of declarator in the Court of Session in Scotland, praying to have it found, that all the leases there referred to, which if I count them right, amount to from 290 to 300, all impeached in one action of declarator, are good and valid leases. My Lords (the Court, I suppose, overlooking that circumstance, or perhaps the print before us being inaccurate), it appears that, when they held all those leases to be good, they have in some cases held leases, stated to be for ninety-nine years, to be good. If there can be a fraud upon the entail, as something that is to be contradistinguished from a breach of the prohibition, I should submit to your Lordships, that it may deserve consideration, whether the Executors and Disponees in trust of the Duke of Queensberry, who as such are neither more nor less than his representatives, if he was a party to that fraud, have a right to come into Court with an action of declarator, not making the numerous tenants parties to that suit, but praying to have it declared at their instance, [322] that leases granted under such and such circumstances are valid leases. To explain myself upon that: In the Roxburgh case, where we had a grantor of sixteen feus, we had a case of A. and B. who were alleged to have been acting, if you please so to put it, who might be represented to be acting in fraud of the entail. I do not mean to use the term fraud offensively; and where two parties only to that transaction were represented to be acting in defraud of the entail, it was very difficult to consider one as guilty of that fraud, and the other as not mixed in it; but where the Duke of Queensberry is the party on one side, and between 290 and 300 persons are parties on the other side, if the leases of each are to be impeached on the ground of concert and collusion, it seems fair to contend, first, That each tenant, who is to be charged as affected by that concert and collusion, should be charged with it in the form of the pleadings; and, secondly, That it should be proved against each in point of fact; and it may possible be extremely clear, I do not say how the fact is, but it may possible be extremely clear, that the Duke of Queensberry, if you can separate breach of prohibition from fraud, and consider breach of prohibition as something different from fraud, that he might be engaged in a transaction which, when the whole circumstances were taken together, might be on his part a fraud upon the entail, but that the tenant A. or the tenant B. might be able to say we took our leases fairly, and in circumstances devoid of all fraud, whatever might be the case of other tenants. I am now looking at the ground of collusion as uncon-[323]-nected with the effect of a grassum being paid on any particular lease; but looking at the case as a transaction in fraud of the entail, the tenants, not proved to be parties to the fraud, may say we are entitled to have our leases sustained, and yet those, who stand only in a situation in which they represent the grantor of those leases, if he was guilty of fraud upon the entail, they having no character but as his representatives, may not be authorized to

call upon the Court in an action of declarator, to sustain the leases, whatever rights tenants acting fairly may have.

My Lords, They have found another fact, "that the tack in question, and others " before the Court, were not entered into in the fair, rational, and husbandlike administration of the estate, but for the purpose of forestalling the rents and profits thereof ;" finding in this in favour of a principle of law much contested between the parties ; they say on the one side, that the heir of entail is the proprietor of the estate, that he is monarch of the estate, to use their expression (I think I shall show your Lordships that he is a limited monarch), and that he is not bound to attend to this thing called the fair, and the rational, and husbandlike administration of the estate, and that nobody can tell what that is ; that that principle, if sustained, would furnish a question to be tried in every case ; and, on the other hand, it is insisted, that the tenant in tail, though certainly he is not a mere factor, is nevertheless bound to a fair and rational treatment of the estate, giving a reasonable attention [324] to the interests of those who are to follow him. I am not now representing my own opinion, but only stating the substance of the controversy. It is contended on the one hand, that this finding cannot possibly be supported ; and on the other hand, that it is a proposition which may be well maintained, by looking to what is the true law with respect to entails.

My Lords, This finding also supposes that the period of nineteen years is fixed by the statute of 10th Geo. III. ; when I come to call your Lordships' attention to that statute, perhaps your Lordships may not think that it is an accurate assumption with respect to the operation of that statute. Then they go on to state, "that in respect " that the tack is otherwise objectionable on the grounds above stated, and that the " tenants on that account have no claim in equity in support of their tacks, find that " the said tack cannot be restricted to any shorter period than that for which it was " originally granted." Your Lordships will observe, that here they not only determine that a lease for nineteen years is good, and that, if granted for thirty-one years, it might stand for nineteen, because it was within the power of the grantor to grant for nineteen years, but they must have taken this as law, that the lease may be good, though having an indefinite undetermined duration till the Court of Session shall say whether it is for thirty-one years, for twenty-nine years, for twenty-seven years, for twenty-five years, for twenty-one years, or for nineteen years.—My Lords, This seems a [325] little unnecessary, unless they were to review the finding in the first part of the interlocutor, because, if the first part of the interlocutor could be sustained in law, it did not signify whether the lease was for twenty-one years or for what period it was ; but it appears to have been discussed, and that they found that the lease might have been sustained, not for thirty-one years, but for nineteen years, if this equitable ground had not been interposed.

My Lords, With respect to the two other, the minor cases, I shall not trouble your Lordships with stating the different interlocutors in them. The case in them will be very much the same with respect to grassum ; and with respect to the question, whether there is a diminution of rent, they find the facts upon which the cases must be decided, and to which the law must be applied, as you find them stated in the former cases, in a great measure. I would represent, therefore, to your Lordships, that I take the First Division of the Court of Session to have determined that these leases are bad,—that they were *ultra vires* of the Duke,—that there was concert,—that there was collusion between the Duke and the tenants, all the tenants whose leases are not sustained,—and that there was fraud ; and that upon all these grounds taken together, or upon some of them severally taken, the tenants were entitled to have the benefit of their leases. And I presume the Court thought they had, in pleadings and otherwise, before them, sufficient to enable them to form judicially these determinations affecting all.

My Lords, The question in the other case, I mean the case with the Duke of Buccleuch, arises [326] on another entail, which we have called, in the course of our discussions, the Queensberry entail. I shall have occasion to state to your Lordships, that there are some differences in the language of the deed of entail with respect to the March and Neidpath estate, and the deed of entail with respect to that estate which we call the Queensberry estate. But I proceed not to state the nature of the proceedings with respect to the Queensberry estate ; because I think I am justified in saying, that the decision of the First Division of the Court of Session cannot be right, if the decision of the Second Division of the Court of Session is right ; and that the decision of the

Second Division of the Court of Session cannot be right, if the decision of the First Division of the Court of Session is right; for, though the deeds of entail are somewhat different in the circumstances, the principles, on which they must be determined, are for the most part the same: one Court, by the application of those principles, thinking itself at liberty to cut down the leases; the other stating, that the true principles, affecting deeds of entail, will not warrant them to hold that such leases are bad. Perhaps I may be allowed to say, and if I am inaccurate it is not for want of attention and of looking into it, and I do not find in the course of the discussions, either of the Bar or the Bench, when the case was heard before the Second Division, that this question of concert or collusion, and fraud, was much discussed. Whether they forbore to discuss it by reason of finding any difficulty in distinguishing between what is fraud and [327] what is matter prohibited, or that they thought the nature of the pleadings did not open that view of the case, or for what other reason, I will not say; but it does not appear to me, that they did very much enter into a consideration of that part of the case, and yet it certainly does appear, not only in the papers we have before us, but in the cases we have had occasion to look into, that lawyers of great eminence, and great judgment too, seem to have thought that there was a distinction between a fair and a fraudulent use of the power in an entail, as distinguished from the doing that, which was prohibited or not prohibited.

My Lords, The parties seem to have reproached each other in the Court below with respect to the delay. These charges appear to have commenced on the part of the Duke of Buccleuch; and they likewise intimate, that there has been some degree of management in bringing forward, on the other part, particular tenants with their actions, in the decision of whose cases the titles under the leases might be more favourably attended to, than perhaps in other cases, which might have been selected. But I pass all that by, as not at all assisting us in the decision of that, which we may have now or hereafter to decide upon.

My Lords, The first proceeding which is stated with respect to the Buccleuch business, is the proceeding of the Trustees or Executors of the late Duke of Queensberry; and it may be important here to call your Lordships' attention to the summons. My Lords, that summons states, "That the late Duke of Queensberry was proprietor of [328] all "and whole the dukedom of Queensberry and other places, as nearest and lawful heir "of tailzie and provision to the late Charles Duke of Queensberry;" stating the limitations and restrictions and stating the clauses prohibitory, irritant, and resolute, of a certain entail or entails: "That the said William Duke of Queensberry, during the "time that he possessed the said lands and estate, did, by himself, or his commissioners, "factors, or others properly authorized by him, grant a great variety of tacks or leases "of the said lands, and particularly the following:" And then they proceed to state, as I before mentioned to your Lordships, what, unless I am inaccurate, amount to about 298 leases; and I observe in page 12, of the summons I am now reading, that here are leases mentioned for 99 years. Then it states, "That the said lands and estate now "belong to his Grace Charles William Duke of Buccleuch and Queensberry, who has "threatened to challenge the leases, and the possession of the tenants in the lands, in "process of reduction and declarator, and processes for removing the tenants therefrom: "and also to bring actions of damages against the present pursuers, as the Executors and "Trustees of the late William Duke of Queensberry, founded on allegations that the said "leases are void and null, or at all events are granted by the deceased William Duke of "Queensberry without sufficient powers to grant the same, as having been restricted by "the terms of the entail or entails, and the investitures under which he held the same: "That in consequence of those threats, the pursuers [329] have also been threatened and "molested by the tenants on the said lands and estate, who have made large claims "against them as Trustees foresaid, for relief of the claims of the said Charles William "Duke of Buccleuch and Queensberry against them, and for damages, in the event of "his proceeding in his threatened challenges of the said leases: That the pursuers, as "Executors and Trustees, are bound to recover the whole of the estate and funds which "belonged to his Grace, and to apply the same to the uses and purposes expressed in "the said trust-deed; but that, in consequence of these threats, they are prevented from "proceeding in such execution of their duty, and from winding up the affairs committed "to their management. And although the pursuers have oft desired and required the "said Duke of Buccleuch to desist from his threats, yet he will by no means desist

“therefrom, but refuses, or delays so to do, and continues to insist therein.” Then it prays, that it should be “found and declared that the late Duke of Queensberry had full power to grant the said tacks, and was no way limited from granting the same, “by any entail or entails or investitures of the said estate.”

My Lords, Then it prays, in the nature of an injunction bill. The proceeding therefore is a proceeding on the part of the Executors and Trustees of the Duke of Queensberry, to have each and every of 290 or nearly 300 leases declared to be all valid against the heir of tailzie, the tenants, as I understand, not being parties to these proceedings; and [330] therefore, if the Duke of Buccleuch can be taken in this suit to have joined issue upon any matters, either of fact or of law, which the tenants are interested in sustaining; and, if this judgment had been a judgment in favour of the Duke of Buccleuch upon any matter in fact or law, and had therefore been consequentially adverse to the interests of the tenants, who are no parties to the proceedings, certainly it seems to be a matter of great difficulty, at least to a mind formed in the habits of an English lawyer, to know how that judgment could be applied as against the tenants. On the other hand, it appears to me a proceeding, though not objected to, I observe, a proceeding a little extraordinary in its nature, because, taking it that the tenants are not parties, the Duke of Buccleuch is called upon to set up his defence, I should suppose, as against each of these 290 or 300 leases; and, if there can be a distinction made between the rights of the Executors and Trust-disponees of the late Duke, as representing the late Duke, and as having no interest or title, except such interest or title as the late Duke had; and if there be any foundation for the judgments, which have been pronounced, as I have read them to your Lordships, of the First Division of the Court of Session, that this was concert and fraud upon the entail, it seems a singular thing to say, that all these leases should be sustained, not at the instance of the tenants, or such of them as might have innocently maintained their leases, but at the instance of the Trust-disponees of the Duke, who, if a case of fraud of that nature can be [331] sustained, must be affected in their titles precisely as the Duke himself would be.

My Lords, In answer to this, the Duke of Buccleuch states this: he admits that he has brought an action of reduction, and then he states the prohibitory and irritant clauses, and so on, and then he proceeds to do that which I apprehend he meant, whether he has sufficiently executed that purpose is another question, but which I apprehend he meant to amount to allegation, not only that this was *ultra vires* of the Duke of Queensberry, but that it was fraudulent on his successor, “the said deceased William Duke of Queensberry succeeded to the estate of Queensberry in the year 1778, as an heir of entail, under the foresaid deed of tailzie, and made up titles accordingly, under the conditions therein contained, but after entering on the possession of the estate, he did not, as the leases gradually expired, let the lands at the just avail for the time, in terms of the entail;” and, if your Lordships will look at the leases, you will see that great numbers of them were under treaty at the same time, “but granted leases for nineteen years, below the true value, and in consideration of large grassums received, and after having continued this system for a period of eighteen or nineteen years, during which time he had consequently drawn a grassum for the letting of every farm on the estate, not satisfied with the slower mode of again exacting grassums as the leases might periodically fall, he, from the desire of speedily raising a large sum of money to add to his great wealth, and with the [332] view of defeating the prohibitions contained in the said deed of tailzie, thought fit, about the year 1796, when the whole estate was then under current leases, which had been granted by himself, to form a device, without waiting for the expiry of these leases, of letting of new the whole estate, both for his own life, and for nineteen years after his decease, and also in diminution of the rental, contrary to the conditions of the entail, but thereby to obtain immediate payment of large sums of money.” My Lords, When I come to explain the circumstances, to which this allegation alludes, your Lordships will see more distinctly what the operations of the grassums were. If the law allowed them so to operate, and if the advantage he made of the property was an advantage he was entitled, by the terms of the entail, to make of the property, no person can quarrel with it; but, when I come to state to your Lordships the circumstances and the transactions of the Duke of Queensberry with respect to these leases, and the effect of those transactions, your Lordships will see, that it is at least incumbent

upon your Lordships to be quite sure that he had these powers, and that he had executed them in the manner in which he was authorized to execute them.

My Lords, I wish to state it in the way I am now doing; for I know it does not become any man in a judicial situation to look at the conduct of the parties with reference to any other consideration than the legal effect of it. Therefore I dismiss all observation of any other kind. I consider myself as having this duty imposed upon me, and this [333] duty only, to consider what is the legal effect of these acts, always attending to this, that, if the law pronounces it to be fraud, it must be so pronounced. In pursuance of that device, it is alleged, his Grace entered into transactions with tenants of different farms on the estate, by which it was agreed, that the latter, upon renouncing the leases, which they then held, and for which they had already paid large sums of money, should, on payment of additional large sums to the Duke, obtain new leases for nineteen years at the same rent as that, which was payable at the period of the said Duke's succession to the estate in the year 1778, or which was stipulated in their said original leases, and without any regard being had to the large sums of money, which had then been paid, his Grace or his factors authorized by him becoming bound, at the same time, to renew the said leases to the said tenants annually during the Duke's life, for the space of nineteen years from the time of his said renewal, without any increase in the amount of the rent being stipulated. Your Lordships will be pleased to give your attention to that circumstance,—that there were grassums taken,—that the grassums were paid on the surrender of many leases, which had not yet expired, upon which leases also grassums had been paid; and that at the time when the leases were made for nineteen years, the author of the entail granted leases, not only for his lifetime, or nineteen years, but that the Duke entered into an obligation, that he would grant for a longer period, if it was declared lawful, and that [334] he would renew from year to year; and that the question is, Whether the lease existing for the time ought, in point of law and equity, to be considered as a lease for nineteen years? It is stated in argument, that it is settled, that the statute of 1449, as to singular successors,—if no possession has been taken during the life of the grantor, does not protect the tenants, and that therefore this engagement to renew *de anno in annum* left at last only a nineteen years' lease upon the estate; which nineteen years' lease, they contend, the Duke had a right to let at the last moment of his life, provided there was a surrender of the former lease; and that, therefore, this amounts to no more than a surrender of the former lease, and a nineteen years' lease, subject to the question about grassum.

Then it states, That these leases were granted in execution of the above-mentioned device of the said late Duke, and all of them are contrary to the provisions of the said entail, and liable to reduction, among other, for all or part of the following reasons. *Primo*, Because they are not proper leases, but complex contracts, conveying away the lands for a term of years, partly for yearly rent, but in great part for a grassum or price payable to the Duke himself. *Secundo*, Because they were granted for a space longer than the setter's life-time, or nineteen years, the obligation of renewal being part of the contract, and elongating the terms of possession for which the lands were let. *Tertio*, Because the leases were not let for the just avail, but for a rent known and intended to be inadequate, and far less [335] than the avail. The validity of that reason will depend upon the construction your Lordships shall put on the clause in the deed of entail. *Quarto*, Because they were let with diminution of the rental actually existing previous to letting them, the Duke having previously, by grassums, received an additional rent for the lands beyond that stipulated in these leases.

Then, my Lords, with respect to a tenant of the name of Hyslop, the summons, with respect to him, contains nearly, though not exactly in the same words, all this allegation about frauds; and this case so coming before the Court as between the Executors and Trust-disponees of the late Duke of Queensberry and the present Duke, and between the present Duke and one of the tenants, whose lease is mentioned among the 290 noticed in the proceeding of the Executors and Trust-disponees, the Court of Session proceeded to consider these cases and the judgment, which they gave at the instance of the Executors of the Duke of Queensberry, is to this effect. I do not know that it is necessary to trouble your Lordships with the very words of it; but I may state, that the effect of it is to sustain all these leases without exception. My Lords, in the case of Hyslop, he says, that he has nothing to do with the question between the Representatives of the Duke of Queensberry, and the present Duke of Buccleuch; that he is no

party to any concert or collusion ; that he knows nothing about it ; that the only question he has to discuss with the Duke of Buccleuch, is, whether his lease ought to be sustained? and I believe I represent the effect of the [336] words of the Second Division of the Court of Session, when I say, that they were of opinion, first, That the taking grassum was no objection ; secondly, That there was no diminution of the rent, in the sense of diminution of the rent, as abstracted from the taking of grassum. They say further, that supposing there had been no such objection as grassum ; that, according to the true construction of the clause in the Buccleuch entail, if the Duke let at the old rent, he let without diminution of the rent ; that he was not obliged to look out for an increased rent ; and that therefore this lease being let for the old rent, and the grassum being no objection, this is a good lease. A question arose also, in the course of the discussion before the Judges of that Court, as to the effect of the word “dispone.” Your Lordships will recollect, that in the Wakefield case (and indeed it is some consolation, after what we have heard of that Wakefield case, that I see it admitted in this case, that the Wakefield case was rightly determined, and that the ninety-seven years’ lease was, according to the law of Scotland, an alienation), the word “alienate” occurred. In the Buccleuch case, there is no such word as the word “alienate.” The prohibition is a prohibition against disposing,—and according to the case of Stirling of Law against Macdowall and others, lately decided by the Court of Session, the word “dispone,” it is said, is not of the same effect as the word “alienate ;” that though “alienate” would prohibit such leases, “dispone” would not : but how that question would have been settled by the Court, if it had been necessary to determine [337] the case of Hyslop on that point, and that point only, it does not appear to me that we are informed by the account we have of the judgment ; and therefore that judgment also has left us in this situation, that it is a judgment which informs us, that the Judges of the First Division are altogether wrong as to the principle which they apply in construction ; that they are altogether wrong in their interpretation of the words “diminution of the rental ;” that they are altogether wrong in their notions as to the legal effect of taking grassum ; and it leaves us further in this situation, that we have a decision prior to this, in which the Court held, that a prohibition to disporre was not a prohibition to alienate ; and in the present case we do not know what the judgment of the Court would have been, if it had been necessary to determine the effect of the word “disporre.”

Having stated to your Lordships generally the outline of the case, I will take leave, with your Lordships’ permission, to draw your attention to the instruments, the construction of which has given rise to the respective judgments of the Court of Session, premising, in a short word, that your Lordships see the great consequence and the great importance of whatever may be your decision in this cause ; it bears upon property included in between 290 and 300 leases in the Buccleuch estate ; it bears upon property to a very large amount in the March estate ; it bears upon the interests of all persons, who claim under the disposition made by the Duke of Queensberry, of his sup- [338]-posed great fortune ; a decision against those persons, therefore, is a decision that strikes very strongly against very large interests, which they are contending for : on the other hand, your Lordships are to recollect, that a decision, that will support their interests, is a decision that goes to cut down what is contended on the other hand to be the absolute right of the Duke of Buccleuch ; and it is further stated, and stated with great probability of truth, that if a Scotch entail could be got rid of in effect by the means which the Duke of Queensberry has used, the present holders of most of the entailed estates in Scotland (I mean where there are not special prohibitions and special clauses about leasing), may destroy the hopes of all persons, who feel themselves at this moment entitled to those estates in expectancy.

My Lords, With respect to the Buccleuch entail, your Lordships will find the disposition and tailzie bears date the 25th December, 1705, it was registered in the Register of Tailzies the 21st February, 1724, and the Books of Session, 17th June, 1724. The recital of this is in these terms : “Forasmuch as we having considered the “state and condition of James Earl of Drumlanrig, our eldest lawful son, are fully “convinced of his weakness of mind and unfitness to manage our estate, or represent “us in our dignities and in our said estate, and being well resolved to leave no place “for any question concerning the said James Earl of Drumlanrig his condition and “capacity after our decease, for preventing all process or arbitrement on [339] that

“subject, or on the succession to our honours and estates, and also for preventing the snares that may be laid for the said James Earl of Drumlanrig, to the visible prejudice of our estate and family : therefore, and for the other weighty causes and good considerations us moving, we have thought fit (with and under the reservations, conditions, provisions, limitations, restrictions, clauses prohibitory, irritant, and resolute, under written, allenarly and no oyrways), to be bound and obliged to sell, annailzie, and dispone.” Your Lordships will recollect, it has always been contended, that these words have, and must have some technical narrow meaning, and yet you perceive the very first word which occurs is the word sell, which has certainly a definite meaning in the law of England, and in the law of Scotland, and yet it is here unquestionably applied to a gratuitous deed, “to sell, annailzie, and dispone, like as we by these presents, sell, annailzie, and dispone.”

Then the deed states the institute and substitutes, reserves life-rents, provides an annuity for James Earl of Drumlanrig, creates an obligation for the payment of the entailor's debts, and the powers reserved to him : and then there is this clause, “That notwithstanding the right of fee of the said whole earldome, lands, baronies, and others above specified, be devolved and secured by this present disposition and tailzie, in favours of the said Lord Charles Douglas and his foresaids, and the other heirs of tailzie above mentioned, yet it shall be lawful for us to contract debts which shall affect the said Lord Charles Douglas, and the heirs of [340] tailzie, and the foresaid tailzied estate, in the same manner as if they were consenting with us in the several bonds, contracts, obligations, dispositions, or other writs whatsoever to be granted by us, or as if they were served heirs to us in our lands and estates : and also, it shall be lawful to us to sell, annailzie, and dispone the said lands and others above and after mentioned in the whole or in part, redeemably or irredeemably, for whatsoever cause, or in whatsoever manner of way :” an expression which seems to intimate, that the author of this deed, when he uses the words “sell, annailzie, and dispone in whatsoever manner of way,” must have had in his contemplation the different ways in which selling, alienation, and disposing, might be effected, “and to revoke, alter, or innovate this present disposition and tailzie, and order of accession, in whole or in part, and generally to do every other thing without consent of the said Lord Charles Douglas, and the other heirs of tailzie, and others above and after mentioned, as freely in all respects as we might have done before the making hereof, or as if these presents had never been made nor granted ; and likewise, by the tenor hereof, it is expressly provided.” I am now about to state the prohibitory clauses to your Lordships : Provided and declared, and so to be provided and declared in the instrument of resignation, charter and infeftments to follow hereon, and in all the subsequent procuratories of resignation, retours, precepts of infeftments, and rights of the said estates, that it shall not be lawful to the said Lord Charles Douglas, [341] and the heirs-male of his body, nor to the other heirs of tailzie above mentioned, “the very expression in the Duntreath case, “nor any of them, to sell, wadset, or dispone,” not using in that prohibitory clause the word alienate, “to sell, etc. any of the aforesaid earldome, lands, baronies, offices, jurisdictions, patronages, and others foresaid, nor any part of the same, nor to grant infeftments of life rent or annual rent out of the same :” which words I apprehend contain a prohibition, which would be contained in the word alienate : “nor to contract debts, nor do any other fact or deed whereby the same, or any part thereof, may be adjudged, appraised, or any ways evicted from them, or any of them, except so far as they are empowered, in manner after mentioned : nor to violate or alter the order of succession foresaid, any manner of way whatsoever : and also with this provision, that the eldest heir-female and tailzie above specified, and the descendants of their bodies, shall exclude the younger and her descendants as heirs-portioners, and shall succeed always without division :” the author of this deed, therefore, intending as one of his purposes, to keep the whole of the estate in one individual ; “and that the whole heirs and descendants of their bodies so succeeding, shall be obliged in all time coming upon their succession, to assume, and use, and bear the surname of Douglas,” thereby also expressing his anxiety that it should be a Douglas, “and the title, designation, and arms of the family of Queensberry, as “their own proper surname, title, and designation ; and that the said Lord [342] Charles Douglas, nor the other heirs of tailzie above specified, shall not set tacks “nor rentals of the said lands for any longer space than the setter's life-time, or nineteen

"years." "Shall not set tacks or rentals;" rentals may be represented to your Lordships as a species of tack held by what are called in Scotland, Kindly Tenants, who usually pay, if not always, what is called entry-money, "and that without diminution of the rental, at the least at the just avail for the time." Here the words, "the rental," cannot mean the same thing as the word rentals used before, but it means rent; I take notice now, that it has been insisted, that this clause itself shows, that it was lawful to take grassums, because it is said, you shall not set tacks nor rentals of the said lands for any longer space than the setter's life-time, or for nineteen years, and that without diminution of the rental; then they say, if you set a rental, taking what they call entry-money, you cannot set a rental of that sort without a diminution of the rent, if taking grassum is diminution of the rent: Whether taking a grassum be a diminution of the rent, will be to be considered by and by; but this reasoning upon the application of the words "diminution of the rental," to rentals, where entry-money is taken, has been met by argument against it in the papers on your table. Then follow these words, "without diminution of the rental, at the least at the just avail for the time." The construction the Court has put upon these words, and has put upon these words without the least expression of doubt that they rightly construe them, is this; they say, that it should be read [343] "without diminution of the rental, or at least at the just avail for the time," meaning that you should take the old rent, but, if the circumstances of the times do not allow you to obtain the old rent, you shall at least let for the just avail at the time, that is, for such rent as you can reasonably get, and that you must get that by auction, or in some other mode. I own, I think that a little doubtful, because you must construe the words "at least" recollecting that the word "or" is no part of this deed, and that the words stand, "without diminution of the rental, at the least at the just avail for the time;" and it seems to me questionable whether the words "at the least at the just avail for the time," words, according to the text, additional to the words "without diminution of the rental," can, according to just construction, be taken to introduce an alternative, although no such word as the word "or" is used to create an alternative, and therefore questionable, whether those words are really to be considered as the Court has construed them,—that you shall take the rent presently payable, or, if you cannot get that, you shall take such rent below that, as is the just avail at the time.

My Lords, Here I take leave to say again, as I took the liberty to say in the Wakefield case, that I cannot bring my mind to be much affected by what we have heard so much of at the Bar in this case, in the Wakefield case, and in others, that if you construe a clause of this kind, where you have these words, as meaning that you shall, on all occasions, get the rent, which is the just avail at the time, a [344] court of justice must, in each case, be called upon to determine the fact, whether you have so acted or not. The answer to that is, first, if that be the meaning of the words, there is no more difficulty in construing the instrument, than if those words had been expressly inserted in it:—if it had been inserted in the instrument, that you shall get the rent, which is the just avail at the time, you could not let a lease unless you should get the rent, which is the just avail at the time; and that it is interposing a difficulty of no consequence when once you have established the meaning of the words to be the same, to say that that difficulty is imposed, because in each case you must meet it as well as you can. I do not believe there is a marriage-settlement in this part of the kingdom, made between year's end and year's end, in which a power of leasing is granted to a tenant for life, in which he is not under the condition of letting for the best rent, which can be got at the time; and yet, in forty years and upwards, which I have lived in the profession, I do not recollect more than one or two questions at most, arising on such a case as that; and there is but one criterion which our courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others, as he has for himself; if he has got more for himself than for others, that is decisive evidence against him: the Court must see that there is reasonable care and diligence exerted, to get such rent as care and diligence being exerted, circumstances mark out as the rent, likely to be produced.

[345] Then the deed proceeds, "nor to do any other fact or deed, civil or criminal, directly or indirectly, by treason or otherwise, in any sort, whereby the said tailzied lands and estate, or any part thereof, may be affected, appraised, adjudged, forefaulted,

“or any manner of way evicted from the said heirs of tailzie, or this present tailzie in order of succession thereby prejudged, hurt, or changed; neither shall the said Lord Charles Douglas, nor any of the said heirs of tailzie, suffer the duties of ward, marriage and relief, either simple or taxed, nor the feu, blench, and teind duties, nor any other public burdens or duties whatsoever, payable furth of the said tailzied lands and estate, to run on unsatisfied, so as therefore the lands and others foresaid may be evicted, appraised, or adjudged.”

My Lords, I point your attention to the last clause, because it shows an anxiety on the part of the author of this deed, not only with respect to other public burdens, but with respect to teinds: and I think I shall be able at least to satisfy your Lordships, that the question, whether throwing the public burdens on the old reserved rent is not a diminution of the rental within the meaning of authors of such deeds, is at least a question, that deserves a great deal of consideration before you determine it in the negative. I would illustrate that now, for the sake of leading your Lordships to what I shall say more particularly by and by. Here is one lease let at 3s.: the grassum taken is above £200. Now, if we were, instead of considering those great cases which the gentlemen have adverted [346] to in their arguments, to take a case of inferior amount of property, the operation of this doctrine would appear. Your Lordships know, that by an act of 1633, teinds are payable out of the estates according to a proportion of the rent, which is paid, or, as the expression is in that statute, of the rent, as constantly paid. Now, in the case I have stated, the rent, as constantly paid, is not the whole rent, that is paid: that is clear enough: but in construing that statute, in order to do justice, the Courts in Scotland, after putting quite a different construction upon it, as we have been told, from 1633 to 1731 or 1732, in 1731 or 1732 said this, When we are valuing those teinds, we are not to value them by looking merely at the rent which is constantly paid, though such is the statute expression, because if we do, the person, who has the land, may let the land for 3s. a-year, and may take a grassum of upwards of £200: then, when the man, who is entitled to the teinds, comes, he will have two-fifths, or some certain proportion of 3s. What has the Court of Session said? The Court of Session has said from 1731 or 1732, this is not the rent, which is constantly paid: and, while they are contending that grassum cannot be rent, what they say is this, that in ascertaining what is the rent constantly paid, the grassum shall be taken into consideration, and that the rent shall be, not the 3s. but the 3s. and one-tenth, or some other proportion of the grassum that was paid. See what the consequence may be as to the diminution of the rent, if the man who is to receive 3s. a-year, the reserved rent, that is, the old rent under the old lease, is to have his assessment made [347] upon him, not at the rent of 3s. a-year, but at the rent of 3s. a-year, plus £10 a-year. You may say his rent is not diminished, but then you must determine this, that a man who gets nothing, is in the same situation as if he got something; that is the plain English of it. But I mention this passage about teinds, because it shows that the author of this deed was attending to these things.

Then with respect to the irritant and resolute clauses, it goes on thus: That if they do not do all these things, or they shall, “by altering and changing the order of succession, or disposing, selling, wadsetting, or burdening with infestments of annual rent or other servitudes and burdens, the said lands and others aforesaid, or any part thereof, or by granting tacks or rentals otherwise than as above, or by contracting debts, except in so far as they are empowered in manner underwritten, or by doing any other fact or deed, civil or criminal, by treason or otherwise, whereby the said lands may be burdened, evicted, forfeited, or adjudged:” then it refers to public burdens again, those are all to be paid: and there is a resolute clause, evicting the estate from the person who does those acts. Then there is a provision, that the next heir shall, in such cases, succeed, the succession opening again to the person who would have taken. If the father contravenes, the son shall succeed, “reserving always to the person, who shall succeed by virtue of the contravention, the rents and profits of the said estate, until the existence of the said nearest heir, with the burden of the payment of current annual rents and public burdens:” so that the person, who was to take the [348] estate, you see, was to take it with the liability to public burdens, that is, if you were to suppose that persons in this part of the world would descend so much from their dignity as to make an entailed estate of 3s.

a-year with a grassum of £200, the man with the 3s. would be bound to pay the public burdens, though he had but 3s.

Then there is the clause, "That it shall be lawful to, and in the power of, the said Lord Charles Douglas, and of the other heirs of tailzie above specified, whether male or female, to provide and infest their lawful spouses in competent life-rent provisions of a part of the lands and estate, not exceeding the sum of £1000 sterling of yearly rent." Now, I beg leave to state to your Lordships, that this is a clause which I think deserves more attention, than has been given to it; for this is an estate, which it was in the consideration certainly of the author of this deed should always be such an estate, as would give to the spouse of a lady, or to the spouse of a gentleman, for both males and females are provided for, "in competent life-rent provisions of a part of the said lands and estate, not exceeding the sum of £1000 sterling;" of course leaving to the heir of entail a property, that was useful and valuable to him, after that £1000 sterling was paid to the spouse; but it is not only that, but "if there shall happen to be two life-rent provisions upon the said estate, then and in that case the second life-rent provision, during the existence of the first, shall not exceed £800 sterling;" so that there is £1800 if there are two. Then, thinking it not improbable there might be three, there is a third provided for, which is not to [349] exceed £500; so that £2300 may be the burden upon this estate at the same time. Now, when your Lordships come to see, that the Duke of Queensberry, when he came into possession of his estate in 1778, received an estate, which netted to him about £11,300 a-year; and when, instead of letting that estate from time to time, with such a rise in the rent, as the circumstances of the country would enable him to get for it, he lets it at the old rent of £11,300, taking grassum upon grassum, three times over in some cases; when you recollect that, which I have before intimated to your Lordships, that the public burdens are to be assessed, not with reference to the rents, but to the grassums, or a proportion of the grassums (in other words, that rent, and a proportion of grassum, are understood to be meant by the words "rent constantly paid"), you will not be very much surprised when I state to your Lordships, as we are informed, that that estate, which in 1778 yielded to the Duke of Queensberry £11,300, in the year 1817 pays to the Duke of Buccleuch, provided he has not three jointresses upon it, the sum of £3600. Nevertheless it is a question in law, and a nice question in law, whatever it may be in any other view of the case, whether a rent of £11,300, still a nominal rent of £11,300 a-year, the estate yielding only in true rent £3600 a-year, and which may happen to be subject to three jointures, is a rent that can be at all impeached, in the sense of the law, for diminution?

My Lords, Besides this, the heir of entail is empowered to provide the younger children of the marriage with a sum of £3600 for their portions; [350] so that he may have upon this estate, which it is contended may be thus let, £2300 for jointresses, and £3600 for younger children. I have pointed out all these clauses of the entails to your Lordships, because it does appear to me that they are very material.

It may be now necessary to state to your Lordships shortly, the effect of the other entail,—the March and Neidpath entail. My Lords, that deed of entail is likewise important in some parts of it. That entail is dated the 12th October, 1693, and was recorded in the Books of Session the 3d Sept. 1781. There are, first, the clauses which are usually found; and then there is a clause in these words: "That it shall be always lawful to, and entirely in the power and liberty of, the said William Duke of Queensberry, by himself alone, at any time during his life, without consent of Lord William Douglas, or any other of the heirs of tailzie, and so on, to sell, alienate, and dispone the foresaid lands of Newlands," and so on; and then the way in which the power is given to set tacks is this, "reserving power and liberty to the said William Duke of Queensberry, during his life-time, to set tacks of the haill lands, baronies, and others immediately above rehearsed, for payment of such yearly duties, and for such space and endurance as he shall think just." The author of this entail, therefore, reserves to himself the power of setting tacks as large as he pleases; but when he comes to give the power to others, he says, "It shall not be lawful to Lord William Douglas, and the heirs male of his body, nor to [351] the other heirs of tailzie respectively above mentioned, nor any of them, to sell, alienate, wadset, or dispone any of the said haill lands, and so on above rehearsed; nor to grant infestments of life-rents, nor annual rents, forth of the same; nor to contract debts, and so on; and the person contravening is to lose his estate: But he says, it is expressly provided and declared, that

"notwithstanding the irritant and resolute clauses above mentioned, it shall be lawful and competent to the heirs of tailzie above specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said lands and estate during their own life-times, or the life-times of the receivers thereof, the same being always set without evident diminution of the rental; and likewise, that it shall be lawful and competent to the said heirs of tailzie to grant suitable and competent life-rent provisions in favour of their wives, not exceeding the sum of 5000 merks of yearly free rent of the said estate, and to grant provisions in favour of their children, not exceeding two years' free rent of the same." Your Lordships observe the expression, "5000 merks of yearly free rent of the said estate," and the expression, "yearly free rent of the same," at the close of the paragraph. And in this deed there is this distinction also, that it does contain the word alienate in the prohibitory clause.

Having stated this deed to your Lordships, I will proceed. I promised your Lordships, I fear, more than I can possibly perform, because it appears necessary, in order to lay the groundwork, to call your [352] Lordships' attention to the statute of 10th Geo. III. which one of the interlocutors I have read states to have fixed the term of nineteen years. My Lords, that statute recites, "That by an act of the Parliament of Scotland, made in the year 1685, entitled, An act concerning tailties, all his Majesty's subjects are empowered to tailzie their lands and estates in Scotland with such provisions and conditions as they shall think fit, and with such irritant and resolute clauses as to them shall seem proper," a recital which, by the way, tends, as your Lordships observe, to clear up a question which occurs in all these cases, what is the effect of inserting in these tailties other provisions and conditions than those which are expressly mentioned in the statute; "and which tailties, when completed and published in the manner directed by the said act, are declared to be real and effectual against purchasers, creditors, and others whatsoever," a recital quite correct. Your Lordships recollect, that the statute of 1685 is not effectual as against purchasers and others, unless the tailzie is registered in the manner directed by the said act.

Then follow these words: "And whereas many tailties of lands and estates in Scotland, made as well before as after passing the said act, do contain clauses limiting the heirs of entail from granting tacks or leases of a longer endurance than their own lives, for a small number of years only, whereby the cultivation of land in that part of this kingdom is greatly obstructed, and much mischief arises to the public." Your Lordships will see that expression is not common sense: but on look-[353]-ing at the original roll of the Parliament office, it is found, that this is printed with the omission of that word, which they may very much desire to have in the Buccleuch entail, the word *or* "of a longer endurance than their own lives, or for a small number of years only." Now, to prevent that mischief, it is thereby enacted, "that it shall and may be lawful to every proprietor of an entailed estate within that part of Great Britain called Scotland, to grant tacks or leases of all or any part or parts thereof, for any number of years not exceeding fourteen years, from the term of Whitsunday next after the date thereof, and for the life of one person to be named in such tacks or leases, and in being at the time of making thereof, or for the lives of two persons to be named therein, and in being at the time of making the same, and the life of the survivor of them, or for any number of years not exceeding thirty-one years from the term aforesaid." This clause, therefore, is a clause which enables every proprietor of an entailed estate to let according to this clause, whatever may be the clauses in his deed of entail; but if he does let according to this clause, then, by virtue of a subsequent section, he can only let under the particular restrictions and conditions which in such case this act imposes. "Every such lease for two lives shall contain a clause obliging the tenant or tenants to fence and enclose, in a sufficient and lasting manner, all the lands so leased within the space of thirty years, and two-third parts thereof within the space of twenty years, and one-third part thereof within the space of ten years, if the said [354] lease shall continue for such respective terms," the Legislature calculating, that a lease of thirty-one years would be about as long as two lives; "and that every such lease for any term of years exceeding nineteen years shall contain a clause obliging the tenant or tenants to fence and enclose, in like manner, all the lands so leased during the continuance of such term, and two-third parts thereof before the expiration of two-third parts of such term, and one-third part

“thereof before the expiration of one-third part of such term.” Then there is a clause compelling the tenants to keep up the fences. Then there is a clause enabling every proprietor of an entailed estate, without exception, to grant leases of land for the purpose of building, for any number of years not exceeding ninety-nine years; but that is followed by a clause limiting the number of acres he is to let for that purpose.

Then there follows the clause “that the power of leasing hereby given shall not in any case extend to or be understood to comprehend a power of leasing or setting in tack the manor-place, office-houses, gardens, orchards, or enclosures adjacent to the manor-place.” That clause was introduced in consequence of what is the known law of Scotland; that although we say, in a sense, and in a strong sense, that the heir of tailzie is the absolute fiar and proprietor, and so on, unless so far as he is limited, yet it is extremely clear he is limited, though there are no conditions in the deed of tailzie; and he is limited, as your Lordships will recollect, by a judgment we have had here, from letting the manor-house, and the lands about the house, it being [355] understood that it shall be kept up, and shall not be let. Then there follows these words: “That all leases made or to be granted under the authority of this act” (for the Legislature seems determined to put this out of the question as to such leases as they authorized, but I cannot agree with what is said in another place, that because they meant to put this out of the question as to such leases as they authorized, therefore they put it equally out of the question as to all other leases), “shall be made or granted for a rent not under the rent payable by the last lease or sett, and without grassum, fine, or foregift, or any benefit whatsoever, directly or indirectly, reserved or accruing to the grantor, except the rent payable by the lease; and that no such lease shall be granted till after the end or other determination of any former lease of the same premises, or that such lease, if granted for a time certain, shall be within one year of being determined: and that all leases otherwise granted shall be void and null;” then it is provided and declared, that if any tailzie shall, either expressly or by implication, contain powers of leasing more ample than are hereby given, the heirs of entail in possession shall be at liberty to exercise all such powers in the same manner as if this act had never been made;” the Legislature, therefore, authorizing us to say, that deeds of entail, if they cannot contain prohibitions about leasing by implication, may at least contain by implication powers and permissions to do so.

Now, my Lords, upon the construction of all these clauses taken together, this act of Parliament [356] says, that if a lease is for more than nineteen years, such and such things shall be done; and I apprehend the meaning of this act is this, that if you do things beyond your power of leasing, which, being beyond your power of leasing, you can do only by the authority of this act, that every thing you so do shall be done according to this act. This act seems to me not to be the foundation of the right, if there be such a right, of the heir of entail to let for nineteen years, unless he is specially prohibited: It speaks, indeed, of leases made under the authority of the act exceeding nineteen years, and under what restrictions and conditions such leases are to be made; but it does not appear to be an act declaring that, independently of the effect of the act, any heir of tailzie, not specially prohibited, may make a lease for nineteen years. It seems, however, upon reading this statute, very reasonable to suppose, that the person who drew this act thought that the *presumpta voluntas* would give a power to grant leases for nineteen years.

I will now proceed to state to your Lordships what are the actual facts of this case, always taking the liberty to repeat, I may very much mistake the case, but I have never been able to look at it without considering it as a matter of some importance, that the action, in which all these leases have been held to be good, is an action at the suit of the Executors and Trust-Disponees of the Duke, standing in no other right than that in which the Duke himself would have stood if he had been in Court. I proceed now to state what I conceive to be the facts of this case.

It has been represented to us, that the grantor of [357] this deed of entail never had let with grassums. He was succeeded by his son Charles Duke of Queensberry: commissioners were appointed to manage his estate, and it is undoubtedly the fact, and an important fact to be recollected in the consideration of this case, not only that in his time leases were let, though for comparatively short periods, but that they were let also for grassums, and they were not only let for grassums, but they were let for grassums by commissioners, some of whom were persons unquestionably in the highest

situations in the law in that country : and therefore it is fit to be recollected, that those persons must either have thought, and I think it but fair to say that they must have thought that they had power to grant such leases, or that they were determined to take the chance in the case of a young man who might outlive all the short leases they might grant. I think it is not proper to take it in the latter way, but that the Executors of the Duke of Queensberry have a right to the inference, that the persons who made those leases thought they were entitled to make those leases in point of law ; and I think, if they so thought, that their opinions are deserving of considerable weight.

My Lords, As I understand it, the taking of grassums was discontinued before the death of Duke Charles in 1772, and the rental, which in 1720 had been about £6500, was increased to the sum of about £8000. The late Duke succeeded to the estate in 1778 : at that time, unless I have collected the facts of this case inaccurately, there were no leases for [358] grassums on the estate. My Lords, It has been stated to your Lordships, that the Duke of Queensberry went to great lengths in cutting down all the timber upon the estate. I make no observation upon that ; he had a right to cut down all the timber upon the estate if he thought proper, and the same as to the house ; he so dealt with the house, I presume, as he had a right to do, for I do not find that made the subject of complaint ; but though he had a right to cut down the whole of the timber upon the estate, I apprehend, that, in point of law, however much he may have been entitled to be represented as monarch of his estate, he would have made no contract that would have given any person a right to cut down that timber after his death, though he could have sold the whole of it for £30,000 now paid, and if the wood was severed from the land before he died, the purchaser would have the benefit of the bargain, but if it was not severed from the land before he died, then he would not have the benefit of the bargain ; and I apprehend, that if he had sold wood to the amount of £30,000, to be paid *de anno in annum* £1000, whatever was uncut at the time of his death, the person, who had so bought that wood, could not touch a stick of it : so that if a person sells wood to be cut off an entailed estate after his death, whatever may be his disposition to carry his prerogatives high as the monarch of the estate, that is one particular in which he cannot do so, for he cannot sell wood to be cut after his death.

My Lords, About the year 1796, there having been a good deal of dealing in grassums before, the [359] Duke of Queensberry having been very well advised, when I say very well advised, I mean advised by a person whose advice would have considerable weight, set about leasing all the estate for grassums ; and until the Wakefield case disturbed the idea, which had been entertained, there was no further interposition ; but at length, by a sort of act on his part, which I cannot represent, as far as he is concerned, to be an individual act with tenant A. or tenant B. but by an act of his, connecting himself with all the tenants of the estate, he made leases of the nature and kind, which I have endeavoured before to state to your Lordships, which I can now, having examined the case pretty accurately, state more correctly, by dividing them into four classes of leases.

There were leases granted to the tenants on renunciation of tacks which were current, or to strangers under the burden of the current tacks, and with obligations in both cases to grant new leases for nineteen years annually during the Duke's life. There were leases granted where the current leases had actually expired under similar obligations. There were leases granted without an obligation of renewal, but where the leases then current were not near their natural expiration ; and there were leases granted without an obligation to renew, and which were not granted till the previous leases had expired.

In the first of these classes, if the person had a current lease for which he had paid a considerable grassum, we will say at the end of nine or ten years, the Duke enters into a new contract with him, and lets him a lease for nineteen years, taking another [360] grassum, so that there has been a grassum paid as a consideration for the first lease,—a grassum as a consideration for the second lease, besides which, if the bargain was made with a stranger, he had, in order to come in, to pay a sum to the tenant in possession for a renunciation : and in the contract there was an obligation to renew *de anno in annum*. In such a case as that (I am not now observing upon the lawfulness of it, but upon the fact), you will observe, that the Duke of Queensberry got one grassum when he let the first lease, and that, long before the second lease was expired, he got another grassum ; and having got both these grassums, he enters into an

obligation to renew *de anno in annum*, which, whether it was legal or not, is a circumstance which must be represented as a consideration given on his part for the grassums, which had been so paid.

My Lords, I will give you examples of each class of leases, if your Lordships will take the trouble to look at them.—There is a lease of Crawick Mill, No. 69 of those that are libelled, the rent of which was £27 10s.; the consideration for this was the renunciation of the former lease for nineteen years, in which the grassum appears to have been £335, paid at Whitsunday, 1796; and at Whitsunday, 1798, a further grassum of £447 15s.; so that upon that you observe that there are two grassums paid in the course of about three years, amounting to about £700 upon a rent of £27 10s. I will not trouble your Lordships with other instances of this class; but the second class was where the leases had actually expired, and No. 67, for instance, is a lease renewable with the annual rent of £7 15s., a grassum [361] being taken of £255. Then there are leases granted without the obligation to renew; two leases, No. 212 and 147, granted each at the rent of £1; and there are three grassums taken in each of these cases; in the first case, £63 at Whitsuntide, 1788; £18 at Whitsuntide, 1806; and at Whitsuntide, 1807, £170 10s., making £251 10s.; and in the second case, £103, £48, and £83, making £234. I have taken the trouble to put down the amount of the various sums paid as grassums, in order to show what the actual operation of this is, stating it again as a question, whether this is legal or not. Then, in the fourth class, there are three or four stated, and one is a lease of £1 11s. 6d. on which the sum of £171 was paid; and another is that instance, which I mentioned to your Lordships, which you will find to be No. 267 of the libelled leases, where the rent is 3s. and the grassum paid for that lease is £231 3s.

My Lords, The amount of the several sums, which the Duke received in grassums, is stated very differently; but the result of the whole of this operation is, that the rent, which was a free rent in 1778, as I before mentioned to your Lordships, according to the representation of the case to us, of £11,300 (there was no rise in any instance in the Duke's time, he taking grassums, and not only taking grassums in all his leases, but receiving fresh grassums, and receiving those fresh grassums, as they assert, in concert with all his tenants), was, at the death of the Duke, £3600, chargeable, as your Lordships observe is stated by the entail, with a jointure of £1000 if there [362] was one Lady, and another jointure of £800 if there were two, and another of £500 if there were three; and chargeable also with £6000 or £7000 for children; and the question then is, Whether the interlocutors which I have read to your Lordships, are interlocutors, which do justice to the parties, stating their respective claims against each other.

Now, my Lords, when this case was argued before the Judges of the Second Division, as I have already stated to your Lordships, they were of opinion that there was no diminution of the rental according to the true intent and meaning of the entail, they construing the words “without diminution of the rental, at the least at the just avail for the time,” as if the words stood “without diminution of the rental, or at the least at the just avail for the time;” and it is material to mention this, because it may be the ground of some misapprehension as to this case hereafter. As to that, I understand the fact to be, and if I am mistaken in that I shall be glad now to be set right, that that word “or” is not inserted in the deed of tailzie. The Judges of the Second Division of the Court of Session have certainly understood the case as I understand it; the word “or” is no part of that deed, and that therefore the clause stands thus: That the heir of entail is to let for his own life-time, or for nineteen years, without diminution of the rental, at the just avail for the time.

My Lords, Upon that part of the case, I have before taken the liberty to intimate to your Lordships (and I speak here with great diffidence when [363] speaking on Scotch instruments), if this were an English instrument, I cannot find out the principle, upon which I should be entitled to insert that word “or,” if those words were, as they are here, without diminution of the rental, at the just avail for the time; the very circumstance of having the words, “at the just avail at the time,” must show that the author of the deed meant something else besides “without diminution of the rental.” Then does it alter that, if you introduce words which still make the nature of the concluding words stronger? The question will be, Whether, because in many cases the words “diminution of the rental” have been held to mean diminution of the rental presently paid; therefore the words “diminution of the rental,” when found in a con-

text sufficient to give them a different sense, and where there is no word creating an alternative, are to be taken in that sense? I do not state that that difficulty is a difficulty which cannot be got over; but, speaking most respectfully, I cannot agree in that, which has been laid down, viz. that there can be no reasonable doubt about it.

They have further held, that the taking grassums, and I must suppose they have held, that taking grassums, under all the circumstances, under which the Duke has taken them, is not to be considered as a diminution of the rental; that the words "diminution of the rental," affected in their sense, or not affected in their sense by the subsequent words, are to be taken to mean without diminution of the rental presently paid; and, if so, that they may not only take grassums at the expiration of the [364] leases, but that they may take them at regular times, calling in by renunciation those leases; that, calling in those leases by renunciation, they may then take another grassum. The amount of the grassum paid appears generally to be, and I believe the fact is generally that it is, calculated with reference to the rent, and the intended endurance of the tack, when the lease is granted; they hold that you may call it in by renunciation, and that, on the tenant surrendering from time to time, if that plan is adopted, and acted upon, there may be at all times a nineteen years' lease upon the estate.

My Lords, I have before stated to your Lordships, that this opinion of the Judges of the Second Division of the Court of Session is an opinion, which, to me at least (I do not mean to say that it is not according to the law of Scotland, but that it is an opinion, which to me at least, is irreconcilable to the principles, upon which the First Division had given their judgment: though the circumstances are not exactly the same nor the modes of considering them perhaps exactly the same, yet they do apply principles in the one case to the construction of deeds of entail, which are altogether different from those, which are applied by the other Division to the construction of deeds of entail: and we are therefore now involved in this situation, that the person, who has the honour to address you, most unfeignedly would represent that he is under the painful difficulty of coming to a determination, whether the Judges of the one court or the other are right in their decision: and to come to the determination, [365] previously to deciding such a question, whether, in a case of this sort, you have now all the information that you ought to have, before you shall come to a decision.

Now, My Lords, there is one view of this case, which appears to me also to have been (I mean to speak most respectfully) but slightly treated in the Second Division of the Court, and what I mean is, whether there is not a diminution of the rental in this case. My Lords, the Judges of that Division, I see, have said, that where an entailed estate is let at the rent presently payable, though the rent presently payable may be reduced, as to the free rent received, very considerably by the public burdens and charges, yet, nevertheless, that is not a letting with a diminution of the rental, and, my Lords, I agree there may be cases, in which that doctrine is right: but I do entertain a very considerable doubt, whether in a case, circumstanced as this case is, there be not occasion to consider somewhat more, whether the effects of these transactions is not, in the sense and the meaning of this entail, or according to the expressions of this entail, if you choose rather to have it so, a diminution of the rental.

My Lords, I before stated to your Lordships that remarkable case of the 3s. rental, and £231 grassum. I do not know how it may be in the law of Scotland, nor do I pretend to speak with any confidence, very much otherwise, but I have no conception, that if this was the construction of an English instrument, I should not be called upon to attend somewhat to this distinction. If I am called upon to let at the [366] last rent, and it should happen that, after letting at the last rent, public burdens are imposed, the property-tax for instance, which the tenant is to pay, I have nevertheless fulfilled the obligation which the instrument placed upon me; but the case I apprehend may be very different, when you come to consider, not public burdens which may hereafter be imposed, but public burdens affecting the rent at the time, as, for instance, in this case, with respect to the teinds: here is a difficulty which has certainly induced me to think, and often to think, that this case wants further consideration. It is clear, as I understand the facts of the case, that from the year 1633, when the statute passed about teinds, down to the year 1731, the valuations were made upon the actual rent paid, the words of the statute being, that they should be charged upon certain proportions of the rent constantly paid. My Lords, In the year 1732, or thereabouts, the Court of Session said, this cannot be right; it cannot possibly be what the statute

meant by the rent constantly paid; there must be such a meaning put upon these words, as that justice may be done to all parties concerned; and therefore, if you let with a grassum, in estimating what is the rent constantly paid according to the meaning of that statute, you shall not say that the rent rendered is the rent presently paid, but you shall take a proportion of the grassum, according to what would have been the rent paid but for that grassum. See, My Lords, what is the effect of that as to entailed estates. Here is a lease let, and let at 3s. that is the rent constantly paid;—here is a grassum paid on that lease of £231 10s. [367] Does the heir of tailzie receive 3s. ?—No. When he comes to account for the teinds, the court says, the grassum must be considered in ascertaining the rent constantly paid in the sense of that statute; for the purpose of doing justice grassum is rent, and we will therefore take a proportion of that £231 the grassum, and add it to the money received, the 3s. and you shall pay your teinds according to the amount of the rent calculated on the addition of the 3s. to that proportion of the grassum. My Lords, I do not say whether that is annailzieing or not, I do not say whether it is disposing or not, I do not say whether it is or is not diminution of the rental; but this I know, that, if the Duke of Queensberry could let at 3s. because he could maintain that there was no diminution of the rental as against the heir of tailzie; and the heir of tailzie, on the other hand, is to pay the burden of teinds on a proportion of the grassum received by the Duke, in addition to the 3s.—the rent constantly paid or reserved to that heir of tailzie,—the heir of tailzie, unless I misunderstand the matter, must have that, which is not worth his acceptance.

Now, my Lords, if you apply the difficulties, which arise in the case so put, upon the 3s. rent, to the case in all its circumstances, how does it vary? It varies only in this; you are struck with that way of putting it, when you put it on the 3s. and £231,—but you are not quite so much struck, when you put it on the rent, which in 1778 was £11,300 a-year, and which, by letting in this mode, is reduced, not as to that, which the Duke of Queensberry has reserved, but with reference to the [368] proportion which the law takes in respect of all these grassums, is reduced to the free rent of £3600 a-year,—a free rent of £3600, capable of being burdened, according to the terms of the entail, with three jointures of £1000, £800, and £500, and with £6000 for children, that deed of entail providing anxiously too that the heir of entail shall from time to time pay the public burdens!—This, my Lords, is surely a case of very considerable importance,—a case which requires much of consideration, before we can be quite convinced that all this is according to clear law. Whatever was the law as to teinds in 1732, was the law as to teinds before 1732, before the entails in question were made, and was the law in 1633;—the construction has been different, but the law was always the same, and the true construction of it was always the same; and when the court put a new construction upon the words “rent constantly paid” as to tithes, they seem to have placed heirs of entail in circumstances very different from those in which they stood in point of interest in the entailed estate, before that new construction as to teinds was adopted.

My Lords, The courts have also differed as to the principles on which they have construed this entail.—One court says, that the heir of entail is to be considered, as I before stated it, as absolute fiar of the estate,—that he is the absolute monarch of the estate, with this exception, that he is such, so far as he is not fettered; and, when we inquire whether he is fettered or not, we are told that he is not to be fettered by implication, that he is not fettered unless where he is expressly, in clear terms and expression, fettered; that there are no fetters [369] created by words, unless they are such words as that he who runs may read, and may understand them; that such were the terms used by a very great Judge. I ask in what way the Court of Session understands the terms so used by that great lawyer.

My Lords, That the heir of entail is a fiar,—that he is the proprietor,—that he is not to be considered as fettered, unless he is by express words fettered, and that he is not to be fettered by implication, is, generally speaking, doctrine not to be questioned. But that all decided cases sustain, without exception, these doctrines, I cannot agree, and I cannot admit that an heir of entail is not fettered in some way, in some cases, in some circumstances, otherwise than as he is expressly fettered. My Lords, I cannot find in all these papers, in any author I have had access to, in any book, nor have I heard from any mouth, that though a deed of entail contains not one single word, no provision whatever, against lowering the rent, the heir of entail can let below the last

rent, unless in the case, in which it is impossible that he can get it. I should be glad to know how it happens that, if it be true, according to the printed opinions, that if a restriction is not expressed in the deed of tailzie, that is a restriction that no heir of entail is under, they all admit, every one of them, that the heir of entail, if he can let for ninety-nine years, if he can let for a grassum, because he is not prohibited so to do, yet cannot let below the old rent, though there is no such prohibition in the tailzie! upon what does that rest? There may be, for aught I know, a very satisfactory account of it, [370] but I have not seen it. Again, with respect to the letting the mansion-house, and the grounds about the mansion-house, cannot an absolute fiar, an absolute proprietor of his estate, let his mansion-house, and the grounds about the mansion-house? and yet, although there be no such prohibition in the deed of entail, it is quite clear that an heir of entail cannot do it. That has been decided over and over again in the court below and here. Then, does not all show, that there may be implied obligations, some such obligation, as requires him to attend in some sort, or some manner, to the intent of the author of the deed, beyond that by which an absolute fiar is bound? It is said, that an heir of entail cannot let on an elusory consideration; in short, there are decisions which authorize one to say, that when the doctrine is laid down in the very strong terms in which it is, it must be taken to be a doctrine laid down with the exception, if I may so express it, of the excepted cases.

My Lords, I do know certainly that decision has gone a very great way in limiting construction, and that construction has been limited in cases, in which one can hardly understand the principles, on which it was limited; but I should be the last man in the world to deviate from rules, which have been laid down, for I look upon it, that certainty with respect to titles is a great deal better than even sensible rules of law, or sensible rules of construction. Speaking with all deference, I never could have consented to the decision in the Duntreath case. There is no more doubt that that case was decided against the meaning of the author of that deed, [371] aye, and against the expression of that deed, than that I am standing at this table; but I will not break in upon what has been settled by that case, for the importance of abiding by what has been considered as settled law can never be represented too forcibly.

Next, my Lords, With respect to grassum, let us try what there is of reason and consistency in the law as we have heard of it, and as it is said to be extracted from the Westshiels, and other cases. If I say to a man, Sir, you shall have a lease for nineteen years, and you shall give me for that lease a couple of thousand pounds grassum, and I will make the rent so much less than it otherwise would be; it is contended, upon the authority of these cases, that this heir of entail may put the £2000 in his pocket, and make a valid lease, as it respects the person to succeed him. But he cannot say to the proposed tenant, I will make you a lease at £100 a-year, and you, instead of paying me the money now, shall give me a bill or a bond for the payment of so much annually, not as rent, we will not call it rent for the world, but, instead of paying me a grassum of £2000 at this time in my hand, you shall give me a bill or a bond to pay it me at twenty different payments, to be made at the periods when the reserved rent is payable; this is not grassum, however much like it, but rent. Pay me now, the thing is safe against the next heir of entail:—pay me in future,—accept the benefit of credit which I give you (the thing in effect the same as if you had paid me now, and I had lent you the money so paid, upon the same credit), that is not safe against the next heir of entail:—but he, when he comes into [372] possession, shall have the future payments. If I, an heir of entail in possession, let black acre for £100 a year, and £1000 paid into my pocket that morning, the lease is good, and he who succeeds to me is to have only the £100 a-year: but if, on the same day, I let white acre at £100 a-year, and desire the tenant not to trouble himself, but to suit his own convenience, by paying the sum of £1000 by certain instalments, these shall be deemed rent; and in the one case the lessor is to have the whole £1000, in the other he is not. So as to wood; the heir in possession, it is said, may sell it for present payment, or for payment at present in part, and for payments by instalments afterwards. If the wood is cut down in his life time it is well; but the purchaser cannot cut a stick after the death of the heir, whatever he may be said to be as fiar or proprietor. As to wood, the heir in possession cannot, for present profit to himself, dispose of future produce not accruing in his own time; but future produce of a different kind, in a sense, they say he may dispose of for rent payable in future, and grassum paid down. My Lords, I do not mean to say, that if the

law has decidedly settled these things, we are, because of such observations, to disturb that, which is so settled; but the question is, whether the law has so settled it, and whether it has gone so far as to establish that a whole estate can be dealt with in the manner, in which the Duke of Queensberry has dealt with this, provided such a large question is open upon the pleadings: and at least we should have the collective opinions of those, who best understand the law of Scotland, the case being brought [373] before them in all the views of the case; and we should not decide without the best information we can receive from those, who can give that information, after we have ourselves stated in some degree the difficulties we feel upon the subject.

My Lords, It is said that there has been a practice in the case of the King and Church as to taking grassums, and I agree there has been, when the practice can hardly be said to have been according to law. There has been a constant struggle between the persons holding crown lands and church lands, and the Legislature both in England and Scotland, the Legislature interposing from time to time against the non-observance of law as to such property. It must be admitted, however, that grassums, in cases of such property, have received much countenance in the administration of law. How far that fact shall weigh in decision upon the powers of an heir of entail, or fix his obligations, is matter much to be considered.

About the year 1685, it will be found, I think, that the leasing in Scotland extended only to very short periods; with respect to grassums, when they were first taken by heirs of entail, we have not much information.—Under this entail, I apprehend, not for some years after it was made,—not before, I think, 1720;—and that the practice should grow into use in this and other entails, is not very marvellous, when you consider, that an heir of tailzie in possession lets the lands perhaps only for eight or nine years; when you again consider that, if any body thought proper, being lucky enough to know the terms, on which the lease was made, [374] during the currency of it, to interpose, in that case the person who made the lease and the tenant together might purge the irritancy; when you know that it very frequently happens that the persons succeeding as heirs of tailzie stand in a connection of affinity or obligation, which prevents their disturbing the acts of those in possession; and when you see how this thing has crept on from time to time. But you must ask, on the other hand, if this be the law, how comes it it has not been acted upon in so many settled estates as there are in Scotland, with reference to which it has not been attempted? Men have an inducement to take the last penny out of their estates, and how has it happened that this has not been universally done, or almost universally done? Can you doubt after decision in favour of the leases in question, that it will be universally done, unless the Legislature interfere, if by law it can be universally done? Nevertheless, we must take the law as we find it, be the consequences what they may.

My Lords, I will mention also the word “dispone” to your Lordships here. It is very true, that in the entail of the Queensberry estate, the word “alienate” does not occur; and the word “alienate” not occurring, it is urged, that the Wakefield case cannot be said in terms to be an authority, unless the word “dispone” has the same effect as the word “alienate.”

It must be recollected, that in the case of Macdowall, the Second Division of the Court held, that the word “dispone” had not the same effect as the word “alienate,” which shows again what may be the consequence of our immediate decision in this case. [375] They have lately held in that case of Macdowall, that, because the prohibition was only against disposing, although this House might have said that, if the prohibition was against alienation, you could not let a lease for ninety-seven years, that does not extend to disposing; and, therefore, they there confirmed a lease for 300 years. I know, my Lords, that that was a decision made, when there was a very considerable division of opinion in the Court. It also appears, that in this case a distinction has been taken between the words “dispone” and “alienate;” whether the word “dispone” means the same as if the word was “alienate.” It would be of the last importance that we should know what is the understanding of all the Scotch Judges as to the word “dispone”; because if these objections about grassums, and so on, should fail, it will be then to be considered, whether the positive clause as to leases affects the generic meaning, if I may so express it, of that word “dispone,” and whether, because particular leases are prohibited, or particular leases permitted in a deed, in which there is a generic term, a generic pro-

hibitory term, it shall or shall not have the effect of prohibiting leases, which would be bad *vi legis*, if not within the prohibitory clause; for instance, whether if this word "dispone" strikes at leases, as "alienate" does, it can be contended that, because certain leases are not permitted or prohibited by this entail, therefore this heir of entail is let loose from the ordinary prohibition, *vi legis*, of letting the mansion-house and the grounds around, the prohibition as to elusory rents, as to extravagant endurance, and so on.

[376] My Lords, If I were obliged to state to your Lordships, what, in my judgment, is the meaning of the word "dispone," I could not express at present a doubt, that that word "dispone" does as effectually prevent leasing as the word "alienate." I know "dispone" may refer to the particular thing called disposition, but when it is said you are not to "dispone" in any manner of way, does not that mean expressly to state, that the author of that deed conceives that there may be dispositions of different sorts?

When I look into the language of statutes passed before and at the time of the date of this entail: when I look into the language of writs and of writers, it appears to me to be clearly proved by the citations from statutes, and from writers, and from instruments, that an assignation or a tack is a disposition, in the language of the law of Scotland: this seems to me almost as clear as that I have the honour now to address your Lordships; at the same time knowing, as I do, and have had experience of the talents and abilities of the Judges of Scotland, I am not only bound, but disposed to believe, that I may be in some error upon this subject, which I should be glad to have corrected. If this is to depend upon the meaning of the word "dispone," and the interpretation to be put upon that word, at present certainly I think the word "dispone" would as effectually bar long leases as the word "alienate."

My Lords, The result of the whole is, that I feel it due to myself, if I may take the liberty so to say, when called upon to discharge so important and so anxious a duty as my duty in this case is: I [377] think it due to your Lordships, recollecting the immense consequence which must attach upon your judicial act, whatever may be the nature of it; I think it due to the Judges of Scotland, whose decision we are called upon in this place to review, to the lieges of Scotland, whose laws we are to settle, not with all the advantages, which I wish we could have when called upon to decide on great interests in property: above all, having regard to what has been the habit of your Lordships in cases of great value as to Scotch estates and titles, I mean to call upon the Judges to consider and re-consider what they have stated. Upon all these considerations, I think it fit to advise your Lordships to remit the two Buccleuch cases to the Second Division of the Court of Session, calling upon that Court, in your remit, to attend to the fact, that the action of declarator at the instance of the Executors and Disponees in trust, is an action brought by them in their character as such: to consider what is the effect of the action being brought by them in their character as such, in the absence of so many tenants, regard being had to all the circumstances that are alleged in the defences, as circumstances of concert, and alleged as acts of fraud upon this entail: and calling upon them to settle what is the meaning of this word "dispone" in that entail; and generally, calling upon them to attend to all the circumstances which belong to that entail, as influencing their opinion upon that action. I have looked with great anxiety to the pleadings, in order to see how, in their decision upon that action of declarator, or in their proceedings with respect to two or three tenants, the Court [378] can affect all the other tenants, unless they have agreed to be bound by the result of these proceedings; but upon that I am not able to form any satisfactory opinion. It will be necessary, however, to remit the action of Hyslop for further consideration: and, when we have the opinion of the Second Division of the Court of Session upon these remits, taking care to have the best consideration we can have, by calling upon the Court of the Second Division, in obedience to the statute, to call to their assistance the Judges of the First Division, that the Judges of the First and Second Division may together consider all the points, we shall then, I trust, have obtained such further information from the Court of Session, as will enable us, not only to dispose of the Buccleuch declarator and the case of Hyslop, but would enable us, if the other causes stood over, to determine them: and, if the pleadings are such as enable us to do so, to determine, with that information, the rights of all persons, whether parties before the Court or not.

My Lords, I feel, and I am sure I state my regret that it should be so with the utmost sincerity, that this tends in some measure to delay, in a case in which it is due to the feelings of all persons interested that there should be no delay; but I should hope and trust, that in a case of this nature, in which the Second Division of the Court of Session, I observe, have interposed, in order to avoid delay, to give their opinion in the manner they have, that the Court of Session, in both Divisions, would be pleased to take this matter into their consideration immediately in their next session. My Lords, if [379] they do that, I speak for myself, and I speak most sincerely for myself, I believe I should be able to give my opinion upon this great and complicated case, as soon as I could now satisfactorily do it; for, although I have, I can venture to assure your Lordships, spent every hour which I could devote to this purpose to the consideration of this case, there are difficulties belonging to the decision of it, which as yet, and I am not ashamed to confess it, I have not been able to overcome. If I were pressed at this moment to give my decision, I should give it according to my present judgment. But even if it were satisfactory, in that state of things, to others, it would not be satisfactory to myself, and I avow it; and therefore I follow the example of my predecessors, and advise your Lordships to remit these Buccleuch cases, that they may be considered by both Divisions, and that we may have all the information that can possibly be procured before we come to a final conclusion on questions of such vast importance.

Lord Redesdale,—My Lords, attending to the circumstances which the Noble and Learned Lord has referred to, and to what he has said upon the subject of these causes, I will not at this late hour detain your Lordships long; nor should I have troubled you at all, if I had not understood that it was his wish, that, having attended the hearing of the appeals, I should generally state my sentiments upon them. I agree with the Noble and Learned Lord in the manner in which he proposes to dispose of these cases. I conceive it to be in conformity to the manner in which your Lordships would dispose [380] of a case of the same description, if it arose in the courts in this country. For if a case had arisen in one of the courts in Westminster Hall, and had passed through the Court of King's Bench and the Exchequer Chamber, and had come here in the form of a writ of error, your Lordships would have had the judgment of all the courts upon the subject, and might also have had here the assistance of all the Judges to guide you in your decision; but as you cannot have the same assistance in a case from Scotland, and there are in the decisions of the two Divisions of the Court of Session points in which they appear to have differed in opinion, the only way which your Lordships have of obtaining that assistance which you would have in the case of an English cause, is that which the Noble Lord has proposed.

It would be improper for me to enter much at length into the cases at this moment; but it strikes my mind as most extraordinary, that those of the Judges of the Second Division of the Court of Session who have considered the terms in which the entail of the Queensberry estate is expressed, containing an express prohibition, "that the heirs of tailzie should not set tacks or rentals of the land for any longer space than the setter's life-time, or for nineteen years, and that without diminution of the rental, at least at the just avail for the time," should have put the construction which they have put upon these words; and that upon that construction they should have proceeded in the interlocutor which they have pronounced. The interlocutor indeed has the effect of declaring, that the late Duke of Queensberry had the power of granting all [381] the tacks in question, some of these tacks in question being certainly within the terms of the words of the express prohibition, and therefore not capable of being sustained, if that express prohibition does operate to prohibit tacks of any description; and, therefore, I must presume, that in the extent of the judgment, the Court has determined, that the word "dispone" has not the effect of the word "alienate": and although the very words of the clause prohibiting tacks has been distinctly argued upon, considered and interpreted by the Court, and their decision seems to have been in a certain degree founded upon the construction which they have given to those words; yet in the extent of their decision, they must have put that clause wholly out of their consideration, and considered that the word "dispone" not being equal to the word "alienate," therefore the long leases contained in the action of declarator are leases which may be sustained, because there is no prohibition to alienate.

My Lords, With respect to the construction of the word "dispone," I must confess,

as far as I can judge from the authorities stated in the printed cases, and in the argument at your Lordships' Bar, I cannot have the least doubt, that the word "dispone" used in this entail, is not used in the limited sense which has been supposed to be attributable to it, but has been used in a general sense, superadded to the other words; and that, according to all that I have found of authority in the law of Scotland, disposing is a word of extended effect, including alienation in a variety of ways in which property may be disposed of, and particularly in different acts of Par-[382]liament clearly applying to leases of estate. I therefore think a prohibition to dispone must be at least equivalent to a prohibition to alienate, and strictly applicable to a lease.

My Lords, There are also particular parts of the deed of entail in question, which seem to me to require a consideration which has not perhaps been given (as far as we can judge from the accounts we have had of what passed in the courts below), by those who have made the decisions which are the subject of appeal. If the words "without diminution of the rental" are to be so restricted, as to mean without diminution of the nominal rental at the time of the lease granted, which appears to have been the construction put upon those words in the Court below, the consequence as to the Queensberry estate will be this: That if the first person who succeeded to the entail, and those who followed, had let constantly at the rent which was the reserved rent at the time of the entail, and which is stated to have amounted to between £5000 and £6000 a-year at the time of the entail, granting leases continually from time to time at that rent, and taking grassums, the effect at this time would be, that this estate not only would produce nothing to the heir of entail now in possession, but would not produce anything to answer either the charges in point of jointure which might have been made upon it, or the charges which, as provisions for younger children, might also have been made.

So, my Lords, with respect to the other estate, the Neidpath estate, the consequence would have been exactly the same; and the consequence is very [383] striking with respect to one part of the powers given, that to make provisions for younger children; because the power in the entail of the Neidpath estate as to younger children, is to settle upon the younger children two years' net rent; whereas, according to the construction put upon the words "without diminution of the rental," in that entail, there might have been no net rent; and consequently the power of settling on younger children would amount to nothing; and the intent of the author of the entail, in this respect, might have been wholly defeated.

To the deed of entail of the Neidpath estate, there is annexed a rental of the lands as they stood at the time; and to show what was the view which the persons who settled this estate had, the net rental is expressly noticed in the deed, and contrasted with the reserved rents; with an obligation, as your Lordships will recollect, that all the public burdens, of course including the teinds, shall be discharged by the person in possession from time to time; and he is bound to make that discharge, though, according to the construction put upon the words "without diminution of the rental," there might be no income whatsoever to be received by the person in possession equal to the payment of those public burdens.

The rental, speaking of the different estates, says,—the sum of the whole, that is, of the rents reserved in the leases of the particular estates, is so much. Then there is deducted for teinds, and so on, so much; then the net rent is stated at so much. The consequence is, that in that rental reserved [384] rents, amounting to a considerable sum, are reduced to a net rent, very much below the reserved rent, and so throughout, to the end of the rental; and it concludes, "the sum of the whole foregoing rental, contained in the preceding four pages, extends to the sum of £17,002 13s. 10d. Scots;" and if your Lordships recollect what £17,002 13s. 10d. Scots is, your Lordships will perceive, that at this moment, if the estate had been constantly let at the same rent from time to time, there could not possibly have been anything coming out of the estate to the heir of entail in possession. It appears to me, therefore, that it must certainly have been considered by those who created this entail, as well as by those who created the entail of the other estate, that "diminution of the rental" must, in their view, have meant, at least, diminution of "net rental." It cannot have meant simply the diminution of the nominal rental, because many clauses in the deed are founded upon the substance of the net rental; and therefore a diminution of the net rental must have been meant to be prohibited by the deed of entail.

The effect of what has been done with respect to the Queensberry estate, is unquestionably, as it now stands, to reduce the net rental to be received by the present possessor very considerably below the net rental received by the late Duke of Queensberry when he succeeded to the estate.

The construction put upon the words prohibiting leases in the Queensberry entail, appears to me very extraordinary. The qualifying words are, "without diminution of the rental, at the least at the just avail for the time;" and those words have [385] been interpreted as if they were disjoined by the word "or," as if the words "without diminution of the rental" were one complete sentence; and the words, "at the least at the just avail for the time," were another complete sentence, the one not connected with the other, and disjoined by the introduction of the word "or." There is nothing in the deed itself which imports that these words should be so disjoined, or the word "or," introduced; and I apprehend you must take all the words together; you must construe the words "at the just avail for the time," as words interpreting the words "without diminution of the rental," and as parts of the same sentence. And if you do so, it is impossible that the construction which has been put upon the whole by the Court of Session can be the just and true construction of the instrument. The clause must be considered either as of no avail, or it must be deemed to have prohibited some of the leases in question.

I do not think it necessary to detain your Lordships with any further observations upon either of these cases, after the Noble and Learned Lord has made so full and accurate a statement of them. It appears to my mind, that it is highly important that the law upon the subject should be completely settled; not only with reference to the particular cases which are in question in these two entails, but that all persons who are in possession of entailed estates in Scotland, and those who may claim after them, should know what the law is upon the subject; and I believe it will be found, that, generally, the effect of a decision in a particular case is much [386] more important, with a view to prevent future litigation and future questions between other parties, than with a view to the interests of the parties concerned in the particular case; that in all cases it is of more importance that the law upon the subject should be settled, known, and well understood, than what may be the effect of the decision as between the particular parties interested. I conceive the course proposed is highly proper, in order to enable your Lordships to come to a decision, which must, when you do come to it, operate in a certain degree as a legislative enactment, which cannot be altered without legislative enactment, as it may affect other cases. I entirely concur, therefore, in what has fallen from the Noble and Learned Lord. I do conceive, that what he has proposed is the only way in which your Lordships can with satisfaction come to that decision which it becomes your Lordships, in your character of Judges in the last resort, to come to upon so important a subject—so important in the future administration of the law, and upon which there has been in the two Divisions of the Court of Session so much difference of opinion.

DUKE OF BUCCLEUCH v. MONTGOMERY.

(Judgment, July 10, 1817.) It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal; and in reviewing the same, the [387] said Court is to have especial regard to the fact, that this action of declarator is brought by the Executors and Trust-Disponees of the late Duke of Queensberry, as such, against the heir of tailzie, seeking thereby to establish unconditionally all and each of the numerous tacks mentioned in the summons, and granted by the said Duke, in the manner and under the circumstances mentioned in the pleadings, and is not instituted by any of the persons to whom such tacks are granted, nor are any of such persons parties thereto: And it is further ordered, That the said Court do reconsider the defences of the said appellant, and especially, Whether, in a question between such parties, the leases so granted, ought or ought not to be considered as granted in execution of such device, as is alleged in the said defences; and if so granted, Whether the same ought to be considered as granted in fraud of the entail, and are or are not such as ought on that account, or any other account appearing in the pleadings, to be held invalid, or not to be sustained at the instance of the pursuers, as representing the Duke: And in reviewing the interlocutor complained of, the said Court do par-

ticularly also reconsider what is the legal effect of the word "dispone," contained in the deed of tailzie of the 26th December, 1705, with reference to tacks of lands comprised in the said deed; and further do reconsider what is the effect, with reference to such tacks, of all other parts of the said deed, which relate to tacks, having regard to the endurance of such tacks, and to the fact of grassums being or not being paid upon the granting thereof, or paid upon the granting of former leases, [388] and to all other the terms and conditions upon which such tacks were made, and to the effect of such grassums, terms, and conditions, in reducing the amount of the clear rent receivable by the heir of tailzie, and to all the circumstances under which the appellant has alleged, and it shall appear, that the late Duke of Queensberry granted all such tacks: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing: which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.

DUKE OF BUCCLEUCH v. HYSLOP.

It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal, with reference to all and each of the grounds upon which the appellant has alleged that the tack, to which this cause relates, ought to be reduced, in a question between the appellant and the lessee, as such, after the Court shall have first reviewed the interlocutor complained of in the cause between the Duke of Buccleuch and Sir James Montgomery and others, Executors and Trust-Disponees of the late Duke of Queensberry, deceased, in pursuance of a remit to the said Court, in the [389] said cause, of even date herewith: And it is further ordered, That the Court to which this remit is made, do require the opinion of the Judges of the other Division, in the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same: And after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

KNATCHBULL, and Others,—*Appellants*; KISSANE, and Others,—*Respondents*,
[Feb. 25, March 2, 1818].

[Mews' Dig. viii. 861.]

[K. holding certain premises under a lease made in 1769, for three lives at £300 rent in 1802, obtains from G. tenant for life of the premises, with power of leasing at the best rent, then under age, and in embarrassed circumstances, by the offer of immediate payment of a year's rent then due, but by the custom of the country not payable till half a year after, and by a promise to plant on the premises 10,000 trees for the benefit of the landlord, and to make over to him those already planted, a new lease of the lands at the old rent, substituting instead of the two of the old lives, two young lives:—the lease, however, containing nothing about the trees planted, and no covenant to plant the 10,000 trees, but only an agreement endorsed on the lease to plant them. The old lease still retained by K. and no trees planted by him; but immediately after execution of the new lease of 1802, he assigns that lease upon trust to secure a provision for a wife whom he then marries; and soon [390] after, by will, secures the provision upon other property, in case the lease should be evicted.—G. after he came of

age, accepts the rent, and gives receipts for it. K. dies. Bill against his son, the widow and her trustees, by G. and his trustees (the remaindermen not made parties) to have the new lease delivered up to be cancelled, as being fraudulent and void—and the bill dismissed below. But the decree reversed by the House of Lords declaring that the lease, as between the lessor and lessee, was such as ought to be cancelled, but remitting to the Court below to proceed, with respect to relief as against the widow and her trustees, as should be just.]

The bill, filed in the Court of Chancery in Ireland, in 1807, stated that a lease of certain lands, in the county of Tipperary, was granted by one Mathew, the proprietor in fee, to William Kissane, in 1769, for the lives of the said William Kissane, and of Leonard Doharty and John Bray, and the survivor of them, at the annual rent of £300 5s. payable half yearly, that the lease was duly enrolled, and that Kissane continued in possession till his death, which happened in 1804.

The bill then stated a sale and conveyance of the lands in fee, in 1783, to George Goold, who, by will, dated 1787, devised the lands to his grandson, Henry Michael Goold, for life, remainder to his issue male in such proportions as he should, by deed or will, appoint; and for want of such appointment to the testator's eldest son, with remainders over: and with a power to the said Henry Michael Goold to lease for three lives, or thirty-one years, to commence in possession, at the most improved yearly rent and without fine. The tes-^[391]tator died in 1789, H. M. Goold being then of the age of six years.

The bill then stated that Henry Michael Goold had been very extravagant, and had contracted debts to a large amount at a very early period of life: that in 1802 he visited his estates in the county of Tipperary, and was then, while still under age, prevailed upon by Kissane to execute a new lease of the lands at the old rent, though the lands had trebled in value, substituting the life of Elizabeth Chadwick, then eighteen years of age, whom Kissane was about to marry, and the life of his son William Kissane, then of the age of sixteen years, instead of the lives of Doharty, who was then above sixty years of age, and of Bray, who was dead, though Goold was kept in ignorance of that fact; the inducement held out by Kissane, being a promise to pay immediately a year's rent, which was then due, but, by the custom of the country, not payable till half a year after; a promise to plant 10,000 trees, and to make over to Goold those already planted. That Goold executed the lease without perusing it, that he had nobody to advise him at the time, that he was ignorant of the value of the lands, that the lease did not contain any grant of the trees on the premises, and that, in point of fact, there were none on the premises; that Kissane did not deliver up the old lease, alleging that it was then in Dublin, and that he did not pay the year's rent immediately, but only gave a bill of exchange for it payable forty-one days after date.

The bill further stated that, the lease having ^[392]been executed on the 2d October, 1802, Kissane, in the same month and year, being then seventy years of age, on his marriage with the said Elizabeth Chadwick, by indentures of settlement assigned the lands upon trust to secure a provision or jointure of £250 a-year to the said Elizabeth, and by will, dated March, 1804, he devised and bequeathed all his property real and personal upon the trusts therein mentioned, charging the jointure on other lands, in case the said demised lands should be insufficient for the payment of it, and he directed his trustees to raise certain sums of money to make a provision for his wife in case the lease should be set aside. Kissane died soon after. The bill further stated that Goold having attained his age of twenty-one years in 1803, and, continuing to be embarrassed in his circumstances, in 1804, conveyed his estates to trustees, who, along with him, filed the bill against the representatives of Kissane, and those interested under his will, praying that the lease of October, 1802, might be declared fraudulent and void, and might be cancelled, or, if necessary, that the same might be reconveyed; and, that Elizabeth Chadwick and her trustees, if ignorant of the fraud, might be indemnified out of the other property of Kissane in respect of her marriage portion, and that an account, if necessary, might be taken of the personal estate of Kissane, etc.

In the answers it was insisted that the new lease was obtained without fraud on the part of Kissane, who was then only sixty-three years of age, and not seventy, as alleged in the bill, in consideration ^[393]of the undertaking, endorsed on the lease, to plant

10,000 trees for the use of Goold, which he would have done, had he not discovered that Goold had practised a fraud on him, by representing that he had power to make the lease, and that he was of age at the time; and that this was the reason for making a provision for the wife, by way of caution, in case the lease should be set aside; that both Doharty and Bray were living, and in good health, at the time of putting in the answers; and Elizabeth Chadwick and her trustees alleged that they were purchasers for valuable consideration without notice. It was admitted that the lands were worth about £600 a-year, and that no trees had been planted.

Evidence was given on the part of the Plaintiffs (Appellants), that Goold, at the time of executing the lease, was under age; that the lands, on a lease for three lives, were worth, in 1802, from £600 to £900 a-year. A witness who was present at the execution of the lease, deposed that nothing was then said as to Goold's age; that Goold was greatly embarrassed in his circumstances when the new lease was executed, and that Kissane knew it; that the lease was produced by Kissane ready for execution, at the time of the agreement with Goold; and that Kissane alleged, as a reason for not delivering up the old lease, that it was then in Dublin, and that, in fact, it was not delivered up.

The Defendants produced Bray and Doharty as witnesses, who said they were in good health in 1802, and were, at the time of their examination, of the respective ages of fifty and forty-seven years. [394] One witness deposed that Goold represented himself as of age previous to October, 1802, and several receipts for rent paid to Goold and his receiver for the premises subsequent to 1802, and the lease of 1802, and endorsement thereon, by which Kissane agreed to plant the 10,000 trees, were proved.

The cause having been heard on the 11th July, 1814, the Court below dismissed the bill with costs, and from this decree the Plaintiffs appealed.

Sir S. Romilly and Mr. Roupell (for Appellants). The lease of the 2d October, 1802, was obtained from the Appellant, Henry M. Goold, fraudulently, by misrepresentation and concealment, and without consideration. The fraud is evidenced by the transactions themselves. The Appellant was a very young man, not even of age, inexperienced in matters of business, ignorant of the value of land, and who had, by his extravagance, involved himself in debt, and was raising money by the most improvident means. This was known to Kissane, who was a very old proprietor and occupier of land in that part of Ireland, and well acquainted with the value of land there. The bargain was made by Kissane with the Appellant, Henry M. Goold, himself then a minor, and who had no professional or other assistance.—The lease of 1769, which was then subsisting, was held on two lives, both of which were persons far advanced in years, and for which two lives were substituted, the lives of two young and healthy persons; this advantage [395] too was obtained by Kissane, without any consideration whatever paid or given by him to the Appellant, for the rent reserved by the new lease was the sum of £300 5s. and no more, being the same rent as had been reserved thirty-three years before, by the old lease, and which was grossly inadequate, in point of value, as land in the county of Tipperary had, in the year 1802, when the new lease was granted, risen in value to three times the amount of what it was in the year 1769, when the old lease was granted; the only colour or pretence of consideration was, that Kissane should plant 10,000 trees on the said premises, and assign them to the Appellant, but which it is admitted he did not do, and that he should assign such trees as he had then already planted; it appears, however, that no trees had then been planted, and it is, therefore, obvious that Kissane had deceived the Appellant, Henry M. Goold, by falsely representing to him that he, Kissane, had planted trees on the said demised premises, which were to be so assigned. The inducement which the Appellant had, and the temptation held out to him by Kissane, to agree to such new lease, was the promise of immediate payment of a sum of money, for a year's rent, which the Appellant was entitled to at the time, but which, notwithstanding such promise, was not paid in money, but by a bill of exchange at a long date; and the Appellant, Henry M. Goold, has not confirmed the lease of 1802, since he came of age; and the only remedy which the Appellant had, was in a court of equity; for the old lease was not delivered up, nor were the lives extinct, and it [396] might have been set up as a bar to the trial of the validity of the second lease, at law.

He who afterwards received the rents for Goold was present at the execution of the lease, but he was, at that time, neither agent nor receiver, but a mere stranger. Then

it may be said if the lease is void you need not the aid of equity. But it is quite common for equity to interfere to compel the delivering up of deeds invalid at law—*Underhill v. Horwood*, 10 Ves. 209—*Bromley v. Holland*, 7 Ves. 3; and the reason is, that they may not remain with those who can make no legal use of them, and continue a cloud on the title.

Mr. Wetherel and Mr. Wingfield (for Respondents).—The bill was defective for want of parties, the remainder-men who had an interest in the subject not being before the Court. The bill too did not offer to replace the interest under the old lease; and these defects might be relied on as grounds for dismissing the bill, in case the decree could not be supported on the principle about to be stated.

1st. With respect to Goold, no deception is here charged; and direct fraud being absent, supposing him to have been under age, the lease is not void but voidable, as in *Zouch v. Parsons*, 3 Burr. 1794; and the lease was confirmed by him, by his acceptance of rent under it after he was of age. The rule is the same in equity as at law. Here it is clear, that rent was accepted by him three or four years after he came of age. Suppose, then, that fraud is absent, though the landlord may, from [397] folly or improvidence, have let his lands at half the rent which they are worth; and if, though under age at the time, he after he becomes of age, confirms the transaction, the lease is good.

2d. Then, with respect to the remainder-men, they say, that it is unnecessary to make them parties, because the lease cannot bind the remainder-men, as the lands are not let at the best rent. But if the lease is valid as against the tenant for life, the objection to it is premature. The title of the remainder-men has not accrued, and they are not parties: and equity never acts by anticipation. This is said to have been the ground of the decision below. Equity will not cancel the lease by anticipation, and *non constat*, but the *cestui que viès* may be dead before the title of the remainder-men accrues. The delivering up the instrument, lest it should be a cloud on the title, does not here apply; for the lease is not void with respect to Goold.

Suppose the lives in the old lease were dead, the remainder-men might have an interest to contend that the new lease was a good one, and were necessary parties. It is common to order deeds to be delivered up to be cancelled; but we are not litigating that point generally, but whether, under the peculiar circumstances of this case, the lease ought to be delivered up, and *Bromley v. Holland*, 7 Ves. 3, is no authority in this case. It was said to be essential, if bad as to the remainder-men, that it should be challenged by Goold.—Why? It is merely a question of time. If he was a minor at the time, the lease is only voidable, and he con-[398]-firmed it by clear acts. The rent must have been received, not under the old, but under the new lease; for he was a party to the new lease, and could receive the rent in no other way or character without an express reservation. The consideration is the planting of 10,000 trees, and there is a covenant, or at least an agreement, that Kissane would plant them. It is observable, too, that the receiver was present at the execution of the lease, and that there were laches in filing the bill. It appears, from the evidence of Mr. Humphries, a very skilful English attorney, that he was sent to Ireland, in 1803, to investigate the state of Mr. Goold's affairs, by the trustees afterwards appointed by Goold by the deed of 1804, one of whom died before 1807. The bill however is not filed till 1807. But if there had been no laches, and the bill had been filed before the death of the other trustee, then evidence might have been given of consideration in money, services, etc. which did not appear on the face of the deed, for parole evidence, collateral to, but not contradicting the deed, might be given.

They cannot succeed unless they establish gross misrepresentation. But there is no such thing; and there are repeated acts of confirmation.

Lord Eldon (C.). There is no want of parties here; for the lease is void at law as to the remainder-men, because it is a bad execution of the power, which requires that the most improved rent should be reserved.

Sir S. Romilly (in reply). They say there is no [399] fraud; but I do not know what fraud is, unless taking advantage of the folly and improvidence of a youth under age, and getting from him a lease at a rent of £300 a-year for lands which were worth £900 a-year, without consideration, without coming under any obligation, is fraud. But if it were necessary to show direct actual fraud, that is proved by the promise to plant 10,000 trees, a mere pretended consideration, which was not introduced as an

obligation in the lease ; and for the performance of which promise there was no security, except the memorandum on the back of the lease. As to the confirmation, suppose he had confirmed the lease, though it would then have been good at law, it would still remain subject to be set aside in equity for fraudulent circumstances. Besides, the receipts were merely for rent, which might have been paid under the other lease, so that they were at least equivocal. As to the laches, the bill was filed as soon as the circumstances could be investigated ; and then it should be remembered, that the two leases were retained. Kissane himself by his settlement showed, that he was aware that the new lease could not be supported.

(March 6, 1818.) Lord Eldon (C.). This is an appeal from a decree of the Court of Chancery in Ireland, and the Appellants represent that they filed their bill in that Court in May, 1807, stating that Thomas Mathew being seized in fee simple of the towns and lands of Knockballymaloe and Kilross, in the county of Tipperary, he, in July, 1769, granted a lease thereof to William Kissane now deceased : [400] the said premises containing about 332 acres of land, plantation measure, to hold unto the said William Kissane, his heirs and assigns, for his (Kissane's) own life, and the lives of Leonard Doharty and John Bray, and the life of the survivor of them, at the annual rent of £300 5s. payable half yearly : and that the indenture of lease was duly enrolled, and that William Kissane entered into possession of the premises, and continued in the possession thereof until his death, which happened in the year 1804. And further stating, that John Bray, one of the lives, was dead ; that Leonard Doharty was living ; and that the said Thomas Mathew was dead ; and that Francis Mathew, his eldest son and heir at law, in the month of June, 1782, sold and conveyed the said premises to John Carrol, in trust for Michael Aylmer, Esq. who, in the month of February, 1783, sold and conveyed the inheritance of the said premises to George Goold, deceased, in fee ; and that the said George Goold, deceased, by his will duly attested, made in the month of June, 1787, devised the said estate and premises unto the Appellant, Henry Michael Goold, for and during the term of his natural life, and after his decease to go and belong to his issue male, in such shares and proportions as he should, by deed or will, appoint ; and for want of such appointment, then to his eldest son, with divers remainders over : and the testator, by his said will, empowered the Appellant, Henry Michael Goold, to grant leases of the said estates for three lives or thirty-one years, to commence in possession, at the most improved yearly [401] rent and without fine. And further stating, the death of the said George Goold in the month of March, 1789, when the Appellant, Henry Michael Goold, was of the age of six years or thereabouts ; and that the said Appellant's guardian received the rent of the premises from the said William Kissane, until the time after mentioned.

I observe here, before proceeding further with the statement, that the reasoning and the objection, founded on the want of the remainder-men as parties, cannot be sustained ; as the lease from Goold to Kissane is clearly proved not to have been let at the most improved rent, and therefore is and must be void as against the remainder-men if they choose to quarrel with it.

And further stating, that the Appellant H. M. Goold had been very extravagant, and had contracted debts to a large amount at a very early period of his life,—which was very probably the case, he being like many young men, who, being extravagant and in debt, are reduced to difficulties, and led by their embarrassments into improvident contracts : and then they complain that they have been imposed upon, and sometimes take as much advantage of others, as they say others have taken of them.

And further stating, that Goold being, in the year 1802, in the county of Tipperary, the said William Kissane, who was then far advanced in years ; I pass over the other allegations that he was crafty, and so on—and skilled in the value of lands, and ready to take advantage of a young man, formed a design to impose on the Appellant, Henry Michael Goold, who was thoughtless and inconsiderate, to [402] obtain from him a renewal of his interest in the said land ; and that accordingly the said William Kissane, who owed the Appellant, Henry Michael Goold, a year's rent, and which, by the custom prevailing in that part of the country, the Appellant imagined was not to be paid until another half year's rent became due, some time in the month of October, 1802, requested the Appellant, Henry Michael Goold, to substitute the life of Elizabeth Chadwick, a young lady of the age of eighteen years or thereabouts, with whom the said William Kissane was then about to marry, in the room of one of the original lives

in the lease of July, 1769: and that to induce the said Appellant, Henry Michael Goold, to comply with such request, the said William Kissane promised to pay the Appellant, Henry Michael Goold, the year's rent then due without the customary allowance of time (and the offer of ready money usually meets with a ready acceptance); and he further promised to plant 10,000 trees, and to make over to the Appellant those which had been already planted; and that so great was the folly and indiscretion of the Appellant, Henry Michael Goold, and such his want of ready money, that although the said lands had then trebled in their value, as the said Appellant has since discovered, since the year 1769, and although the said John Bray, one of the lives in the said lease, was dead, but of which the Appellant was then ignorant, and was assured to the contrary by the said William Kissane, and although the said Leonard Doharty was above sixty years of age, and the said William Kissane himself above seventy, the Appellant, Henry [403] Michael Goold, agreed to substitute the life of the said Elizabeth Chadwick in the room of the said John Bray; and that thereupon the said William Kissane produced a parchment writing to the Appellant, Henry Michael Goold, who had not then attained his age of twenty-one years, and who had no person to advise him, and was ignorant of the value of the said lands, and the said Appellant executed the same, and the said William Kissane executed a counterpart, which is dated the 2d of October, 1802.

Your Lordships will permit me to notice, that the matter, stated by way of allegation in a bill is not always true; but often the mere coinage of the imagination of the drawer of the bill; and as to the alleged death of Bray, if he was the same Bray who was examined as witness, he must have been alive: and he says, in his evidence, that instead of being dead in 1802, he was then alive, and in good health—"and is now of a good healthy constitution; and is now about the age of fifty years." And Leonard Doharty, who was stated to have been in 1802 above the age of sixty years, says, that instead of having been then above the age of sixty, "he was in a right good state of health and constitution in the month of October, 1802; and is now of the same good state of health and constitution, and is now of the age of forty-six or forty-seven years."

I suppose it may be taken for granted, that these persons were the same mentioned in the bill; and though perhaps they somewhat under rated their ages, as we are all apt to do, yet alive they certainly [404] were when they were examined as witnesses. To be sure, when you consider that they were named as the *cestui que vies*, in 1769, and when you recollect the lapse of time from 1769 to the time at which they gave their evidence, you cannot help suspecting that they were a little more advanced than the full vigour of youth, or that Kissane must have had very great confidence in the strength and vigour of their constitution when they were little children; and, that the vigour and strength which they had when they came into the world, would probably continue, and that they would live long.

However, we must take the representation to be correct for the purposes of this cause.

And further stating, that the Appellant's, Henry Michael Goold's, execution of the said parchment writing was procured from him by a fraudulent representation and suppression; that the Appellant never read the said parchment writing, and that the said William Kissane had, unknown to the said Appellant, caused the said lease to be filled up with his, the said William Kissane's own life, with that of the said Elizabeth Chadwick, and also with the life of the said William Kissane's son, who was then of the age of fourteen years or thereabouts; and at the annual rent of £300 5s. being the same rent as had been reserved forty-six years before; and that such new lease did not contain any grant of the trees then on the premises, but which had turned out to be immaterial, as the said William Kissane had not planted any thereon, and that the said William Kissane had kept the original lease in his possession,—alleging that the [405] same was in Dublin, and that the said William Kissane kept the said original lease in his possession to protect himself and his representatives at law, in the possession of the said premises. And further stating, that the said William Kissane did not pay to the Appellant Henry Michael Goold the rent which was then due, but gave the said Appellant a bill of exchange, payable forty-one days after date, and which was not paid until a considerable time after the same became due.

Your Lordships then see how the case stands. Young Goold goes to Ireland in

1802, and grants this lease in the way which was stated. Whether he was then embarrassed and involved in debt or not, he seems to have been, at least, so much in want of ready money, that it was material to him to have a year's rent paid down, instead of waiting for the usual time of payment, according to the custom of the country. And accordingly a bill of exchange, payable in December, 1802, was drawn; and on looking at the original bill you find a writing on the front of it, which they call an endorsement. That is not usually the manner here, where generally an endorsement is made on the back, and not on the face of the bill. Kissane was then in possession under the old lease held for these lives, in the full vigour of their youth and constitution; and when the new lease was made, therefore, if this had been perfectly fair on all sides, the new lease would be granted in consideration of the surrender of the old lease. But, as one has heard of on other occasions, it was thought safest to have two strings to the bow: and [406] it so happened, that he had left the old lease in Dublin: and he kept both in his possession since 1802: so that one finds it difficult to say, that the surrender of the old lease was part of the consideration for the grant of the new lease. The rent was the same as that which was reserved in 1769; and the lessor had then no right to bind the inheritance, except by a lease in possession, and at the best rent that could be got, and that was nearly double the old rent. They said that it was true, that as against the remainder-men it was not good: but that it was good as against Goold. But then recollect that he covenants that it was valid as against the inheritance, and that he bound himself to make good the value in case the lease should be evicted.

The old gentleman, although we must not say that he was so crafty as he was represented in these papers to be, was, at least, very provident, for the next week after the execution of the lease he settled it on the lady whom he married. It does not appear that they made any provision as to the issue: and it so turned out, as might have been expected, that there was no issue of that marriage.

Then after the settlement on the lady, he seems to have been casting his eye back upon the transaction, with respect to the execution of the lease, and to have had some doubts whether they were not such as rendered its validity rather questionable: perhaps, as it has been represented, because Goold had not told him that he was only tenant for life, with a power of leasing at the best rent. But however that was, he, in his will, devises all his [407] estates real and personal, in trust for the benefit of his children born before his marriage with this lady. And then the bill states, that the said William Kissane, after reciting in his said will that since his marriage it had been apprehended that the lease by virtue of which he held the lands might be evicted, and might therefore not be considered a sufficient security for the provision which he had made for this lady: therefore, in order the better to secure a provision for his said wife, in case the lease should be evicted or determined, he ordered and directed his trustees to raise certain sums of money for that purpose.

The way in which Knatchbull and the other Appellants became interested was by a trust deed from Goold.

The bill charges that the lease was made at a gross under value, and that it was proved that the premises were worth a great deal more rent: that Goold had never been in Ireland before, and was unacquainted with the value of the property: although it is admitted that Cooke, who was afterwards his receiver, was present at the execution of the lease. And, on the whole matter, the bill prayed that the lease might be set aside, without offering the conditions which Kissane would be entitled in equity to have annexed to that determination.

We called for the original lease. I do not know whether timber is of any value in the county of Tipperary, but Kissane agrees to plant 10,000 trees, which were to be suffered to grow for the benefit of the landlord. The lease, however, was drawn [408] in such a hurry, that this little policy, as we would call it in the North of England, was forgot: except that there was a little endorsement respecting it on the back of the lease. I do not call that a covenant: for unluckily it would not do as an English covenant, not being under seal; and it could at most only amount to a parole agreement, on which perhaps an action might be brought.

The Lord Chancellor of Ireland was of opinion, and I beg to be understood as never speaking of his opinions but with the greatest respect, that the bill should be dismissed, leaving matters as they were before. Now it is impossible that it could be right simply

to dismiss the bill, because, if the lease of 1802 was valid, the decree ought to have directed the old lease to be delivered up: and if that had been objected to, because the remainder-men were not parties, and they might be interested to set aside the new lease; or because Kissane did not know that Goold was only tenant for life; still such an arrangement might have been made as would have protected Kissane in the possession to the extent of the interest under the old lease, as far as Goold could have protected him; so that it was impossible it could be right as it stood.

Then another question is whether, without using the word fraud, which is often misunderstood when lawyers use it, this is a lease that can be sustained. It was contended by my learned friend at the bar (Mr. Wetherel) that there was not sufficient charge of fraud to get rid of the lease on that ground. But I think he will agree with me that if there is that in the bill which, in [409] construction of law, amounts to a fraud, in the legal sense of that term, it is not necessary that the plaintiff should apply that term to it in the bill.

Now, attending to the absolute want of consideration in this case, equity cannot but feel a strong disposition to set aside the lease. He has a lease for his own life, and those of Doharty and Bray; and however stout these might be, they were less valuable lives than the life of this lady, eighteen years of age, and of Kissane's son, fourteen or sixteen years of age, which were the lives substituted in the lease of 1802. And how can it be contended that the substituting, for a lease for three old lives, a lease for one old life and two young ones, at the same rent, when the lands were worth double the old rent, was a transaction in which valuable consideration was given by Kissane? And then Goold covenants absolutely for the validity of the lease; and, though he got nothing, he was liable for the value with his purse, and even with his person if he could not pay: and further, the old lease remains in the hands of the lessee as a shield; I do not say it was intended as a fraud; but there is enough to show that Kissane was anxious, in case Goold had quarrelled with the new lease, to have the old lease to set up against him. And when you consider the temptation of an immediate sum of money held out to a young man greatly in want of ready money; and then the notion of wood being given to him, of which there was not a stick on the property; and that you do not find inserted in the lease what was agreed upon as to the planting of trees; it does appear to me [410] that this is a lease without consideration, giving value for nothing: and from these and the other circumstances, I cannot agree that this bill should be dismissed generally, or that the lease of 1802 is a subsisting lease at all.

I am always afraid, when dealing with these Irish cases, that I may overlook some peculiarity in the mode of proceeding in that country. But I am authorized to say, that this case has been considered by a Noble and Learned Lord well acquainted with the Irish practice, and that he concurs with me in this opinion. But if we order the lease of 1802 to be delivered up, we must take care that justice is done, and that the enjoyment shall continue under the old lease, and that Kissane's representatives should be relieved from the obligations of the new lease.

I do not rest much upon the alleged acts of confirmation in receiving the rent. If the old lease had been delivered up, they would have been much more material. And without entering into the question about leaving a cloud on the title, the circumstance of Kissane's having the old lease in his possession is one which establishes the jurisdiction; for, whether he was an infant at the time of executing the lease, and afterwards confirmed it, if it was in his power to confirm, or an adult, he could never have gone to law; for they would have pulled out the old lease, and have said—we hold by this title.

Then what I propose is, that the lease of 1802 be declared void as between Kissane and Goold, without prejudice to the old lease.

[411] Then there is another point, as to which I wish to know, whether the parties desire that there should be any further proceeding. Kissane seems to have thought that his chance for the lady would be increased if he got the new lease: he weds the lease, and then, *eo instanti*, he marries Miss Chadwick, and settles it on the wife. Now whether the lease is bad, as against Kissane, and whether it is bad as against her, a purchaser for the most meritorious consideration, that of marriage, are different questions: and though this point did not require attention in the previous state of the proceedings, it may be material now.

This is not much worth her agitating: but if she wishes to agitate that matter, as the Court has not considered this before, I apprehend the cause ought to be remitted with a declaration as to these points, and so calling the attention of the Court to the state of the case as between her and Goold. But if the lease is bad as between Kissane and Goold, it does not appear important for her to carry it further, regard being had to the provisions of the will and the equities of Goold.

The Judgement of the House, after the usual recitals, was in these terms:

“That the said decree complained of in the said appeal dismissing the Appellant’s bill with costs, be and the same is hereby reversed: and it is hereby declared that the lease of the 2d Oct. 1802, prayed by the bill to be declared fraudulent and void and to be cancelled, is a lease which ought, as between the lessor and lessee, and those [412] claiming under the lessee as volunteers, to be delivered up and cancelled: but it being represented to the Lords that the Court of Chancery in Ireland, having dismissed the bill, did not proceed to take into consideration whether the relief or any and what part of the relief prayed by the bill, in case the lease was to be considered as invalid as between the lessor and lessee, and such volunteers ought to be granted as against Elizabeth Chadwick, now Elizabeth Armstrong, and her trustees, or any other points arising in the said cause in such cases as aforesaid: it is therefore ordered that the cause be remitted back to the Court of Chancery in Ireland to proceed therein as may be just, and as is consistent with this Judgment.”

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CAMPBELL, and Another,—*Appellants*; ANDERSON AND Co.,—*Respondents*
[Feb. 9, March 16, 1818].

[Decreet in October, 1807, by justices of peace against Anderson and Co. tanners, finding them liable in a penalty, and condemning stock on their premises seized in August or September, 1807, by an excise officer, made without evidence, on complaint of a collector of excise that Anderson and Co. carried on the trade of curriers as well as tanners at the same time, contrary to law. The goods sold under the decret, and purchased up by Anderson and Co. who brought their action in [413] 1809, in the Court of Session, against the excise officers, for reduction of the decret for reasons specified (the decreets being against Anderson and Co. not being one of the reasons specified), and other reasons, and for repetition of their money, and for damages. Preliminary defences founded on want of jurisdiction in the Court, because the decret rested on revenue statutes, on want of a month’s previous notice to the officer, and on the alleged expiration of the time for bringing the action (three months), repelled: and interlocutor of the Lord Ordinary on the merits reducing the decret, and finding the pursuers entitled to repetition of their money, but assolvieing the defenders from the conclusion for damages. The interlocutor acquiesced in by the pursuers, who dropped their claim for damages, and the interlocutor adhered to by the Court. Difficulties in the Dom. Proc. because the summons contained a conclusion for damages, though not insisted upon after the Lord Ordinary’s interlocutor; and because the reason that the decret was against Anderson and Co. was not specified in the summons, and question whether it could be taken advantage of under the words “other reasons”: but the judgment AFFIRMED.]

This was an action by Anderson and Co. tanners in Beith, in Ayrshire, against Iver Campbell, collector, and Archibald Douglas, supervisor of excise, to reduce a decret of justices, made on complaint of the collector, condemning the whole stock in the drying-

sheds of the pursuers, consisting of uncurried skins, which had been seized by Douglas, the excise officer, on the alleged ground that the pursuers were in partnership with a currier in Beith, contrary to law; and for repetition of the money paid by the pursuers for their own skins when sold by roup under the decret; and also for damages.

[414] The complaint was founded on the statute 1 Jac. 1, cap. 22, sect. 6, which enacts—"that no person or persons using the mystery of tanning leather shall occupy " or use the craft or mystery of a shoe-maker, currier, butcher, or of any other artificer, " using or exercising the cutting or working of leather:" and on the statutes 9 Anne, cap. 11, and 24 Geo. 3, cap. 19, referring to the first mentioned act, and reciting—"the " due execution whereof hath been and is of great importance to the public good and " service of this realm, and will very much contribute to the ascertaining and collection " of the duties by this act intended to be granted:" from which last words it was contended that the acts were all revenue statutes.

The decret proceeding merely on the statement of the complainer, without any evidence, was in these terms:—

" At Saltcoats, the 5th of Oct. 1807 years.

" Upon a complaint at the instance of Iver Campbell, Esq. collector of excise, to the " Honourable his Majesty's Justices of the Peace for the county of Ayr, against William " Anderson and Company in Beith, for exercising the trade of a tanner along with the " trade of a currier, or other cutter of leather, contrary to law, and having in their " possession 90 hides, 104 calf-skins, 52 hog-skins, and 5 sheep-skins, all seized by " Archibald Douglas, supervisor of excise at Kilmarnock, the said justices, consisting of, " etc. etc. having considered the above complaint, and the laws of excise made in that " behalf, and having [415] heard parties at full length, condemn the seizure therein " mentioned, as craved; and appointed the tanned leather specified to be roup'd and " sold for behoof of his Majesty and seizure-maker; and decern'd, and thereby decern, " the said William Anderson and Company in £3 sterling, to which, on account of " favourable circumstances, they mitigate the statutory penalty, and ordain them to " make payment thereof to the complainer, together with the expense of recovery, " if needful; and further, ordain this their sentence to be put into due and lawful " execution by officers of excise, constables of the peace, and decern."

The seizure was made in the end of August, or beginning of September, 1807; and on the 6th October, 1807, the day after the date of the decret, the goods were sold under it, and purchased up by the pursuers for £120, for which sum, with the £3 penalty, they brought their action, as above-mentioned, in the Court of Session, in Jan. 1809.

The defenders gave in preliminary defences, founded on certain statutes limiting actions against revenue officers, for matters done by them in that character, in certain cases, to three months, and requiring a month's notice to be given to the officer of the revenue before the action is brought. (23 Geo. 3, cap. 70. 28 Geo. 3, cap. 37.) They further stated, as a preliminary defence, that the Court of Session had no jurisdiction in the matter.

The preliminary defences were repelled by Lord Woodhouslee, Ordinary, and by the Court.

The cause then came on to be heard on the 28th Nov. 1812, before Lord Gillies, Ordinary, who pro-[416]-nounced the following interlocutor:—"sustains the reasons " of reduction, reduces, decerns, and declares, conform to the conclusions libelled: finds " the defenders also liable to the pursuers in repetition of the sum of £123 sterling, " libelled as having been illegally extorted from them by the defenders, and interest " thereof from 11th Nov. 1807, until payment, and decerns: assoilzies the defenders " from the claim of damages concluded for, and decerns: but finds them liable to the " pursuers in expenses," etc.

The pursuers acquiesced in this interlocutor, and, in the subsequent proceedings before the Court, claimed only the money extorted from them, and the reduction of the decret. The Court, on advising a petition and answers, adhered to the Lord Ordinary's interlocutor; and, afterwards, on a second petition, and after having directed the argument to be stated in memorials, they adhered to their former judgment. From this judgment the defenders appealed.

The following cases, respecting the jurisdiction of the Court of Session, with reference to revenue questions, decided before and since the Union, were stated in the printed case for the Respondents :

Cases decided before the Union:—Keith against Murray, 10th Dec. 1675—The Tacksmen of the Impost of Edinburgh against Young and Others, 2d Feb. 1681—Duke of Hamilton v. Laird of Clackmannan, 14th Dec. 1665—Lord Colville v. Feuars of Kinross, 15th December, 1666—Duke Hamilton v. Laird of Allardyne, 6th Dec. 1667—Stewart v. Aitchison, 17th Jan. 1668—Duke [417] Hamilton v. Maxwell, 29th Feb. 1688—Ingles v. Laird of Balfour, 25th June, 1668—Collector General of Taxations v. the Director of the Chancery, 22d Jan. 1669—Collector of Taxes v. Masters and Servants of the Mint-house, *eodem die*. Duke of Hamilton v. Feuars of the King's Property, 14th July, 1660—Pearson v. Town of Montrose, 23d June, 1669.

Since the Union, the following cases have been decided:—Case of William Reid, 19th July 1765 (Fac. Col. p. 41), in which the matter of jurisdiction was particularly considered by the Court—competition between Commissioners of Excise and Creditors of Earl of Northesk, January, 1724 (Dictionary, vol. 1, p. 25, *vide* King). Hamilton v. Legrand, 4th Dec. 1733—Ogilvie v. Wingate, 1st Feb. 1701—The Creditors of Burnet v. Murray and his Majesty's Advocate, 7th July, 1754—affirmed in the House of Lords, on 24th Feb. 1755—Locke v. Tweedie, 3d Dec. 1703—Robertson v. Jardine, 6th July, 1802—also the case of Guthrie v. Cowan, 10th Dec. 1807.

The Court of Session has an undoubted jurisdiction over justices of peace and other inferior courts, where they have exceeded their powers:—Countess of Loudon v. Trustees of Ayrshire, 28th May, 1793—Patillo v. Maxwell, 25th June, 1779.

Lord Advocate and Solicitor General (for the Appellants). 1st, Whether the Court of Session has jurisdiction.—2d, Whether the action ought not to have been brought within the three months limited by the statute.—3d, Whether a month's [418] previous notice ought not to have been given to the officer.

1st, That depends on whether these are revenue statutes. If they are statutes merely for the regulation of trade, the Court of Session has jurisdiction. If they are revenue statutes, the Court of Exchequer alone has the jurisdiction by stat. 6 Anne, cap. 25. The stat. 1 Jac. 1, cap. 22, if originally intended for the mere regulation of the trade, was made a revenue stat. by the act of 9 Anne, cap. 11; and the stat. 24 Geo. 3, cap. 19, declared that these extended to Scotland. They did so extend by the act of Union; but doubts had been entertained; the purpose of removing the doubts was the better collection of the revenue, so that this was equal to a positive declaration that these were revenue statutes. The Court of Exchequer was instituted by the 6th of Anne, cap. 26, which enacts (sect. 6), "that all and every the revenues and duties, etc. and all informations, actions, etc. touching or concerning the before-mentioned matters; and all prosecutions, remedies, and accounts, for or concerning the same, etc. shall be within the jurisdiction and authority of the said Court of Exchequer in Scotland, and hereby are annexed to the said Court." There is no statute giving any such jurisdiction to the Court of Session, and the only alteration has been with respect to the powers given to the justices. The cases of Ramsay v. Adderton, Kilk. 308; and Duke of Queensberry v. Officers of State, Fac. Coll. Dec. 15, 1807, were decided upon this view of the jurisdiction. (Lord Eldon, C. The question in this country in [419] such a case would be, not whether the Court of King's Bench could try whether the penalty had been incurred, but whether it might not say that the decret of the justices was bad on the face of it.) There was nothing in the summons respecting the irregularity, and no such question was argued, except that it was said that the justices had proceeded without evidence; and if so, the party had his remedy by appeal to the Quarter Sessions, or the Exchequer. But here he calls on the Court of Session to decide, not on the irregularity, but on the merits: and the Court, having sustained its own competency, then reduced the decret on the merits, and not on the form.—2dly, If these were revenue statutes, the action should have been brought within three months. This is made necessary by the statute 28 Geo. 3, cap. 37, which extends to Scotland, as was held by the Court of Session in Grant v. Harper, Feb. 1810. But fifteen months elapsed before the commencement of this action.—3dly, The pursuers did not give the month's previous notice required by the statutes to be given to the officer, if the act, whether wrong, or beyond his duty or not, was done in his character of excise officer. This was done in his character of excise-man.

With respect to the argument that the statutes did not extend to Scotland, because the proceedings there mentioned were unknown in Scotland, the case of *Surtees v. Allan* (2 Dow, 254), decided in this House, was an answer. This personal action is a nullity, because the money was paid into the Exchequer [420] before it was brought, *Scott v. Shearman*, 2 Black. 977.

The Court of Session may quash the order where the question is whether it is a revenue case or not; but it is clear that these are revenue statutes, and the language of the Court in *Ramsay v. Adderton*, and *Duke of Queensberry v. Officers of State*, might be quoted against their own judgment in this case. Supposing these to be revenue statutes, the action was clearly precluded by lapse of time and want of notice. The officer had no control over the justices; and he would be in a very hard situation if this personal action could be sustained against him while the decree was in force, and no sufficient ground to reduce it had been laid in their summons.

Sir S. Romilly and Mr. Warren (for the Respondents). This was merely an action to recover money, taken from the Respondents without lawful warrant, and therefore received to their use. And it is unnecessary to enter into the question, whether these were or were not revenue statutes; for, admitting all this, yet the decret being a nullity, they paid the money in their own wrong, and had a right to recover it. They say there is good ground in our summons to reduce the decret. But we did not know what the decret was. They refused to show it; and all we knew was, that under colour of some decree, they seized our property. The single question is, whether our money has not been taken from us without any authority [421] at all: and, even if these statutes do extend to Scotland, the limitation and notice do not apply to actions for the recovery of the money, but to actions of trespass or *tort*; *Wallace v. Smith*, 5 East, 115, 122 (*Irving v. Wilson*, 4 T. R. 485); and the reason for the notice is stated to be, that the officer may have an opportunity to tender amends. The summons originally was for production of the decret, repetition of the money, and damages. It was dismissed as to the damages by Lord Gillies. We submitted, and it stands as if there had been no claim for damages in the summons which relieves us from the obligation of notice. The decret could not be sustained as it was against *Anderson and Co.* This was decided in England in *Rex v. Harrison and Co.*, 8 T. R. 508, and there Lord Kenyon said that the Court was bound in duty to take care that these summary convictions were regular, whether the parties objected or not. How could they know on this conviction who was to pay the penalty? Of whom was it to be demanded? Who were *Anderson and Co.*? There is no information in this decret. The penalty is £3. But it might be £3000. There are at least as many defects as lines in it. But it will be sufficient to mention one or two. The evidence is not mentioned; and the decret being subject to appeal, how is the Court of Appeal to judge of it? According to their own books, this is a decisive objection. A complaint was laid before them, and what is the substance of the information received by them? Not a syllable appears. The seizure-maker is Archibald Douglas, and, having heard him, they condemn the leather to be roused [422] and sold for behoof of his Majesty and the seizure-maker, he being the only witness. Interest was an objection to a witness even here, much more in Scotland. In the English law the cases required that the name of the witness should be set out, that it might be seen that the penalty was not given to the witness. But here it is stated that it is so given. Then it does not appear that the examination was on oath. There must be some form of proceeding by which they are bound in Scotland, though there may not be the same strictness as here. The decret should also set forth the description of stock, that it might be seen that it was illegal stock. All these are fatal objections, and the conviction is a nullity, and we are entitled to a repetition of our money.—(Lord Eldon, C. This action is originally brought mixing *assumpsit* and *tort*. If the proceeding had been here, if you said a word about *tort*, you must have given notice. Can you, by slipping in a count for money had and received, get rid of that? Then, if this is *assumpsit* for £123, the question arises whether the payment was, or was not voluntary. If you brought your action for damages, after getting rid of the conviction, it must be within three months.) If it had been for damages alone, that would be the case, but the claim for damages has here ceased, and the action is for recovery of our money. (Lord Eldon, C. It was originally for more, and the demand is reduced by sentence; and the point they argue is, that as it was brought originally for more than the money paid, you should have

given a month's notice.) Our memorial below stated that all we [423] claimed was a repetition of our money. They rely on stat. 28 Geo. 3, cap. 37. But that could apply only if the action were brought in the Exchequer, which had jurisdiction, but not exclusively. All the terms of it were applicable to a court where the trial must be by jury. It never could apply to proceedings in the Court of Session. If the action had been brought in the Exchequer, they would have had the advantage of the statute. But it is brought in the Court of Session, to whose proceedings the statute cannot apply. (Lord Eldon, C. You bring your action fifteen months after the seizure, upon this state of facts. They purchased their own goods; and I do not find that you then questioned their right to retain the money; and the money is paid into his Majesty's Exchequer. Can you then, in an action against the individual who made the seizure, recover that money which, before he had notice of your purpose, he paid into the Exchequer? It has been decided in this country that the courts are to take notice of the time when the officer is called upon to pay the money into the Exchequer.) He paid it in his own wrong. (Lord Eldon, C. He could not help paying it.) They protested, and he might have stated that circumstance, and that it was alleged that the seizure and conviction were illegal. The delay was in consequence of applications to the Excise Office to settle the matter. The next objection was, that we ought to have appealed to the Quarter Sessions. But it has been decided in Scotland that the jurisdiction of the superior court is not taken away, unless by express words, or neces- [424] sary implication; *Guthrie v. Cowan*, Fac. Coll. 1807; and also in England, *Rex v. Jukes*, 8 T. R. 542, 544—*Rex v. Sparrow*, 2 Bur. 1042, 1st, Then we say that this decret was a nullity.—2d, That the statutes requiring notice and commencement of the action within three months cannot apply to a proceeding in the Court of Session.—3dly, That the jurisdiction of the Court of Session cannot be taken away by general words. But there is another objection, that the action is exclusively triable in the Court of Exchequer. It is clear that the Court of Session has jurisdiction over the proceedings of magistrates, as the Court of King's Bench has here; and, if a decret is appealed from, though an excise officer is connected with it, the Court of Exchequer has no more power to remove the cause than the Court of Exchequer has here to remove a cause from King's Bench, where the question is whether the powers given to magistrates have been properly executed. And by stat. 6 Anne, cap. 26, the Court of Exchequer is put on the same footing as the Court of Exchequer here. Suppose then an action of trespass brought against an officer of excise in the King's Bench, or Common Pleas, it was never argued that the officer could plead that he was an excise officer, and not bound to answer. A special application must be made to the Court of Exchequer, which might, if they thought proper, remove the cause by a proceeding in the nature of an injunction; not that the Court of King's Bench could not entertain the cause at all, but that the officer has the privilege of being sued in the Exchequer. That is the principle; *Crispe v. [425] Campbell*, 1 Anst. 205, N. If it be the privilege of the officer, as *Eyre*, Ch. B. there states it, the officer ought to apply for it. If he does not, he waives it. In this case they did not apply to the Exchequer, and waived the privilege; and there was one part of the case here so definitely belonging to the Court of Session, that the Court of Exchequer could not remove it: viz. the authority to quash or reduce the decret. (Lord Eldon, C. The summons claims two things, a repetition of the money, and damages. The Court has negatived the damages, and given you a repetition of the money and the whole of the expenses. You admit that the claim for damages cannot be supported; but then that demand occasioned almost all the other questions. But how could one part be removed and not the other?) The Court of Session has clearly the jurisdiction over the principal matter, viz. whether the magistrates have properly executed their powers, and the incident follows the principal matter. (Lord Eldon, C. How could the whole have been removed?)

Lord Advocate.—I cannot state any process for that purpose. If the Court of Exchequer were to issue an injunction, the consequence might be a general warrant to commit the Barons. The fact is, that the Exchequer has the exclusive jurisdiction in revenue matters; the Court of Session an exclusive jurisdiction in common questions; and the Court will consider whether it has jurisdiction without attending to any application by another [426] court, and such an attempt to interfere was never made. The reduction, if the grounds were that these were not revenue statutes, that they had fallen into desuetude, etc., belonged exclusively to the Exchequer: and the question is,

whether the ground was the irregularity of the decret, or that an excise officer had done wrong in that character. In the latter case the cause could be tried only in the Exchequer. With respect to the irregularity of the decret, it was sufficient to state that what they argued upon was a mere abstract which might be subsequently filled up; and, if the action had been properly brought, a full record would have been made up. This was clearly incompetent for defect of notice. They say, the claim for damages was abandoned, but then issue was joined on that, and the expenses, perhaps the whole of them, occasioned by it; for, if repetition alone had been demanded, *non constat* but the money would have been paid. They produced no authority for this form of proceeding in any case, and the principle was against it. As to the objection that the stat. 28 Geo. 3, cap. 37, did not extend to Scotland, or to actions in the court of Session, because the terms applied only to courts which might proceed by jury trial, the case of *Grant v. Harper* was an answer to that, and that of *Surtees v. Allen* (2 Dow, 254), decided in this house, after a most able argument by the Noble Lord who moved the judgment, had set the question at rest. The summons prayed to set aside the conviction, and for damages; and the laying it so was an admission, that till the conviction was reduced the pursuer [427] could not reclaim the money paid to his Majesty. (They say, that they did not know what the decret was till you told them.) They might have proceeded by petition or reduction. (Lord Eldon, C. One ground of complaint is, that the goods were sold without notice to them.) That is denied, and there is no evidence of it. The other party was entitled to a copy of the decret if he had applied for it. In the reduction he might have called for production of the decret; and if he then wished to proceed on the irregularity, all he had to do was to ask leave to amend his summons. (Lord Eldon, C. He goes on here guessing what it may be, and prays that it may be reduced for reasons set forth, and other reasons to be proponed on the discussion. Now this reason, that the decret was against Anderson and Co. was not specifically mentioned in the summons. Could that be taken advantage of under the words other reasons, etc.?)

It could not: *Newcastle Fire Company v. McMorran* (3 Dow, 264), where the policy was mislaid in the summons. In the *Queensberry* cases, the summons against the Duke of Buccleuch was amended after issue, and they might have amended their summons here so as to lay the ground of irregularity. But they had not done it, and there was no issue after the decret was produced. (Lord Eldon, C. What is the meaning of "illegally extorted" in the Lord Ordinary's interlocutor?) The meaning I take to be, that the justices were wrong in point of law, and that the officer had no right to make the seizure; and that the goods having been sold under [428] this illegal decret, the money paid for them was illegally extorted from the pursuers.

Lord Eldon, C. This was a proceeding for the reduction, if I may so express it, of a conviction against Anderson and Co. under certain acts of parliament, for carrying on the business of tanning and currying leather at the same time. There were several questions in the case. 1st, Whether this was a valid conviction, as being a conviction, in a criminal proceeding against Anderson and Co. 2d, It was objected not only that this was a conviction in a criminal proceeding against Anderson and Co. by that description; and that though a description of that kind had been held good in civil proceedings, it was necessary in a criminal proceeding to know with certainty who are or are not convicted; but also that the conviction was had for various other reasons apparent on the face of it. But the Appellants contended that, supposing they were wrong in all this, the Court of Session had not jurisdiction, however unjust the conviction in itself; and that the provisions of the statutes as to the time within which the action might be brought, and as to the month's previous notice to the officer had not been complied with. I have considered the case with a great deal of attention; and although there are difficulties in it, I am of opinion, upon the whole, that the Court below is in the right, and that there is not reason sufficient to reverse this decision.

Judgment AFFIRMED.

VOLUME VI.

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

RUSCOMBE, and Another,—*Appellants*; HARE,—*Respondent* [June 23, 1817;
Feb. 6, June 5, 1818].

[Mews' Dig. vii. 1184; see 2 Bli. N. S. 192; considered in *Jackson v. Innes*, 1819, 1 Bli. 104, at pp. 114, 124, 130, 131. See also *Plowden v. Hyde*, 1852, 2 De G. M. & G. 684, at p. 690.]

[Husband, having two mortgages on his estate, devises it to his wife, and dies. Wife, having married again, joins her second husband in another mortgage of the estate, consolidating the two former mortgages into one, at a different rate of interest, reserving the equity of redemption to the husband and his heirs, without any recital or special circumstance to show that it was the intention of the parties to make a new settlement of the estate. Husband, after death of the wife, deals with the property as his own, disposes of part for val. con. and dies. Bill by heir at law of the wife, against the purchaser, representatives of the husband, and mortgagee, to redeem; and decreed accordingly; and the decree affirmed in Dom. Proc., with alterations as to the manner of taking the accounts:—]

[The rule being that, where husband and wife mortgage [2] the wife's estate, and the equity of redemption is reserved to the husband and his heirs, without recital or special circumstance to show the intention to make a new settlement of the estate; the husband has the equity of redemption, as he before had the legal estate, only *jure uxoris*.]

The bill filed in T. T. 1800 in the Exchequer, against William House, Richard Ruscombe, Alexander Bruford, the younger, Francis Bruford, and William Long, stated, that Nicholas Hare, seized in fee of certain lands and other hereditaments, in the parish of Lyng, in Somersetshire, in 1749, by lease and release mortgaged the premises to William House for £800, with interest at four and a half per cent. and covenanted to levy a fine, *sur convauance de droit come ceo*, etc. the uses of which were to enure to House, his heirs and assigns, subject to the proviso for redemption; and the fine was duly levied. In 1762, Hare mortgaged the premises for a further sum of £450 and interest at four and a quarter per cent. to the same House.

Hare, afterwards, by his will, dated 21st June, 1757, devised all his freehold estates and lands of inheritance whatsoever, to his wife Mary Hare, her heirs and assigns; and made her sole executrix and residuary legatee. He died in 1764, leaving the said Mary Hare, the Respondent's mother, his widow, and the Respondent, then an infant of two

years of age, his son and heir at law, him surviving. Mary Hare proved the will, and took upon herself the execution.

[3] In 1765 Mary Hare intermarried with Alexander Bruford.

In 1766, by indentures of lease and release, made between Bruford and Mary his wife of the one part, and House of the other, reciting the indentures of 1749, and deed poll of 1762; and that the principal sums of £800 and £450 were not paid; the will and death of Nicholas Hare, the mortgagor: the marriage of Mary Hare with Bruford; and that the sums of £800 and £450 were then due from Bruford and his wife; but that all the interest had been paid up to that time by Bruford: it was witnessed, that for the better securing of the said sums of £800 and £450 with such interest for the same as thereafter mentioned; that is, interest at the rate of £5 per cent. Bruford and Mary his wife granted, bargained, sold, etc. the premises to House, discharged of the former proviso for redemption, but subject to another proviso, that in case Bruford should pay the two sums, amounting together to £1250 and interest at £5 per cent. at a time therein specified, House should reconvey the premises to the husband Bruford, his heirs and assigns for ever: and Bruford and Mary his wife, jointly and separately, declared and agreed, that all fines and recoveries, etc. theretofore levied and suffered of the said premises, and a fine then intended to be levied, and which Bruford covenanted for himself and his wife, to levy to House, should be and enure to the use of House, his heirs and assigns, subject to the condition of redemption.—This last-mentioned fine was afterwards levied.

House died in May, 1791, having made a will, [4] by which he appointed sole executor his son and heir at law, the Defendant William House, who duly proved the will, and became his personal representative.

Mary, the Respondent's mother, died in 1794, leaving him, her only child by Nicholas Hare, her heir at law. Alexander Bruford died in 1799, having previously made a will, appointing his sons, Alexander and Francis, his executors, and devising to them the premises before-mentioned, or part of them; and that they, and Ruscombe, and House, entered on and took possession, etc. And the bill prayed an account and redemption.

Ruscombe put in a plea and answer, and pleaded that he was a purchaser for val. con. without notice; and this being over-ruled, he further answered, that he agreed with Bruford for the absolute purchase of a part of the mortgaged premises; and that in 1797, in consideration of £2000 paid to House, and £600 to Bruford, House, at Bruford's request, by lease and release, released and conveyed, and Bruford granted, ratified, and confirmed, to Ruscombe and to Long, his trustee, the premises therein described to hold to Ruscombe and Long, to the use of such person, and for such purposes as Ruscombe should, by deed or will, appoint; and in default thereof to the use of Long, his heirs and assigns, during the life of Ruscombe, in trust for Ruscombe; and after the determination of that estate to the use of the right heirs of Ruscombe. The answer then stated that Ruscombe paid the money, was let into possession, and ever since held the property as his absolute estate of inheritance.

[5] House answered that the mortgage money had been paid, and that he claimed no interest in the estates. Long referred to the answer of Ruscombe, and stated that he was only a trustee for him.

Alexander and Francis Bruford submitted that, by the transactions of 1766, the estates vested absolutely in Alexander Bruford the elder; and that he alone, in 1789, mortgaged the premises to House for a further sum of £300, being the arrear of interest accrued, due on the said sum of £1250; and that in 1797, part of the estate had been conveyed to Ruscombe, as stated in Ruscombe's answer; and that by will, dated 1798, Bruford the elder had devised the rest of the estate to them.

It was ordered by consent that the Respondent should admit at the hearing the several deeds and will mentioned; and no witnesses were examined on either side.

The Court, on the 17th December, 1813, declared that the Plaintiff (Respondent) was entitled to redeem; and decreed an account of what was due for principal and interest on the two mortgages of 1749 and 1762, such interest to be computed from the death of Alexander Bruford, and that, on payment thereof, the Defendants, Ruscombe, Bruford, etc. should reconvey the estate, free from all incumbrances, etc.

From this decree Ruscombe and A. Bruford appealed.

Mr. Martin (for Appellants). This case is distinguishable from that of *Jackson v.*

Innes.* The husband was bound only to keep down the interest [6] of the debt. He did not represent Hare; and yet, in 1766, he made himself liable to pay the debt, which it was not reasonable he should do without some benefit. This was not like the case of pledging the wife's estate for the husband's debt; but it was the case of a husband binding himself to pay the debt of a wife; and it may be presumed that the wife, in consideration of his making himself so liable, intended to transfer to him the equity of redemption. Unless this was the intention, one cannot well tell why the deed of 1766 was executed, as there were no arrears of interest, and it was not therefore likely that the mortgagee would have called for this deed. Unless then a recital of the intention to re-limit to the husband is absolutely necessary, this is as favourable a case as can well be. The ground of the decree in *Jackson v. Innes* was, that the intention of the parties was merely to render the wife's estate a security; and that no benefit was intended for the husband beyond the pledge of the wife's estate for his debt (*Cooth v. Jackson*, 6 Ves. 12. *Innes v. Jackson*, 16 Ves. 356). But here, unless he was to have the benefit of the equity of redemption, he made himself liable for the wife's debt for no consideration at all. (Lord Eldon, C. The deed recites that the wife was not only devisee, but executrix and residuary legatee of Hare, her former husband; and then it states that the wife and her husband, Bruford, were indebted to House, which he could not be unless he had, along with his wife, personal assets of Hare.) The only reason for making him liable, unless he was to have this benefit, would be that the estate was not sufficient security, but it was sufficient; and the presumption [7] is, that he was made liable, because it was intended that he should have the equity of redemption.

The decree was, at any rate, erroneous in the directions respecting the computation of interest: Ruscombe had a right to say that he should be in as good a situation as House; and what would be the amount of the argument as against House? True, Bruford ought to have paid the interest up to the time of his death. But was House bound to call for the interest? It would be a good answer for House, that he was not bound to call for it from year to year; and if so it was a good answer for Ruscombe. We are therefore entitled to the whole of our interest, and not merely to interest from the time of Bruford's death—even if the House should be against us on the principal point.

Mr. Heald. In *Innes (Cooth) v. Jackson* it was stated to be a rule, that where the wife's estate is mortgaged without a recital of any other purpose, and the equity of redemption is reserved to the husband, he shall be considered as a trustee for the wife, and her heirs. (Lord Eldon, C. I think there is some case in which it is laid down as a rule that when the wife's estate is mortgaged, and nothing is recited except the purpose of securing the repayment of the money, and the other covenants are conformable, and the equity of redemption is reserved to the husband, the Court considers him as entitled to the equity of redemption as he was before seized of the legal estate, *jure uxoris*. But there is some speciality in *Jackson v. Innes*.) In *Broad v. Broad* (2 Ch. Ca. 98, 161) such a rule is presumed; but there [8] was a positive agreement in that case, and the decision would be the same whether there was such a rule or not. But, suppose that such a rule does exist, the question is, whether it does not rest on the principle mentioned by Lord Thurlow in *Clinton v. Hooper*, 3 Bro. Ch. Ca. 201. On referring to all the cases, he laid down this rule, that where there is a mortgage of the wife's estate by husband and wife for the husband's debt, she is a surety for her husband. That is the principle; and her estate shall be exonerated out of the husband's assets. So that on that ground it is rather probable that equity would lay down such a rule as is stated in *Innes (Cooth) v. Jackson*. But is that to extend to cases where the debt is that of the wife? It must be so held if this decree should be affirmed, as in this case the debt is that of the wife, not that of the husband. In *Lewis v. Nangle*, Amb. 150, the facts are shortly stated; but it is to be collected from that case that the rule depends on the application of the money; so that the rule is to be governed by the equities of the case. Then how would it be if she clearly meant to give the equity of redemption to her husband? (Lord Eldon, C. Lord Thurlow's notion was, that the intention must be recited.) The question is whether, if there is such a rule, it must

* Heard in Dom. Proc. March 3, 6, 1815, but not decided.—*Vid.* *Innes v. Jackson*, 16 Ves. 356.

not bend to circumstances. In *Clinton v. Hooper*, where the wife's estate was mortgaged, and the husband received the money; and she, having agreed during coverture, and confirmed the agreement when a widow, that her estate should continue liable; it was held that the estate was not to be exonerated out of the husband's [9] assets. (Lord Eldon, C. It is very important that it should be settled by this House, whether there is such a rule. Lord Thurlow said that the wife's intention, as recited, should govern. But suppose the rule to exist, yet there may be a doubt whether it applies in *Innes (Cooth) v. Jackson*.) That is what I have been endeavouring to get at: that the rule is not inflexible. Then what are the circumstances that may alter and vary it? Suppose the equity of redemption reserved to a stranger; or is the rule confined to husband and wife? But here the great ingredient is, that it was the wife's debt. The husband might say, "I am a purchaser for valuable consideration of this equity of redemption; for although I possessed assets of the former husband, at the time "I married Mrs. Hare, it does not follow that I possessed assets of his to pay this "interest for ever, and yet I covenant to pay the interest." The rule therefore does not apply to this case. (Lord Eldon, C. It is proper that the Register's Book should be searched for *Broad v. Broad*, and *Clinton v. Hooper*. Lord Redesdale. Yes; for the Chancery cases are very incorrect. Lord Eldon, C. This is the debt neither of husband nor wife, but that of the estate: and neither the husband nor wife, in respect of the estate, were liable, unless in as far as she possessed assets of Hare; and some inquiry ought, perhaps, to have been directed as to that fact.) Probably Hare, the former husband, did not leave assets sufficient to pay the debt, otherwise he would not have borrowed money on mortgage: and the wife, if she had received assets, would probably have re-[10]-deemed soon after Hare's death. Then comes the covenant by him, for himself and his wife, for further assurance, which is quite consistent, every thing showing that he gave a valuable consideration for this equity of redemption. It might be said that all this was not for the benefit of the wife. But still he gave that consideration; and some part of the benefit accrued to the wife; for House might say, "Pay me the money, otherwise I will foreclose:" so that the estate might have been preserved by his becoming liable to pay the debt, which was a benefit to the wife. (Lord Eldon, C. Did the Court, without difficulty, apply the same rule to the case of a purchaser as to that of a representative?) It was said by the present Ch. J. C. B., then Ch. B., that this was a mortgage of the wife's estate, and, on that ground, within the rule.

Then, with respect to interest, *Ruscombe* was a purchaser for val. con. and stands in the same situation as that in which *House* would have stood: and is entitled to interest from the time it was paid: and the decree is, at least in that respect, erroneous.

Mr. Agar. This case was different from that of *Innes (Cooth) v. Jackson*. (Lord Eldon, C. It was a question there whether it was merely a mortgage, or also a new settlement.) Then here, it is clear, there was not the least intention that this should be new settlement of the property. It appears from the deed of 1766, that the interest on the previous mortgage was four and a half per cent.; and that the object of the deed was to raise the interest to five per cent. It was "for better securing [11] the "repayment of the money, and such interest as hereinafter is mentioned," *i.e.* at the rate of five per cent; and can it be said that the mere reservation of the equity of redemption to the husband, particularly to him, his heirs, and assigns, without any thing more, gives to him alone the wife's estate? But had the estate become his at law? The proviso is, that "in case Bruford, his executors, administrators, or assigns, "should pay the said two several sums of £800, and £450, making together the sum "of £1250, and all interest thereon, at the time therein mentioned, to the said William "House, his heirs, executors, administrators, or assigns, the said William House, his "heirs and assigns, should at any time or times thereafter, etc. release and convey the "said messuages or tenements, lands and premises, etc. unto the said A. Bruford, his "heirs and assigns, for ever." It was only on condition of his payment at the time mentioned, that the estate was to be conveyed to him, and to become his at law. But he had not paid at the time. He did not perform the condition, and had no estate. And yet this deed was to deprive her and her heirs of the estate! In the words of a decision in another Court, it was only by declaration manifestly plain, or by necessary implication, that she could disinherit her heir at law. If there is a doubt, the heir

takes : and a fine levied with a different intent could not pass the estate to the husband. The case of *Lewis v. Nangle* had nothing to do with this, as the question there does not arise here. We do not ask him here to exonerate. The simple point is, did she mean to give [12] up her whole interest in the estate to him? In *Corbet v. Barber*, 1 Anst. 138, 141, the late Ch. B. (Thomson) says, that where a fine is levied with a different intent, it had never been permitted to pass the estate from the wife to the husband : and he was fully borne out in this statement by the authorities : *Jackson v. Parker*, Amb. 697—*Astley v. Lord Tankerville*, 3 Bro. C. C. 545. And there is no case impugning that doctrine. Can this reservation, then, of the equity of redemption, with a proviso, give the estate to the husband, especially when, as here, he has not paid according to the proviso? In *Clinton v. Hooper*, 13 Bro. Ch. Ca. 201 ; and 1 Ves. jun., 173 ; the question was merely whether the wife's estate should be exonerated, which does not arise here. Then as to *Lewis v. Nangle*, reported in *Ambler*, 150 ; and in a note to the case of *Evelyn v. Evelyn*, in Cox 2 P. Wms. 665 ; and in Cox Ch. Ca., it appeared from the Register's Book that the husband had laid out £800 in improving the estate. The question was, whether the wife's estate should be exonerated. But we ask no exoneration here, but to be permitted to redeem.

They ask why the mortgage of 1766 was granted, and the fine levied : I answer, to give a higher rate of interest. It fell from one of your Lordships that the covenant for further assurance was by Bruford and the wife, and that if he alone obtained the fee simple she could make no farther assurance, and the covenant would so far be absurd. The effect of their argument would be to make this a deed without consideration, which could not stand from the [13] wife to the husband. The Appellant had notice of all these circumstances, and could not be in a better situation than the person from whom he derived his title.

Mr. Martin (in reply). The question is, whether the husband intended to give the wife a beneficial interest : for it is settled that a wife, if she pursues the proper forms, may pass her estate from herself and her issue, if it is clear that she so intended ; and a large proportion of the estates in the whole country have been acquired by such titles. I know of no case exactly like this ; and none of the cases cited on the other side will bear them out. It is stated in the deed of 1766 that all arrears of interest on the original mortgages were paid ; so that there was no reason for any further security, unless it was intended to new model the estate by giving the equity of redemption to the husband. House had the mortgaged estate in fee, and as far as he was concerned, this fine was not at all necessary ; and if the object had been merely to increase the rate of interest, it would have appeared by a recital in the deed that he had called for it, and threatened to call in the mortgage money. There is, however, no such thing. But suppose the object had been to increase the rate of interest, Bruford binds himself to pay it, and assumes the liability to discharge the principal. If these facts had been recited on the face of the deed, they would have shown a sufficient consideration. But a consideration was not necessary. The question is, what was her intention : and there is no instance where a woman has been relieved against a fine except where improper means [14] have been used to compel her to levy it. The principle is, the wife's intention : and all the cases on the other side are cases where the wife's estate had been pledged for the debt of the husband ; and the dictum of Thomson, Ch. B. might be dismissed with that observation. The mortgage of 1766 could have had no object unless the intention was that the equity of redemption should go in a different way. The mortgagee got no new remedy : but, without this, the husband could not have the interest : and to give him that interest must have been the purpose. The only new operation is the giving him the equity of redemption. There was a farther mortgage of the estate by the husband alone twenty-eight years after ; and that, if she was apprized of it, was an acknowledgment on her part that the husband had the equity of redemption. (Lord Eldon, C. Was she a party to that deed?) No, it was not necessary, if she had before given the equity of redemption to her husband. The case of *Jackson v. Parker* is rather in our favour, than against us, as it seems to have been decided on the intention. The case in 1 Vern. 213, was one in which the husband got the money. Here he had nothing, and was a loser unless he got the equity of redemption : and the fact was, although it could not be now brought before the House, that the wife had no assets of her former husband. In the case of Lord and Lady Huntington (1 Bro. P. C. 12 Vern. 437), the estates were originally the wife's, and it appeared

that for his own purposes he had prevailed on her to join in a revocation of the old, and limiting new uses. That there was the case of a woman pledging her [15] estate for the debt of her husband, and *ultra* that purpose no interest was conveyed to the husband. But here there was no necessity, no object for the mortgage of 1766, except to give the husband this interest. It seems to have been a postnuptial settlement proceeding on a previous arrangement; and the subsequent mortgage shows the understanding of the family that the husband had the equity of redemption.

(Feb. 6, 1818.) Lord Eldon, (C.). The leading question here is, whether the husband had a title to convey; 2d, whether, if he had no title, the persons claiming under him can, as against the heir at law of the wife, stand in a situation better than that in which the husband would have stood.

I do not mean, at present, to call upon your Lordships for any opinion upon these points; as much of the argument was addressed to the House, in the presence of a noble Lord who, I have some reason to believe, had formed an opinion upon the case; and I am anxious that the opinion should be known, not so much with reference to the present case, as with regard to another case, that of *Cooth v. Jackson* (16 Ves. 356), decided by myself; a case, however, which appears to me very different from the present case; and I ought in justice to say that, although on the best consideration I could give to the case, I thought the decision right, yet there are many important considerations to be attended to before that judgment can be either affirmed or reversed.

Now what are the facts of this case? Nicholas Hare, being seized in fee simple of the premises in [16] question, in 1749 mortgaged the same by lease and release to William House for £800, and there was a covenant to levy a fine, the uses of which were to ensure to House, his heirs and assigns, subject to the proviso for redemption, and the fine was accordingly levied. In 1762, Hare by a deed poll mortgaged the estate to House for a further sum of £450.

Under these circumstances he made his will in 1757, and devised all his lands to his wife, describing her as his dear and beloved wife, and made her his executrix as well as devisee; and, what both the printed cases have omitted to mention, she was his residuary legatee. They have also omitted to mention the rates of interest for the £800 and the £450, which were different from the rate of interest in the subsequent mortgage of 1766. And it will be consolation to me during my remaining life, knowing that it has been said that I have been dilatory in decision, that I have, by looking at the original instruments, saved to the right owner many a landed estate which would otherwise, probably, have been given to his adversary.

Hare died in 1764, and in 1766 it appeared that his dear and beloved wife had married in the interval between these two periods. She being residuary legatee, was liable for the debts of the testator to the amount of the assets. If there was no personal estate, then she could not be personally liable; and the real estate was the only debtor. She could be personally liable only in respect of the personal assets or rents and profits of the real estate. And if up to 1766 she continued liable in respect of the assets received by her, [17] Bruford, by marrying her, also became liable to the amount of the assets. I would here state, that we cannot attend to a suggestion made at the bar, that there were no assets; for where it appears on the face of the instrument that he is a debtor, and acknowledges himself as such, it must be so taken, unless there is the clearest evidence to the contrary.

And now see the importance of examining the original instruments. The deed of 1766 recites the mortgage for the £800, and then the second mortgage for £450 with interest at £4 5s. per cent: and then it states that all interest was paid up by Bruford, but that the principal sums were due; and then the motives for executing this deed of 1766 were stated; and these were for the better securing the principal sums, "and "such interest as hereinafter is mentioned," and that was the increased interest of five per cent.

Now if it clearly appears to have been the intention of the wife, that he should have the equity of redemption, he must have it. But still the question is, what Courts of Equity have agreed to consider as evidence of that intention manifested on the face of the instrument from which you are to draw your conclusion. I perfectly recollect what fell from the lips of Lord Thurlow, though it is a quarter of a century ago, upon that point: that where the equity of redemption is, in these cases, reserved to the husband,

if there is no other evidence of the intention, and if the recital shows that the instrument is framed for other purposes, the husband is seized of the estate which he before had; [18] with this difference, that if he before had the legal estate *jure uxoris*, he afterwards had the equity of redemption, but still *jure uxoris*: or if the estate which he before had *jure uxoris* was equitable, so it remained equitable, but still *jure uxoris*: and that equity throws this protection round the wife, that the deed shall operate no further than its particular purpose, unless there is some recital of intention that the husband should take the benefit. But there may be complex cases, such as some of those which have been cited, very different from the case of a simple reservation of the equity of redemption to the husband, where the estate belonged to the wife. And yet it appears that, even in these complicated cases, the rule of law prevailed.

A good deal has been said, about whether the debt is that of the husband, or the wife, or of both. Now this is a case where, if there were no assets, it was not the debt of either. If there were no personal assets, the debt was charged only on the real estate; and if the testator had other real estates, his covenant would have bound the other real estates; but the wife would not be the debtor. Then it will result to this. A person mortgages his estate for sums at a certain rate of interest and dies, leaving his wife, his devisee, executrix, and residuary legatee. The wife marries again, and along with her husband makes another mortgage of the premises for the same sums: the instrument reciting that the interest was paid up to that time, but that the principal sums were due; and that the purpose was for better securing the payment of the [19] principal sums and a higher rate of interest: and for what? for any other purpose? no other purpose. And then it is asked what was the object of the mortgage. The answer is, that it was the better securing the payment of the principal, and varying the rate of interest. You may say, that it was for the further purpose of reserving the equity of redemption to the husband. But the question comes back again to this; whether there are any special circumstances to show that the intention was to go beyond the purpose recited in the deed.

Then we have to consider what was the effect of the fine, and with respect to that the same answer may be given. The fine is levied only for the same purpose for which the mortgage was made. If a fine by him alone could answer the recited purpose, the circumstance of her joining with him to levy the fine, might be evidence of her intention to waive her right. But that is not the case: for, the estate being that of the wife, whether the purpose was to vary the rate of interest or to entitle him, if a fine was necessary, the purpose could not be effected unless she joins him in the assurance on record.

Then it is said that he made this his debt. But we know that it often happens that, although a man covenants for payment to a creditor, and makes it his debt as to the creditor; yet, as between him and the estate, it is not his debt, but that of the estate. Hare mortgaged the estate. You now demand your money: but I will be security to you the mortgagee, and have my demand over against the estate.

[20] So it will come to this: an estate mortgaged for two sums is devised to the wife: she marries Bruford: and they acknowledge that they are indebted, which they could not be unless they had assets of the former husband, and make another mortgage deed, consolidating the two former mortgages, and reciting that the purpose is to give a higher rate of interest: and there is nothing to show that she meant to give her husband the benefit of her estate, except the equity of redemption reserved in this way. Whether that is sufficient to give the equity of redemption to the husband is now to be determined. I do not press for your decision on that point at present; but merely throw out these considerations generally.

On the 16th Feb. 1818, the Lord Chancellor stated the concurrence of Lord Redesdale in the opinion that the decree ought to be affirmed.

(June 5, 1818.) Lord Eldon (C.). The decree in this case was right, in so far as it declared that the heir at law of the wife, whose estate had been mortgaged, was entitled to redeem, although the equity of redemption had been reserved to the husband and his heirs. Here there is no recital, no special circumstance from which it can be concluded that the real intention was to make a new settlement of the estate—nothing to take it out of the rule that where the husband is seized of the legal estate *jure uxoris*, and husband and wife join in a mortgage of the estate—reserving the equity of redemption to the husband and his heirs, the husband [21] has the equity of redemption, as he

before had the legal estate, *jure uxoris*; nor any such special circumstances as those in the case of *Jackson v. Innes*, the name of which in the Court of Chancery is *Cooth v. Jackson*.

But on looking at the record it appears that there are some errors in the terms of the decree which ought to be corrected. There was one mortgage for £800, and another for £450 by the former husband; and these were, in 1766, consolidated into one by the wife and her second husband, at a different rate of interest. The decree has directed the account to be taken on both the mortgages, as if existing separately, instead of being consolidated into one at a different rate of interest. This is a mistake; the account ought clearly to be taken on the consolidated mortgage. The wife died in 1794, and the husband in 1799; and the decree directed that the interest should be computed from the death of the husband. While both the wife and husband lived they were not bound to keep down the interest: but when the wife died the husband became tenant for life by the courtesy; and, as tenant for life, was bound to keep down the interest from that time. But the decree directs no account of the interest till the death of the husband.

Another consideration is, that as they were not bound to keep down the interest on the mortgage of 1766, how is that to be provided for? The arrear of interest at the death of the wife must be converted into principal, and considered as a charge on the estate, and the estate must answer it. So that the arrear of interest is to be converted into [22] principal at the death of the wife, and to be considered as a charge on the estate; and from that time the husband was bound to keep down the interest.

Another mistake is that *Ruscombe* is ordered to reconvey the estate free from all incumbrances. It ought to be free from all incumbrances created by himself.

Decree affirmed, with alterations as above.

IRELAND.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

SHULDHAM,—*Plaintiff* (in Error); SMITH (Lessee of Mathews),—*Defendant* (in Error): and SMITH,—*Plaintiff* (in Error); SHULDHAM,—*Defendant* (in Error) [April 25, 28, July 8, 1817; June 3, 5, 1818].

[Devise of real estate in trust to pay the clear rents, issues, and profits, and in certain proportions, to certain persons in the will mentioned, for life: and then testator proceeds to devise as follows:—"And from and after the "death of the survivor of them the said L. S." etc. (naming the several persons to whom the above life interests were given) "then I give and "devise all and singular the said manor, messuages, lands, etc. unto all and "every the children of my late sister E. C. by her three several husbands" (naming them), "that shall be then living, and their heirs and assigns for "ever, equally to [23] be divided between them as tenants in common, and "not as joint tenants; and if there should be but one such child, and no "issue of any of the other children then living, then, and in that case, I "give and devise all my said real estates in Ireland unto such surviving "child, his or her heirs and assigns for ever." The event which happened was that, at the death of the surviving annuitant, there was only one child of the sister E. C. then living, but that there was issue of several of the other children then living. Held by the House of Lords, in concurrence with the unanimous opinion of the Judges attending, that there was an intestacy, from the death of the surviving annuitant; the event which happened not having been provided for.]

This was an ejectment on the title, brought in or as of Hilary Term, 1811, in the Court of Exchequer, in Ireland, by Elizabeth Mathews, widow, by John Smith, her

feigned lessee upon her own demise only, for the recovery of all that and those the town and lands of Balleymulvey, and other lands in the declaration in ejectment particularly mentioned, situate in the County of Longford, in Ireland, to which ejectment defence was taken generally by the Plaintiff in error in Hilary Term, 1811; and at the Summer Assizes, 1811, the same came on to be tried by a special jury of the county of Longford, at Longford, when the said jury found a special verdict to the substance and effect following; that is to say,

“ That Pooley Molyneux was seized of the lands, tenements, and hereditaments mentioned in the declaration within-written, in his demesne as of fee, and being so thereof seized on the 12th day of April, in the year of our Lord 1767, duly [24] made his last will and testament, signed by him in the presence of three credible subscribing witnesses, and subscribed by the said three credible witnesses in his presence, and thereby gave and devised in the words following;—‘ As touching and concerning my temporal estate and effects, I devise all and singular my manors, messuages, lands, tenements, hereditaments, and real estate whatsoever in the kingdom of Ireland, which I shall be seized or possessed of, interested in or entitled unto at the time of my death, unto my nephew, Lemuel Shuldham, Esquire, and his heirs and assigns for ever; upon the trusts, nevertheless, and to and for the several intents and purposes hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in trust, after deducting all taxes, repairs, receiver’s or bailiff’s salaries, and all outgoings incident to the said estate, to divide the clear residue of the yearly rents, issues, and profits thereof into twenty equal parts or shares, and to pay the same unto the several persons hereinafter mentioned, to wit, six twentieth parts or shares of the said clear residue of the yearly rents, issues, and profits of my said real estates unto himself the said Lemuel Shuldham, or his assigns, for and during the term of his natural life, by equal half-yearly payments; six other twentieth parts or shares thereof to my sister, Dorothy Molyneux, or her assigns, for and during the term of her natural life, by equal half-yearly payments: two other twentieth parts or shares thereof to Mrs. Rebecca Shuldham, or [25] her assigns, for and during the term of her natural life, by even half-yearly payments: one other twentieth part or share thereof unto my niece, Sarah Curtis, or her assigns, for and during the term of her natural life, by equal half-yearly payments: one moiety or half part of one other twentieth part or share of the said clear residue of the said yearly rents, issues, and profits, unto my niece, Nabby Jackson, or her assigns, for and during the term of her natural life, by equal half-yearly payments; and the other moiety or half part of the said last-mentioned twentieth part or share unto my niece, Catherine Hewetson, or her assigns, for and during the term of her natural life, by equal half-yearly payments: one other twentieth part or share of the said clear residue of the said yearly rents, issues, and profits of my said real estate unto my niece, Catherine Smith, or her assigns, for and during the term of her natural life, by equal half-yearly payments: two other twentieth parts or shares thereof unto my niece, Eleanor Shuldham, or her assigns, for and during the term of her natural life, by equal half-yearly payments; and the remaining twentieth part or share of the said clear residue of the yearly rents, issues, and profits of my said real estate, unto my servant, David Davies, or his assigns, for and during the term of his natural life, by equal half-yearly payments. Provided always, and it is my true intent, that in case any of the said several persons to whom I have directed such particular parts, shares, and pro-[26]-portions of the clear residue of the yearly rents and profits of my said real estates to be paid as aforesaid, shall happen to die, either before me or in the life-time of my said nephew, Lemuel Shuldham, then I will and direct that the said part and share, parts and shares of the said several person and persons so dying, shall go and be had, received, and taken by my said nephew, Lemuel Shuldham, or his assigns, for his natural life. Provided also, and it is my further intent and meaning, that when and as any of the said several persons hereinbefore named, who shall survive my said nephew, Lemuel Shuldham, shall happen to die, then I will and direct that the part, share, and proportion of the said clear residue of the rents and profits of my said real estate, hereinbefore directed to be paid to him, her, or them so dying, shall go and belong to and be divided between the survivors or survivor of the said several persons share and share alike, and in equal parts, shares, and proportions, and from and after the death of the survivor of them, the said Lemuel Shuldham, Dorothy

“ ‘ Molyneux, Rebecca Shuldham, Sarah Curtis, Nabby Jackson, Catherine Hewetson,
 “ ‘ Catherine Smith, Eleanor Shuldham, and David Davies ; then I give and devise all
 “ ‘ and singular the said manor, messuages, lands, tenements, hereditaments, and real
 “ ‘ estate whatsoever, in the said kingdom of Ireland, unto all, and every the children
 “ ‘ of my said late sister, Elizabeth Curtis, deceased, by her three several husbands,
 “ ‘ Kelly, Esq. the Reverend [27] Shuldham, and Butler,
 “ ‘ that shall be then living, and their heirs and assigns for ever, equally to be divided
 “ ‘ between them as tenants in common, and not as joint tenants ; and if there should
 “ ‘ be but one such child, and no issue of any of the other children then living, then,
 “ ‘ and in that case, I give and devise all my said real estates in Ireland unto such
 “ ‘ surviving child, his or her heirs and assigns for ever : Item, it is my will, and I do
 “ ‘ hereby authorize and empower my said nephew, Lemuel Shuldham, his heirs and
 “ ‘ assigns from time to time, as occasion shall require, during the continuance of all or
 “ ‘ any of the trusts hereby in him or them reposed, to grant leases of all or any part
 “ ‘ of my said real estates in Ireland, for three lives or thirty-one years, at the best
 “ ‘ improved yearly rent that can be had or gotten for the same, without taking any
 “ ‘ thing by way of fine or income, for, or in respect thereof, so as such leases do
 “ ‘ commence in possession and not in reversion, or by way of future interest, and so as
 “ ‘ the same be not made dispunishable of waste by any express word therein contained,’
 “ ‘ as it did by the said will produced in evidence to the jury aforesaid more fully
 “ ‘ appear.

“ That the said Pooley Molyneux afterwards, that is to say, on the day of Octo-
 “ ber, in the year 1772, died, seized of such his estate, of and in the lands, tenements,
 “ and hereditaments aforesaid, and in the said declaration mentioned, without having
 “ revoked or in any manner altered the said will ; after whose decease, the said Lemuel
 “ [28] Shuldham, the trustee named in the said will, entered into the said lands, tenements,
 “ and hereditaments, in the said declaration mentioned, and was seized thereof as the
 “ law requires.

“ That the said Lemuel Shuldham, Dorothy Molyneux, Rebecca Shuldham, Sarah
 “ Curtis, Nabby Jackson, Catherine Smith, and Eleanor Shuldham, and David Davies,
 “ in the said will mentioned, died previous to the year 1809 ; and that the said Cathe-
 “ rine Hewetson, in the said will mentioned, having survived them, died on the 15th
 “ day of May, 1809.

“ That the said Pooley Molyneux never was married, but had three sisters, viz. Mary
 “ Molyneux, Dorothy Molyneux, and Elizabeth Butler, and had no brother, and that at
 “ the time of his making his said will, the said Mary Molyneux, and Elizabeth Butler,
 “ were dead ; and that the said Mary Molyneux died without issue ; and that the said
 “ Dorothy Molyneux, sister of the said Pooley Molyneux, survived the said testator and
 “ died without issue ; and that the said Elizabeth, the sister of the said Pooley Moly-
 “ neux, was married three times, that is to say, the said Elizabeth was first married in
 “ the year 1712 to Bryan Kelly, who died in the year 1716 ; and the said Elizabeth
 “ was afterwards married in the year 1718 to Samuel Shuldham, who died in the year
 “ 1721 ; and the said Elizabeth was afterwards married in the year 1732 to Buckley
 “ Butler.

“ That the said Elizabeth had issue by the said Bryan Kelly, two daughters, Cathe-
 “ rine Kelly and Elizabeth Kelly, her only issue by the said [29] Bryan Kelly, and
 “ that the said Elizabeth Kelly, her daughter, intermarried in the year with
 “ William Hewetson ; and that the said Elizabeth Hewetson, otherwise Kelly, died after
 “ the time of the making of the said will, but previous to the said testator's death, to
 “ wit, in the year 1768, leaving children by her said husband, namely, Brimsley
 “ Hewetson, who is since dead, leaving issue still living, Catherine Hewetson, otherwise
 “ Nicholson, who is also dead, leaving issue still living ; and Abigail Hewetson, other-
 “ wise Jackson, who is also deceased, leaving issue still living ; and that the said last-
 “ mentioned Catherine Kelly, in the year intermarried with John Mewkins,
 “ and after his death with James Smith ; and that the said last-mentioned Catherine
 “ Kelly died after the testator, to wit, in the year 1778, leaving children by her said
 “ two husbands, some of whom left issue, who are still living.

“ That the said Elizabeth, the sister of the said Pooley Molyneux, had issue by
 “ Samuel Shuldham her second husband, three children, namely, Lemuel Shuldham,
 “ Molyneux Shuldham, and Rebecca Shuldham ; and that the said Molyneux Shuldham

“ died in the year 1798, unmarried and without issue, and that the said Rebecca Shuldham died in the year 1785, unmarried and without issue, and that the said Lemuel Shuldham, the son of the said Elizabeth, died in the month of October, in the year of our Lord 1775, leaving lawful issue, Elizabeth Shuldham his eldest daughter, Pooley Shuldham his eldest son, and the said Eleanor Shuldham his third child, [30] who died in his the said Lemuel's life-time; and that the said Elizabeth, daughter of the said Lemuel Shuldham, intermarried in the year 1771, with Folliott Warren, and had by him several children, some of whom are now living, and that the said Pooley Shuldham died in the year 1793, leaving John Brady Shuldham the Defendant, his eldest son and heir at law, and several other children, and the said John Brady Shuldham is also heir at law of the said Pooley Molyneux of the said Elizabeth Molyneux, otherwise Butler, of the said Dorothy Molyneux, of the said Lemuel Shuldham, Rebecca Shuldham, and Pooley Shuldham.

“ That the said Elizabeth, the sister of the said testator Pooley Molyneux, did, after the death of her second husband Samuel Shuldham, intermarry with Buckley Butler, and that she, the said Elizabeth, had by the said Buckley Butler issue, two daughters, namely, Sarah Butler and Elizabeth Butler; and that the said Sarah died in the year 1802, without issue, and that the said Elizabeth, the daughter of the said Elizabeth and Buckley Butler, married in the year 1755 with William Robinson, who died in the year 1758, by whom she had issue, one son, William Robinson, who is living; and that the said Elizabeth Robinson, after the death of the said William Robinson her husband, that is to say, in the year 1764, intermarried with Samuel Mathews, by whom she had issue, several children now living, and that the said Samuel Mathews died in the year 1785; and that the said Elizabeth [31] Mathews is the lessor of the Plaintiff in this action.

“ That the said Elizabeth Mathews was the only child of the said Elizabeth Butler, the sister of the said Pooley Molyneux living at the time of the death of the said Catherine Hewetson; and that all the children of the said Elizabeth, the sister of the said Pooley Molyneux, died in the life-time of the said Catherine Hewetson, save the said Elizabeth Mathews, who survived the said Catherine Hewetson, and that there are issue of several of the said children now living.

“ That the said Catherine Hewetson, otherwise Nicholson, Abigail Hewetson, otherwise Jackson, Sarah Mewkins, otherwise Curtis, and Eleanor Shuldham, four of the annuitants in the said will, named, were children of the children of the said Elizabeth, the sister of the said testator; and that the said Catherine Hewetson survived the said Lemuel Shuldham, Dorothy Molyneux, Rebecca Shuldham, Sarah Curtis, Nabby Jackson, Catherine Smith, Eleanor Shuldham, and David Davies.

“ That at the time of the death of the surviving annuitant, there was only one child of the said Elizabeth, the said testator's said sister, to wit, the lessor of the Plaintiff, Elizabeth Mathews, then living, but there was issue of several of the other children of the said Elizabeth testator's sister then living.

“ That on the death of the said Pooley Molyneux, the said Lemuel Shuldham entered into [32] possession of the said lands, tenements, hereditaments, and premises in the ejectment in this cause mentioned, and continued in possession thereof till his death, and that upon his death the said Pooley Shuldham entered into possession of the said lands, tenements, hereditaments, and premises, and continued in possession thereof till his death, and that thereupon the said Defendant John Brady Shuldham entered into possession of the said lands, tenements, hereditaments, and premises, and is now in possession thereof.

“ That the said Lemuel Shuldham, Pooley Shuldham, and the Defendant John Brady Shuldham, whilst respectively in possession of the said lands, paid the annuities in the said will mentioned, pursuant to the trusts in said will to the several annuitants to the year 1809, when the surviving annuitant died.”

The special verdict having come on to be argued, the Court, in Trinity Term 1811, pronounced judgment that the lessor of the Plaintiff in the ejectment should recover her term against the Defendant, of and in two sixth parts undivided, of and in the said premises, in the declaration mentioned.

Against this judgment each of the parties brought a writ of error in the Court of Exchequer Chamber: Shuldham, the heir at law, conceiving that Mrs. Mathews, the lessor of the Plaintiff, ought to have recovered nothing; and Mrs. Mathews conceiving

that, instead of two-sixths, she ought to have recovered the whole. The judgment having, in T. T. [33] 1812, been affirmed in the Court of Exchequer Chamber, the parties brought their writs of error in the House of Lords.

The ground on which the courts below gave judgment for two-sixths in favour of Elizabeth Mathews was stated by one of the council above, *arguendo*, to be this. The courts below considered the words, "that shall be then living," as referable to the time of the death of the testator, and construed the will as if the interests had then become vested. There were six children of the testator's sister, Elizabeth Curtis or Butler, living at the time of his death; one of whom, Sarah Butler, the sister of Mrs. Mathews, died without issue; and the Court was of opinion, that Mrs. Mathews, the lessor of the Plaintiff, took one-sixth in her own right, and one-sixth as heir at law of her deceased sister. But this construction of the will was almost, or altogether, abandoned in the argument above; the words, "that shall be then living," being understood as clearly referring to the time of the death of the last annuitant.

The two causes were first argued on the 25th and 28th April, 1817, by Sir S. Romilly and Mr. Leach (now Sir John Leach, V. C. E.) for Shuldham, the heir at law; and by Mr. Hart and Mr. Preston for Smith, the lessee of Mrs. Mathews. On the 8th July, 1817, they were by order again argued, the Judges being present.

Mr. Preston (for Smith, Lessee of Mathews. After stating the previous part of the will). Then [34] come the words on which the question turns, "then I give and devise " all and singular in the said manor, messuages, lands, etc. unto all and every the children of my said late sister Elizabeth Curtis, deceased, by her three several husbands " Brien Kelly, Samuel Shuldham, and Buckley Butler, that shall be then living, and " their heirs and assigns for ever, equally to be divided between them as tenants in common, and not as joint tenants: and if there should be but one such child, and no issue " of any of the other children then living, then and in that case I give and devise all " my said real estates in Ireland unto such surviving child, his or her heirs and assigns " for ever." The testator died in 1772, leaving his nephew Lemuel Shuldham his heir at law, Elizabeth Mathews the survivor of the children of Elizabeth Butler, and others of her children. On this the question has arisen, whether Mrs. Mathews, as the only survivor of the children of Elizabeth Butler, living at the death of the last annuitant, is entitled to the whole, or any, and what proportion, or is excluded by the second clause, there being issue of other children of Elizabeth Butler then living. I contend that she took the whole, or at least one-fourth. (Lord Eldon, C. One-fourth?) Yes, as there were four branches, the issue, living at the death of the last annuitant, of Elizabeth and Catherine Kelly, and of L. Shuldham, taking three shares as representing their parents, and Mrs. Mathews the remaining fourth. But the first clause, independent of the second, would give the whole to Mrs. Mathews, and the gift is in these terms, "to [35] all and " every the children of my said late sister, etc. by her three several husbands, etc. that " shall be then living, their heirs and assigns for ever." It is not necessary to enter into any criticism respecting the meaning of the word every, as by the rule of law, where there is a gift to persons as a class, and one only is living, that one takes the whole: and so it was held in a late case in K. B. 13 East, 526, Doe, Lessee of Stewart v. Sheffield. There the testator "gave and devised unto the sisters" (the gift being plural) "of J. H. to hold to them, etc. as tenants in common." J. H. had had three sisters, of whom one only was living at the date of the will. It was contended that as the gift was plural to sisters, the testator must have meant that, if there was only one, that one should not take: and that, as the devise was to the sisters as tenants in common, the testator manifestly intended that the three who were all once living should take several estates or shares, which were not to go over from the one to the other. The authorities were there considered; and Lord Ellenborough says, "though no case has " been cited which in terms corresponds with this; yet, looking at the will itself before " us, I have little doubt in saying, that the testator intended to devise the estate to the " several objects of his bounty in classes, taking the chance of there being a greater or " less number of persons in each class: and meaning that, if there were more than one " individual of the same description, they should all take equal shares; if only one, " that the one should take the whole given to that class or description." And then speaking of [36] another part of the will he says: "there is no doubt but that, if only " one of each class had been living at the testator's death, that one would have taken " the whole of what was bequeathed to the same class;" and he cites, Crooke v. Brock-

ing, 2 Vern. 106. And then he says: "if she be not entitled to the whole, what part " is she to take? a third or the half? Supposing there had been ten sisters originally, " and some of them had died, were the rest to have taken only each a tenth? or could " he have meant that the class should have less when reduced to one only? The scope " of the will shows that he looked to the class, and not to the number of individuals " who might happen to compose it." And then he combats the proposition that this was a lapsed devise. Le Blanc, J. says: "it is clear that the testator, in devising the " premises to the sisters of J. H. generally, used the term sisters, to denote that family " as it was at the time of making the will, which is the time to look to," etc. And Bayley, J. says: "it is left to the sisters generally, not by name, etc. If indeed the " property had been left to them by name, as tenants in common, no doubt, if one of " them had died before the testator, her share would have gone over:" and then he lays down broadly the doctrine which I contend for: "where it is left generally, under " the class or description of sisters, children, or the like; and there may be additional " sisters, children, etc. after the will is made; there who ever answers the description " at the death of the testator, will take under such a devise, etc." This is in unison [37] with the rule of law that where there is a gift to two, and one only is capable, that one takes the whole. That is stated in the year books 17 Ed. 3, fol. 29, and 18 Ed. 3, fol. 29, and is referred to in the argument in Shelly's case (1 Co. Rep. 100): and it is consistent with *Greenwood v. Tyler* (Hob. 314) and *Windsmore, Lessee of Long v. Hobart* (Hob. 313), in Lord Hobart's time. Thus it appears, that in wills and deeds where there is a gift to persons, even by name, some capable and some not, such as are capable take the whole. It is evident therefore upon authority and principle, and also from the practice in limitations in settlements to children in tail and in fee, that if one only is capable, that one takes the whole.

This is a provision therefore, though not adequately expressed, that if only one child of the elder sister should be living at the death of the last annuitant, she should take the whole. If there had been two children then living, they would have divided the property; and it would be absurd that she should lose all by the death of one in the life-time of Catherine Hewetson. It is more consistent that she should take the whole than nothing. It is clear the testator did not intend an intestacy, if there should be any issue of his sister living at the death of the last annuitant; and he never contemplated that the heir should take while there existed a descendant of the sister. If the point stood on this clause alone, it would be impossible to meet the argument. There is a case (*Christopherson v. Naylor*) which comes near this in 1 Mer. 321, before the M. R. in which the testator gave "to all and every the child and children of my " brother and sister, which shall be [38] living at my death: but if any child or " children of my said brother and sister should happen to die in my life-time, and " leave issue, then the legacy or bequest, hereby intended for such child or children so " dying, shall be for his, her, or their issue." In point of fact, there were children dead at the date of the will, who left issue. But it was held that the issue took only by substitution for their parents, and that the issue only of such children as were living at the date of the will were entitled in the event of the death of their respective parents during the testator's life-time. The testator did not contemplate the issue of the sister's children in their own character, and they could not take as purchasers. It must have been meant, that they should take, if at all, by descent or transmission from their parents. But I submit that, if the case stood there, Mrs. M. would clearly take the whole.

Whatever difficulty there is, arises from the second clause. They must say, either that it puts a different construction on the former clause; or that it repeals it altogether. He might mean to include the issue, but, if he has not done so, they cannot take; and then she is not excluded. They must show a clause of repeal in such a way as that if there was only one living, and no issue of the others, in that case only was the surviving child to have any thing. That is contrary to the intent: for though there should be no plan by which the issue could take along with the surviving child, if that was the intent, yet *utile per inutile non vitiatur*: and it is not consistent with common sense, that if [39] there were two children, and if one died without issue, the survivor should take; but that Mrs. M. should be defeated by the accident that the one died, leaving issue. It is not desired on the part of Mrs. Mathews to strike out any words. Her title is complete under the first clause: and by the second it was intended only to

express the sense of the first more fully. But although it should be your Lordships' opinion that there was an omission in the first clause, she could not be entirely excluded.

The rule of law is, that the intent is to be executed as far as possible, and shall not fail altogether because the whole cannot take effect, as *utile per inutile non vitiatur*. Unfortunately there is no clause providing for the issue; but the intent is clear. The children of his sister were the objects of his bounty while there existed issue of hers capable of taking. Then if two children could take, why not one? But if the second clause repeals the first, she will take nothing. Where is the expression in the will excluding her? Not in the first clause; and the design of the second is to express more fully the intent in the first, though there is a blunder. The title vests by the former clause, and no slip in a subsequent clause can take from Mrs. M. her title under the first clause. The question is, whether the second is a clause of repeal. It is admitted that if there were two, Mrs. M. would take the half; but it is contended that, as she is the only surviving child, and there is issue of the others, neither Mrs. M. nor the issue can take any thing. Is that the plan of the will? I am aware that Mrs. [40] M. perhaps takes more than was intended if she takes the whole. But she has the rule of law in her favour. In the courts below they endeavoured to make the issue participate. (Lord Eldon, C. How did they get at two-sixths for Mrs. M.?) (Sir S. Romilly. They were of opinion that the six children took a vested interest at his death. (Lord Eldon, C. Who were the six that took? And how came Mrs. M. to take two shares?) The six children who survived the testator. Mrs. M. they thought, besides her own share, took another share, as heir at law of her sister Sarah Butler.) (Lord Eldon, C. According to that reasoning, the words "then living" refer to the time of the testator's death.) Mr. Preston. As to that part of the case it is for them to answer it. But, I submit, it is quite impossible to say that the event on which they were to take was the death of the testator. The case of *Den v. Bagshaw*, 6 T. R. 512, is a decisive authority against that construction. The event was clearly the death of the last annuitant. That shows however how anxious the courts below were that the issue should participate. But is that a reason why Mrs. M. should take nothing? She certainly takes either the whole or a part: for the testator did not intend an intestacy while any object of his bounty was capable of taking. And though the issue should be excluded, still she takes as the surviving child of the sister, because *utile per inutile non vitiatur*. The case of *Doe v. Martin*, 4 T. R. 39, shows how anxious the courts were to go to the full extent of the words. The devise was "to the use of all and every the child or children, "equally, share [41] and share alike, to hold the same, if more than one, as tenants in "common, and not as joint tenants; and if but one child, then to such only child, his "or her heirs or assigns for ever." The Court seeing the intent to give the children the fee, brought the words "his or her heirs" to the words "all and every the child or "children."

The testator perhaps intended that the issue should take under the first clause; but *quod voluit non dixit*; and if they can take, it is under a construction of the first clause put upon it by the second. Every part of the instrument is to be taken, and, though I protest for Mrs. M. against that construction, yet, by way of experiment, if you can see upon the face of the will that he intended to include the issue, the intent must be that no child should be excluded who had issue living at the death of the last annuitant. And you are to judge whether he has sufficiently shown that intent on the face of the will. But for that purpose words must be supplied, "then living, or if dead, "leaving issue at the death of the surviving annuitant." These words are not there; but if it be clear from the second clause that it was so intended, I do not know any rule of law that prevents the supplying of these words. This construction, however, is one to which, if to be adopted at all, you must be driven by necessity. The first construction is founded on the rule of law; the second can be resorted to only to execute the intent.

Sir S. Romilly (for the heir at law). It will be impossible to affirm the judgement, that the plaintiff [42] in the original cause takes two sixths, because the words then living cannot be understood as applying to the time of the testator's death, or because there is nothing on the record which shows that Mrs. Mathews was heir at law of Sarah Butler. A new view is taken of the case to-day, that she takes the whole, or one fourth, on the ground that the Court may supply words not in the will, "then living,

"or shall be then dead, having left issue, then living." And they say that the three who were then dead having left issue had each a share, and that Mrs. M. takes the other fourth. No diligence has been able to furnish a case like this. The question here is, whether in the event that has happened there is any devise. As to the intent, I do not know that any one who makes a will intends to die intestate, even if he were to devise to the heir, though that would be the effect in law. But in several events that have or might have here happened, he would have died intestate. If all the annuitants died in the life-time of Lemuel Shuldhams, he would take the whole of their shares for his life. But if three of them, suppose, were to die in his life-time, and then he were to die, their shares are not given over on his death: for among the annuitants themselves, the survivorship takes place only between the annuitants surviving him: so that this would be so far an intestacy. Then as the words "then living" clearly refer to the death of the surviving annuitant, if Mrs. M. had died while any of the annuitants were living, there would have been an intestacy. But the event which has happened is that one child survived the annuitants, and that others, who had [43] previously died, left issue then living, an event which, as we say, is not provided for at all: since the property is given to the one only in case there should be no issue of the others then living. Can you then, against the words of the will, say that it shall go over in the event which has happened? He seems to have thought that he had provided for the issue of the other children then living. But although he thought so, he had not in fact done it.

If it had stood on the first clause, it is said she would take the whole, as a devise to a class takes effect though it should be reduced to one. But the reason of that is, that the one is the only person who answers the description at the time the devise can take effect. In *Doe v. Sheffield*, if sisters had been born after the date of the will, they would have taken, as the devise was to a description or class, and not to persons by name. And the words tenants in common, there refer to a possible case. As to the cases in the year books there the devise is *per my et per tout*, as to a man and his son, and he has no son, the man takes the whole. But I do not see how that applies to a devise to the sister's children as tenants in common. But, although the legal effect of the former clause were to give the whole to Mrs. M., it would be revoked by the subsequent clause. The whole will is to be taken together; and words cannot be overlooked, whatever may be their operation. The testator says, "unto all and every" the children of my late sister, by her three several husbands, etc. that shall be "then living, and their heirs, etc. equally to be divided between them as [44] tenants "in common." The legal effect then would be, if it stood there, that the one surviving child should take the whole. But it does not stop there. The testator goes on saying, in effect, that he did not there provide for the event of only one surviving; and he provides for it in this way, by giving the estate to such child, only in the event of there being no issue of the others. As to the intent he did not look at the other event of one surviving, and there being issue of the others then living: supposing that he had provided for it before, which he had not done. But it being clear that he did not provide for that event, though there should be no doubt that he would have provided for it if he had thought of it, yet your Lordships will not supply words for that purpose, if he has not expressed that intent.

It is admitted that the testator did not intend that Mrs. M. should take the whole, but a portion; and unless they can tell what portion, the heir must take. It is clear it cannot be a fourth. Mr. P. says that you may supply certain words which would have that effect. But I ask from what part of the will as it stands does it appear what she is to take? He proposes to supply the words, "or be dead leaving issue then living." What estate then would Elizabeth Kelly take who died in his life-time? Would she take in fee? for Mr. P. gives an estate to her. So that he proposes to supply words which would give an estate in fee to a nephew or niece, though dead before the estate could take effect, even before the death of the testator. A view of this case was taken before which is not re-[45]-lied on to-day. It was argued that the testator, when he uses the words, "that shall be then living," must be understood to mean exclusive of those who were annuitants, and that the testator meant "no issue of any of the other" children who were not annuitants," and it was said that such other children died without issue. But Elizabeth Kelly died leaving issue; and it is clear that she was one who could, upon that supposition, have taken. So that supposing such violence could be done to the words of the will as to say that the meaning was "no issue of any

"other children besides annuitants;" it is not the fact that all such other children died without issue. But besides, what could be more capricious than to supply words to exclude those to whose parents the testator had given annuities? Why exclude the issue of L. Shulldham for instance, who was his favourite? That was quite extravagant, and how did it appear that he intended this? You must strike out the words "and no issue of any of the other children then living," if you exclude the heir at law: whereas the rule is, that he is never to be disinherited, except by express words or necessary implication.

Mr. Preston. The argument is such as I anticipated; that the second clause is a repeal of the former. I say the first is the substantial clause, and that the second is not a repeal, but only accumulative, and doing more fully what he had done before. It is admitted that by the first clause she has some portion; and that she takes more than was intended, is no reason why she should not take what was intended for her. By the rule of law Mrs. M. [46] takes the whole by the effect of the first clause; and it is better that she should take more than was intended, than that she should take nothing. There I stand; and let them show what less than the whole I am to take. The only difficulty is that she takes more than was intended, but the devisee ought not to fail on that account.

They say it does not appear on the verdict that Sarah Butler died intestate. It is not necessary it should appear on the verdict. If you pretend that she was not, we will show that she was.

Then where there is a general and particular intent, and both cannot be satisfied, you will give effect to the general intent; and if the issue cannot take as purchasers, they may take as representing their parents. What was the effect of the will at the time the testator made it? Did he mean that Mrs. M. should be excluded, if she should be a surviving child? If he meant that she should be included, my object is answered. And as to the issue, if they admit that two would take the whole from the issue, then it follows that one will take it. I conclude then with great confidence that the devise in the first clause is not repealed by the second; and that if the second has any effect, it can only be in putting some construction on the first.

Lord Eldon (C.). The testator died in 1772, having previously made his will, and the state of his family at the time he made his will was this. He never was married, and never had a brother, but had had three sisters, Mary, Dorothy, and Elizabeth. At the time of making the will, Mary and [47] Elizabeth were dead, the former without issue, the latter, Elizabeth, leaving issue. Dorothy survived the testator, but died without issue; and it appears that some of the issue of the sister Elizabeth were living at the time of making the will, and were among the annuitants. And when he disposed of his property in twenty shares, and meant that this should be brought to a conclusion by the death of the annuitants, he could not but contemplate that more than one child of his sister Elizabeth might leave issue then living. Then he makes provision for certain annuitants; and if he were asked whether, upon their death, he intended an intestacy, he would probably say "no such thing"; yet that may be the case, and a surprise upon his intention, though I do not say it is so.

The courts in Ireland were of opinion that the lessee of Mrs. Matthews ought to recover two-sixths of the estates, and this on the ground, as I now understand, that six children of his sister Elizabeth Butler survived the testator, putting out Elizabeth Kelly; and that they were to be considered as the issue under a clause which I shall state presently; and that it was to be taken that Sarah Butler, one of the six, died intestate as to her share, and that her sister Mrs. M. took one-sixth as her sister's share, and one-sixth as her own.

Then error was brought, and it was contended that, if Mrs. M. was not entitled to two-sixths, she ought to have the whole; and the heir says that she was not entitled to two-sixths nor to anything:—and that there were no words in the will to give her any part of the property. And it was contended [48] further, that Mrs. M. took one-fourth, if not the whole, on the principle that Lemuel Shulldham's issue living at the death of the last annuitant took one share, the issue of Catherine Kelly another share, the issue of Elizabeth Kelly, who, although she died in the testator's life-time, left issue living at the death of the last annuitant, another share, and Mrs. M. the other fourth share.

The question is whether, according to the true construction of this will, Elizabeth

Mathew, who was the only surviving child of the testator's sister Elizabeth Butler at the death of the survivor of the annuitants, took any and what estate or interest in the estates devised.

That depends on these words:—"and after the death of the survivor of them the said Lemuel Shuldham (naming the annuitants), then I give and devise all and singular the said manor, messuages, lands, tenements, hereditaments, and real estate whatsoever, in the said kingdom of Ireland, unto all and every the children of my said late sister, Elizabeth Curtis, deceased, by her three several husbands, Brien Kelly, Samuel Shuldham, and Buckley Butler, that shall be then living, and their heirs and assigns for ever." Now according to all the ordinary rules of construction, that cannot mean living at the death of the testator, especially as the shares of the annuitants dying in Lemuel's life-time were to go over to Lemuel, and the shares of those dying after his death, to the other annuitants. It must mean living at the death of the survivor of the annuitants:—"equally to be divided between them as tenants in common, and [49] not as joint tenants." We have to consider whether, when he gives estates to all the children of his sister Elizabeth who should be living at the death of the last annuitant, it can be implied that if one only such child should be then living, that one can take the whole. But that is to be considered here having regard to the circumstance that he goes on to contemplate the event of there being but one such child then living: and says, "if there should be but one such child, and no issue of any of the other children then living, then and in that case I give and devise all my said real estates in Ireland unto such surviving child, his or her heirs and assigns for ever."

The first question then is whether, by the effect of the first clause, Elizabeth Mathews takes the whole; and the next question is whether, if that is displaced by the second clause, she takes any thing, and what that is to be.

(A question, for which *vid. post*, was then stated for the opinion of the Judges, who desired time to consider, and no opinion was given in that session.)

On the 3d June, 1818, the cause, Shuldham (heir at law), Plaintiff in error, and Smith, lessee of Mathews, Defendant in error, was again argued (the Judges present) by one counsel on each side. Nothing of consequence sufficient to require a statement of the argument in detail was added to the former argument.

Sir S. Romilly (for the heir at law). The testator [50] gives the rents in proportions to certain persons, among whom was his nephew Lemuel Shuldham, for life; and he gives the portions of those dying in the life-time of Lemuel Shuldham to Samuel Shuldham for life. But the portions of the annuitants predeceasing him, upon his death, are not disposed of: the portions of those only who should survive him being to be divided among themselves: so that in that and other events there would be an intestacy. On the death of the survivor of the annuitants, the testator has devised the estates to such of the children of his sister Elizabeth as should be then living; and in case there should be but one such child then living, he has devised to that one only in the event that there should be no issue of any of the other children then living: an event which has not happened: so there is an intestacy as to the whole of the estates from the time of the death of the last annuitant.

Mr. Hart (for Smith, Defendant in error). The first question is whether the Defendant in error is not entitled to the whole. Second, whether he is not entitled to some and what proportion.

It is a fundamental principle in the construction of wills to prevent an intestacy if possible where the testator has declared his intention in favour of certain objects of bounty to the extent of the entirety of his estate; and if on a review of the whole context you can find language sufficient to carry the entirety, you will not suffer that to be destroyed by any subsequent clause that may raise a doubt to control or narrow the construction. Admitting that [51] the testator has by inadvertence omitted to provide for some partial contingencies, that will not support an inference of intention to die intestate as to the whole of the estates from the death of the surviving annuitant.

It is hardly disputed but that, under the first clause, the single surviving child would take; and then the question is whether from the second clause you can attribute to the testator a meaning so absurd as this—that if two children should be then living they should take the entirety, regardless of the issue of the others then living; but that if only one such child should be then living, that child should take nothing in case there should be issue of the others then living, for which issue he had made no

provision. The second clause is not negative, but accumulative, although imperfectly expressed.

But your Lordships will struggle hard to include the issue, if it can be done; and then the question is whether the second clause may not be considered as a correction of the first so far as to read the will thus—"to all and every the children, etc. that shall be then living, or, being dead, shall have left issue then living." But if that cannot be done, the one child then living takes the whole under the first clause, and the second operates nothing.

Sir S. Romilly (reply). I cannot agree that it is a rule to lean against an intestacy. It must appear by declaration plain or necessary implication that the heir at law is disinherited. If you supply or take away words, there would be no difficulty in [52] the construction of wills. But the rule is that you are to add nothing, and to give effect to every word if possible. To say that the meaning is capricious is nothing to the purpose. The question is, What has the testator said? and every other construction is no less absurd and capricious than ours, unless you add a whole string of limitations. If you supply the words "or being dead shall have left issue then living," an estate is given to persons dead at the time it takes effect, which is worse than our construction. But there is no clearly expressed intention of giving any thing to the issue; and then there is no devise to the one child then living, except by an implication—which is here prevented by the second clause, in which the testator has said that it is only in the event of there being no issue of any of the other children then living that he means to give the estate to such one child; an event which has not happened; so that the intestacy is clear. There is no decided case that bears upon this.

Lord Eldon (C.). As I understand this case, it will be difficult to support the judgment of the Court below giving two-sixths of the estates to Elizabeth Mathews, having regard to the whole of the will, and the facts found by the special verdict. It has been contended on the one side that Elizabeth Mathews took the whole; and on the other side it is contended that having regard to the will, the circumstances, and facts found, and the intestacy that must upon this will on some events have taken place, the whole must go to the heir at law. The [53] will states—"and from and after the death of the survivor of them the said" (naming the several annuitants) "then I give and devise all and singular the said manor, messuages, lands, tenements, hereditaments, and real estate whatsoever, in the said kingdom of Ireland unto all and every the children of my said late sister Elizabeth Curtis deceased by her three several husbands, Brien Kelly, Samuel Shuldham, and Buckley Butler." And if the will had stopped with these words, there might be ground for contending that he meant that the interest should be vested at the time of making the will, or of his death. But then he adds—"that shall be then living;" and the question is whether these words are not so connected with the introductory words as to confine the vesting of the interest to the time of the death of the last annuitant: "and their heirs and assigns for ever, equally to be divided between them as tenants in common, and not as joint tenants." I agree that, if the will had stopped there, we might be authorized in law, although no mention was made of what was to be done in case there should be but one child living at the death of the last annuitant, to conclude that the one then living should take the whole. But the difficulty arises from this—that he goes on to say—"And if there should be but one such child, and no issue of any of the other children then living, then, and in that case, I give and devise all my said real estates, in Ireland, unto such surviving child, his or her heirs and assigns for ever." And upon this it is contended that, unless the judgment of the Court below was [54] right, although the testator has expressly said that the one child should take in the event of there being but one child, and no issue of any of the other children then living, yet the true construction of the will was that Mrs. Mathews, as the only surviving child, took the whole. It is very difficult to consider that as the legal effect of the will; and if that is not the legal effect of the will, then we have to consider, by implying words as far as we have authority to imply them, what proportion she is to take under the will, leaving the rest to go to the heir at law, or what others than the heir at law are to take, and in what proportions.

No estate is, in words, given to the issue; and, if you can imply words so far, you have to consider whether estates are given to the children of Elizabeth Curtis or Butler dying in the life-time of the last annuitant, but leaving issue, and not merely leaving

issue, but issue who should be living at the death of the last annuitant: and then you must read the will in this manner: "I give and devise all and singular the said manor, " etc. unto all and every the children of my said late sister Elizabeth Curtis deceased, " by her three several husbands, Brien Kelly, Samuel Shuldham, and Buckley Butler, " that shall be then living: and unto all and every the children of my said late sister, " by her three several husbands, who shall not be then living, but dead, leaving issue " then living." The extent to which words can be implied is well known to the Judges: but there will be great difficulty in going this length. I move that the following question be put to the Judges.

[55] "Whether on the true construction of this will, Elizabeth Mathews, the lessor " of the Plaintiff, the only child of the testator's sister Elizabeth Curtis (or Butler), " living at the time of the death of Catherine Hewetson the surviving annuitant, took " any and what estate or interest in the estates devised by the testator—having regard " to the whole contents of the will, and the facts found in the special verdict."

The Judges retired, and, in about an hour after, returned.

Gibbs (C. J. C. B.). Your Lordships desired the opinion of the Judges in the case of Shuldham and Smith, upon the question—"whether on the true construction of this " will Elizabeth Mathews, the lessor of the Plaintiff, the only child of the testator's " sister, Elizabeth Curtis (or Butler) living at the time of the death of Catherine " Hewetson, the survivor of the annuitants, took any and what estate or interest in the " estates devised by the testator, having regard to the whole contents of the will and " the facts found in the special verdict." The Judges have considered the case, and we are all of opinion, having regard to the whole contents of the will and the facts found in the special verdict, that Elizabeth Mathews took no estate or interest in the estates devised by the testator: and the ground of this opinion is shortly this. Looking at the whole of the will, and observing how the several interests are disposed of, although we plainly perceive that the testator did not intend that the heir at law should take any thing while there existed [56] any issue of the testator's sister Elizabeth Butler, living at the death of the surviving annuitant: yet it is impossible for us to discover, with any certainty, to whom or in what proportions the interests are given. And as we cannot make a disposition for the testator where he has made none for himself, that we can, with any certainty, discover, the whole, as undisposed of, must go to the heir at law.

Lord Eldon (C.). (June 5, 1818.) Your Lordships have now the benefit of the advice of the Judges in this case, who having regard to the whole of the will and the facts found in the special verdict, have certified their unanimous opinion that, instead of two-sixths, the lessee of Mrs. Mathews was entitled to nothing: and that there was an intestacy as to the whole of the property from the time of the death of the surviving annuitant. I have seldom been more disturbed about any case than about this: for I have not the least doubt, if your Lordships should concur in the opinion of the Judges, but that the actual intent of the testator must be disappointed. But the question is, whether there is here that intelligible expression of intention, which shows how the property is disposed of to the exclusion of the heir, who never claims by force of the intent, but by the rule of law.

The testator directs the rents and profits of his estates to be divided into twenty shares, and to be paid to certain persons for life. And then he says, "provided always, " and it is my true intent, that in case any of the said several persons, etc. shall happen " to die either before me, or in the life-[57]-time of my said nephew Lemuel Shuldham: " forgetting to provide for the event of their dying after him, or after Lemuel Shuldham, " then I will, and direct that the said part and share, parts and shares of the said " several person or persons so dying shall go, and be had, received, and taken by my " said nephew Lemuel Shuldham, or his assigns for his natural life. Provided also, and " it is my farther intent and meaning, that when and as any of the said several persons " hereinbefore named, who shall survive my said nephew Lemuel Shuldham, shall " happen to die, then I will, and direct that the part, share, and proportion of the said " clear residue of the rents and profits of my said real estate hereinbefore directed to be " paid to him or them so dying, shall go, and belong to, and be divided between the " survivor or survivors of the said several persons, share and share alike, and in equal " parts, shares, and proportions," not stating what was to be done with the shares of those dying before Lemuel Shuldham, in the event of his death, and his not being the

surviving annuitant: "and from and after the death of the survivor of them," naming the annuitants, "then I give and devise all and singular the said manor, messuages, etc. unto all and every the children of my said late sister, Elizabeth Curtis, deceased, by her three several husbands, Brien Kelly, Samuel Shuldham, and Buckley Butler, that shall be then living," which last words must mean living at the death of the surviving annuitant, "and their heirs and assigns for ever." If the will had stopped there, the [58] children then living must have taken as joint tenants; but then follows "equally to be divided between them as tenants in common, and not as joint tenants." If the will had stopped there, Mrs. Mathews might take the whole; as it is clear that where there is a devise to a class, equally to be divided between them as tenants in common, if there should not be a sufficient number to call for a division, one would take the whole; the operation and effect in law being the same as if the testator had said, "and if only one, then to that one." But the will does not stop there, and we cannot, by implication, conclude that he meant that one only should take when he himself happens to contemplate, and in terms to provide for, that event: and the misfortune is that the manner in which he here does so is this, "and if there should be but one such child, and no issue of any of the other children then living, then, and in that case, I give and devise, etc. unto such surviving child, his or her heirs and assigns for ever." Now the event which happened was that there was but one such child, and that there was issue of several of the other children then living: and then the question is, whether, as against the heir at law, you can, by implication, or by supplying words, give the whole to one, in an event in which the testator has said that such one child shall not have it: or whether you are authorised to divide the estate into different aliquot parts between the one child and the issue of the others, where the testator has not told you what aliquot part is to be given to the one, and what to the issue of the others. It [59] seems impossible therefore so to divide it, unless you can supply all that I before stated, "that shall be then living, or that shall be then not living, but dead, leaving issue then living:" that is, unless you can add a new class. The Judges have unanimously said that there is an intestacy, and I cannot put a more satisfactory construction on this will.

Lord Redesdale. This case appeared to me at first to admit of some doubt; but now I am clearly of opinion that the judgment of the Court below is erroneous, and must be reversed.

The estates were given upon the conclusion of the trust, "unto all and every the children, etc. that shall be then living," the last words clearly referring to the death of the last annuitant, for otherwise the word ought to be "now" and not "then": "and their heirs and assigns for ever." So that if two survived, they would have taken in moieties; if three, in thirds; and so on. How the Court below came to divide the estate into sixths I do not exactly know. There were more than six children; and as the division was not to take place till the death of Lemuel Shuldham, he was not one of the children who could take. Then he adds, "equally to be divided between them as tenants in common, and not as joint tenants." If he had stopped there, it might be implied that if there were only one, the one should take the whole. But then he goes on expressly to direct what is to be done in the event of there being but one such child; and he has declared that such one child [60] shall take only in case there should be no issue of any of the other children then living. He provides for two events, that of there being more than one child, and that of there being only one, and no issue of the others. But he has not provided for a third case, that of there being only one child, and issue of the others then living. The third event, however, is that which has happened; and in that event there is no disposition. I agree therefore that the judgment is wrong, and must be reversed, the lessee of Mrs. Mathews having no title to maintain the ejectment.

Judgment REVERSED accordingly.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

CORMICK, — *Appellant* ; TRAPAUD, and Another, — *Respondents* [Feb. 6, March 16, June 5, 1818].

[Mews' Dig. vii. 33, 45 ; xii. 910.]

[M. Cormick, first tenant in tail under the will of his father, R. C. deceased (by which will estates in tail male in remainder were given to the devisors' other sons, F. C. and T. C.) before suffering a recovery, executes a settlement on his marriage, by which he limits an estate for life to himself, with remainder to the first and other sons of the marriage, in tail male, remainders to his brothers, F. C. and T. C. for life, with remainders to their first and other sons in tail male :—and afterwards suffered a recovery, mortgaged the settled estate to R. Plaistow, and died without issue male. C. Cormick, son of T. C. [61] (F. C. having died without issue) enters upon the estate, suffers a recovery, and dies, leaving M. C. the Appellant, his eldest son.]

[Bill of foreclosure by Plaistow resisted by M. C. the Appellant—the question being, whether C. Cormick, the Appellant's father, was entitled under the will of R. C. or only as a volunteer under the settlement, by M. C. the first tenant in tail. Foreclosure decreed below. Argued in Dom. Proc. that as the settlor had not the fee, but was only tenant in tail at the time of the settlement executed, the provisions of the statutes of Elizabeth, enacted for Ireland by 10 Car. 1, sess. 2, cap. 3, did not apply to this case. Answered that there was no substantial distinction between tenant in fee and tenant in tail, who had it in his power at any time to acquire the fee ; that the brothers and their sons took new estates under the settlement, which were voluntary, and void as against the subsequent mortgagee for val. con. So held, and decree affirmed.]

Michael Cormick, who was tenant in tail of certain estates in Ireland under the will of his father Richard Cormick, by which estates tail in remainder were given to his two younger brothers, before suffering a recovery, made a settlement after his marriage, pursuant to previous articles, by which, after limiting an estate for life to himself, remainder in tail to the first and other sons of the marriage, he gave estates for life to his brothers, remainder to their first and other sons in tail ; and then mortgaged the settled estates to Richard Plaistow, who filed his bill to foreclose. Fraud in obtaining the mortgage was alleged but not proved ; and the substantial question was, whether the mortgage was valid as against the real representative of one of the brothers, and entitled to the protection of the statute 10 Car. 1, sess. 2, cap. 3, taken from the English acts, 13 Eliz. cap. 5, and 27 Eliz. cap. 4, made in favour of purchasers for valuable consideration ; and whether such representative was not a volunteer under the settlement as against the mortgagee, although the settlor was only tenant in tail at the time it was executed : and the cases of *Doe v. Manning*, 9 East, 59 ; *Doe v. Routledge*, Cowp. 705 ; *Brown v. Carter*, 5 Ves. 862 ; and *Hill v. Bishop of Exeter*, 2 Taunt. 69, were cited for the mortgagee.

The cause was heard in the Court of Chancery, in June, 1811, and re-heard in December, 1811, when the Lord Chancellor ordered a case to be made for the opinion of the Court of Common Pleas, stating the circumstances as follows :—

“ Richard Cormick being seized in fee of divers lands in the county of Mayo, and particularly the lands as hereinafter stated in mortgage in this cause to said Richard Plaistow, on or about the 6th day of November, 1737, made his will, duly executed for passing real estates, and by the said will devised, amongst other things, as follows :—My will is, that, after my debts and legacies be paid, that all my real and personal

estate shall go and descend to my eldest son, Michael Cormick, and the issue male of his body for ever; and, for want of such issue, my will is, that all said estate shall go to my second son, Francis Cormick, and his issue male for ever; and, for want of such issue in him, my will is, that the whole estate shall go and descend to my third son, Thomas Cormick, and his issue male for ever: the eldest son of such of my sons [63] issue male that should inherit said estate, and his issue male, to be always preferred before the second, or any other son, so as to make it an estate tail in all the sons of any of my sons that should inherit; and, for want of such issue, that all the said estates shall go to the right heirs of the said Michael Cormick; with full power to any of the said sons that shall inherit said estate, to charge it with reasonable provisions for any younger children he shall have, and with a reasonable jointure for such wife as he or they shall marry.'

"And that under the description of the said testator's real estate, the said mortgaged lands were comprehended.

"That said Richard afterwards, that is to say, in the month of ———, in the year 1738, died so seized of the said lands, without revoking or altering his said will, leaving issue, three sons; that is to say, the said Michael Cormick, his eldest son and heir at law; the said Francis Cormick, his second son; and the said Thomas Cormick, his third and youngest son: and upon the death of the said testator the said Michael entered into possession of the said lands, and under the limitations of the said will continued seized thereof until his death.

"That said Michael Cormick, on or about the 6th day of March, 1743, intermarried with Mary Blake, the only daughter of Xaverius Blake; and previous to such marriage certain articles of agreement, under the seals of the parties thereto, bearing date the 6th day of March, 1743, were entered into and executed in contemplation of such marriage, between the said Michael Cormick, by the [64] name and addition of Michael Cormick, of Mullinmore, in the county of Mayo, Esquire, of the first part: Xaverius Blake, of Doonmacree, in the said county, Esquire, on his own behalf, and likewise for and on behalf of his only daughter, Mary Blake, of the second part: Denis Daly, of Raford, in the county of Galway, Esquire, and Walter Blake, of Oranmore, in the said county, Esquire, of the third part; whereby the said Xaverius Blake did covenant with the said Michael Cormick, his executors and administrators, that he would pay to the said Michael, as the marriage portion of his daughter, the sum of £2000, which sum was afterwards duly paid; and the said Michael, in consideration of the said intended marriage, and of the marriage portion of the said Mary, and for the securing a maintenance to the said Mary, in case she should happen to survive the said Michael, did thereby covenant with the said Xaverius Blake that he the said Michael Cormick would, by judgment or judgments, statute merchant or of the staple, or other sufficient personal security, secure to the said Denis Daly and Walter Blake, their executors or administrators, the sum of £7000 sterling, to the uses, trusts, and purposes following; that is to say, that in case the said Mary shall survive the said Michael, having then no issue by him, or having issue, and that such issue should happen to die without issue, then and in either of the said cases, that the said Mary should, out of the yearly interest and produce of the said £7000, have and receive for her maintenance and support the sum of £400 a-year during her life; or the sum of £300 a-year [65] only, on a certain event therein mentioned. And it was further covenanted by and between the said parties that, in case the said Mary Blake would have and recover dower out of the real estate of her intended husband, the said Michael Cormick, that she should have her election to have her dower at common law, or the said provision therein before provided for her, provided she should make her election in twelve calendar months after the decease of her said intended husband. And the said Michael Cormick further covenanted with the said Xaverius Blake, his executors and administrators, for the said considerations, that he would settle all his real estate in the kingdom of Ireland, whether in fee simple, fee tail, fee farm, or lease, or leases for lives, in such manner as the counsel of the said Xaverius Blake, or his heirs, should advise, but so as not to obstruct or hinder the payment of £130 a year to the said Michael's mother for life, and so as the said Michael Cormick should have an use for life only, with proper remainders to support contingencies; with remainders to the first and every other son of the said Michael Cormick and Mary Blake, successively in tail male, according to priority of birth and seniority of age: the elder to take before any younger; but subject

to the powers, provisions, portions, provisoes, and authorities, thereafter mentioned. And to enable the said Michael Cormick to execute such settlement, he did covenant and agree for him, his heirs, executors, and administrators, with the said Xaverius Blake, his executors and administrators, to levy fines and suffer common recoveries of all his said real estate. [66] And the said Michael Cormick further covenanted with the said Xaverius Blake, his executors and administrators, that the said real estate of the said Michael Cormick should be charged with, and liable to, the sum of £4000 sterling, as a portion and provision for the younger child or children of the said marriage, if there should be no issue male at the said Michael's death, or that having such the issue male should die without issue; *pro ut* the said articles of agreement, which were registered on the 23d of May, 1746, under a memorial signed and sealed by the said Xaverius Blake.

"That in Hilary Term 1743, the said Michael Cormick levied a fine of the said mortgaged lands and others, *sur connuance de droit come ceo*, etc. in consideration of a sparrow hawk, to one Roger Palmer, on which proclamations were duly made pursuant to the statute; *pro ut* said fine and proclamations, etc.

"After the said marriage, that is to say, on the 8th day of October, 1748, a certain deed of settlement was executed between the said Michael of the first part; and Roger Palmer and Walter Blake of the second part; George Browne and Francis Palmer of the third part; and the said Xaverius Blake of the fourth part, and which deed was signed and sealed by the said Xaverius Blake and Michael Cormick; whereby, after reciting the said articles of the 6th of March, 1743, in part, and (amongst other things), that then it appeared from the situation of the said Michael's affairs, that in order to raise money to pay his debts, he must sell part of his said real estate, but was possessed of some valuable leasehold interests [67] for years, which he intended to settle, and was also willing and had agreed, in order to make good his said original agreement or contract, in the said articles, to create a term for years of the value of £400 a year and upwards, in part of his estate, in order to raise a fund of £4400 sterling, to be paid into the hands of the said Xaverius Blake, to be by him laid out in the purchase of lands, in the name of the said Michael Cormick, and to be settled to the same uses: the said Michael did thereby grant, assign, and make over unto the said Roger Palmer and Walter Blake, certain lands and premises therein mentioned, to hold all and singular the said premises, with their appurtenances, to the said Roger Palmer and Walter Blake, for the term of ninety-nine years, at the yearly rent of a pepper-corn, if demanded; upon the trusts, and subject to the several provisions, conditions, limitations, and agreements therein after mentioned and expressed: and further, that the said Michael Cormick, in consideration and full execution of the said marriage articles, and covenants contained in them, did convey unto the said George Brown and Francis Palmer, and their heirs, the said mortgaged premises, with other lands, as well lands comprized in the said articles as other lands of the said Michael Cormick, but still subject to the said lease or term for years, to the said Roger Palmer and Walter Blake, to the uses and trusts following, amongst others: that is to say, in trust for, and to the use of the said Michael Cormick for and during the term of his natural life, without impeachment of waste; remainder to the use of the first, and other sons of [68] the said Michael Cormick, on the body of the said Mary his wife begotten, or to be begotten, and the heirs male of the body of such first, and other sons lawfully issuing, and in the general course of family settlements. And for want of such issue, remainder to the use of the said Francis Cormick, brother to the said Michael, and son of the said Richard Cormick the said testator, for and during the life of the said Francis: with like remainders as aforesaid, to the use of the first, and other sons of said Francis, and the heirs male of their respective bodies; and for want of such issue, remainder to the use of the said Thomas Cormick, brother to the said Michael, and son of the said Richard Cormick, the said testator, for life: with like remainders to the use of the first and other sons of the said Thomas Cormick lawfully to be begotten, and the heirs male of their respective bodies; and in default of such issue, with such remainders and limitations over as the said Michael should by will or other deed, nominate or appoint. It was declared by the said settlement that as to any lands mentioned therein, whereof the said Michael was in possession, by virtue of a lease or leases for years, it was not intended to convey or settle the same, but for such term or terms as the said Michael then had, and for any further term or time which he should thereafter acquire. And

it was further agreed, that it should be lawful for the said Michael Cormick to raise a sum of £7000 sterling, to be laid out at interest, as a fund to secure the said Mary Blake, his then present wife, in case she should happen to survive him, the sum of £400 a-year for [69] her jointure, if the said Michael should die leaving issue by the said Mary, in case the said Mary should make it her election to have such provision secured for her within twelve months after the said Michael's death, in lieu of dower at law; otherwise that said Mary should have dower. And it was further covenanted between the said parties, that it might be lawful for the said Michael Cormick, by any deed by him executed, and attested by two or more witnesses, or by his last will, to charge the said lands in the said trust term, and all and every other part of his said real estate, with any sum of money for the preferment and maintenance of his daughters and younger sons by the said Mary as should not be preferred in his own life-time, with any sum not exceeding in the whole the sum of £5000 sterling; to be paid and distributed to and amongst such daughter and daughters, and younger son and sons, in such reasonable shares and proportions as the said Michael Cormick should by such deed, will, or other writing in the nature of a will, direct and appoint; and for want of such appointment to be distributed to and amongst them in equal shares and proportions. And the trust of the said term so limited unto the said Roger Palmer and Walter Blake, was by the said settlement declared to be, that said trustees, their executors, administrators, and assigns, should and might, during the life of the said Michael Cormick, receive the rents, issues, and profits of the said lands in said term mentioned, and pay the same into the hands of the said Xaverius Blake, who was to pay Mary Cormick, alias Blake, the sum of £180 sterling, [70] payable half yearly, by virtue of a deed or instrument to that purpose, perfected by the said Michael Cormick: the remainder of such rents, issues, and profits to be by the said Xaverius Blake laid out to the best advantage (without any risk to his own fortune), that he could thereby raise a fund of £4400 sterling, to be laid out in the purchase of lands, which should, immediately after such purchase, be settled, secured, and limited to the same uses, subject to the same powers, charges, provisoes, conditions, and agreements as already mentioned: and after raising the said £4400 then, and from thenceforward, in trust to permit and suffer the said Michael Cormick and his assigns, during his natural life, to receive the rents, issues, and profits thereof, still subject to the several other contingent charges and incumbrances therein already mentioned; and from and after the death of the said Michael Cormick, in trust that the said Roger Palmer and Walter Blake, their executors, administrators, and assigns, should and might, by leasing, mortgaging, and absolute sale of the said term, with the consent of the said Xaverius Blake (if then alive), raise the portions and maintenances already mentioned, to and for the daughters and younger sons of the said Michael Cormick, in such manner, shares, and proportions as they should then respectively appear to be entitled to; *pro ut* the said deed, which was registered on the 4th day of May, 1750, under a memorial signed and sealed by the said Xaverius Blake.

"That afterwards, that is to say, in Michaelmas Term, in the thirtieth year of the reign of King [71] George the Second, and in the year 1757, a common recovery was suffered of part of the said mortgaged and other lands; *pro ut* said recovery, wherein Edward Colpeys demanded against Roger Palmer the said lands comprised in the said articles, which said Roger Palmer called to warranty said Michael Cormick, who vouched over the common vouchee; but no deed appears making a tenant to the precipice for the said recovery.*

"That the said Michael Cormick afterwards, that is to say, by deeds of lease and release bearing date respectively on the 15th and 16th of August, 1777, after reciting that the said Richard Plaistow did as of Trinity Term, 1775, obtain two separate judgments in the Court of King's Bench against said Michael Cormick, each for the sum of £3844 debt, besides costs; and that there was then due to said Richard on the said recited judgments for principal, interest, and costs, the sum £4354 7s. over and above all just and fair allowances; and after further reciting that the said Michael Cormick then stood further indebted unto the said Richard in the sum of £865 17s. 4d. sterling, said sums making in the whole the principal sum of £5220 6s. 4d.; and that

* By the Irish Act of 21 Geo. 2, c. 11, § 8, a recovery is good after twenty years, if the persons joining had a sufficient estate, though the deed making a tenant to the writ be lost.

said Michael Cormick was willing and desirous to give the best security in his power unto the said Richard for the due payment of said £5220 6s. 4d., and for that purpose had proposed to grant his real and freehold estates in said county of Mayo in mortgage to the said Richard, for the better securing [72] unto said Richard the repayment of said sum, the said deed of release witnessed that the said Michael Cormick did, for the reasons and considerations aforesaid, and in consideration that said Richard had executed warrants of attorney to said Michael Cormick to acknowledge satisfaction on the records of said two judgments : and also in consideration of five shillings to the said Michael in hand paid by said Richard, the receipt whereof was thereby acknowledged, did grant, bargain, sell, release, and confirm, unto said Richard Plaistow, *pro ut* the deed, to hold with the appurtenances unto said Richard Plaistow, his heirs and assigns for ever : subject to the proviso or condition of redemption therein mentioned : that is to say, if said Michael, his heirs, executors, or administrators, on the 1st of May, 1778, should well and truly pay or cause to be paid to said Richard Plaistow, his executors, administrators, or assigns, said £5220 6s. 4d., and should in the mean time, and until payment of said sum, well and truly pay, or cause to be paid to said Richard Plaistow, his heirs, executors, administrators, or assigns, interest for said £5220 6s. 4d., at five per cent. per annum, from the date of said indenture, half yearly, then and from thenceforth it should and might be lawful to and for the said Michael Cormick, his heirs or assigns, into the said premises, or into any part or parcel thereof, in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy as in his or their former estate : and also that then and from thenceforth one bond or obligation, with warrant of attorney for confessing judgment thereon, bearing equal [73] date with said indenture, perfected by said Michael Cormick to said Richard Plaistow of the penalty of £10,440 12s. 8d., conditioned for the payment of the said principal sum of £5220 6s. 4d., and the interest thereof on said 1st May, 1778, should be delivered up to be cancelled (casualties excepted) : or if judgment should in the mean time be obtained on said bond pursuant to said warrant of attorney, then said Richard Plaistow, his heirs, executors, administrators, or assigns, should, at the request, costs, and charges, of the said Michael Cormick, his heirs, executors, administrators, or assigns, execute a warrant of attorney to acknowledge satisfaction on the record of such judgment : which bond and warrant were intended as collateral security for payment of the said sum of £5220 6s. 4d. sterling, intended to be thereby secured, and not as a security for any other or different sum.

" And that at and before the time of the execution of the last-mentioned deed, the said Richard Plaistow had actual notice of the said marriage articles of 1743, and of the said settlement of 1748 ; *pro ut* the letters.

" That in the month of August, 1779, the said Michael died without issue male : and the said Francis Cormick died in the life-time of the said Michael without issue : and the said Thomas Cormick also died in the life-time of the said Michael, but left issue one son, Charles Cormick, who entered into all the said lands : and the said Charles Cormick having died, leaving Michael Cormick his eldest son and heir at law, the said Michael Cormick, who is in possession of the said lands, claims [74] to be entitled to the said lands under the limitations of the said will of Richard Cormick, and in the said deed of settlement of the 8th of October, 1748, made in pursuance of the said articles of 1743, some or one of them ; and which settlement was registered on the 4th of May, 1750, upon a memorial signed and sealed by the said Xaverius Blake.

" And the only question is, whether, under the circumstances aforesaid, the deeds of the 15th and 16th of August, 1777, are a good and valid security for the principal money and interest secured thereby, as against the persons claiming under the limitations contained in the said deed of the 8th of October, 1748, and in and by the said will of the said Richard Cormick."

The said case was argued before the Court of Common Pleas in Ireland, who, on the 10th of June, 1812, delivered their unanimous opinion in the affirmative of the question, and signed the following certificate :

" We have heard this cause argued by counsel, and are of opinion, that under the circumstances of this case, the mortgage deeds of the 15th and 16th of August, 1777, are a good and valid security for the principal money and interest secured thereby, as against the persons claiming, under the limitations contained in the deed of the 8th of

October, 1748, and in the will of Richard Cormick, in the case mentioned. Norbury, L. Fox, E. Mayne, W. Fletcher."

The said cause came on to be heard before the Lord Chancellor, on the 9th of July, 1812, on the [75] Judge's certificate; when his Lordship was pleased to decree, that it should be referred to the Master to take an account of what was due to the Plaintiffs for principal, interest, and costs, on the foot of the said mortgage, and of the borrowing clause therein contained; and also to take an account of the real, freehold, and personal estates of Michael Cormick in the pleadings mentioned, into whose hands the same came, and how applied and disposed of; and also to take an account of the debts, legacies, and funeral expenses of the said Michael Cormick; in which account all just allowances were to be made. And it was ordered, that all creditors of the said Michael Cormick, who had debts, charges, or incumbrances affecting his said estate, should be at liberty to come in before the Master, and prove the same.

The Master by his report, bearing date the 13th day of June, 1813, certified, that he found that the said Michael Cormick, deceased, was at the time of his death seised, as of fee or freehold, of the several lands and hereditaments therein specified, situate in the counties of Mayo, Roscommon, and Westmeath (which included the mortgaged premises), and he certified, that there was due to the Plaintiffs for principal, interest, and costs, on the foot of the mortgage deeds of the 15th and 16th days of August, 1777, in the pleadings mentioned, the sum of £14,581 4s. 5d., and he stated that no proof of any other debt had been laid before him.

It does not appear that any account was taken of the sums advanced after the date of the mort-[76]-gage, no part of such sums being included in the sum reported due.

This report was duly confirmed by an order bearing date the 14th day of July, 1813.

On the 21st day of July, 1813, the cause came on to be heard before Lord Manners, on the report and merits: when his Lordship ordered that the register should compute interest as usual; the gross sum, with interest from the confirmation of the report, to be paid in three months, or a foreclosure and sale to take place: the sale in the first instance to be of the mortgaged premises; and if the produce thereof should be insufficient, then a sale to be had of a competent part of the residue of the lands in the report mentioned, and that the Plaintiffs and Defendants should have their costs out of the funds to arise by such sales.

From this decree Michael Cormick, the son of Charles, appealed:—the executors of Plaistow, he having died in the course of the proceedings, being the Respondents.

Mr. Wetherell and Mr. Shadwell (for Appellant). The substantive question is whether the limitations to the brothers under the settlement of 1748 were voluntary, and, consequently, fraudulent, and void as against the mortgagee by the statutes 13 Eliz. cap. 5, and 27 Eliz. cap. 4,—the provisions of which were subsequently enacted for Ireland by 10 Car. 1. sess. 2, cap. 3, so that the law is perfectly the same in both countries. It has been doubted whether the mortgagee gave a proper consideration for the mort-[77]-gage, but no great reliance is placed upon that point. The question is very important, but it would be a waste of time to travel through all the learning of what is called the range of the marriage consideration, a subject as to which there is no very precise general result even at this moment. The old cases say that collaterals are within the range. But I will suppose the law to be this: a person, having an estate in fee, on his marriage, makes a settlement, with limitations to the issue, and, in failure of issue, to his brothers; and afterwards mortgages or sells the estate. I assume that there the marriage consideration will not embrace the limitation to the brothers. But if that be so, where the settlor has an estate in fee, it does not follow that it is so, where the settlor has not an estate in fee. In all those cases where a limitation to brothers was held to be voluntary as against a subsequent purchaser, for val. con. the settlor had an estate in fee; and the absolute disposal of the whole property. The interest of the brother in that case is the mere voluntary gift of the settlor. But in this case the settlor had but an estate tail, which, if he did not marry or suffer a recovery, would go to his brothers Francis and Thomas under the limitations in the will of Richard Cormick: and it is contrary to the fact to say that Michael gives this interest to his brother, for the brother takes not by the gift of the settlor but by the will of the donor. The whole history of the cases does not present a single case where when tenant in tail, on his marriage, introduces merely repetitions of a former settlement

declaratory of the antecedent provisions—not a single in-[78]-stance where, upon such a state of facts, the gift has been held voluntary under the statutes of Eliz. How can it be said that the settlor gives it when he allows it to go on as before? No ingenuity can raise a colourable argument that it was voluntary within the spirit of the acts; and one cannot help thinking that this was viewed below as if the settlor had the fee. The statutes never contemplated that there was fraud in not suffering a recovery,—in not acquiring the fee when you might acquire it. And yet that is what they must contend. From the earliest case on the subject to *Doe v. Manning* (9 East, 59), there is no such thing. The language of the statutes applies only to cases where the settlor has the fee. But here he had only an estate tail, and the settlement is only affirmative of the intention that the estates given by the will of Richard Cormick should continue. The gift was not *ex mero motu*, as if the settlor had the fee; and in justice to the landed proprietors of the country it cannot be held that every tenant in tail commits a fraud unless he suffers a common recovery. It is remarkable here that Blake has waived taking estates tail to the issue female of the marriage. He probably said to the settlor—"I waive that claim, provided you allow the old limitations to continue." Suppose the settlor had the fee, if the father-in-law waives the giving estates to the issue female upon condition that the settlor suffers the property to go to his collateral male relations,—that is not a voluntary gift under the statutes. It may be very common to waive the claim to give estates to the females in order that the property may go to the collateral male relations of the son-[79]-in-law; and where the father-in-law waives the claim with that view, no case can be shown where the limitation under such circumstances has been considered as voluntary. It is a case of bargain or contract, and not that of a voluntary gift: and with reference to this point the reasoning of Wilmot in *Roe v. Hamilton*, 2 Wils. 356, deserves your Lordships' attention. The consideration to Cormick is a waiver by the father-in-law of settling the estate on his daughter's issue female, provided Cormick would allow the former settlement to remain unrevoked as to the brothers. The case of *Roe v. Hamilton* then coincides with this; and a recital in direct terms is not necessary, but the intention may be inferred from the whole scope of the instrument. This is the first case where it has been held that a person who has the power to acquire the fee is in the same situation as if he actually had the fee; and that if, instead of suffering a recovery, he leaves the property to go to his collateral relations, he commits a fraud. Another view of the case is, that it is a case of contract: which distinguishes this from a voluntary gift, though it should not be considered as within the range of the marriage consideration. All the cases cited on the other side below moved on the *cantilena* of the marriage consideration. But even if the decree could be sustained, it cannot be supported in as far as it lets in the other creditors and legatees. The Court seems to have considered itself bound by the opinion of the Court of C. P. But a case may be recollected in which one of your Lordships, after sending it for [80] the opinion of the Court of K. B., decided against that opinion. In *Doe v. Manning* and other cases, nothing else appeared but the mere purposes of the settlement: and a voluntary gift is then void as against a purchaser for valuable consideration. But here Blake articles that Cormick should not himself take the fee, but suffer the estate to go to his brothers, with such remainders over as M. Cormick should by deed or will appoint: and there was no case to show that a subsequent recovery could operate so as to enable him to give to some, and not to others. How then can that be assimilated to a fee? The cases cited by them do not apply to the present case. The limitations here were not good even to the children, unless they were good to the collaterals. There is no case in terms like this case. The settlor was not seized in fee simple, and that affords a reasonable ground of distinction. But there is a legal difficulty as to the effect of the subsequent recovery. The recovery must have its effect at the time it is suffered, and it must be good as to the whole, or it is nothing. It cannot have a limited effect: and unless it is good as to the brothers of Michael, it is good for nothing at all. Where is the case where a recovery has been held to have only a partial operation? Yet that must be the way in which it has been construed. (Lord Eldon (C.). Why might not the effect of the recovery be to make the estates good to the collaterals also until displaced?)—Yes; but then the settlor must have had the fee at the time of making the settlement: but here he had not: and that is the real difficulty: and this is a case where it is [81] held that a settlor, not seized in fee simple, might partially disappoint the former settlement.

As to the other point the bill is filed by the mortgagor simply on his own case, and

not on behalf of himself and the other creditors : and there was nothing to warrant the decree as to the other creditors and legatees.

Sir S. Romilly and Mr. Hart (for the Respondents). The Court of Chancery was not bound by the opinion of the Court of Common Pleas. But it cannot be conceded that the opinion was of no weight, and that the Judges overlooked the only question in the cause. Cases are as fully and ingeniously argued in Ireland as they are here ; and the Courts below were of opinion that in this case there was no solid distinction between the case of a settlor seized in fee and one who might by a recovery acquire the fee when he thought proper. And it is now completely settled by the case of *Johnston v. L-----*, lately decided, that when, in a marriage settlement, there are further limitations to collaterals, the ulterior limitations are voluntary, and are defeated by a subsequent sale or mortgage for val. con. The only question here is, whether the circumstance that the settlor was tenant in tail, and not seized in fee, affords any solid or substantial ground of distinction. He had the absolute dominion over the estate ; and the collateral relations are as much volunteers as if the settlor had the fee. It was impossible that this could be considered a solid distinction. There would indeed be a distinction if [82] Mr. W. could persuade your Lordships that those limitations to the brothers were only the old uses under the will of Richard Cormick ; for then this would not be the bounty of the brother. But how is it possible to make that out ? They took estates tail under the will. But under this settlement they took estates for life only ; their sons taking estates tail. Then they say that this is a case of contract ; and if that be so, it must be admitted that the settlement is not voluntary. But what motive could Blake have for so strange a contract ? There is no pretence for that argument. As to the point respecting the other creditors and legatees, the reason of the decree is there perhaps not very intelligible, and it may be proper to alter it. (Lord Eldon (C.). I doubt whether it was necessary that the settlor should have the fee. But suppose a recovery had been suffered and made to enure to confirm the uses under the old will, I doubt whether you could get rid of that. They must contend that these were the same uses as in the will, and that if there were occasion to bring a formedon, they could do so under the will.) (Mr. W. I admit that the old uses are gone, but the statutes apply not to the form, but to the substance. A formedon could not be brought certainly. But the uses are not void under the statutes.) The dominion which the settlor had over the estate was commensurate with a fee. The articles must have contemplated an estate in fee, and no intention can be inferred to leave unaffected the old estates tail, as the fee could be got only by destroying them entirely. This was clearly a gift by their brother ; but [83] they are displaced only in favour of a purchaser for val. con. ; and the gift stands as to whatever part of it remains after the claim of the purchaser shall be satisfied.

Mr. Wetherell (in reply). Their doctrine is, *volens volens* you shall have a fee. But the law did not always compel persons to perform their moral duty. There were analogous cases in the bankruptcy law ; and, in cases of powers, the distinction between power and property was established (*Holmes v. Cogill*, 7 Ves. 499). This case goes further than *Doe v. Manning*. These were technically in law new gifts, but morally and substantially they were not new gifts, so as to bring them within the statutes of Elizabeth.

Lord Eldon (C.). This question is perfectly new. It is a question also of English law ; and that question is, whether a limitation made by a tenant in tail, in his marriage settlement to his brothers, is a voluntary limitation within the meaning of the decisions which apply to a tenant in fee, who, although he has so voluntarily settled the property, may, notwithstanding, dispose of it to a purchaser for val. con. ; and the claim of the purchaser is good against the volunteer. This is no case where it has been determined that the same rule applies in the case of such a limitation by a tenant in tail as in that of a voluntary limitation by one who has the fee. The consequences of the decision may possibly very deeply affect property which may have passed under a great many family settlements. I have however formed an opinion upon the case, and [84] with some confidence that the opinion is right. But it can do no good to decide the case before the recess ; and afterwards it will be to be considered whether, considering the property at stake and the importance of the point, the case ought not to be argued before the Judges.

Lord Eldon (C.) (after stating the case) (June 5, 1818). The decree was not, as the practice is here, for a foreclosure only, but for a sale also, as the practice is in Ireland — “the sale, in the first instance to be of the mortgaged premises : and if the

"produce thereof should be insufficient, then a sale to be had of a competent part of the residue of the lands in the report mentioned."

When this case came to be heard the argument was confined to so much of the case as depended upon these two questions: 1st, whether under the settlement of the 7th and 8th of October, 1748, certain persons to whom estates were given by that settlement were volunteers: 2d, whether the mortgage was a good and valid security, on the principle that the mortgagee for valuable consideration, even with notice, had a better claim than mere volunteers.

I could not at first understand, and I do not yet very well understand, why an account is directed in the same cause, of debts, legacies, and funeral expenses. In the one case it is stated that all creditors may come in and prove; in the other case, that all creditors and legatees may come in before the Master in the usual way. This is of some consequence: for it may be a very different question as [85] between the volunteers and this particular mortgagee and creditor, and as between the volunteers and subsequent creditors and legatees. This is the case of a mortgagee and creditor, claiming specifically against the mortgaged estate. If the estate is not sufficient to pay the whole of the debt, he, by his specialty, is entitled to resort to the other real estates chargeable as assets, and to the personal estate as assets. So that the decree is rightly applied to his case as a mortgagee and specialty creditor. But if the estate should be more than sufficient to pay his debt, a question may arise with the other creditors who do not claim specifically against the estate; and the question as between the volunteers and them, and between the volunteers and legatees, may be very different.

The principal question is whether the Appellant is to be considered as a volunteer; and whether he can support his claim as against a mortgagee for valuable consideration, even with notice. And on the best consideration which I have been able to give to this case, it appears to me that the brothers of Michael Cormick, who were tenants in tail in remainder under the old settlement, by the effect of the new settlement, recoveries, and other transactions, became purchasers of a quite new and different estate; and instead of tenants in tail in remainder, became tenants for life, with remainder to their first and other sons in tail male: the life estate being the gift of the settlor, and also the estates of the sons, who had no estate before and took originally. I cannot find that, according to [86] the authorities, those who took these new estates can be held to be purchasers for consideration, or can be regarded in any other light than as volunteers.

Then the doctrine whether new estates could be given to them as volunteers by one who was himself only tenant in tail was considered, and the point very ingeniously argued. There could be no doubt that if he had previously suffered a recovery, or if the estates had been given to him in fee, the brothers and their sons would be volunteers; and they say, on the other side, that there is no substantial distinction in this respect between tenant in fee and tenant in tail: and so the Court below determined, in concurrence with the unanimous opinion of the Judges of the Court of Common Pleas. I cannot advise your Lordships to reverse that decision; and then the question returns to the decree with reference to the other creditors and legatees.

There can be no doubt as to the point considered as a question between the volunteer and the executors of Plaistow, a mortgagee and creditor. If the mortgaged estate should not be sufficient to make good the debt, he has his remedy against the general assets not included in the settlement. But if the estate should pay more, then a question may arise, what is to be done as to the residue between the volunteer and the other creditors; and what is to be done with reference to the legatees. I believe the real meaning of the decree is to decide the question only as between the volunteer and the mortgagee, claiming against this specific estate, con-[87]-firming the other creditors to the general assets. And then there may still be a difficulty with respect to the legatees.

What I propose to your Lordships then is to affirm this decree, with a declaration that the affirmance is without prejudice to any question with other creditors besides the Respondents who represent the mortgagee, or between the Appellant and the legatees. This declaration can do no harm; and if the real meaning of the decree should be that to which in construction it is liable, it may be important to declare that our affirmance is without prejudice.

Decree AFFIRMED, with declaration as above.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GORDON,—*Appellant* ; MARJORIBANKS, and Others,—*Respondents*
[Feb. 9, 16, 1818].

[3 Scots R. R. 389. Considered in *Frame v. Cameron*, 1864, 3 Macph. 290, at p. 294 ; *Croall v. Edinburgh (Magistrates of)*, 1870, 9 Macph. 323, at p. 327 ; and *Alexander v. Stobo*, 1876, 9 Macph. 599, at p. 605. In the two cases last cited it is referred to as *Gordon v. The New Club*.]

[The erection of a kitchen, billiard room, and a covered passage on the back area of a house in St. Andrew's Square, Edinburgh, opposed on the ground that it would be contrary to the original plan of the new town, and a nuisance. The feu charter contained several restrictions, but none as to building on the back area. Held by the Court of Session that the buildings might legally be erected on the ground, as it was understood, that the erection would be no material deviation from the original plan. The judgment affirmed in Dom. Proc.]

[88] [The Lord Chancellor being of opinion that the mere exhibition of a plan was not a contract or engagement, that all that was there represented would or must be done or adhered to, unless specially referred to as stated in his judgment, *post*.—(*Vid. ante*, *Gibson v. Feoffees of Heriot's Hospital*, [Dow] vol. 2, 301.)]

The question in this case was whether the proprietors of a house in St. Andrew's Square, Edinburgh, were entitled to erect a kitchen and other offices according to a plan in process on the back area of their house. The building was opposed on the allegations that it was contrary to the original and general plan of the new town of Edinburgh, and that it would be a nuisance to the neighbourhood ; both which allegations were denied, and it was also contended that the mere exhibition of the plan was no restriction, the feu charter containing no such restriction nor any reference to the plan as a restriction in this particular.

The magistrates of Edinburgh, before feuing out the ground on which the new town is built, procured a plan delineating the intended streets and squares, and marking out, by letters, the different areas to be feued. The front row, or lines for the front of the houses, were delineated on the plan ; and the back areas were marked as pieces of vacant ground, shaded green ; the ground being then in grass or tillage. The plan was engraved and published.

The area marked letter N. in the plan, on the south side of St. Andrew's Square, was in 1784, [89] feued by the magistrates to David Ross, Esquire, afterwards Lord Ankerville, and purchased from his trustees in 1809, by a club of gentlemen called the New Club ; and the rights taken in the names of the Respondents as their trustees. The charter granted to Mr. Ross proceeding on the narrative of his having paid the sum of £230 “ as the rated purchase money of 42½ feet of ground of area, letter N. “ lying on the south side of St. Andrew's Square,” disposes to him, “ his heirs and “ assigns whomsoever, heritably and irredeemably, all and whole the said 42½ feet in “ front of area, letter N., lying on the south side of St. Andrew's Square, etc.” The charter, like the charters of the other feuars in the square, besides conveying to each of the feuars his house, cellarage, and back area, granted as common property, “ the “ whole space of ground within the line of the street-ways of the square, as now “ levelled and enclosed by a parapet wall and iron rail, and that as a common property “ with the several feuars around the square.” But under the condition “ that the “ aforesaid space be used allenarly for the pleasure, health, or other accommodation of “ the feuars or their families, but no way to be converted into a common thoroughfare, “ or used to any other different purpose whatever.” With respect to the other parts of

the subjects disposed, viz. the dwelling-houses, cellarage, and back ground of the areas, there is no restriction in the charters, except upon the right "to subfeud, sell, or dispose of all or any part of the piece of ground before disposed, or house or others built thereon, to be [90] held of them or their heirs, or of any other interjected superior, but alienably to be held of and under us and our said successors in office, as superiors, in all time coming." In every other respect the charters respectively declare, that, with regard to the space feued, it should be lawful for the proprietor "to exerce any other act of ownership which may not be inconsistent with the manner of holding hereby prescribed;" but under this declaration, "that if the said David Ross, Esquire, or his foresaid, shall convert the subjects built upon the piece of ground hereby feued into breweries, or do any other act or deed to infer a claim of thirlage, they are to free and relieve us, and our successors in office, the piece of ground hereby feued, and feu-duty payable for the same, of and from the payment of all multures which can be claimed furth thereof, as payable to any mill to which the same may have been restricted."

Mr. Ross built in the front of his area a house with a series of closets behind it, reaching to the second story of the house, and about six feet above the highest part of the wall which divides his area from the adjacent property. He also, in his back area, built a coach-house and stables, above which there were two apartments, intended for servants, and a hay-loft. One of these apartments, in the end of the coach-house next the Appellant's property, had a chimney. But neither the Appellant's uncle, the late Baron Gordon, nor the Appellant's father, ever complained of the smoke from this chimney.

In like manner, the other proprietors on the [91] south side of the square built on each of their lots large houses, together with stables, coach-houses, and such other buildings on their back areas as they respectively found requisite.

The house having been purchased by the club, in order to render it suitable for the purposes for which it had been purchased, various repairs and a few alterations were necessary. In particular as it had been built at a period when water-closets were not in use in Edinburgh, it was necessary to erect these conveniences on the area immediately behind the house. The Respondents, accordingly, proceeded to make these erections behind the house; and they ordered the surface of their back area to be lowered, so that the roofs of their new erections might not be higher than the wall betwixt their ground and the ground belonging to the Appellant's father, the late Mr. Gordon. But a bill of suspension and interdict was presented by Mr. Gordon. The Ordinary on the bills ordered the bill to be answered, and in the mean time granted the interdict. The Respondents petitioned the Court against the interlocutor, maintaining their right of building on the back area, but stated that they had then no intention of erecting any thing more than a staircase and closets of the height of the mutual wall. The bill and interdict were refused in so far as regarded these buildings; but the bill was passed *quoad ultra* in order to allow the suspender an opportunity of trying the right to erect on the back area buildings higher than the common wall; and the Respondents were therefore interdicted for a short time from building higher than the wall. [92] But the time was suffered to expire without further proceeding.

In 1813, the club resolved to turn the stable and coach-house into a kitchen, billiard room, and warm baths, which were to communicate with the main-house by a covered passage running through the middle of the back area. A plan of the new erections was produced in process, the ridge of the buildings (now finished according to that plan) not being more than six feet higher than the lowest part of the mutual wall. The Respondents presented a petition to the Dean of Guild craving leave to erect the new buildings, which petition was served on Dr. Gregory and Mr. Gordon, the proprietors of the adjoining houses. Dr. Gregory made no objection. Mr. Gordon objected, on the grounds before mentioned, that the buildings would be contrary to the original plan of the town, and a nuisance.

The Dean of Guild pronounced the following interlocutory order: "The Dean of Guild having considered the petition for the managers of the New Club, with the answers thereto for Charles Gordon, Esq. replies, duplies, triplies, titles, and whole process, and also visited the premises, repels the objection, that the use to which the proposed buildings are to be put is of the nature of a nuisance. Finds, that when the ground on which the new town is built was feued, a regular plan was laid down, in

“ which the health and comfort of the inhabitants appear to have been consulted by
 “ disposing of the back ground into areas for promotion of a free circulation of air,
 “ [93] and adding beauty to the appearance, as well as of affording convenience to the
 “ inhabitants, and from which plan no deviation ought to have been permitted. Finds,
 “ that in cases where any material deviation from the general plan has taken place, the
 “ same has either arisen from the consent of conterminous heritors, or from not being
 “ opposed by the public or those having interest therein in proper time. Finds, how-
 “ ever, that no material deviation or inconvenience will arise from the proposed change
 “ on the buildings belonging to the pursuers, therefore grants warrant to them to make
 “ the alterations and additions craved, conform to the plan marked as relative hereto,
 “ under the special exception and condition that the height of the passage to the pro-
 “ posed kitchen, billiard-room, and baths, does not exceed that of the garden, or division-
 “ wall, and decerns.”

The now Respondents presented a bill of advocation to the Court of Session, complaining of this sentence of the Dean of Guild, in so far as it prevented them from raising the building, which was to form the passage from the house through the garden to the proposed kitchen, to the height they intended, and restraining them to the height of the common division-wall between theirs and Mr. Gordon's property.

And Mr. Gordon thereupon presented his bill complaining of the sentence so far as it repelled the objection to the proposed buildings as a nuisance, and granted warrant to the Respondents to make the alterations and additions craved by their petition, [94] conform to the plan exhibited by them, though with the condition annexed as to the height of the passage.

These mutual bills of advocation being passed, the cause was argued before the Lord Alloway, Ordinary, who conjoined the processes, and made avizandum to the Lords of the First Division, appointing the parties to prepare and print memorials to be reported to the Court.

The Lords of the First Division pronounced the following interlocutor: “ Upon the
 “ report of the Lord Alloway, and having advised the memorials for the parties, the Lords
 “ advocate the process, and in the advocation at the instance of Mr. John Marjoribanks
 “ and others, find that they are entitled to erect the passage to the proposed kitchen,
 “ billiard-room, and baths, of the height and dimensions as said passage is delineated in
 “ the plan in process, and decern accordingly, and in the advocation at the instance of
 “ Charles Gordon, find, decern, and declare, in terms of the interlocutor of the Dean of
 “ Guild.”

From this judgment the Appellant, who sisted himself as a party on his father's death, appealed.

Mr. Brougham (for Appellant). 1st. The magistrates had no right, consistently with their own charters to others, to give leave to erect these buildings; and that raises the question, whether the original plan is to be taken into account at all. With respect to that question, I refer to the case of *Deas v. Magistrates of Edinburgh*, in 1772, when L. Mansfield moved the judgment of this [95] house, which was considered below in *Gibson v. Feoffees of Heriot's Hospital* (2 Dow, 301), as a decision on the merits, and as settling the law on the subject: and in a recent case, *Deuar v. Young*, 1814, this is the view that was taken of the case of *Deas*. The decision in *Deuar v. Young* is in our favour; and is a decision on the very question (*Riddel v. Moir*, 1801; *Campbell v. Lindsay*, 1803).

They said they had a right to do every thing not prevented by their charter. But the charter refers to the plan; and it is clear that by the plan the back area was to be kept open. *Gibson v. Feoffees of Heriot's Hospital* was a distinct case. In that case there was no reference whatever in the charter to the plan; and the objection was that the magistrates had not fulfilled their part of the contract, to which it was contended they bound themselves by the exhibition of the plan; and in deciding *Deuar v. Young*, the Judges had the case of *Gibson* in their eye.

Mr. Adam. We obtained a right of servitude by our charter, by which we are entitled to prevent the erection of these buildings; and any other contrary grant is illegal. But we contend also that the magistrates did not grant any inconsistent charter. There is no writing on the plan, and it is to be judged of by the view: and the plan, which lay for inspection at the time of entering into the contracts, applies to the back area as well as to the front; and so it was considered in *Deuar v. Young*, and

— *v. Campbell*, Nov. 1815: and a copy of L. Mansfield's judgment in the case of *Deas* was before the Court.

[96] The magistrates were not at liberty to alter the plan. They may perhaps say that the plan shows only the original intention of the magistrates: and that they were to be governed only by the charter. But there is a special reference to the plan in the charters: and, if they adopt it for one purpose, they must take it for all purposes. They admit that they are bound by it as to the front of the house, and they must therefore take it as their rule in every other particular: and the violation of the contract in one point is no reason for violating it in any other point. They infer from the clause in the charter by which they are allowed "to subfeu, sell, or dispose of all or any part of the piece of ground, house, or others, built thereon, etc." that it was intended that the back area should be built upon. But the word others does not bear out that argument: and it is a forced inference. They also rely on the clause stipulating that "if the premises should be converted into breweries, etc. the magistrates should not be liable to multures, etc." But that gave authority neither to build nor to convert into breweries: but only, provided that in case the premises should be converted into breweries, the magistrates should be free from certain consequences. (Lord Eldon, C. Do you contend that according to the original plan this was always to remain a garden? The case set up here is only this—that they should not build higher than the division wall. But how were they permitted to build at all, if by the plan this was always to be a garden?) We carry it farther, that they were not permitted to build at all. The [97] colour showed that it was not to be built upon. True, stables, etc., had been built there: and it was not thought of any consequence to prohibit them, as they were only of the height of the wall, and did not obstruct the light. But that is no reason for not insisting upon the right, when the contract is violated in a more injurious manner. In *Deuar v. Young*, the Court seems to have considered the plan as the common agreement; and yet in that case, there was no reference to the plan; so that our case is stronger. The case of — *v. Campbell*, decided in 1815, is also in our favour. The buildings are, besides, a nuisance.

Lord Advocate (for Respondents). The only restrictions in direct terms are the conditions under which they were to be at liberty to subfeu and convert the premises into a brewery, and the provisions with respect to the area of the square. There is nothing in the charter to prevent the erecting of buildings on the back area. But they say there is in some particulars a reference to the plan: to which we answer in the words of one of your Lordships in the case of *Gibson* (2 Dow, 312, 313), that it would be dangerous when men put their contracts in the solemn form of a charter, to consider that as a condition of the contract, about which there was some representation when the contract was entered into, but which was not mentioned in the charter.

But supposing the plan could be taken into account, nothing appears on the face of it respecting the height of the wall: every case they cite is totally subversive of their own argument. Deci-[98]-sions are referred to for the purpose of showing that no building could be erected, except where it is marked out on the plan that a building is to be erected. But every one of the cases recognize the right to build on the back area, if the building is not carried higher than the division wall. The plan says that there shall be no building on the back area; but the cases say, "you may build there up to the height of the wall." In the case of *Deas* there was no decision by this house on the merits. It was merely remitted in order to try the question of right: and the Courts have deviated from the plan: for they allow buildings up to a certain height, restraining them therefore only as to the height, to which the plan has no reference. In the cases of *Reid v. Neils*, *Strachan v. Wardrop*, and *Sim v. Anderson*, it was held that buildings might be erected on the back areas.

Sir S. Romilly. They have in their favour only the letter N. and a green colour. It is clear from the charter, and even from the conditions and restrictions in it, that it was understood that they might build on the back area; but their argument is that some clauses ought to be struck out, and others substituted which are not there, merely on account of the green colour on the plan.

They argue that the parties ought to be governed by the plan, and that no buildings at all should be erected on the back area: and next they say that the buildings are a nuisance, independent of the plan. With respect to the first point, they rely on the case of *Deas*, in which an interdict against building on the ground in front of Princes

Street [99] was refused below. That was reversed by this House in order to give an opportunity to try the question of right. The judgment of this House in that case was said below to have established this, that the plan was the common law of the city of Edinburgh, and that the magistrates were bound to make good their representations in the plan. By the plan, the ground in front of Princes Street was to be converted into gardens, terraces, and pleasure grounds. Did they then make good, or were they required to make good, that representation? No such thing. The magistrates were restrained from building upon it; and that was all. That decision could not make the plan the common law of Edinburgh. Common law was common usage, and it certainly had been common to build on these back areas. The restrictions, when intended, were put in express words. There was no pretence for the allegation that the buildings were a nuisance, independent of the plan.

Mr. Brougham (reply). There were obvious reasons for expressing the restrictions as to the intersecting of any superior, and relieving the magistrates from certain claims, without excluding other restrictions. They interfered only for their own interests. (Lord Eldon, C. Coach-houses and stables were generally built on these areas.) That was by sufferance. (Lord Eldon, C. One of the Judges (Lord Meadowbank), a great authority, speaking of the case of Deas, says, that he held it to be the common law of the city of Edinburgh.) He may have alluded to the custom. True, build-[100]-ings up to the height of the wall were suffered by Gordon to be erected without opposition, because no serious inconvenience resulted from them. But now it was become a matter of serious inconvenience. Upon their argument there was nothing to prevent them from erecting buildings on the back area as high as the club-house. That, they may say, would obstruct the light; but so does any building beyond the height of the wall, *pro tanto*; and we have a right to prevent their building an inch above it. All the feus are referable to the plan, which is therefore part of the feus. What prevents their erecting buildings in the front? They must refer to the plan. A servitude may be inferred where it is not mentioned in the titles. Deuar prevented an appeal by paying the costs, but did he suffer the other party to build? (Lord Eldon, C. If the inspection of the plan can raise a contract, then all the houses ought to be of an equal height; and all the walls likewise; and there ought to be no buildings at all on these areas.) One has a servitude that another's wall should not be higher than his own; but, in order to object with effect, he must have an interest: he must show that his light is obstructed, and that is a question of fact. If he is not injured, he could not object to a remote wall being higher. But they have not only raised their buildings considerably higher than before, but have put three times the weight on the party wall; and we have a right to prevent the weight as well as the height. The whole principle of the civil law with respect to servitudes shows it: and even if they had a right [101] to build to a certain height, it does not follow that they had a right to build beyond it.

(Feb. 16, 1818.) Lord Eldon (C.). This case which originated in a dispute between a club, called the New Club, proprietors of a house in St. Andrew's Square, and the proprietor of an adjoining house, comes here by appeal from two interlocutors of the First Division of the Court of Session. The first and principal interlocutor is this. "Upon report of the Lord Alloway, and having advised the memorials for the parties, the Lords advocate the process: and, in the advocacy at the instance of Mr. John Marjoribanks and others, find that they are entitled to erect the passage to their proposed kitchen, billiard-room, and baths, of the height and dimensions as the said passage is delineated in the plan in process;" I request your Lordships' attention particularly to these words, "and decern accordingly: and in the advocacy at the instance of Charles Gordon, find, decern, and declare in terms of the interlocutor of the Dean of Guild, find the said Charles Gordon liable in the expenses of process."

The other interlocutor related merely to the expenses.

When I called your Lordships' particular attention to the words "as the said passage is delineated in the plan in process," I did so for the purpose of bringing under your notice the distinction between these interlocutors and that of the Dean of Guild. That magistrate having considered "the petition for the managers of the New Club, with [102] the answers thereto for Charles Gordon, Esquire, replies, duplies, triplies, titles, and whole process, and also visited the premises, repels the objection, that the use to which the proposed buildings are to be put is of the nature of a nuisance: finds, that when the ground on which the New Town is built was feued, a regular

“ plan was laid down, in which the health and comfort of the inhabitants appear
 “ to have been consulted, by disposing of the back ground into areas for the promotion
 “ of a free circulation of air, and adding beauty to the appearance, as well as of afford-
 “ ing convenience to the inhabitants, and from which plan no deviation ought to have
 “ been permitted: finds, that in cases where any material deviation from this general
 “ plan has taken place, the same has either arisen from the consent of the conterminous
 “ heritors, or from not being opposed by the public, or those having interest therein, in
 “ proper time: finds, however, that no material deviation or inconvenience will arise
 “ from the proposed change on the building belonging to the pursuers: therefore, grants
 “ warrant to them to make the alterations and additions craved, conform to the plan
 “ marked as relative hereto: under this special exception and condition, that the
 “ height of the passage to the proposed kitchen, billiard-room, and baths, does not ex-
 “ ceed that of the garden or division-wall, and decerns.” Now the distinction is in the
 particular language by which they declare the right of the members of the club to build.
 The Court of Session declares their right to build their passage as delineated in the
 plan in process, that is, in some [103] parts higher than the division wall. The Dean
 of Guild was of opinion that they were not entitled to build higher than the wall.

The question arises out of a claim on the part of the club to build on the area
 behind their house, according to a plan delivered. That was opposed on two grounds,
 as was stated; 1st. That the building would be a nuisance; and certainly if the
 Appellant was well founded in that, he had a right to abate the nuisance. It appears
 hardly possible to make out the objection on that ground. But the principal question
 is, whether, regard being had to the original plan of the town, each heritor could main-
 tain the proposition that the conterminous heritors had come under an obligation not
 to build on the back areas. The original plan is one delineating the streets and squares
 of the intended town, and scites of the houses; the areas of the fens being coloured
 green, and marked with letters: and, without entering into the question with respect
 to the magistrates, the question here is, whether as between the heritors themselves
 there is such a reference to the plan as that the law can infer the existence of contracts
 between the parties that the ground should always be kept in the state in which it was
 delineated on that plan. With respect to St. Andrew's Square, we are told that the
 plan represents the scite of the house, and that all the rest is to be kept free: that is,
 not covered with buildings. But what further information was given by the plan which
 communicated nothing as to the areas, except in so far as it represented the ground
 as in grass, we have not learned at our bar. It is stated in the cases [104] here,
 that the plan did not represent even the depth of the houses; and it was also
 stated that, although the areas have been separated by division walls, there is nothing
 in the plan to show that they were to be so separated: nothing to show that the walls
 were to be any particular height, or that they were all to be of the same height.

The charter now belonging to the club was granted to Mr. Ross, afterwards Lord
 Ankerville, which refers to the lot marked letter N. in the plan, the adjoining lots being
 in the same manner, I presume, marked with the letters M. and O.: I mention this
 charter rather as evidence of the understanding between the magistrates and the feuar,
 than as a thing which is to bind the several heritors as between themselves: for the
 question here is not with the magistrates, but the question is whether the transactions
 as to that plan have been such as that it can be legally inferred that the several heritors
 have contracted with each other in such a manner as that each has a servitude over the
 property of the rest, so as to give him a legal right to restrain them from making that
 use of their property which otherwise they would be entitled to make.

Looking at the charter then first as evidence of the understanding between the
 magistrates and feuar, it conveys, besides the house, cellarage, and back area, “ the
 “ whole space of ground within the line of the street-ways of the square as now levelled
 “ and enclosed by a parapet wall and iron rail, and that as a common property with
 “ the several feuars round the square. But under the condition that the aforesaid
 “ space be used, allenarly, [105] for the pleasure, health, or other accommodation of the
 “ feuars or their families; but no way to be converted into a common thoroughfare, or
 “ used to any other different purpose whatever.” So that, the plan representing the
 square in front, the charter grants that, but under the restriction to be used in the
 manner mentioned. With respect to the other parts of the subject disposed, the
 dwelling house, cellarage, and back ground, there is no restriction, except on the right

"to subfeu, sell, or dispose of all or any part of the piece of ground before disposed:" and then follow words from which the Respondents have drawn an inference in their favour, "or house or others built thereon." On the one side they ask, if it was not intended that there should be any building but the front house, what was the meaning of the words "or others built thereon?" And on the other side they answer that they may mean appurtenances, and not detached buildings. But still the Respondents may say, that this a question to be determined between them and the conterminous heritors, and not between them and the magistrates. And indeed after having said "all or any" "part of the piece of ground before disposed," the other words might have been left out, so that, in Scotch, as well as in English instruments of this kind, there may be surplusage.

Then there is another clause of the charter declaring that it shall be lawful for the proprietor "to exercise any other act of ownership which may not be inconsistent with the manner of holding hereby prescribed," but under this declaration, "that if the" said D. Ross or his foresaids shall con-[106]-vert the subjects built upon the piece of "ground hereby feued into breweries, or do any other act or deed to infer a claim of "thirlage, they are to free and relieve us and our successors in office, the piece of "ground hereby feued, and feu duty payable for the same, of and from the payment of "all multures which can be claimed furth thereof as payable to any mill to which the "same may have been restricted." Here therefore they contemplate that the subjects built upon the premises might be converted into breweries: and I mention this for the sake of two observations, 1st. That, let the meaning of this be what it may, the question which we have to decide is, not, I repeat it, a question with the magistrates, but one between two conterminous heritors; and then, if the original plan exhibited is the rule of good faith and obligation, it is, after this, the most surprising thing in the world, in fact I mean, if when they are feuing out these pieces of ground in this case and others, it should be supposed, without a word said about it in the charter, that there was an understanding that these areas were to remain gardens for ever, separated by walls of which there was no exhibition on the plan either as to their height, or even as to their existence at all.

Let it not be supposed that I disregard the taste and the beauty of the city of Edinburgh. Far from it; I saw it once when it was less beautiful and elegant than it is now; although it was even then a very striking and beautiful object. But I say, as I said on a former occasion, that whatever may be due to the taste and beauty of the city of Edin-[107]-burgh, we are not here to support them at the expense of the legal rights of the parties, nor to carry our respect and regard for taste and beauty so far as to establish a contract where there is no such thing.

Mr. Ross, as is stated in these papers, built a series of closets behind the house six feet above the highest part of the division wall, and also a coach-house and stables on the back area: and this was not found fault with. Then see how you are to account for it, if there was to be no building at all on the back area, that these coach-houses and stables were built there: (and I wish to know also what they saw on the plan to constitute an obligation to keep one part of the area uncovered, and to show that there was no obligation not to build these closets on the other part of the area:) and yet this was done very generally. Then by what authority were these water-closets built on the back area? But the necessity for these things was such that I do not think that much stress can be laid upon the circumstance.

This feu was purchased by a club of gentlemen, consisting of 300 members, among whom were probably some of the faculty of advocates, and, I am sure, some of the learned judges; for, I observe, the Lord Ordinary declines pronouncing any interlocutor, on the ground of his being a member: and, considering the character of those who compose this club, it cannot be supposed that they conceived they were violating the common law of the city of Edinburgh when they set about these alterations.

The club did not want the coach-house and [108] stables, and they proposed to convert them into a kitchen, billiard-rooms, and baths; and connect them with the house by means of a covered passage: and they intended at first that the passage should not be above the height of the mutual wall. Afterwards they found it expedient that it should be a little higher; but it never struck them that, if the passage were not higher than the mutual wall, it could be any breach of obligation with respect to the conterminous heritors. But how that understanding, as to the height, could be repre-

sented on a plan where every thing was left vacant ; and how it could be inferred from such a plan that some descriptions of buildings might be erected and not others, is, perhaps, more than one can well conceive.

It appeared then that afterwards they found it convenient to have a higher passage. The wall itself, being built on sloping ground, was higher at the end next the houses ; and, in order to keep the passage as low as they well could, they began by lowering the ground in the area. The building consisted of two stories, there being a passage from the lower story to the ground offices, and another passage above, forming a direct communication from the main house to the baths and billiard-rooms, etc. Gordon, it appears, did not choose to submit to this ; since it was at least unpleasant, if no nuisance ; and whatever one may think of the generosity and honourable feeling of waiving a right, I say again, that in a court of judicature we have nothing to do with that : for we are not here to decide what persons may be expected to do from [109] taste and honourable feelings, but what are their contracts and obligations in law ; and if Mr. Gordon can by law destroy these buildings, he is doing nothing but what he is fully entitled to do.

On the other side of this club-house is the house of Dr. Gregory, whom I understand to be the very eminent physician of that name, one not likely perhaps to be disposed to acquiesce if this had been a nuisance. He, it seems, made no objection ; but a most ingenious reason is assigned for his acquiescence. Mr. Gordon objected on account of the smoke, and, considering that the club consisted of 300 gentlemen, some of whom might be often amusing themselves at billiards, there might be some reason to object to the noise also ; and if there was much festivity, not only the smoke, but the smell also from the kitchen, might be unpleasant. But it was ingeniously argued that Dr. Gregory had no such reason to object, because, as his house is on the east or west side, whichever it is, the wind at Edinburgh generally blows from such a quarter, that the noise, smoke, and smell, all go to Mr. Gordon, and not to Dr. Gregory.

The Court was of the opinion which has been stated, on the ground, as I understand it, that there was no material deviation from the plan in this instance, and that this was no nuisance ; and that there was nothing in the plan which prevented the erecting of these buildings. Mr. Gordon has no building on his back area. But the same inference, as far as depends on the plan, must arise, as to the areas behind Princes Street : and he has a coach-house and stables behind Princes Street. [110] How they got there, if inconsistent with the plan, we do not know ; but he covenants that they should not be higher than the division wall ; and how is that special covenant consistent with the alleged effect of the plan, which, it is said, prohibits their being carried higher ? If the plan prevented the building them higher, it is hardly possible that the magistrates should have taken him bound by a separate contract not to build higher.

But it is a different question whether the heritors have not so contracted between themselves, as to enable one to compel the others to refrain from building in this way. I understand that where a Scotch servitude exists it must be expressly created ; and then see what the plan is : and here I am obliged to say, subject to all the censure to which I may be exposed, and I do not know that I ought to consider that as worthy of much attention. But I do not hesitate, because I most sincerely think it is my duty, to say, that to infer such a contract from the exhibition of such a plan, would be as violent a stretch in judicature as ever I met with in the course of a long professional life. I do not mean to say that there may not be a plan, of such a nature, and exhibited in such a manner, as to point out their rights to various parties, and to constitute the ground of contract and obligation between them ; but the plan must speak intelligibly what is meant. Take the case of Butterworth for instance. In that case there was a plan pointing out clearly the obligations imposed on the party. He signed the plan, and the charter referred to the plan so signed ; and then it was impossible that he [111] should be permitted to diminish the value of the houses that others might build. But how do the circumstances bear upon a plan which shows nothing beyond what the charter professes to regulate ? And where not a syllable is said in the charter about the matter, you are to infer, 1st. That the heritors may divide the ground into separate areas ; and that you may infer, since it is so convenient for them to enclose their ground. But the plan says nothing about the mode of enclosure : that the

wall of A. should be of the same height as the wall of B.; or the wall of B. of the height of the wall of C.: or any or all of them, of any given height; and unless it is a common obligation, how can the argument be supported as to the obligation between any two of the heritors?

In the case of the Feoffees of Heriot's Hospital (Dow, 2, 301), speaking of the case of Deas, in which this House proceeded, on the advice of a noble person, of whom I again say, that, as long as the law of Scotland or of England exists, his name will be pronounced with respect and veneration; a noble person, who for some time exclusively managed the business in Scotch causes here, which I do not think a happy condition of this House; in that case, I thought it my duty to say that, with which, if said in his presence, he would not have been offended; always speaking with the respect and deference due to so great and exalted a character, that, although his intention was not to alarm, I was so infirm, that if I had been one of the corporation of Edinburgh, I should have been alarmed. And your Lordships will pardon me if I take the liberty [112] again to say, that his speech is addressed a great deal too much to the taste and honour of parties, instead of dwelling upon their contracts, and following the steps of that correct judicial path within which a Judge is by his duty confined. As to an observation made with respect to the case of the Feoffees of Heriot's Hospital, that the judgment of this House in that case was one to be obeyed, not to be followed, I must take the liberty to say that this would be a course which, if pursued, would call for some attention. For, although every Court may say, that if a case varies in facts and circumstances, it is at liberty to found upon these different circumstances; I do not recollect that it ever fell from a Judge in this country, that he would obey the judgment of this House in the particular case, but not follow it in others. That is not a doctrine to which we are accustomed.

That case, although it justly called for observation on what had been said in the case of Deas, was determined on a different ground. The property there belonged to the magistrates and feoffees of Heriot's Hospital, and the feuar was to pay what was called the slump sum to the magistrates, and the feu duty to the hospital. A plan was at that time exhibited, by which the ground was represented as clear from certain old houses. The magistrates were empowered under an act of parliament to purchase the houses; but before they did so, the act and authority expired. The trustees called for the feu duty, and the feuar answered, "No—the plan held out that certain old houses " were to be removed, and they are not removed; [113] and therefore I am not bound " to pay." I was weak enough to think that it was clearly impossible to support that plea. If he had a right to have the houses removed he might call on the magistrates to remove them; but why not pay the feu duty to the feoffees of Heriot's Hospital? No man can be more ready than I am to admit that it is difficult for the mind of an English lawyer to deal with Scotch law, especially the law of entails; and, judging from what was this day read at your bar, it seems to be no less difficult for the mind of a Scotch lawyer to deal with English entails; the similarity of names producing a notion that there is more similarity in fact than there actually is. And it was for that reason, from an anxiety to guard against English impressions, that I was desirous to examine that case with the most vigilant attention. But I do say, that unless we covenanted with the Duke of Bedford that he would not build so as to deteriorate our view, we could not prevent him from so doing upon the ground of an exhibition of a plan from which we might understand that he intended to act differently. If the transaction relative to the plan mentioned in the case of Deas, had been such as clearly to render it the foundation of a contract between the parties; and the plan had been of such a description, and had been exhibited in such a manner, as to point out their obligations, in a way that could not be mistaken, then the faith as pledged ought to have been kept. But if that was the representation, how was it that the plan [114] was not executed? In that very case of Deas, in 1772, five years after the first exhibition of this plan, which had been supposed to have created the common law of the city of Edinburgh, the proceeding in this House was so far a reversal of the opinion of the Court of Session, which had held that there was no such understanding. It seems most strange, that if this plan created the common law of the city of Edinburgh, if it was so clearly a ground of contract, that it was almost nefarious to attempt to act in opposition to it: that five years after the Court of Session, before its division, should have been of opinion that there was no such contract; and that subsequently, although

one division was of opinion that there was such a contract, the other division thought there was not.

I also thought and ventured to say in that case that the question of right had not been decided in this House in the case of Deas, and my authority for that was the very words of Lord Mansfield, who spoke of "laying the order of the House on the Court below, to pass the bill of suspension that it may be conjoined with the action of declarator, and the question of right decided:" from which I understood that it had not then been decided.

Now with respect to the walls, if they were entitled to separate their back areas, where is the evidence as to the mode in which this was to be done? It was admitted that the walls had been built of different heights. Where is the evidence [115] that they should be only six feet high, or that they might not be raised to ten feet, or what is the intermediate height? Where is the evidence that they should be of equal height, or that they must exist at all? So again on the plan the back area appears to be vacant, or in the state of a garden; and yet, there coach-houses and stables were generally built: and there is so much of admission that these might be built, and of the height of the wall, if not of a greater height: and where is the evidence as to the height of the wall which is to regulate that of the coach-houses and stables! In short every step we take inferring contracts and negative servitudes, leads us into difficulties. I say that the very circumstance of the taking of special obligations, not only from an individual feuar, but from all of them, as to the square or ground in front, while there is no such obligation as to the ground behind, does appear to me to raise an inference, not that there was any restriction as to the use of the back areas, but that there was none.

This is the opinion which I offer to your Lordships. I do not profess to have much taste; but if I had, I should not think myself at liberty to indulge it at the expense of doing that which is consistent neither with law nor the contracts of parties. On these grounds my opinion is that this judgment ought to be affirmed.

There is one point however which has not been explained. The wall is common property, and it was stated here that not a word was said below as [116] to the point whether these buildings placed a greater weight on the wall than the old buildings did. The judgment however may be affirmed with a qualification as to that.

It having been intimated to the House on behalf of the parties, that they did not wish that the point as to the weight on the wall should be noticed, the judgment was simply AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CAMPBELL, and Another,—*Appellants*; STEIN,—*Respondent* [March 2, 16.
June 5, 1818].

[Mews' Dig. ix. 38; xiii. 38, 58; 3 Scots R. R. 400. See as to application of Statutes of Limitation to Scotland, *R. v. Walker*, 1761, 1 W. Bl. 286; *Suttees v. Allan*, 1814, 2 Dow, 254. See also *Richardson v. Merry*, 1863, 1 Macph. 940, at pp. 944, 948. As to position of managing owner, see *The Bellecainn*, 1886, 5 Asp. Mar. Law Rep. 582.]

[Solicitor in London brings his action against his debtor in Scotland for costs incurred in the conduct of an appeal in Dom. Proc.]

[The action, in which the costs were incurred, was originally brought in the Admiralty Court to recover the amount insured upon salvage for a recapture made by the ship *Diana*, of which Yelton, Ogilvie, and Stein, the Respondent, were the owners: Stein being however one of the registered owners only for security of a debt due to him from Ogilvie. Pending the

suit before the Judge Admiral the *Diana* was sold, and the debt paid to Stein. Stein's name was, however, continued in the subsequent proceedings in the Court of Session and House of Lords. Yelton, the ship's husband, by letter to the agent in Scotland, stated it to be Mr. Stein's request that a particular [117] solicitor named should be employed to conduct the appeal, and he was employed.]

[To the action by the solicitor, Stein, who was the principal defender, the others being insolvent; pleaded the triennial prescription; and averred (and the averment not disproved) that Yelton had no authority from him to write the letter to the agent in Scotland, that he never was consulted about the matter, and that the use of his name in the proceedings in Scotland and in Dom. Proc. had been entirely without his authority or knowledge. Answered that the law of Scotland and the triennial prescription did not apply, the debt having been contracted in England: and that, supposing that to be wrong, the prescription did not apply because the debt was constituted by writ, Yelton, as ship's husband, having power to bind the other owners, and having bound them by his letter. Judgment below for the defender, the Court being of opinion that it was itself the proper *forum*, and that a ship's husband could not bind the owners in this matter: and the grounds of judgment held in Dom. Proc. to be right.]

[But the Lord Chancellor being of opinion that, by the policy of the Hawkesbury acts, Yelton might have bound Stein as a co-owner, if their names appeared together as owners in the register, a copy of two registers (agreed by the parties to be a true copy) produced, in one of which the name of Stein appeared, in the other that of Yelton; but not being together in the same register the Lord Chancellor conceived that it was too much to say that they were co-owners; and judgment affirmed.]

The Appellant, on the 3d March, 1810, brought his action in the Court of Session against John Yelton, shipmaster in Kincardine, James Ogilvie, shipmaster there, and Robert Stein, farmer in Loanside, owners of the ship *Diana*, of Kincardine, for payment of £125 16s. 4d. being the balance of a bill of costs due by them to the Appellant, Mr. [118] Campbell, for conducting an appeal to the Lords, in which he was agent for Messrs. Yelton, Ogilvie, and Stein, the owners of the *Diana*, who were the Respondents, and James Smith and other underwriters were the Appellants. Yelton and Ogilvie became bankrupt before the present action was brought.

The appeal of the owners of the *Diana*, in which the costs sued for were incurred, and the employment of the Appellant to conduct it, originated in the following circumstances: the *Diana* in the year 1799, in the course of a voyage from the Frith of Forth to the Baltic, fell in with the *Lady Bruce* of Newcastle, in tow of a French privateer. The *Diana* recaptured this vessel, and the owners immediately effected insurance to the extent of £400 on the salvage supposed to be due to them as recaptors.

The *Lady Bruce* was again captured by a Dutch schooner privateer, and the owners of the *Diana* having made their demand upon the policy for the amount of the salvage, were met by the objection, that they had no insurable interest in the vessel.

Upon this point a long litigation took place between the owners and the underwriters, first before the Judge Admiral, and afterwards before the Court of Session. The owners were successful in both instances. The cause on the part of the owners was conducted in the Court of Session by Mr. Adam Rolland, writer to the signet. As soon as it was known that the underwriters had resolved to [119] carry the question to the House of Lords, Mr. Rolland addressed the following letter to Mr. Yelton, who was the ship's husband, and managed the correspondence for the other owners: "The insurers of the *Lady Bruce*'s salvage having appealed, what is to be done? Are you "to follow them and defend? If so, the first thing which the solicitor in London will "require, is £50 to account of the expense." The ordinary solicitor employed by Mr. Rolland, their agent, was Mr. Mundell. The following answer was returned by Mr. Yelton to Mr. Rolland's letter: "I am favoured with yours of the 14th instant, and "note its contents. We must undoubtedly follow on and defend. Mr. Stein mentioned this to me some days ago, and requested that Mr. Campbell should be employed

"as solicitor. I told him you had a friend of your own, and, unless you was quite agreeable, I could not do it. As to this, in course."

To this Mr. Rolland answered, that the parties might employ any solicitor they pleased. And upon being still pressed to say, whether Mr. Campbell was as agreeable to him as Mr. Mundell, he writes, "I am not entitled to say which of the two solicitors is most agreeable to me. When left to myself, I employ Mr. Mundell; but I know Mr. Campbell as well as Mr. Mundell, and I know them to be equally able and attentive; and that you are in safe hands while your cause is under charge of either," etc.

[120] Some farther correspondence took place, and Mr. Yelton again wrote, "I am favoured with yours, and have again spoke with Mr. Stein, who still wishes, as his name is into it, that Mr. Campbell should be employed."

The Appellant was accordingly employed to conduct the case of the Respondents in the Appeal. And it is to be observed, that the proceedings in the House of Lords, as well as all the previous proceedings, were carried on in the names of Messrs. Yelton, Ogilvie, and Stein, as owners of the *Diana*, and that Stein was in fact a registered owner pending the proceedings in the Court of Admiralty.

The defence put in for Mr. Stein, the Respondent, to the Appellant's action was, "That the account libelled on was prescribed, and the Defender denies being resting owing any part of it." This defence was founded on the act 1579, cap. 83, by which it is enacted that "all actions of debt for house maillies, mennis ordinars, servands fees, merchants comptes, and uther like debts that are not founded upon written obligations be perserved within three veires, urtherwise the creditours sall have na action except he outhter priefe be writ, or be aith of his partie."

The cause came before Lord Armadale as Ordinary. The Respondent was examined as a haver, and denied being in possession of any writings called for. Parties were afterwards heard by their counsel, and the Lord Ordinary was pleased to pronounce the following interlocutor: "The Lord Or-[121]-dinary decerns against the Defenders John Yelton and James Ogilvie, for whom no appearance is made, in terms of the libel; and having heard parties procurators upon the grounds of the libel, defences for the other defender Robert Stein, and deposition emitted by him, in respect he does not allledge payment, nor offer to instruct that his name was not used in the question of appeal, repels the said defences, and decerns also against the said Robert Stein, in terms of the libel: finds him liable to the Pursuers in expenses," etc.

Upon advising a representation, with answers, his Lordship pronounced this interlocutor: "Before answer, appoints the cause to be called, on Wednesday next, and the Respondent to show from the appeal case, or from the correspondence betwixt him and the agent for the representer in this country, that the name of the representer was used as a party in the proceedings before the House of Lords."

This order having been complied with, the cause was argued before the Lord Ordinary, and his Lordship pronounced the following interlocutor: "The Lord Ordinary having resumed consideration of the representation for Robert Stein, Defender, together with the answers thereto, and having heard parties procurators, finds sufficient evidence that the question from which the account pursued for originates, was for several years publicly carried on before the Court of Session, in the names of Yelton, Ogilvie, and the Representer [122] Robert Stein, as joint owners of the ship or vessel the *Diana* of Kincardine; and was afterwards, in the same manner, carried on in their joint names, in the appeal; therefore, and in respect of what is stated in the former interlocutor, now under review, refuses the desire of the representation, and adheres to that interlocutor."

Against this interlocutor, Mr. Stein, the Respondent, gave in a full representation, which the Lord Ordinary refused, without answers, of this date, "reserving to the Defender to insist against his own agent, if he should be so advised."

Mr. Stein reclaimed to the whole Lords (First Division) against these interlocutors: and upon advising his petition, with answers, their Lordships were pleased to pronounce the following interlocutor: "The Lords having resumed consideration of this petition, and advised the same, with the answers thereto, they alter the Lord Ordinary's interlocutor reclaimed against; sustain the defence of the triennial prescription, and find that the constitution and subsistence of the claim libelled, are only competent to be proven by the oath of the Defender; and remit to the Lord Ordinary to proceed accordingly; but find the Pursuer not liable in the expense of process."

From this interlocutor Mr. Campbell appealed; and Mr. Stein appealed from it for his costs, and to this cross appeal a formal answer was put in.

The reasons of appeal were,

I. The contract being entered into in England, [123] the *lex loci contractus* must regulate both the constitution and extinction of the debt. The demand was made by legal process, a few months after the lapse of three years; and a demand had been previously made as stated in the summons, by rendering the bill to Mr. George Mill (at the time the agent of the ship-owners) on the 13th June, 1807, in less time than a year after the judgment of the House of Lords.

II. It is proved by the letters of Yelton, the ship's husband, that he was specially authorised by the Respondent, Mr. Stein, to commit the charge of the case of the Respondents in the appeal, brought by the underwriters to the Appellant, Mr. Campbell. However solemnly the Respondent may now (after the interlocutors which were favourable in the courts below to the ship-owners have been reversed) assert that Yelton's letters were written without any communication with him, it must be remembered that Yelton was a co-owner and the ship's husband, and the partner of the Respondent in the ship, and therefore whatever he did, bound the other owners as well as himself; and Mr. Stein cannot be heard to say, that his partner in his correspondence acted unfairly, so as thereby to affect third parties. At the same time the Appellants must be permitted to observe, that the Respondent has never denied his knowledge of the capture made by the *Diana*; his knowledge of the actions both in the Court of Admiralty and in the Court of Session in Scotland, and afterwards in the House [124] of Lords, and he never, it will be observed, objected till a demand was made upon him for the expenses attending the supporting the judgments of the courts below. Then to be sure he says he was not consulted "as to the propriety of instituting, nor informed "of the mode of conducting the original action;" and again, that "he was utterly "ignorant that his name was used in the proceedings." These are matters he must settle with his partners. It might naturally occur to them, that a person whose name was in the ship's register must have known, that he necessarily became a party in every action arising out of the ownership; and perhaps in conducting the cause the other owners might have considered the assistance of the Respondent as not of very great importance. The decisions in the cases of *Spottiswoode v. Arnot*, and *Campbell v. the Equivalent Company*, even when there was no partnership, but merely a co-operation, not very steady, for attaining a particular object, determined, that acquiescence at one time, and no actual dissent afterwards, was equivalent to a mandate. Here the Respondent was aware of the proceedings from their commencement, and not only entered no dissent, but actually authorized the employment of the Appellant, Mr. Campbell. The cases too of *Nasmyth v. Jameson*, *Sadler v. McLean*, and *Drummond v. Stewart*, support the same arguments.

III. The Respondent admits his name was in the ship's register; he does not deny that he knew of, [125] though he says he was not consulted, as to the litigation; he admits that Yelton was the ship's husband; Mr. Yelton, therefore, had, without any special mandate or authority from the other owners, power to act as he did in following out the claim on the underwriters. He was the managing partner, and by his acts bound all the other partners.

IV. The claim does not fall under the act 1579, were it to be considered as a debt contracted in Scotland. The mandate of the ship's husband was in law the mandate and writing of the Respondent. The constitution of the debt therefore is by "writ" of party; and the Respondent himself admits, that claims of this description do not fall under the triennial prescription. The communications of Yelton are in law the same as if the communications had been made by Stein himself, and it is not necessary to trace home to the Respondent personally any act or deed inferring his approbation, although if it were, it is apprehended, that the knowledge of the proceedings,—the having entered no dissent, and the letters of his managing partner Mr. Yelton, are sufficiently satisfactory on this part of the case; and as the present question does not fall under the statute 1579, it is unnecessary to examine minutely the authorities and cases relied on by the Respondent. The debt is clearly constituted by a mandate in writing; the Respondent does not even allege payment, and there therefore can be no ground for applying the statute.

[126] In the case for the Respondent it was argued, with respect to the first point,

viz. whether this was to be considered as a question of English law, that if by the law of Scotland, there is no distinction, as to this question of prescription, between the accounts of a writer and a merchant, and if it be also settled, that where the merchant creditor resides in England, and his debtor in Scotland, the latter may plead the triennial prescription, the same defence must be available, when the action is at the instance of an English writer or solicitor. But, more than a century ago, in the case of *Mason v. the Earl of Aberdeen* (Nov. 29, 1709; *Morrison's Dict.*, p. 11095), the Court of Session "were clear, that there is no distinction to be made betwixt merchants' and 'writers' accounts;" and in no succeeding case has this principle ever been departed from. Now, if there be no distinction between the accounts of merchants and writers, where both parties are domiciled in Scotland, it is presumed, that an alteration in the domicile of the Pursuer must have precisely the same effect, whether he be a merchant or writer. If therefore the Respondent can show, that the triennial prescription is a good defence, where the action is at the instance of an English merchant, for goods furnished in England, the Appellants can dispute its application to this case in no other way, than by proving a generic distinction between the law-account of a Scotch writer and of an English solicitor. This they have not pretended to do; and in order to dispose of this preliminary objection, it [127] seems only necessary to establish that, in the parallel case of an English merchant, the triennial prescription is a relevant defence to a domiciled Scotchman.

At one period the decisions fluctuated a good deal upon this latter point: but as no alteration has occurred for more than forty years, the Respondent conceives it sufficient to refer to a single case at the commencement of that period. In the case of *Randal v. Innes*, 13th July 1768 (*Faculty Collection*), the general question now attempted to be revived by the Appellants, was fully discussed and deliberately determined. The Pursuer of that action had furnished goods to a Captain Innes, in the years 1757, 1758, 1759, and 1760, during nearly the whole of which period both parties resided at Woolwich. Captain Innes came to Scotland in the end of 1759, where he continued to live till his death, which happened in 1765. Randal brought an action against Captain Innes's representatives; and these parties pleaded the triennial prescription as their defence. The Pursuer argued, that the case ought to be decided by the *lex loci contractus*, or law of the creditor's domicile; whereas, it was successfully maintained by the Defenders, that it ought to be governed by the law of the debtor's domicile, or the *lex loci* where the action was brought. "The Court sustain the defence of the triennial 'prescription, assoilzie the Defenders, and decern,"—was the judgment pronounced. The most recent case in which the triennial pre-[128]-scription has been sustained, in opposition to the claim of a domiciled Englishman, is that of *Thomson v. Lord Duncan*, which was decided by the Second Division of the Court in the winter session of 1808–1809. The cases of *Delavalle v. Creditors of the York Buildings' Company* (*Fac. Coll.*, vol. 10, p. 404); and *Strother v. Read* (*Fac. Coll.*, vol. 14, p. 253), were stated at some length in support of the same principle.

2d. In answer to the objection, that the Respondent had not alleged payment, it was argued: 1st. That a person pleading the triennial prescription was not bound to allege payment, because the debt might never have existed (*Thomson v. Lord Duncan*, 1808–9): 2d. The constitution, as well as the subsistence of the debt, must be referred to the oath of the party (*Erskine*, b. 3, t. 7, s. 18; b. 4, t. 2, s. 11; *Douglas v. Grierson*, Nov. 18, 1794, *Fac. Coll.*, vol. 11, p. 295).

3d. The facts were admitted that Ogilvie being owner of one-half the vessel called the *Diana*, and being indebted to Stein the Respondent, he, in 1797, gave him a security for the debt over his half of the vessel; the deed, as is usually done in these cases, being framed in the form of a conveyance; that in 1798, before the suit terminated in the Court of Admiralty, the vessel was sold and Stein's debt paid: that Yelton, Ogilvie, and their agent, knew that Stein's interest was merely a security; that he could have got nothing in respect of the suit for the salvage insurance money, though the suit had been [129] successful in the House of Lords; and that his debt had been paid, though they had not succeeded. It was impossible therefore that Stein could be bound as joint-owner by Yelton, who, in introducing his name into the proceedings, acted without his knowledge or authority. Neither could Yelton, as ship's husband, bind him in the proceedings from the time of their commencement in the Court of Session, the vessel having been sold before, and he being no longer ship's husband. Besides, this was not

a matter in which the act of a ship's husband could bind the owners. The Respondent positively denied that he had given permission to use his name in any of the proceedings, or that he ever knew that his name had been used either in the Court of Admiralty or subsequent proceedings until he received the summons in the action brought by Mr. Campbell.

There was no new point in the argument above, except what was suggested by the Lord Chancellor, who put the question whether the action for the salvage insured could have been maintained at all unless Stein's name had been in it: and whether a court of law could look at it at all, unless the ownership was made out according to the register. It was contended for the Appellant that Stein was clearly an owner, as his name, by his own admission, was in the register as such; and there was no such thing as an equitable interest in a ship. For the Respondent it was contended, that the cross appeal [130] for his costs was regular, as the objection had not been taken by petition to the appeal committee, but a regular answer put in. To this it was answered that the question still remained, whether the House would entertain an appeal merely for costs.

Lord Eldon (C.). I believe this case will very much depend on what power Yelton had to bind the rest; and if Stein's name was in the register as an owner of the ship at the time when the action was brought in the Admiralty Court to recover the amount of the money insured on the salvage, it will be impossible to say, under the policy of Lord Liverpool's acts, that he had then no interest; and there is no such thing as an equitable interest in a ship. As ship's husband, to be sure he could give no authority in a matter of this kind; but the question remains whether his act did not bind Stein as co-owner.

(March 16, 1818.) Lord Eldon (C.). The Appellant in this case is a very eminent agent, residing in this part of the United Kingdom—I mean in London: and the action was brought by him in the Court of Session against Mr. Stein, to recover the costs of an appeal in this House.

The answer to this demand was, 1st. That he (Stein) never was liable: 2d. That if he was, the triennial prescription applies: and it has been decided that it applies to the accounts of writers, agents, procurators, etc. as well as to merchants' ac-[131]-counts: and it appears that it made no difference that the demand was for the costs of an appeal in this House, and that the person who brought the action was resident not in Scotland but in London. The triennial prescription it seems applies notwithstanding. But it does not apply where the demand is founded in writing, or the debt can be proved by oath of the debtor.

Now if this case is to be decided on the principles applied as the ground of judgment by the Court of Session, I think the decision, in that view of the case, is right. But then there is another view of it, which, as it appears to me, has not been sufficiently considered. Stein was mortgagee of a ship called the *Diana*; and by certain acts of parliament known by the name of Lord Hawkesbury's acts, no property in a ship can exist except in the mode pointed out by these acts. When the first act was introduced, enacting that no property should exist in a ship except it was conveyed in the manner there specified, the distinction between the legal and equitable interest was not attended to; and then a second act was passed enacting, that neither the legal nor equitable interest should pass, except in the mode prescribed by these acts.

And then this difficulty arose that when money was borrowed on a ship that the mortgagee must be the absolute owner. The meaning of the transaction as between the mortgagor and mortgagee is that the ship should be only a security for the debt, and that the mortgagor should still have the equity [132] of redemption. But how is this to be managed? because the acts say that there shall be no equitable interest as distinct from the legal. And we have been employed, I mean I have myself been employed, upon many petitions in bankruptcy, in cases where ships were mortgaged for sums far below their real value, and where the assignees said, "we have the legal title, "and the ships are absolutely ours;" and, though the mortgage might be only for £3000, and the ship might be worth £15,000, the reason would be the same. It is necessary, therefore, that we should see who were, in point of law, the owners; and then it will be to be considered whether the written authority of Yelton must not be taken to be the written authority of Stein, in which case the triennial prescription would not apply. For this purpose we must have a copy of the register, which the

parties may agree to be a true copy of the register, when the action was first brought against the underwriters, and also the proceedings in that action; and if these papers should be laid before us in time, the cause may be disposed of on Thursday.

Upon the grounds taken by the Court of Session I think the decision is right; whether a new ground may not be laid we cannot know without seeing these papers.

(June 5, 1818.) Lord Eldon (C.). This case comes before your Lordships by appeal from a judgment of the Court of Session, given in an action brought in that Court [133] by a very respectable gentleman, Mr. Campbell, and Mr. Gibson as his agent, against John Yelton, James Ogilvie, and Robert Stein, owners of the ship *Diana*, of Kincardine, for payment of a sum of £125 16s. 4d., the balance of a bill of costs, due by them to Mr. Campbell, for conducting an appeal to this House, in which Mr. Campbell was agent for these owners. The summons in this action stated, "That John Yelton, shipmaster in Kincardine; James Ogilvie, late shipmaster in Kincardine; and Robert Stein, of Loanside; owners of the ship or vessel called the *Diana* of Kincardine, are justly indebted and owing to the Pursuers the sum of £125 16s. 4d. sterling, being the balance due on a bill of costs, incurred for them as Respondents, in an appeal at the instance of James Smith, and others, against the said John Yelton, James Ogilvie, and Robert Stein, conform to bill of costs transmitted to George Mill, writer in Edinburgh, their agent." And it concluded, "that the said John Yelton, James Ogilvie, and Robert Stein, ought and should be decreed and ordained, conjunctly and severally, by decree of our Lords of Council and Session, to make payment to the Pursuers of the aforesaid sum of £125 16s. 4d., with the legal interest thereof, from the 13th day of June 1807, when the said bill of costs was rendered, and in time coming during the not-payment."

The defence to this action was, that the account commenced on the 3d Feb. 1802, and ended 22d [134] July, 1806. The present action was not brought till the month of January, 1810. "The account is therefore prescribed, and the Defender denies being resting owing any part of it;" this defence, take it as you please, not stating whether or not the debt was originally constituted, but that if it ever was constituted, it was prescribed: and that if it was once owing, it was not owing now, not being founded on a written obligation.

The question whether the debt falls within the triennial prescription depends upon the act of the Scottish parliament, 1579, cap. 83, introducing the triennial prescription, by which it is enacted, "that all actions for house mailles, mennies ordinars, servands' fees, merchants' comptes, and uthier the like debts that are not founded on written obligations, be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ or oath of his party."

Several questions were raised in the cause—1st, It was contended for the Appellants that, this being an English debt, the triennial prescription of the law of Scotland had nothing to do with it. But as it has been ruled, that a solicitor's accounts stand on the same footing with respect to this prescription as a merchant's accounts, and that, where the merchant creditor resides in England and his debtor in Scotland, the latter may plead the triennial prescription, the allegation that the triennial prescription has nothing to do with this demand cannot be made good. 2dly, It was contended that Mr. [135] Campbell acted on the written authority of Yelton given in his correspondence with Mr. Rolland; and that, Yelton being the ship's husband, the Respondent, Stein, was bound by that authority. But I cannot conceive that a ship's husband has, as such, the power to pledge his owners to the expences of a law suit.

And after attending to this case as much and as anxiously as ever I attended to any case, because, if the Respondent is in justice liable, as this is a debt most justly owing to Mr. Campbell, it is hard that the demand should fail upon the ground of the prescription, I was anxious therefore to ascertain from the register, whether Stein and Yelton must not, under Lord Liverpool's acts, about which your Lordships may recollect there was some discussion, be considered as co-owners. Stein was a mortgagee of a part of the ship, and he states that his mortgage was paid off. But his name appears on the register, and he there, on his oath, states himself to be an owner. But on looking at the registers, it appears, unfortunately, that Yelton's name is not in the one, and that Stein's name is not in the other. It would be too much, therefore, to say, they are co-owners; and it is impossible, then, to act upon the view of the case first suggested from the inside of the House.

The question then comes to the view of the case taken by the Court of Session : and it is with great regret, if that expression may properly come from [136] a judicial mouth, that I am compelled to say that I think this action cannot be maintained.

Judgment affirmed.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

GORT (VISCOUNT), and MAYOR, SHERIFFS, and CITIZENS of LIMERICK,—*Appellants* ;
ATTORNEY GENERAL,—*Respondent* [May 25, 1817].

[Mews' Dig. iii. 324. S.C. in Irish Court of Chancery, *sub nom.* A.-G. v. *Limerick* (*Corporation of*), Beat. 563. Commented on in *Powerscourt v. Powerscourt*, 1824, 1 Moll. 616, at p. 618 : *Incorporated Society v. Richards*, 1841, 1 Dr. & War. 258, at p. 314 ; and see *A.-G. v. Flood*, 1817, Hayes, 611 ; *A.-G. v. Carlisle* (*Mayor of*), 1828, 2 Sim. 437, at p. 446.]

[Information by the Attorney General, at the relation of a freeman of Limerick, against the Chamberlain, and Lord Mayor, Sheriffs, and Citizens or Common Council of that city, stating that certain lands and revenues were granted to and vested in the corporation at large for divers public uses and purposes, the improvement of the city, and the preservation and support of public buildings, bridges, highways, and establishments therein : that the defendants had usurped the powers of the whole corporate body, and that the Chamberlain, in concert with the Common Council, had contrary to the charters and immemorial usage applied the revenues to their private purposes, without reference to the citizens and freemen at large, in their general assembly or Court of D'Oyer Hundred, etc. : and praying that the Chamberlain might account, and that a receiver might be appointed. Demurrers, for want of equity and jurisdiction, overruled by M. R. ; and the order affirmed [137] by the Lord Chancellor, who was of opinion that the uses were charitable and that the fact was sufficiently alleged. Order affirmed in Dom. Proc.]

The Attorney General for Ireland, at and by the relation of John Tuthil, a freeman of the city of Limerick, on behalf of himself and the rest of the freemen, on the 8th Jan. 1816, filed an information in Chancery against the Appellants, John Prendergast, Lord Kiltarton, now Viscount Gort, and the Mayor, Sheriffs, and citizens of the city of Limerick, setting forth, that Limerick was an ancient city, and a corporation by charter and prescription, by the name of the Mayor, Sheriffs, and Citizens ; that by charters of Edward III., King John, and succeeding Kings, all which were confirmed by Queen Elizabeth, many franchises and privileges were granted to the citizens ; and amongst other things that they should have all the lands and waste places within the liberties or precincts of the said city to dispose thereof, with the common consent of the citizens, etc. ; that by virtue of the charters, the corporation was seized, etc. of a very considerable estate in lands, the rents of which, and the receipts for tolls and customs, amounted to a very large annual sum. And that the said estate and revenues, which were so as aforesaid granted to the said corporation, were so granted and vested in them, for divers public uses and purposes, for the improve-[138]-ment of the city, and the preservation and support of several public buildings, bridges, highways, and establishments therein. The information then proceeded to state, that a certain part of the corporation, denominated the Common Council, consisting of the Mayor and Sheriffs for the time being, Aldermen and Burgesses, had usurped the privileges of the Citizens, and had taken upon themselves in the name of the whole body corporate, but without the consent of the citizens or freemen at large, to make leases of the lands, and dispose of the rents, tolls, and other

corporation revenues as they thought fit, and best suited their own private purposes and interest: that in 1761, in consequence of the abuses, a parliamentary investigation took place, in the course of which the books had been inspected, and no clause in the charters or bye-laws had been found, which empowered the Common Council to dispose of the estate and revenue of the corporation; and by the entries in the books, it appeared that the lands and tolls had been constantly let by public cant, yearly, in the Court of D'Oyer Hundred, or general assembly of the whole corporation: and that the election of members of the Common Council, and orders of the council, had been submitted to the Court of D'Oyer Hundred for their approbation, etc.

The information then stated that the Appellant John Prendergast Smith, since Lord Kiltarton, and now Viscount Gort, in or about 1785, had acquired sufficient influence amongst the principal [139] members of the corporation to procure himself to be elected one of the representatives in parliament for the city; he had afterwards obtained an absolute ascendancy over the Common Council, who had assumed to themselves the entire government of the city, and the exclusive management of the affairs and revenues of the corporation. That in 1786 the Appellant, then J. Prendergast Smith, procured himself to be appointed Chamberlain: in which capacity he received the revenues of the corporation, without accounting to the citizens and freemen at large, down to the time of filing the information: that in order to secure to himself and his family the representation of the city in parliament, and the patronage thereof, and the absolute controul of its affairs and revenues; he induced the Common Council to fill up the vacancies in that body from his own friends and dependants, without reference to the general assembly of the freemen, and to admit or reject freemen at its pleasure, without regard to the right, so as to exclude those who were not in his interest, and to admit persons who were not entitled, provided they were in his interest, by which means the corporation had been involved in numerous law-suits which the Chamberlain had defended out of the corporation fund; and particularly law-suits in 1795, 1798, and afterwards in 1813, still persevering in his illegal conduct in the management of the corporation affairs and revenues in concert with the Common Council, etc. etc.

[140] "That according to the ancient immemorial usage and custom of said corporation, the said corporation lands should be let to the highest bidder by public auction, and all leases of corporation lands should be submitted to the Court of D'Oyer Hundred, for its approval and confirmation before the same became of any force and effect, as set forth in the said petition of the said John O'Donnell to the House of Commons; and that the corporation, tolls, and customs, should be also set up to sale by public auction, and should be sold and disposed of to the highest and fairest bidder, as set forth also in the said petition; and that the corporation revenue should be laid out and applied in upholding divers public buildings and bridges, in the city and liberties of said city, and in repairing, cleansing, and lighting the streets and highways in said city, and the liberties thereof: and that various grants of lands and other hereditaments to the whole corporate body were made for these purposes; and that the same should not be done as some of them are, and have been of late years, at the expense of the inhabitants by public presentment at the assizes."

And in the charging part it was stated that in consequence of the proceedings against the corporation in 1813, and other proceedings being threatened, the Appellant procured the Common Council to appoint certain friends of his own a committee of accounts, and laid before it certain garbled and [141] erroneous statements, etc. taking credit for the sums expended in resisting the just claims of persons entitled to the freedom of the city; but had never accounted to the whole body of freemen in the Court of D'Oyer Hundred; and refused to do so when called upon to account to that assembly in October, 1815. And the information then prayed for an account, and the appointment of a receiver.

The Defendants demurred as follows:—

First, That the said information, in case the same were true, (which the said Appellant in no wise admitted), did not contain any manner of equity, whereon the said Court could ground any decree, or give the said informant any relief or assistance against the said Appellant.

And, Secondly, That the said Appellant was accountable only to the Mayor, Sheriffs, and citizens of the said city, as their Chamberlain.

That the said Appellants the Mayor, Sheriffs, and citizens of the city of Limerick,

on the same day filed a demurrer to the said information, and assigned for causes of demurrer:—

First, That the said information, in case the same were true (which the said Appellants did in no wise admit), did not contain any matter of equity, whereon the said Court could ground any decree, or give the said informant any relief or assistance against the said Appellants.

Secondly, That the Court of Chancery had not, and would not exercise any jurisdiction by information, over a civil corporation, even in case of a misapplication of their revenues by them.

[142] And, Thirdly, That the said mayor, sheriffs, and citizens, had an absolute and unqualified right to dispose of their estates and revenues, and did not hold the same, or any part thereof, subject or liable to any trust, or to any account to be rendered thereof at the suit of the Attorney-General, or any other relator, or other person.

The Counsel for the Appellants further demurred, *ore tenus*, to the information for multifariousness.

The demurrers having been overruled by the Master of the Rolls, and the Lord Chancellor, Lord Gort and the others appealed to the Lords.

The reasons in the printed case, on behalf of the corporation, were:—1st, That at common law a right of alienation is incident to all civil corporations, *Sutton's Hospital case*, 10 Co. 306—*Smith v. Barrett*, 1 Sid. 162—*Com. Dig. Franchises*, F. 10. And a civil corporation could not be compelled to account to the Court of Chancery for a misapplication of their funds, *Rex v. Caermarthen Corporation*, *Coop. Ch. Rep.* 30—*Colchester Corporation v. Lowten*, 1 Ves. Beam. 226—*Drimmer v. Chippenham Corporation*, 14 Ves. 245. The effect of the appointment of a receiver would be to deprive the corporation of the benefit of their charters, and to give the Court of Chancery a visitatorial power over them:—2dly, No relief except the appointment of a receiver, was sought against the corporation, nor any misconduct imputed to it, the charges of misconduct being made against certain individuals of the corporation, called the Common [143] Council.—3dly, There was nothing in the information to show that a charitable use was the object of it, and a vague incidental statement that the property of the corporation was vested in them for the support of public buildings, bridges, highways, etc. etc. was not sufficient; *Attorney-General v. Smart*, 1 Ves. Sen. 72—*Attorney-General v. Parker*, 1 Ves. Sen. 43—*Attorney-General v. Oglander*, 1 Ves. Jun. 246:—4thly, 5thly, and 6thly, Because the determinations on the subject of charitable uses in the courts of equity in England, were not applicable to Ireland, there being no Irish statute analogous to the statute of charitable uses, 43d Eliz. in England; and the questions in this case were to be decided according to the law as it stood before the enactment of that statute: and before that time a corporation could not be seized to any use, *Gib. U. T.* 170—*Bac. U.* 57. And as therefore a grant to a corporation for an use would be void in Ireland at the date of the charters, it was impossible to conceive that the crown intended a grant for a void purpose:—7thly, It was not ascertained nor defined how much of the corporation revenues was applicable to charitable uses, and how much to other corporate purposes; and it was necessary that the charity fund should be certain, and the object defined. On behalf of Lord Gort particularly, the reasons were:—1st, That he was made a party as the officer of the corporation, not only for the purpose of discovery, but for relief:—2dly, That he was accountable only to the [144] corporation, and was not a trustee for a charitable use.

And if the object of the information was to compel an account of revenues applicable to charitable purposes, and also of revenues applicable to other purposes, then it was multifarious.

Mr. Leach (now Sir J. Leach, V. C. E.) for Appellants.

The Judge below has said that the funds are applicable to charitable purposes, which founds the jurisdiction. That would be correct if it were alleged as a substantive fact, that they were so applicable; but it was not alleged; it is merely a conclusion of law drawn by him; and the demurrer on that ground is good.

2dly, But suppose the jurisdiction established, this is an information against Lord Gort as receiver, and as such he is bound to account for his receipts to the corporation, or a part of it; and equity cannot interfere, except upon collusion by the corporation in breach of its duty: and there is on the face of the information no charge of such collusion. The information is that Lord Gort had so much influence over the Common

Council, that he procured himself to be made Chamberlain, that he expended the revenues, not for the purposes of the corporation, but for the purposes of the Chamberlain, etc.; and that he accounted only to the committee, whereas he ought to have accounted to the corporation at large. But there is no allegation that the body at large did not do its duty: or that it colluded with the Chamberlain and the other body.

The information prays that another receiver may be appointed; but can the Court remove him, and appoint an officer of its own, when no collusion or corruption is charged? This is a mere civil corporation, and the Court, by this proceeding, assumes a power of visitation, which cannot be exercised in equity: so that, unless collusion were charged, the demurrer is good on the part of the corporation as well as on the part of Lord Gort.

The only ground on which the information could be supported, would be that they were trustees for charitable uses. Formerly it was doubted whether they could be considered as trustees for charitable uses: but, at all events, here there is a defect of averment. The demurrer admits only the facts which are well pleaded, and the facts without the conclusion of law, *Ford v. Peering*, 1 Ves. Jun. 77: and it is not here well pleaded that they are trustees for charitable uses (*Rex et Reg. v. Knowlvs*, 12 How. St. Tr. 1198). And, as the information applies to the whole of the revenues, though part of them had been stated to be applicable to charitable purposes, unless it were stated that the whole were so, the demurrer is good. *Attorney-General v. Corporation of Caermarthen*, Coop. Ch. Rep. 30.

Sir Samuel Romilly. No principle is better established than that, although the Attorney-General claims more than he is entitled to, if he is entitled to any part of the relief, a general demurrer will not hold.

They admit that if a corporation has revenues applicable to the repair of bridges, highways, etc. that it is a charitable foundation; and it is here alleged as a fact that the corporation holds lands, which, by the terms of the grant, are applicable to these purposes. The Master of the Rolls and Lord Chancellor were clearly of opinion that it was stated that the lands were vested in the corporation for the repair of bridges, public buildings, and highways, which have been held to be charitable purposes. The information has the substantive allegation that, "the said estate and revenues, etc. were so granted and vested in them (the corporation) for divers public uses and purposes, for the improvement of the said city, and the preservation and support of several public buildings, bridges, highways, and establishments therein." This cannot be said to be the mere legal effect of the charter. It is a distinct and substantive allegation, that there are in the grants certain objects which are considered as charitable objects. In the charging part of the information it is stated, "that, according to immemorial usage, the corporation revenues should be laid out and applied in upholding divers public buildings and bridges in the city and liberties of the said city, and in repairing, cleansing, and lighting, the streets, and highways, in the said city, and the liberties thereof: and that various grants of land and other hereditaments to the whole corporate body were made for these purposes." Here are two distinct allegations of the application of these revenues, not merely by the charter, but by the practice also, and that grants of land were made for these purposes independent of the charter. And though all the lands are not granted for these purposes, and the lands which are given for such purposes are not specified, are we not to have a discovery? On this ground alone the demurrer ought to be overruled.

If the complaint had been at the instance of one freeman, that the corporation were applying the revenues to party purposes, and particularly against the interests of the freemen, a question would arise which could not be easily disposed of. The question has been agitated. In the case of the Corporation of Colchester v. Lowten (1 Ves. Beam. 226, 244, 245), the point, though not decided, was spoken of as doubtful. In the case of *Rex v. Watson*, in 2 T. R. 204, Ashurst, J. expressed an opinion that equity would give relief, and that extra judicial opinion was mentioned in the case of the Corporation of Colchester v. Lowten. The facts, as they must be for the present taken, are that Lord Gort was made Chamberlain in 1786, that he never accounted to the whole body, nor to a select portion of it: and applied the revenues to his own private purposes, and that these proceedings took place in concert with the Common Council; so that there is an allegation of collusion. Besides, the Chamberlain [148] is a trustee

of a fund for charitable purposes, and the Attorney-General has clearly a right to call him to account. The demurrers are bad also in form, for they are speaking demurrers, introducing new facts.

Mr. Bell. A corporation has clearly a right to alienate its landed property. Whether it can apply its funds to improper purposes has not perhaps been decided; but the *dictum* of Ashurst, J. is against that power (*Rex v. Watson*, 2 T. R. 200, 204). If mayor or receiver applies the corporation charity fund to his own use, he is liable to account, though the proceeding should be sanctioned by the corporation, as in *Sir T. White's charity*, Duke 577 (*Vid.* 2 Vern. 397, Col. P. C. 280.—2 Bro. P. C. 236.)—But here the receiver never accounted to the whole corporation.

Mr. Leach (now Sir J. Leach, V. C. E.). The Attorney-General stated merely what he considered as the effect of the charter, and the practice merely of applying the funds to charitable uses would not fix upon this the character of a charitable trust. But even though it were a charitable trust, the Court will leave the officer to account to the corporation, unless it is averred that the corporation colluded: and it is not averred that the whole corporation colluded. The demurrers were not speaking demurrers: no new facts were introduced, and what were so called were only reasons.

Order AFFIRMED.

[149] ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

RANCLIFFE (LORD), and Others,—*Appellants*; PARKYNS (LADY), Widow of SIR THOMAS PARKYNS, and Others, —*Respondents* [Feb. 16, 18, 20, 23, 25; March 2, 4, 1818].

[*Mews' Dig.* v. 1532, 1562; xv. 656. Considered in *Minchin v. Gabbett*, [1896] 1 L. R. 1; *Wintour v. Clifton*, 1856, 21 Beav. 447, at p. 454; and see *In re Vardon's Trusts*, 1884, 28 Ch. D. 124, at p. 130.]

[Father seized in fee of a manor and lands, etc. in R.; by settlement on his second marriage, limits estates tail to the sons of the marriage in his lands, etc. in R. without mentioning the manor, the ultimate remainder in the lands to himself and his heirs. The father having still the manor of R. and the reversion in fee of the lands, etc. and having two sons of the marriage, afterwards makes a will by which he devises all his manor and lands, etc. in B. and R. to his sons for life, with remainders to their sons in tail. Expressions in the will from which, if there had been nothing to oppose that construction, it might be reasonably conjectured or concluded that the testator intended to devise immediate estates for life to his sons, not only in the manor which was his own, but in the lands, etc. in R. in which they had estates tail under the settlement, and thereby to raise a case of election. But in the will he expressly ratifies and confirms the settlement, and every thing therein contained. Held by the Court of Chancery that this was not a case of election, and the judgment affirmed in Dom. Proc.]

[Lord Eldon, (C.) observing that it is difficult in any case to apply the doctrine of election where the testator has a present interest in the estate devised, although it may not be entirely his own; and here he had manor, and the reversion in fee of the lands; and expressly confirmed the settlement in all its parts; and you cannot, as against that express declaration of intention to the contrary, take it by conjecture, call it demonstration plain, necessary implication, or what you will, but still only conjecture, that he does not mean to confirm.]

[A. by will dated 1735, devises all his real estates in these general words, to his daughter I. for life, remainder to [150] her first and other sons in fee. Marriage of I. and B. (B. having no notice of the will) and petition in 1746 to parliament for an act to enable them to make a settlement, they being minors, in which petition I. is represented as entitled in fee to certain estates which had belonged to her father A. : and act passed and settlement made on that ground. B. by settlement made in 1776, gives considerable interests to C. his eldest son by his wife I. which C. could not otherwise have in his father's life-time. Will of A. of the existence of which the parties had been before ignorant, discovered in 1799 ; bill in 1800 by C. claiming the estates under the will of A. his grandfather, as eldest son of I. dismissed in Chancery without costs ; and the decree affirmed under the circumstances ; it being uncertain whether the estates in question passed under the general words in the will of A. and whether the representation to parliament might not have been correct ; B. honestly believing that he was a purchaser for val. con. ; so long a time having elapsed, etc.]

The case made by the bill as amended in 1800, which will be found more particularly stated in the Lord Chancellor's judgment, was generally and in substance as follows : By articles made in 1707 on the marriage of Sampson Parkyns, eldest son of Sir Thomas Parkyns, and Alice Middlemore, Sir Thomas and Sampson covenanted to settle certain premises in Great or East Leake, and Thorpe in Glebis or in the Clotts, in the County of Nottingham, to the use of Sampson for life, then to the use of Alice for life, remainder to the use of the first and other sons of the marriage in tail male, remainder to the right heirs of Sir Thomas. The marriage took place : Sampson died leaving a son Thomas ; and afterwards, in 1716, a settlement was made in pursuance of the articles, conveying to Thomas an estate [151] in tail male in the premises. In 1730 Thomas suffered a recovery of the manor, mansion-house, and estate, in Leake, and of the estate in Thorpe. In 1731, Thomas, who had married Elizabeth Woodroffe, and his wife mortgaged the estates both in Leake and Thorpe to Cornelius Farr, for £2500 : and, in 1735, for £400 more, making in all £2900 ; and in the same year, 1731, Thomas, by articles, in consideration of his wife Elizabeth having joined him in a fine to secure the mortgages, and for other considerations, covenanted to settle the estates to the uses therein mentioned, and particularly to give a portion of £4000 to the daughter or daughters of the marriage charged on the Thorpe estate. In 1732, a settlement was made in pursuance of the articles by which the manor, mansion-house, and estate in Leake, and the estate in Thorpe, were settled, subject to the mortgage, to the use of Thomas Parkyns for life, remainder to the use of his wife Elizabeth for life ; and then, as to the manor and premises in Leake, remainder to their first and other sons in tail male, remainder to trustees for a term of 500 years, to pay thereout £1500 to Harriet Parkyns, afterwards the wife of Richard Farrer, only sister of Thomas, remainder to Thomas in fee : and, as to the Thorpe estate, remainder to trustees for a term of 1000 years to raise thereout £4000 for a daughter's portion if only one, if two or more £5000 for their portions, remainder to Thomas in fee : and there was a proviso that, in case Thomas died without discharging the mortgage, or leaving at his death sufficient assets to discharge it : the £1500 for [152] Harriet was not to be raised ; and in case Thomas in his life-time should advance the sum, or any part of it, that should be a satisfaction in whole or *pro tanto*. Thomas and Elizabeth had only one child, a daughter, Jane, the mother of the Plaintiff, the late Lord Raneliffe : and Thomas being, as the bill represented, seised in fee of the reversion of the estates in Leake and Thorpe, and of an estate in fee in a mansion house and lands in Leake, in a manor, mansion-house, and lands in Sutton Bonnington, and estates in Buckminster and Sawston, and in a new river share, made a will dated 9th May, 1735, directing his estates in Buckminster and Sawston to be sold by his executrix for payment of his debts, devising a small estate to Daniel Woodroffe, a brother of his wife : and then devising " all his other real estates not therein-before mentioned," to his wife Elizabeth for life, remainder to Francis Lewis, in trust for his daughter, Jane, for life : and then for her first and other sons and their heirs ; then for her daughters and their heirs : and, in default of any issue of his daughter, for his sister Harriet Farrer for life, remainder for her issue, male and female, and their heirs : and he directed the residue of his personal estates, after payment of his debts, to be laid out upon good security, and the interest to

be paid to his wife for life, and, on her death, the principal to be laid out in the purchase of lands to be settled to the same uses as his other real estates : and he appointed his wife sole executrix, who, as the bill alleged, duly proved the will. And the bill alleged that the late Lord Rancliffe, son of Jane, did not, until a short time [153] before his death, discover the will, and that it had been suppressed and he kept in ignorance of his rights under it.

Leaving there the statement of title to the Leake and Thorpe estates, the bill proceeded to state the title to the Ruddington estate, in the county of Nottingham. Sir Thomas Parkyns, already mentioned, his first wife, by whom he had his son Sampson, the father of Thomas, both above-mentioned, being dead, by a settlement in 1727, made on his marriage with Jane Barratt, conveyed the Ruddington estate, not mentioning the manor, to the use of himself for life, and created a term of ninety-nine years to secure the payment of an annuity of £200 to his intended wife in certain parts of the premises ; and a term of 500 years in the rest of the premises, remainder to the first and other sons of the marriage in tail male, remainders over, reversion in fee to himself. The settlement recited that the premises were contiguous to the mansion-house and lands in Bunny, which stood limited to the issue male of Sir Thomas by his first wife, which issue was the above mentioned Thomas, the son of Sampson : and directed that Thomas, or the person entitled to the Bunny estate after the death of Sir Thomas, should have the option to purchase the Ruddington estate for £13,000, to be laid out in the purchase of other estates to be settled to the same uses. The marriage took effect, and Sir Thomas Parkyns, the father of Lord Rancliffe, was the eldest son of the marriage. In 1735, old Sir Thomas, soon after the death of his grandson Thomas, the son of Sampson, which happened on [154] the 1st June 1735, made his will, dated 18th August, 1735, and thereby devised his manors, lands, tenements, and hereditaments in Bunny, Bradmore, Ruddington, etc. etc. to trustees for ninety-nine years, then to his eldest son, by Jane Barratt, Thomas for life, remainder to the first and other sons of Thomas in tail male, with the like limitations to his second son George for life, and to his first and other sons in tail male, remainder to his daughter Anne in tail male, remainder to his own right heirs. The trusts of the ninety-nine years' term were, to lay out the rents and profits of the premises, first, in the maintenance and education of his sons during their minority, the allowance not to exceed £200 for each, and then in the purchase of lands to be settled to the uses before appointed, etc. He then directed that such of his tenants at Bunny and Ruddington as brought him boon coals to pay so much the load in lieu thereof, in case they should not be wanted, and gave some other directions, from which it might be implied that he meant to devise a present interest in the Ruddington estate, and to raise a case of election between the will and the settlement of 1727. That settlement, however, he by his will expressly ratified, with everything therein contained. Old Sir Thomas died in 1741, leaving his eldest son Thomas about nine years of age. It is material to state that by this will the sons had a power of jointuring to the extent of £100 for every £1000 fortune that a wife might bring.

The bill then reverting to the case of the Leake and Thorpe estates, stated that a treaty took place [155] for a marriage between young Sir Thomas Parkyns and Jane Parkyns, the daughter of Thomas, the son of Sampson, and that a petition was presented to parliament in 1746 for an act of parliament to enable them to make a settlement, they being minors ; stating that Jane was seized in fee, in reversion expectant on the death of her mother (among other hereditaments) of the Leake and Thorpe estates, of the yearly rent of £338, subject to a mortgage of £3000. The bill then stated that Sir Thomas and his agents knew of the will of Thomas, the father of Jane, and had a copy of it in his possession ; and that the will, from which it would have appeared that Jane had only a life estate in the premises, was purposely suppressed, and that the judges to whom the petition was referred and parliament had been imposed upon : and that therefore an act was passed reciting that Jane had the fee. The bill then stated the act, and the settlement of 1747, made on the marriage of Sir Thomas and Jane, by which a jointure of £400 was given to Jane : and the estates of Jane, subject to a provision of £2000 for younger children, were settled to Sir Thomas and his heirs. The bill then alleged that the settlement was not conformable to the act, that the estates in Thorpe and Leake were, when the bill was filed, of the annual value of £700 ; and that, on the death of his mother Jane in 1763, they descended to Lord Rancliffe, who was the only son of the marriage.

The bill then stated various proceedings in Chancery relative to moneys arising out

of these [156] family estates : and, among other things, an order in 1756 to pay to Sir Thomas Parkyns the whole of the rents and profits of the Ruddington estate accrued due since his father's death, he being tenant in tail by the settlement of 1727. The bill then stated that Lord Ranccliffe came of age in 1776, and that he was then, being in ignorance of his rights, induced to concur in a settlement for barring the estates tail, etc. Under this settlement, however, various important advantages were given to Lord Ranccliffe which he could not otherwise have in his father's life-time. It is proper to state that Farr's mortgages, after various assignments, were, in 1792, purchased by a Mr. Wright, who declared that he was only a trustee for Sir Thomas Parkyns.

And the bill prayed that it might be declared that Lord Ranccliffe the Plaintiff was entitled in fee to the Leake and Thorpe estates upon the death of his mother : that the settlement of 1776 might be set aside, except as to certain mortgages therein mentioned : and that it might be declared that the Ruddington estate was meant to be devised by the will of old Sir T. Parkyns, and that the Defendant Sir T. Parkyns might be decreed to settle that estate to the uses of the will, or to make satisfaction to the other devisees, and for various accounts.

Sir T. Parkyns admitted in his answer that, as it appeared at the time of putting in the answer, Lord Ranccliffe was entitled in fee, on his mother's death, to the Leake and Thorpe estates : but that the Defendant discovered the circumstance only in 1799, and he denied the suppression of the will, [157] or any knowledge of its existence till two copies of it were discovered among his papers in 1799 ; or any notice of it, or contents of it, when the act of parliament was obtained : but admitted that it did appear at the time of putting in the answer that Jane was entitled only for life to the Leake and Thorpe estate, provided the will operated thereon. He admitted the will of old Sir Thomas Parkyns, but insisted that it was meant there to pass, not a present interest in the estates at Ruddington, but only the manor, and the reversion of the estates, which alone then belonged to Sir Thomas. He denied that any undue means, or any concealment were used to induce the Plaintiff to execute the settlement of 1776, from which the Plaintiff had derived great advantages.

The bill was dismissed in Chancery in 1809 without costs. And from that decree the Plaintiff appealed to the House of Lords.

The two points argued were, 1st, whether the devise of the Ruddington estate raised a case of election : 2d, whether Lord Ranccliffe was entitled to the Leake and Thorpe estates, in fee on the death of his mother.

Mr. Hart and Pepys (for Appellants). If old Sir T. P. had not had the reversion in the Ruddington estate, it would be clear that he intended to pass the whole estate, and that a case of election would have arisen. It is doubtful whether he conceived himself entitled to the manor. In the settlement, 1727, the word manor is not found, but [158] the words "all my estate" might have led him to think that it had passed the manor : and that, if excepted, it would have been excepted by name.

Was it possible that one conceiving himself entitled only to a dry, unproductive manor, could have passed it in the words of this will ? He would have said, my manor of Ruddington, and nothing else. Then it was hardly possible that the testator, if he intended to pass merely his reversion in the estate, could have introduced the provisions as to waste, the cutting of timber, the £200 for the maintenance and education of his sons ; as to the jointure and ninety-nine years' term ; and as to younger children. These must have reference to the whole estate and a present interest, otherwise the children would be all dead before the provisions could take effect. The case of *Welby* (2 Ves. Beame, 191) is a clear authority for us. (Lord Eldon, C. We must look at the pleadings in *Welby v. Welby*. According to the print the reversion is expressly mentioned there.) The reversion is not mentioned here ; so that our case is the stronger. They will rely on the clause in the will in which he confirms the settlement. But that is referrible merely to the provision for his son George, and means only— "I do not mean to touch the provision which you have under the settlement." And suppose he did mean to confirm the whole settlement, he even there evinced his anxiety that the Ruddington estate should go with the rest of the family estates : and then Lord Ranccliffe, if this be not a case of election, is entitled to the benefit of the provision in the settlement, and to purchase at the price there mentioned. Then the provision as to the boon coals [159] was entirely inapplicable to the reversion : and is it clear that he meant to pass a present interest. There was nothing that prevented the plaintiff's

now raising the question, for, though many years have passed, he had no knowledge of the circumstances till about 1800. The election was now decided, and Lord R. was entitled to compensation. The settlement of 1776 was executed by both, but there was no concession to Lord Rancliffe, except a power to burthen the estates after his father's death; and that settlement had no effect as to the Ruddington estate. (Lord Eldon, C. Suppose old Sir T. Parkyns, who made the settlement of 1707, had settled to himself for life, remainder to Sampson in tail, remainder to Thomas, if born before, in tail. Then he makes a will devising the reversion to Sampson and Thomas, and failing them, to somebody else, and, they being dead, would not that somebody else take that estate?) Then we produce the will of Thomas of 9th May, 1735, to show the title of Lord Rancliffe to the Leake and Thorpe estates. There is nothing to satisfy the general words of that will except these estates. The attestation did not specify that the witnesses signed in presence of the testator. That was not necessary, if they did so sign; and whether they did or not was a fact to be left to a jury. The point was decided in a case in 2 Str. 1109. There are several deeds in which the will is recited as passing these estates. Then the answer of Sir T. Parkyns in Chancery admits the due execution of the will, and that precluded us from going into evidence of the fact; and yet they now retract. If one admits too much, there are [160] means, before hearing, of being relieved from the admissions by a supplemental answer. But otherwise the plaintiff is entitled to read and rely on the admissions as facts. If a will is admitted by the heir at law to be duly executed, the Plaintiff does not prove it; and the heir cannot, at the hearing, retract the admission. Such is the practice of courts of equity; but the defendant has departed from that rule, and endeavours to establish a case different from, and the negative of, that which he admitted in his answer. But supposing he were at liberty to retract his admissions, we have evidence to show it, 1st, a deed of 1736, in which there are recitals by the testator's widow, and executrix, proceeding on the ground that the will passed the estates; and, she being in possession, and having the fee *prima facie*, her evidence is good to cut down her own estate, which was an estate for life. Estates being devised by the will to pay debts, the deed recites that she did pay them. And there is a covenant, which is not in the cases, that Sir T. Parkyns may enjoy the mansion-house free from disturbance; so that she releases her own title under the will, and covenants as far as she can for her infant daughter. This is strong evidence that these estates passed by the will: what is there against it? It is said, that in 1746, she represented that her daughter was seized in fee, and it was so taken by the act. But the act professes to do no more than to enable them to pass such interests as they before had, as they might have done, if adult, without the act; and, if it recites that one was seized in fee, who was not so seized, that cannot injure an adverse title; *Pomfret v. Bishop of Win-*[161]*-chester*, 3 Wils. 453: and, besides, there is a saving clause. But the circumstances of such a misrepresentation, and an act passed upon it are so singular, they say, that the court will raise any presumption against it. What is it that is to be presumed? that some deed or will existed altering the state of the property. But who ever heard of such a presumption in a case like this? It does not appear from the proceedings, with respect to that act, that there was any evidence at all. There was nothing but this representation of the widow against her own acts, and other circumstances. Then it was said that Sir T. P. was a purchaser for val. con. without notice. That did not originally occur to them. There is no trace of it in the pleadings; and it is a rule of equity that a defendant cannot insist upon that, unless he puts it in issue, that the other party may know it and show notice. There is a case in *Ambler*, where leave was given to amend the answer, that is, to file a supplemental answer, so as to introduce this defence. Why? if you can insist upon the point without putting it in issue. This is referrible to the general doctrine of equity that you cannot insist upon that which you do not put in issue: and it would be very hard upon the plaintiff if it were otherwise, as he would be deprived of his opportunity of proving notice. (Lord Eldon, C. If the act has a saving clause applicable to your case, you are not under the necessity of insisting on that point. But is there any case in which a court, or this House sitting as a court of judicature, has reserved an act of parliament? I remember a case in the Exchequer, in which it appeared that [162] parliament had disposed of the property of one entitled to a reversion; and it was there held that the matter could be set right only by the legislature.) (*Riddle v. Riddle*, 4 Cruise Dig. 519.) We are strangers to that title, and claim by a paramount

title under the will. A purchaser of a reversion could never claim the benefit of the purchase on the ground of its being without notice. A plea of this description must state that the party was seized, or represented himself to be seized in fee, and was in possession: and Sir T. P. could not have pleaded it. It is true, that, in some of the treatises on pleading, the contrary is stated, and that a case, in Amb. 421, is cited; but that case proves the reverse. It is unnecessary to refer to all the cases, as these must be familiar to your Lordships. It is sufficient to mention that of *Daniel v. Davison*, 17 Ves. 432. Here there was no actual possession. Another answer is, that Sir T. P. had, in legal construction, notice. He was bound to inquire, and if he did not, it was *crassa negligentia*. Besides, the will on which we found comes out of his possession, and deeds reciting the will; and it has been decided that if one is in possession of a document showing the title, he cannot say that he has no notice: *Shelley v. Shelley*, 2 Vern. 235. (Lord Eldon, C. I suppose they will not dispute this, that one must be taken to have notice of every thing that appears on the face of deeds in his or his agent's possession at the time of the purchase.) The language of Lord Hardwicke in *Promfret v. Windsor*, 2 Ves. Sen. 485, applies to this point. Here Sir T. P. admits the possession of documents, which show that the estates passed under the will. [163] (Lord Eldon, C. The title deeds must have been in the hands of the mortgagee.) He had the deed of 1736, which had nothing to do with the mortgage. (Lord Eldon, C. He came of age, in 1776. Now suppose you had made good all these points, would a court of equity sustain this claim by one who suffered the matter to lay over for twenty-four years after he came of age? The question is, whether the bill to remove the term must not be filed within the same space of time as that within which you can bring an ejectment. He being the son of Jane, and the estate being his at her death, when he came of age, if not before, he would naturally inquire about the title. But if he lays by for twenty-four years, can he be heard?) But the father retains the documents which would have discovered the title: and, where the other party is the author of the ignorance, he is not entitled to avail himself of our delay: and in this case he was the parent and guardian.

Sir S. Romilly and Mr. Wetherall (for Respondents). The original ground was fraud in Sir T. P., but that is now abandoned. As to the Ruddington estate, the question is merely this, whether, when the testator devised, in 1735, in strict settlement, he meant to give an estate which he had no power to dispose of. The rule of equity is, that if a testator shows a clear intent to devise an estate which is not in his power, but which is in the power of the devisee, equity compels him to relinquish all benefit under the will, or leave its provisions undisturbed. But it must be clear that the testator intended to dispose of the [164] property; for it is not to be presumed or inferred that he intended to dispose of that which was not his own. The question then is, whether the intent to dispose of the whole estate was so clear here as to raise a case of election. Now he had in view the very instrument which restricted his power over the estate. If he had had no other property which would have answered the description, except the Ruddington estate, then a case of election might have arisen. But he had the manor, and it does not appear that it was unproductive. He had also the reversion in fee of the estate in himself. But it is not necessary for us to rely on the reversion. The argument, however, of M. R. in the case of *Welby* and that of *Church v. Church*, proceeded on a wrong view; and, in the latter case, the decision was reversed on appeal, and he approved of that. The other was not appealed. The testator could not, they say, devise £200 a-year out of the manor. How did that apply to a case where he was enumerating a great many other estates that did yield profits? and nothing is more common than to devise money for the maintenance and education of children, though they have an income of their own: the object being to preserve their own property entire. As to the boon coals it is difficult to understand that exactly, but it is not sufficient to raise a case of election. This was no case of election, therefore, even if there had been no reference to the settlement. But then the testator expressly confirms the settlement in every article, which settles the question. They must contend that when he confirms he means to destroy the settlement.

[165] Then as to the Leake and Thorpe estates. The title of Lord R. rests upon an alleged fraud without an object: that the parties conspired to represent that Jane had the fee instead of a life estate: the estate yielding only £338 a year, subject to a mortgage for £3000 and £4000 for portions, making £7000, which was more than

the value of the estate. A fraud to get an estate subject to all these incumbrances was unintelligible, and a mistake was no less so. Now the fact was, the father was seized in fee of the estates in reversion, expectant on the death of Elizabeth Parkyns, and devised to Jane for life. They knew of the will and its contents, as it was proved by Elizabeth Parkyns. But it must now be taken that it was no effectual will to pass real estate. The attesting clause does not state that it was signed by the witnesses in presence of the testator; and though it is not necessary that this should be stated, yet it is necessary that it should be so attested: and if the fact was that it was not, then it was not a valid will: and where is the evidence that it was so signed? The will could not prove itself even after the thirty years; the signing not being stated. If the possession had gone according to the will, then it might be presumed that it was a valid will. But here there was no such ground of presumption. There was an adverse possession for forty years, and the question was not raised till the lapse of twenty-four years after the plaintiff came of age. The statement to the legislature is to be accounted for on no other hypothesis than that it was not considered a valid will as to real estate. It does not appear from the [166] deed of 1736, which was executed by her merely as executrix, how she sold the estates for payment of debts.

As to the alleged admission, we have not admitted, as a fact, that the will was duly executed; but merely that it so appears on the instrument which you produce; and the answer refers to such proof as the plaintiff may make of it. The will was executed in 1735, when Sir T. P. was only eight years of age; and he speaks only from what appears on the instrument. We could not plead our purchase for val. con. without notice, because the ground of relief was fraud, and the only answer was, no fraud. If there was any thing wrong, it was a mere mistake; and the case comes to this. He becomes purchaser of an estate for val. con., and has the possession from 1747 till 1800, without any attempt to shake the title. It is said, that it was not an estate in possession, but reversion, and that a plea of purchaser for val. con. without notice ought to state that the party, from whom the purchase was made, was in possession. But there is no distinction in principle. The Court says that, where there is a purchaser for val. con. without notice, it will not relieve; and the case of *Walwyn v. Lee* (9 Ves. 24, 32) was much stronger than this; where the Court, on a bill by the children, refused assistance against a mortgagee in possession. Sir T. P. had no notice. He got an assignment of the mortgage, but had no connexion with the mortgage deeds till 1760. True, there was a representation to the legislature, in 1746, that there was a mortgage; and it has been decided that he who has notice of a deed shall be [167] taken to have notice of every thing which it contains, if it be in his power, not otherwise. It was essential that he should have access. But Sir T. P. could not have access to the mortgage deeds, even if an infant were as much bound as an adult. But then, they say, the father was bound to inform the son as soon as he got notice. But the will was in the Ecclesiastical Court, and might have been known to the son as well as to the father. Sir T. P. was a purchaser for val. con. without notice; and the bill is filed twenty-four years after the plaintiff came of age, and forty years after the title accrued—twenty years being the time to which the bringing an ejectment is confined at law. As to the effect of the act, the cases respecting the effect of private acts of parliament will be found in Cruise's able book, in which a chapter is devoted to the subject. The case of *Blake v. Bunbury* (1 Ves. 514) has no resemblance to the present case: and the case of *Welby v. Welby* (2 Ves. & Beame, 191) has gone farther than any case did before.

Mr. Hart (reply). As to the point of election, the question is, what is the intent? I do not know that courts of justice are anxious to find property to which the words may apply without raising a case of election, provided the intent is clear to dispose of that which is not the testator's own property, nor in his power. The testator thought he had power to exclude the issue of his first wife, by a codicil cutting them off with a shilling, and he annexes conditions to the possession of certain medals given to the son by another donor: and might he not also think that he had power to dis-[168]pose of the present interest of the Ruddington estate? The income limited to his sons was limited in a way which manifestly showed that he intended that the expenditure should act on their diligence, and was inconsistent with the notion that the Ruddington estate vested collaterally in the sons. It was certainly difficult to understand the article of the boon coals on their view of the case, not upon ours. Though the settlement is con-

firmed in general terms, he does restrict it in some points, and why not in this? The cases of Riddle and of General Churchill show that where an interest is taken away in express terms by an act of parliament, the matter can be set right only by the legislature. But this act does nothing more than to enable the parties to dispose of their interests as if they were adult, and does not profess to create a new title or to act upon it. The value of the property had been erroneously stated. The guardians had notice of the mortgage, and notice of the deed was notice of the contents, whether in the purchaser's power or not: *Mertins v. Jolliffe*, Amb. 311. And unless the one party could produce the deed, the other must either not deal with him at all, or do it at his peril. A tenant may refuse to show his lease, and yet the purchaser would be taken to have notice. *Eliz. Parkyns*, etc. were parties to the assignment of the mortgage, and the assignee was bound to consider the equity of redemption as belonging to those who took under the will. As to the length of time the Plaintiff was not aware of his interest, and a guardian who ought to have informed him, could not defend him- [169]-self by saying that the possession was adverse from the time of the majority for twenty years, or any other period. The court, where the case is clear, will not only remove impediments, but decree possession. But, if there is a doubt, the Plaintiff ought to be allowed to try his title at law.

Lord Eldon (C.). As this case has occupied three days in the hearing, without a word too much having been said, I propose to your Lordships to defer proceeding to judgment till Monday. Another reason is, that, as this is an appeal from a judgment of my own, I am anxious to consider all I have heard, and all that may occur to my own mind with peculiar care, in order that I may be finally right, if before I have been in error.

(Feb. 23, 1818.) Lord Eldon (C.). It would have been a great satisfaction to me if I could have had the assistance of other Noble and Learned Lords in determining this cause, as it is an appeal from a judgment of my own. But I hope I have brought my mind unbiassed to the decision: and, if I know the operations of that mind, the very circumstance that this may be considered as an appeal from myself to myself, instead of producing a bias in favour of that judgment, would rather produce a bias against it: or at least render me so sensible of the great duty I had to perform, as to induce me to examine the whole circumstances of the case with peculiar attention and accuracy.

I think I can also truly represent that, at the commencement of the hearing of this cause, I had [170] no more recollection of it than of a cause which I had never heard; although, unquestionably, in the course of the hearing my memory was refreshed, and I came more quickly to an accurate understanding of the case than I could otherwise have done.

There are two questions in the cause altogether distinct, and depending on very different principles, both of them, however, questions of so much difficulty, that I shall, with your Lordships' permission, state my own opinion on the question as to the Ruddington estate now, reserving the other point till Wednesday.

To attend a little to the pedigree of the family: it appears that Sir T. Parkyns, on his marriage with his first wife Elizabeth, made a settlement about the year 1685, as nearly as can be collected, by which the issue male of that marriage were made tenants in tail of the estates comprised in it. His wife, it seems, proved unfaithful, and eloped from him, and he takes notice of that circumstance in a codicil to his will.

In 1727, he married Jane Barratt, and had issue a son, Thomas, etc.

By his first wife it appeared that he had issue a son, Sampson, and also other issue not material to state, as they all died without issue, and there was no claim under them. Sampson married Alice Middlemore, and had issue Thomas, his son, who married Elizabeth Woodroffe, who is often mentioned in these deeds. Thomas made a will, which has no bearing on this question, and died. Then in 1800 the state of the title was, that Sir Thomas Parkyns was tenant in tail of the Ruddington [171] estate, under his father's settlement. But the question was, whether the will, made by old Sir Thomas Parkyns, in 1735, was not opposed to that so as to raise a case of election, and give him only a restricted interest.

It becomes necessary, as to these Ruddington estates, to state that, on the 2d and 3d March, 1697, Thomas Winford conveyed to Sir Thomas Parkyns and his heirs "all" that the manor and lordship of Ruddington, in the county of Nottingham, with the

"rights, members, and appurtenances thereof: and all the several messuages, cottages, "lands, etc. in Ruddington aforesaid, then, or late in the several tenures or occupations," of the several persons named: "and all other the manors, messuages, mills, lands, etc. "of the said Thomas Winford, or wherein he or any person or persons in trust for him "had any manner of estate in reversion, remainder, or expectancy in Ruddington "aforesaid."

This conveys not only all the lands, etc. in the possession of Winford, but *ipsissimis verbis*, the manor or lordship of Ruddington, with the rights, members, etc. and all other the manors, messuages, mills, lands, etc. which he had in reversion, remainder, or expectancy in Ruddington; and one need use no argument to show that it is to be presumed *primi facie*, that Sir Thomas meant in his will of 1735 to pass only what was his own, if he had property answering the description in the instrument; and, if you cast your eye over this deed, you will find the same distinction made as in the will of 1735, with respect to lands and manors.

[172] Being then possessed of this estate, he makes the settlement of 1727 on his marriage with Jane Barratt. The parties to that deed were himself of the first part, Jane Barratt of the second part, John Bley and Samuel Sterropp, of the town of Nottingham, gentlemen, of the third part, George Barratt, father of Jane, and John Walters of the fourth part, Henry Sherbrooke and Richard Porter of the fifth part, and Samuel Smith and Abel Smith of the sixth part. And, by that settlement, in which no mention whatever is made of the manor of Ruddington, Sir Thomas Parkyns, for the considerations and purposes therein stated, conveys all the messuages, farms, or tenements, etc. situate at Ruddington; and the reversion, etc. to hold to Bley and Sterropp and their heirs to the use of himself, Sir Thomas Parkyns, for life: and as to part of the said messuages, farms, lands, etc. to the use and intent that Jane Barratt, after the decease of Sir Thomas, should take thereout a clear annuity of £200 for her jointure and in bar of dower; and then to the use of George Barratt and Joseph Walters, etc. for ninety-nine years, for better securing the regular payment of the annuity: (here I mark the circumstance that Jane Barratt became entitled to an annuity of £200, which over-rode all the limitations made by the will:) then as to the lands, etc. charged, to the use of Sherbrooke and Porter, etc. for 500 years, *sans* waste, upon the trusts after mentioned; remainder to the use of the first and other sons of the marriage successively in tail male, remainder to the use of Samuel and Abel Smith, etc. for 600 years, *sans* waste, upon the [173] trusts after mentioned, remainder to the use of the right heirs of Sir T. Parkyns.

"And the trusts of said term of 500 years are declared to be for raising portions "for the younger children of said marriage, viz. £1000 for one younger child, £1600 "for two younger children, and £2000 for three or more younger children, the said "portions to be paid at such times and in such manner as in the now abstracting "indenture is mentioned: provided that if any younger child entitled to a portion "should die or become an eldest son before his or her portions should become payable, "his or her portions to go to the survivors: provided, that if all such younger children "should die before any of their portions should become payable, then such portions not "to be raised, but sink into the estate; and if there should be no younger children of "said marriage, or being such, all of their portions should be paid by the person "entitled to the reversion of the premises expectant on the determination of said term "of 500 years, then the said term to cease: and the trusts of said term of 600 years "were declared to be for raising such portions for daughters of said marriage (in case "of there being no issue male) as are above appointed to be raised for the younger "children of said marriage, payable as in the now abstracting indenture is mentioned, "with the like provisos, as to the shares of such daughters as should die before their "portions became payable, as are above mentioned respecting the shares of the younger "children of said marriage; the said term of 600 years to cease in case of there [174] being "no daughters of said marriage, or on payment of the said daughters' portions by the "person entitled to the inheritance of the same premises expectant on the deter- "mination of the said term; and reciting in the now abstracting indenture of release, "that the messuages, farms, lands, and hereditaments above granted and released, lay "contiguous to the mansion-house of the said Sir Thomas Parkyns in Bunny aforesaid, "and to several farms, lands, and hereditaments in Bunny aforesaid, which, by virtue of "a settlement theretofore made, stood limited to the issue male of the said Sir Thomas

" Parkyns, which issue male was Thomas Parkyns, Esq. the son of Sampson Parkyns,
 " Esq. deceased, who was the eldest son of said Sir Thomas Parkyns, party to the now
 " abstracting indenture: It was thereby agreed and declared, that if the said Thomas
 " Parkyns the grandson, or, in case of his death, the person entitled to the said estate at
 " Bunny aforesaid, should at any time after the death of said Sir Thomas Parkyns be
 " desirous to purchase the inheritance of the lands above granted and released, and
 " should pay unto the said John Bley and Samuel Sterropp, or the survivor, etc. the
 " sum of £13,000 for the purposes after mentioned, then, immediately after payment
 " of said £13,000 the uses, trusts, etc. before declared of and concerning the said
 " messuage, lands, and premises above granted and released, should cease and be void,
 " and from thenceforth the said messuage, lands, and premises should emure, and the
 " said John Bley and Samuel Sterropp and the survivor, etc. should stand seized
 " [175] thereof, to the use of the said Thomas Parkyns the grandson, or such other heir
 " at law as should be entitled to the said estate at Bunny, paying the said £13,000 as
 " aforesaid, and to his heirs and assigns for ever: The said John Bley and Samuel
 " Sterropp to be possessed of the said £13,000 upon trust to lay out the same upon
 " freehold estates in the county of Nottingham to be settled to the same uses, etc.: the
 " said £13,000 and interest in the mean time to be subject to the same uses and trusts,
 " etc." There is in this settlement a clause which, although not printed, is very
 material, that if Sir T. P. should advance for the younger children in his life-time to
 the amount of the portions, this should be a satisfaction, or if he advanced a part, it
 should be in part, or so far, a satisfaction. Without entering into the subject at length
 there are cases where, when a provision is made for younger children by will, an
 advancement to the amount in the life-time of the testator is held to be a satisfaction.
 And this is material, as your Lordships will see by what he did in the will, that instead
 of making the provision there a satisfaction of what was due under the settlement, he
 says that it was in addition to the provision in the settlement. He takes notice, your
 Lordships observe, in the settlement that the lands lay contiguous to the mansion house
 at Bunny, which stood limited to the issue male of his first marriage; and if it had
 stood there, limited to the issue male of Sir Thomas Parkyns, it might, by possibility,
 have included not merely his grandson Thomas, but the supposed issue of Sir T. P.,
 whether his own or not. But he by this par-[176]-ticular description confines it to
 Thomas, the son of his eldest son Sampson. I call your Lordships' attention to this,
 as he might be considered as having regard to the circumstance that illegitimate male
 issue, who might in contemplation of law be legitimate, might be included. The next
 instrument to which I call your Lordships' attention is the will of August, 1735. And
 Sir Thomas makes this will after he had made the settlement of 1727, not including in
 that settlement the manor of Ruddington, of which for any thing that appears he had
 the fee, and having the reversion in fee of the Ruddington estates. After directing the
 payment of his debts, funeral and testamentary expenses, he gave and devised — "All
 " and singular his manors, lands, tenements, hereditaments, situate, lying, and being in the
 " several towns, parishes, fields, precincts, or territories of Bunny, Bradmore, Ruddington,
 " Costock, otherwise Cortlingstock, East Leake, otherwise Great Leake, Wysall,
 " Willoughby, Reyworth, and Gotham, in the said county of Nottingham, or in any of
 " them; and all other his lands, tenements, rents, and hereditaments, lying and being
 " in the said county of Nottingham, and the advowsons of all churches in the several
 " towns and parishes of Bunny, Reyworth, and Costock, otherwise Cortlingstock, above-
 " mentioned; and all his lands, tenements, and hereditaments in Wymeswold and
 " Barrow-upon-Soar, in the county of Leicester, and a fee-farm rent at Bolsover, in the
 " county of Derby, together with an annuity or rent-charge of £100 per annum issuing
 " [177] out of the river Wey, near Guildford, in Surrey; and all and singular his
 " chief rents and fee-farm rents issuing or payable out of any of the said towns before-
 " mentioned, or any of them, or out of any lands or tenements in the precincts of the
 " said towns.

" Unto John Sherwin, of the town and county of Nottingham, Esq. Richard Porter
 " of Arnold, in the county of Nottingham, Esq. Abel Smith, of the town and county of
 " the town of Nottingham aforesaid, Esq. George Barratt of the city of York, woollen-
 " draper, and Samuel Sterropp of the town and county of the town of Nottingham
 " aforesaid, Gent. their executors, administrators, and assigns, for the term of ninety-
 " nine years, to commence from his (testator's) death, upon the trusts, and to and for the

“ ends, intents, and purposes thereafter mentioned, etc. And from and after the determination thereof.

“ To his eldest son, Thomas Parkyns, by his then wife, Dame Jane Parkyns for life ;
 “ remainder to the said John Sherwin, Richard Porter, Abel Smith, George Barratt,
 “ and Samuel Sterropp, their heirs and assigns, for the life of the said Thomas Parkyns,
 “ upon trust, to preserve contingent remainders ; remainder to the first son of the body
 “ of his said son Thomas Parkyns, lawfully begotten in tail male ; remainder to the 2d,
 “ 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and all and every other son and sons of the body
 “ of his said son Thomas Parkyns, lawfully begotten, severally and successively, in tail
 “ male ; remainder to George Parkyns, testator's second son, for life : [178] remainder
 “ to the said John Sherwin, Richard Porter, Abel Smith, George Barratt, and Samuel
 “ Sterropp, for the life of the said George Parkyns, upon trust to preserve contingent
 “ remainders ; remainder to the first son of the body of the said George Parkyns in tail
 “ male ; remainder to the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and all and every
 “ other the son and sons of the body of the said George Parkyns, lawfully begotten,
 “ severally and successively, in tail male ; remainder to all and every other the son and
 “ sons of the said testator's body, lawfully begotten, or to be begotten, severally and succes-
 “ sively in tale male ; remainder to testator's daughter, Ann Parkyns, in tail male, with
 “ the ultimate remainder or reversion to testator's own right heirs for ever : Proviso,
 “ that no wilful waste should be committed on all or any part of the said estate thereby
 “ limited, or that the person or persons for the time being entitled to the same by virtue
 “ of the said limitations, should make sale of, cut down, or destroy, any timber or other
 “ trees standing on said estate (except as therein excepted, and subject to certain restric-
 “ tions therein mentioned).”

Now the utmost construction that can be given to this, *primâ facie*, is that he means to dispose of such estates at Ruddington as were his own ; and these were only the manor and the reversion. But although it appears, *primâ facie*, that he meant to pass only what was his own, yet if the context shows that he means to propose a case of election, and chooses to consider that which was not his own as his own, for the purposes which he had in view [179] in making his will, the expression my manor, lands, etc. will not prevent a case of election from being raised. And all the cases from that of *Noys v. Mordaunt*, which is usually considered as the first, though I rather think it is not the first, case on the subject, to the present time, election amounts to this. If I choose to devise my real estate to the Noble Marquis opposite, I put it in this way because the illustration will make it more familiar ; and in the same will I dispose of an estate which is not mine but his, a court of equity will say that he shall take no benefit from that will unless he makes good the whole of the will : and the Noble Marquis would not take therefore, unless he allows the whole of the will to be effectual, *i.e.* suffers his own to be disposed of according to the will or makes compensation for as much as he takes of mine. That is election. But *primâ facie*, it is not to be supposed that a testator disposes of that which is not his own. It must be by demonstration plain, by necessary implication, meaning by that the utter improbability that he could have meant otherwise, that the case is raised. But where there is that plain demonstration, that necessary implication, then you must give up all to pass according to the will, or make compensation. But it rests upon those contending for a case of election to show that there is that manifest plain demonstration, and utter improbability. So that the question comes to this, whether it is just reasoning in this case to say that there is that clear manifest declaration of intention which raises a case of election. Now it is unquestionable that if by these words describing the premises [180] he intended to devise a present interest in the premises in which his first son Thomas had an estate tail, that amounts to a case of election : but that did not touch the term of ninety-nine years for the regular payment of the wife's annuity, nor the term created for the purpose of raising portions. The testator then devises and bequeaths a fee-farm rent and a rent charge, as a provision for his second son George. And if he had stopped there, this case would have been similar to that of *Blake v. Bunbury* (1 Ves. Jun. 514). But it does not stop there, for he shows that he had in view the settlement of 1727, and declares that this provision was in addition to any portion given to George by that settlement which he expressly ratifies and confirms with every thing therein contained. Now in order to raise a case of election, you must either strike out these words, or you must say that these words have the same meaning as those in *Blake v. Bunbury*, *i.e.*

that he confirms the settlement only as far as respects the portion given by it to George. George also had an estate tail by the settlement, and he must be supposed to intend to continue that, and to destroy the estate tail of Thomas, or to confirm the settlement, except in so far as respects the estates to Thomas and George; but he has said that he confirms it and every thing therein contained. And upon what principle you are to strike out these words of such mighty import, and without any express declaration to warrant it, is more than I am able to state.

Then he declares the trusts of a term to be that the trustees should lay out the rents and profits of [181] the premises comprised in the terms, first for the maintenance and education of his sons Thomas and George Parkyns, and then in the purchase of lands, etc. to be settled to the same uses as the premises before devised. Then recollecting that he had a daughter, Ann, he gives her £1000 at her age of twenty-one, or marriage, which should first happen; and then in case of her death before twenty-one and unmarried, he directs that the £1000 should not be raised, but sink into the residuum of his personal estate; and this £1000 observe, is over and above the £800 to which she was entitled under the settlement.

Then he empowers his son to give a jointure to a wife; and it is not immaterial, when we come to consider the case of the Great Leake and Thorpe estates, that the jointure was to be £100 for every £1000 fortune brought by the wife. This I say is material, because you will see that the value of the fortune of Jane Parkyns is, upon this principle, such as to entitle her to such jointure or nearly so as was provided for her by the settlement made after the act of parliament, of which your Lordships heard so much in the course of the argument.

Then there is a power to Thomas Parkyns, etc. to demise for twenty-one years at the rents mentioned, together with certain boons and services to which the tenants were to be bound; and it has been said that, connecting this with the boon coals afterwards mentioned, Sir Thomas devised an immediate estate in the lands and premises at Ruddington. My opinion, however, is that, when a [182] testator expressly confirms a settlement and every thing therein contained, you cannot, as against that express declaration of intention, take it by conjecture, call it demonstration plain, or necessary implication, or what you will, but still only conjecture, that he does not mean to confirm; and that you cannot reasonably conclude that, because he uses expressions which apply to some and not to others of the subjects devised, he contradicts himself, and does not mean to confirm, although he says that he does confirm; and all upon the ground of these nice, critical observations.

Then he directs his trustees to advance a sum not exceeding £200 to each of his sons for their maintenance while at school, the university, or inns of court; and it has been contended that, considering the fortunes to which the sons would be entitled, he could not have thought it necessary to give the £200 for the maintenance and education of his sons, unless he had intended to raise a case of election. But we should make wild work if we were to draw such an inference from the mere circumstance that the father gives so much for the maintenance and education of his sons, meaning merely that they should not have the power of spending more during their minority.

Then the testator imposes conditions with respect to certain guns, iron trunks, and also certain medals which the son Thomas had as the gift of his grandfather. That raises a clear case of election as to the medals, which the son had as the gift of another person; and the single question is this, whether, as he has raised a case of election as to these medals, [183] he can be considered as having undone that settlement which he has, in express terms, ratified and confirmed, with everything therein contained. That appears to me by far too strong an inference.

Then comes the directions with respect to the boon coals, and it has been argued that because this applies to both the Bunny and Ruddington estates, you are to shut out of the will the words "every thing therein contained"; but it is impossible to give that provision an effect which would destroy other parts of the will.

I notice also that he here mentions a gentleman of the name of Weekes, who, it appears, had married his sister, and this is material with respect to the Leake and Thorpe estates, as that gentleman must have known something as to the titles.

Then he gives rings of a certain value to the judges, etc. And here I notice a circumstance which has some, though not much bearing upon the other question, but which is not to be overlooked, that among those to whom he gives rings Francis Lewis

is mentioned, who was the trustee in the will of Thomas Parkyns, and therefore must have been on terms of intimacy with the family, and have had some knowledge of its affairs. In that same month, August 1735, the day following the day of the date of his will, he takes into consideration the possibility of his first wife Elizabeth having brought into the world any children after she left him, and he says in a codicil, "Whereas Dame Elizabeth Parkyns my late wife did, for the three last years before she left Bunny, "elope from my bed and lie separate in another, and afterwards eloped and [184] parted "from me and lived in London for many years, etc. and never returned, but there died, etc. "And whereas it may so happen or hath, that my said wife may have had one or more "child or children during the three years she left my bed, and went up to London, or "during her elopement thither, etc." Now the use I make of it is this, that it manifests that he had it in his mind that Elizabeth, who had lived in his house for some time, during which she had not been in his bed, might still have had some children whom the law might construe to be legitimate; and that if the settlement made on his first marriage gave the estates to all the issue of that marriage, a difficulty might occur in giving even the Bunny estate in possession to the children of the second marriage. It was usual in old instruments to give a shilling to those who would in law have been entitled, and to near relatives, from a notion, a very false one, that this was necessary in order to exclude them: and he therefore gives each of these children, if any, a shilling and no more. But it is too much to say that therefore he meant to take, or thought he could so take from the children of the second marriage, the interest which they before had, if they had it.

In the third codicil, he gives a further sum of £500 to his daughter Ann. He does not say there that this was to be in addition to her provision under the settlement; but having given her before £1000 which he says was in addition, so this too must be in addition. But in the last codicil, that of 1740, he does say that the sum there given to Ann was in addition. And it is [185] necessary here to advert to a circumstance which was overlooked in the course of the argument with respect to the Leake and Thorpe estates, in which it was contended that certain persons might be considered as guardians by implication; but there is an end of all doubt as to that, since in this will he expressly appoints the trustees guardians of his children.

This is the whole of the will; and the question here is, have you that demonstration plain or necessary implication, looking at the whole of this will as I have stated it, that he meant to dispose of the estates tail of his sons under the settlement, and to convert them into estates for life only, with remainders to their first and other sons in tail? Have you that manifest declaration plain? With respect to that, I say that it is difficult in any case to apply the doctrine of election where the testator has some present interest in the estate disposed of, though it may not be entirely his own. In this case he had a present interest; he has a manor in which, for any thing that appears, he had the entire fee; he has the reversion in fee of the whole estate, and he has expressly confirmed the settlement of 1727 in all its parts; so that it was impossible in this case to contend that he forgot the settlement, which, with every thing therein contained, he expressly ratifies.

There are many cases under this head; but they all amount to what I have already stated. One case which I argued, in 1792, was referred to, that of *Blake v. Bunbury* (1 Ves. Jun. 515). The case was this: Sir Patrick Blake, in a settlement made on his marriage in 1762, for the considerations therein mentioned, [186] and for making a provision for the eldest son of the marriage, granted to trustees and their heirs, a clear rent charge of £2000 per annum upon his estate in the island of St. Christopher's, payable half yearly out of all and singular the lands, tenements, etc. in trust for the first son of the marriage in tail male; remainder to the second and other sons in the same manner; remainder to himself in fee. To secure this rent charge, a term of 2000 years was vested in other trustees, upon trust, to permit Sir Patrick Blake to receive the rents, etc. There was a proviso that the rent charge should cease if Sir P. Blake should settle lands of equal value in Great Britain upon the persons to whom it was limited. By this settlement there was also a charge of £20,000 for the younger children, after the death of their mother. The will was made in 1784. He had no real estate in St. Christopher's except the estates charged. By the will he devised all his real estates in St. Christopher's and Great Britain to trustees in fee, upon trust, as soon as conveniently might be after his decease, to convey those estates for a term of 500

years, and subject to that, to the use of his eldest son in strict settlement; remainder in the same manner to his second and third sons, and to his daughters successively, with other remainders over, with directions that all persons who were to take should take the name of Blake; and it was contended that the eldest son must make his election; and to show your Lordships upon what nice grounds these cases are sometimes argued, it was contended, that this was not like a devise of an estate, A. and another, B. but that the £2000 rent [187] charge was not parcel of the estate; that he must mean lands; and that he had nothing of his own but the lands. Then the testator in that case, after specifying the trusts of the 500 years' term, makes another provision for his eldest son out of an estate in Montserrat, and gives him his house in Portland Place, and then follows a very material clause: "And I do hereby ratify and confirm the settlement whereby my younger children, J. H. Blake, and Annabella my daughter, by my former wife, are entitled to £20,000 in equal proportions;" and it was argued there, as it might be here with respect to George and Ann, that if he meant to confirm it in that particular, and not in other respects, a case of election arose. But that is not the whole; for he further says; "So far as the same relates to my said children." So then he, having no present interest in the St. Christopher's estates, gives these interests, and takes notice of the settlement, and confirms it, so far as relates to the younger children; from which it was argued that he did not mean to confirm it, in all respects, as he has here done, when he says, that he confirms it and every thing therein contained. The Court says (1 Ves. 523): "It is the settled doctrine of a court of equity, and agreed on all sides, that no man shall be allowed to disappoint a will under which he takes a benefit. To put the strongest instance at once, if a man takes upon himself to devise to B. lands to which he has no colour of title, and which are in the possession, or are the inheritance of A. to whom some part of the testator's estate, real or personal, is also devised; A. must either [188] renounce, to the extent of his own estate, the estate devised, or must convey his own estate to B. It is but a modification of the same case, where a man has subjected his estates to special limitations or incumbrances, and by his will makes a new disposition of the same estate, free and discharged from the incumbrances, or under different limitations: the incumbrancers deriving other interests under the will, if they will take by it, must not disappoint it; but must permit the estate to go in the new channel, and as free from incumbrances as the testator intended. Therefore, as to the argument from the supposition, that this had been a mortgage instead of a rent charge, if it was so, and the estate had been disposed of by the testator, free from the mortgage, the case would be the same, only in different words, for a mortgage comes under the head of incumbrance. This putting a devisee to his election, however reasonable and just it may be, was certainly a very strong operation of a court of equity; and I agree, the intent of the testator to dispose of that which is not his, ought to appear upon the will, with such explanation, however, of the *primi facie* appearance as the law admits; and that it ought to appear by declaration plain or necessary conclusion from the circumstances; and no man ought, under pretence of this rule, to be spelt or conjectured out of his property. But as on the one hand we are not to do it by conjecture; so on the other, we are not to refuse our assent to that moral certainty and demonstration which, in such cases as the [189] present, the general object of both instruments, the nature of the subject, the scope and purview of the will, the observations upon the particular clauses, and the force of the expressions construed, according to their natural import, may produce." The Court was of opinion that that was a case of election. These are the principles, and such the determination.

Here it was not necessary to mention the reversion. I think, it would pass under the general words, whether particularly mentioned or not, for we must suppose that the testator meant to pass all belonging to himself that may be included in the words. But I ask whether, looking at the whole of this will taken together, it can be justly said, that the testator meant to pass an immediate interest, having the reversion only? This is a case, in which the testator expressly declares that he means to confirm the settlement and every thing contained in it; and not one in which he says that he confirms it in one particular, leaving it open to the inference, that he means to destroy it in all other respects. That is not all. It is the case of a testator making a provision for his younger children, in addition to that which they had under the settlement, and, at the same time, confirming the settlement not as to them only, but as to every thing therein contained; and not only that, but of a testator who had a manor which would satisfy the words of the devise.

I do not deny, no man can reasonably deny, that, if the testator had been asked, when he made his will, and it had been read over to him, whether he meant to devise the reversion only, or the posses-[190]-sion also, he could not but admit that with respect to these boon coals, and some other minor particulars, there was an ambiguity. But what can you do in a case where he himself has expressly declared that he did not mean to dispose of that which was not his own ; and confirms the settlement and every thing therein contained ?

If then there is an ambiguity, we must, notwithstanding, confirm the settlement in all respects as the testator himself has done, and my humble opinion on that point is exactly the same as it was in 1809.

Lord Eldon (C.). I propose this day merely to state particularly the nature of the title to the Great Leake and Thorpe estate, reserving the consideration of the doctrines in law and equity, upon which the question is to be decided, till the next day of causes.

But first permit me to mention a circumstance, with respect to the Ruddington estate, which I forgot the other day, a circumstance not essential to the decision of that question, but of sufficient importance not to be overlooked. The question there was, whether the will of Sir T. P. in 1735, proposed a case of election as to the Ruddington estate, that is, whether after having settled the Ruddington estate upon his first and other sons in tail male, he meant to devise that estate under the will, and his son Thomas, being himself tenant in tail, independent of the will, whether, if he chose to take under the will, he was bound to allow his interest in that estate to be reduced, so as to make him tenant for life with remainder to his first and other [191] sons in tail male. In 1756-7, proceedings took place in the Court of Chancery confirmatory, in some of its stages, of my opinion. Your Lordships will recollect that the Ruddington estate was one of the subjects of property then in dispute ; that Thomas and his brother were to be allowed only £200 a year each, and that the surplus rents and profits were to be formed into a fund for the purchase of lands to be settled to the same uses as those before limited ; the consequence of which would be, that if there was a surplus of the rents and profits of the Ruddington estate, it would be a fund for the purchase of other lands. The property was under the care of the Court of Chancery ; and Sir Thomas Parkyns, who was tenant in tail under the settlement of 1727, applied to the Court, stating that a receiver had been appointed, not only of the Bunny estate, but also of the Ruddington estate, of which he was tenant in tail ; and that the rents and profits of that estate were his, and were not affected by the dispositions in the will of Sir Thomas Parkyns, of August, 1735. It became therefore necessary to consider the question of election with reference to that point ; and the Court, adopting the opinion of the master, ordered the rents and profits of the Ruddington estate to be paid to him. It is quite impossible that the Court should not have looked at the question of election, as the petition proceeded on the ground of the distinction ; so that my opinion was then acted upon. And subsequent to the will of 1735, a mortgage was made of that estate, upon the notion that the son was tenant in tail, and might suffer a recovery, and [192] that the will did not pass the Ruddington estate, in which the testator had no present interest, but a manor, and the rest in reversion. The question as to the Leake and Thorpe estate is different.

Now the title to the Leake and Thorpe estates seems to depend on the following instruments. The first of these is, the articles of agreement made on the marriage of Sampson Parkyns, the son of Sir Thomas Parkyns, by his first wife, and Alice Middlemore, reciting that Alice Middlemore was a minor, and seized of two parts, and entitled in reversion, on the death of her mother, to the other third part of certain premises mentioned ; and that the mother was willing, in consideration of the marriage, to release her interest in the premises. By that instrument, it was witnessed that the mother covenanted to release accordingly, and that Alice should, on her coming of age, sell the premises ; and that the moneys arising from the sale should be paid to Sir Thomas Parkyns, the father of Sampson : and Sir Thomas and Sampson Parkyns covenanted to settle lands in the counties of Nottingham, Lincoln, Derby, etc., of £100 yearly value for every £1000 that might be received by Sir Thomas from such sale, to the use of Sampson Parkyns for life ; remainder to the said Alice for life ; remainder to the first and other sons of the marriage in tail male, with several remainders over ; the ultimate remainder to Sir Thomas Parkyns in fee. The marriage took effect, and Sampson

died, leaving Alice and one son, Thomas Parkyns, the maternal grandfather of the Appellant's father.

These articles were partly carried into execution [193] in 1716, after the death of Sampson Parkyns; and the parties to the settlement were Sir Thomas Parkyns of the first part; Alice Parkyns, relict of Sampson, and her mother, of the second part; Andrew Haskett and William Porter of the third part; and Sir Richard Cust and Thomas Carter of the fourth part. Here I would notice the names of Porter and Carter; and it is a circumstance which deserves attention, that persons are so often named, who were relations of the parties and witnesses to many of the deeds, and probably knew something of the effect of them. And here I observe that, as in the case of the Ruddington estate, there was a manor as well as lands; and some of the instruments included both, and some not; so here, in the case of the Leake estate, where there is also a manor as well as lands, the manor is omitted in some of the instruments, and included in others. The settlement witnessed that in pursuance of the articles Sir T. Parkyns conveyed to Haskett and Porter all these several pieces, or parcels of ground and enclosures, lying and being within the liberties and precincts of Thorpe in Glebis, in the county of Nottingham, therein described, and all those lands and hereditaments, lying in Great Leake, also particularly mentioned, (not here including the manor or the mansion-house), to hold to the use of Alice Parkyns for life, remainder to Thomas Parkyns, the only son of Sampson and Alice, in tail male, remainder to Cust and Carter for 1000 years in trust, etc., remainder to Sir Thomas Parkyns for life, remainders to the third (Sir Thomas having had two sons before, both dead) and other sons [194] of Sir T. Parkyns in tail male, remainder to the right heirs of Sir Thomas Parkyns. The trusts of the term were to make a provision for daughters in case of failure of issue male. Your lordships will observe, with respect to all the lands which pass by this deed, that the life estate of Alice, and the estate tail of Thomas, her son by Sampson Parkyns, are prior to the life estate of Sir T. P.; and I mention that, because, if he, thus standing behind them, was in possession, as against Thomas, the son of Sampson, this might furnish a subject for suits, and probably did produce the suits referred to in the deed of 1736. This instrument was executed in 1716.

The next instrument to be considered is that of 1730, made upon a recovery about to be suffered by Thomas, the son of Sampson, who was tenant in tail of the premises under the settlement, which did not include the manor and the mansion-house. Thomas conveys to Thomas Woodroffe, with whom he was nearly connected by marriage, all that the manor or lordship of Great Leake, or East Leake, with the rights, etc. thereof; and the capital messuage, or mansion-house, in Great Leake, and the farms, lands, etc., in the occupation of the several persons mentioned, in Leake and Thorpe, in the county of Nottingham; meaning, therefore, to convey not merely the lands, but the manor and mansion house in Leake. And the question is, whether it must not be taken that he had an estate tail in the manor and mansion-house, acquired in some manner which does not appear. But it is not at all uncommon to include, in fines and recoveries, pro-[195]-perty, as to which these assurances are not necessary. The effect was to make Woodroffe tenant to the precipe for the purpose of the recovery. Then a mortgage of the premises was made to Cornelius Farr for £1000, and then another for £1500, and another for £400, making in all £2900. And a fine was levied in 5 Geo. 2, by which the dower of Elizabeth Woodroffe, the wife of Thomas Parkyns, was barred.

Then, on the 15th Nov. 1731, articles for a settlement were agreed upon, which, together with the settlement afterwards made in pursuance of them, deserve particular attention, between Thomas Parkyns, and Elizabeth his wife, of the first part; Sarah Woodroffe, mother of Elizabeth, of the second part; and Saville Cust and Thomas Woodroffe of the third part; reciting the indentures of mortgage to Farr; and that, for the more effectual securing the repayment of the mortgage money, Elizabeth Parkyns, at the request, entreaty, and persuasion of Thomas Parkyns, had, together with the said Thomas, acknowledged and levied the fine already mentioned: therefore, the articles witnessed that in consideration of Elizabeth Parkyns having levied the fine and barred her dower, and of £500 paid to Thomas Parkyns by Sarah Woodroffe, Thomas Parkyns covenanted to convey to Saville Cust and Thomas Woodroffe, the manors, lands, etc., in Great Leake and Thorpe in the Clotts, to the use of Thomas Parkyns for life, remainder to the use of Elizabeth, his wife, for life. And then, as to the Thorpe estate, to the same persons for a term of 500 years, on trust to raise thereout £4000 for the

daughter or daughters of the marriage; and, [196] in default of such issue, to the right heirs of Thomas Parkyns. And as to the manor, mansion house, and estates in Leake, to the use of the first and other sons of Thomas Parkyns, by Elizabeth his wife, in tail male, remainder to the right heirs of Thomas Parkyns. And it was declared that the fine should enure to the use of Farr till payment of the mortgage money, and then to use of the trustees for the purposes mentioned, or such other purposes as might be agreed upon between Thomas Parkyns and Elizabeth his wife. A settlement was afterwards made in 1732, reciting the articles, and by that settlement Thomas conveyed the manor and estates in Great Leake, and Thorpe in the Clotts, to trustees, to the use of himself for life, remainder to the use of Elizabeth, his wife, for life; and then as to the Great Leake estates, manor, and mansion house, to their first and other sons in tail male, etc., remainder to trustees for 500 years, and then to the use of Thomas Parkyns and his heirs. The trusts of the 500 years' term were declared to be "in case there should be "no such issue male of the body of the said Thomas Parkyns upon the body of the "said Elizabeth Parkyns begotten; or there being such issue, all of them should die "without heirs male of their bodies, before any of them should attain the age of "twenty-one years; that said Saville Cust and Thomas Woodroffe, or the survivor of "them, or the executors or administrators of such survivor, should, by mortgage, sale, "or demise of all or any part of said manors, capital messuages, lands, tenements, and "hereditaments, situate at Great Leake aforesaid, for all [197] or any part of said "term of 500 years, or out of the rents and profits thereof, raise, within twelve months "after the death of said Thomas Parkyns and Elizabeth his wife, £1500, and pay the "same to Harriet Parkyns, only sister to the said Thomas Parkyns, towards the "advancing her fortune: and in case said Harriett Parkyns should die before said "Thomas and Elizabeth Parkyns, leaving issue of her body lawfully begotten, then to "pay said £1500 to such her child or children living at her death, share and share "alike, subject nevertheless to the proviso thereafter mentioned.

"And as for and concerning all those lands, tenements, and hereditaments lying in "Thorpe in the Clotts, or in the fields, liberties, and precincts, and territories thereof, "from the death of said Thomas Parkyns and Elizabeth his wife, or the survivor;

"To the use of said Saville Cust and Thomas Woodroffe, their executors, adminis- "trators, and assigns, for 1000 years, *sans* waste, upon the trusts, etc. thereafter "declared; and after the expiration or other sooner determination of said term,

"To the use of said Thomas Parkyns, his heirs and assigns for ever.

"The said term of 1000 years was thereby declared to be limited to said Savile "Cust and Thomas Woodroffe as aforesaid, upon trust, in case there should be one or "more daughter or daughters of the body of said Thomas Parkyns, on the body of "said Elizabeth Parkyns begotten, living at the decease of said Thomas Parkyns and "[198] Elizabeth Parkyns, or the survivor, that said Saville Cust and Thomas Wood- "roffe, or the survivor of them, or the executors or administrators of such survivor, "should by mortgage, sale, or demise of the premises in Thorpe aforesaid, for all or "any part of said term of 1000 years, or by the rents and profits thereof, raise, after "the death of said Thomas Parkyns and Elizabeth his wife, such portion or portions "for such daughter or daughters, viz. if but one daughter £4000, if two or more "£5000, equally to be divided amongst them, and payable at their respective ages of "twenty-one years, or day of marriage, which should first happen, in case said Thomas "Parkyns and Elizabeth his wife should be then dead; and in case they should be "then living, within twelve months after their decease, with maintenance not exceed- "ing the interest of their respective portions and benefit of survivorship; and when "the portions were raised, that said trustees, or the survivor, or the executors or "administrators of such survivor, should, at the request of said Thomas Parkyns, his "heirs or assigns, surrender the said estate and term to the said Thomas Parkyns, his "heirs or assigns, or to such person or persons as he or they should direct or appoint."

Here your Lordships will observe, that the daughter's portion was charged only on the Thorpe estate; and then, the mortgages to Farr affecting both the estates, she had a right to say to the mortgagee, you shall not apply any part of my fund to the pay- ment of your mortgage, but shall be restrained to the other estate until you show that it is not [199] sufficient, in order that both of us may be paid. And your Lordships will recollect this circumstance, that under the will of Sir Thomas Parkyns of 1735, his son Thomas had a power of giving by way of jointure £100 a-year, for every

£1000 fortune brought him by his wife. The consequence is, that the daughter being entitled to £4000, her jointure would be £400 a-year. This is material; and we are not left to speculate here on the value of the estates, as the rents are stated to be £338 a-year. And although the £4000 was charged on the Thorpe in the Clotts estate only, if that estate should not prove sufficient to pay the sum, and there were other estates sufficient for that purpose, it is to be considered whether she had not a claim on the equity of redemption of the other estates to make good the deficiency. And there is a proviso, that said term of 500 years limited to said Savile Cust and Thomas Woodroffe as aforesaid, was upon this express condition; that in case said Thomas Parkyns should die, and not pay said sums of £1000 and £1500 and interest to said Cornelius Farr, his heirs, etc. nor leave sufficient assets to discharge the same, that then the said term of 500 years should cease and be void, and that said £1500 directed to be paid to said Harriett Parkyns as aforesaid, should not be raised or paid; and in case said Thomas Parkyns should in his life-time give said Harriett Parkyns, or the heirs of her body, the said £1500, that then said Savile Cust and Thomas Woodroffe, their executors, administrators, and assigns, should, at the request of said Thomas Parkyns, his heirs, or assigns, [200] surrender the said estate and term to said Thomas Parkyns, his heirs, or assigns; or if said Thomas Parkyns should at any time pay said Harriett Parkyns any sum of money towards the advancing her fortune, that the same should be taken as part of the said £1500, unless the contrary should be signified by writing under his hand and seal."

And this raises the question whether, when a man makes a provision in his will, it is to be taken as an advance in his life-time. And it is singular, that it has been so held, though the provision cannot take effect till after his death. Then a recovery is suffered in May, 1734, by Thomas Parkyns, of the mansion-house and lands in Great Leake, then late in the occupation of his mother Alice Parkyns, to the use of Thomas and his heirs.

This is declared to be a recovery of his own property only; and I notice that, as it may admit of a different consideration from the other estates. In November, 1734, a further mortgage for £400 was made to Farr.

The title so standing up to 1734, a will was made by Thomas Parkyns in 1735, the same year in which the will of Sir T. Parkyns was made: and the short period that intervened between the death of Thomas and the will of Sir T. P. is to be noticed with reference to the probability or improbability of any acts done by him, Sir T. P. and Elizabeth, the widow of Thomas, in the interval. He directs that his estates at Buckminster should be sold by his executrix, for payment of his debts; she having this character which connected her with the [201] personal property: but she was to sell lands; and she could do that only if the will was duly executed; and she does afterwards sell, as appears from a deed executed in 1736. Then he devises all other his real estates to his wife Elizabeth, for life, remainder to Francis Lewis, the same, I suppose, who is mentioned in the will of Sir T. P., in trust for the benefit of the testator's only daughter, Jane Parkyns, during her life, and after her death in trust for her first and other sons and their heirs; and in default of issue male, in trust for the issue female of his said daughter: and in case of her death without issue, then for the testator's sister Harriett Farrer for life, and after her death for her sons and daughters, as before; and in default of issue of his sister, in trust for the testator's right heirs. And the testator by his will directed (this is material), "that after payment of his just debts, legacies, and funeral expenses, the residue of his personal estate which he was then possessed of or anyways entitled unto from his grandfather Sir Thomas Parkyns or otherwise, should be placed out in the name of said Francis Lewis or his heirs upon good security, as soon as the same might conveniently be done; and that the interest thereof should be paid to his said wife during her life, and after her death to testator's said daughter for her life, and afterwards that a purchase of lands should be made with the principal money, and that the same should be settled in the same manner as he had above settled the residue of his real estate, on his said daughter and sister, and their heirs male and female as aforesaid; and [202] failing such issue as aforesaid, then that the same should go to his own right heirs for ever; and appointed his said wife Elizabeth Parkyns sole executrix of his said will."

There is a circumstance with respect to the attestation which deserves to be attended to; for your Lordships know that it is necessary that the three witnesses should sign

in presence of the testator. They state here, that the testator signed it in their presence, but not that they signed in presence of the testator. But if it is proved that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will. But when the will is produced in a court of justice, it is necessary that the proof should be made; and if it were necessary for the decision of the question, it would be sent to a court of law, where a will, thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession if the signing is sufficiently recorded, proves itself. But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity: and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing, though it should not be recorded.

In 1735 a transaction took place, which it is difficult to account for, as to the mortgages to Farr, if the title to the estates rested upon the will, Elizabeth having only a life estate, her daughter a life estate, with remainder to F. Lewis in trust for others; the power of Elizabeth extending only to [203] the estates that were to be sold. But in November, 1735, a transfer of the mortgage took place, to which Elizabeth, who had only a life estate alone of those entitled, was a party, reciting the former mortgages and the will of Thomas Parkyns, and that £3000 was due to Farr for principal and interest, and reserving, on payment of £3135 the equity of redemption to those who might be entitled: a very important fact that Francis Lewis, the trustee, was no party to this deed, and yet that the interest was converted into principal, although it takes notice of the will, which did not allow Elizabeth to add the interest to the principal, he being no party. But so it is, that she, being only tenant for life, under the will, makes principal of the interest: a most unintelligible transaction, if the will passed the estates, and the title stood as it did on the will. And then in 1742, Eardley Wilmot, a great lawyer, takes an assignment of this mortgage, whether it was that he thought a lawyer taking it would frighten every one from challenging it, or for what other reason, I know not: but a more irregular transaction I have seldom seen, upon the supposition that the title to the estates depended on the will.

It was thought adviseable to bring Jane, the daughter of Thomas, the son of Sampson, the son of Sir Thomas Parkyns, by his first wife, and Sir Thomas Parkyns, the son of Sir Thomas Parkyns, by his second wife, together by marriage, and, they being minors, it was conceived, that an act of parliament was necessary to enable them to make a settlement. It appears that in the year 1746 ap-[204]-plication was accordingly made to parliament by a petition to this effect:

“Petition to the Lords Spiritual and Temporal, of Sir Thomas Parkyns, Baronet, “an infant, eldest son, and heir of Sir Thomas Parkyns, late of Bunny, in the county “of Nottingham, Baronet, deceased, and of the said John Sherwin, Richard Porter, “and Samuel Sterropp, his trustees and guardians; and also of Jane Parkyns, spinster, “an infant sole daughter and heir of Thomas Parkyns, Esquire, deceased, who was son “and heir of Sampson Parkyns, Esquire, deceased, who was in his life-time eldest son “and heir apparent of the said Sir Thomas Parkyns, deceased, by dame Elizabeth, his “first wife, deceased; and also of Elizabeth Parkyns, widow, mother of the said Jane “Parkyns the infant.” The petition, after stating the will of the said Sir Thomas Parkyns hereinbefore in part recited, stated—

“That the said George Barratt died in the life-time of the said Sir Thomas Parkyns, deceased, and that the said Abel Smith did after his death decline and had “never acted in the said trust:

“That the said petitioner, Jane Parkyns, was seized and entitled to her and her “heirs, of, in, and to a share or shares in the New River, brought from Chadwell and “Amwell to London, valued and estimated at £1000, and of one undivided moiety of “an estate at Sutton Bonnington, in the county of Nottingham, of the yearly rent of “£60, but charged with an annuity of £20 for one life; and that she was also seized, “to her and her heirs in reversion expectant on the death of the said [205] Elizabeth Parkyns her mother, of and in divers other lands and hereditaments in the county of “Nottingham, of the yearly rent of £338 or thereabouts, but subject to a mortgage “for £3000 and interest:

“That the said John Sherwin, Richard Porter, and S. Sterropp, at the instance and “on the behalf of the said Sir Thomas Parkyns, the infant, and the said Elizabeth

“Parkyns, at the instance and on the behalf of the said Jane Parkyns, her daughter, had respectively entered into a treaty for the marriage between the said Sir Thomas Parkyns and Jane Parkyns, the infants, and for settling a competent jointure on the said Jane Parkyns, and making provision for the daughters and younger sons of the said intended marriage out of the estates of the said Sir Thomas Parkyns, the son, in pursuance of the power given him by his father's will; and also for settling and disposing of the lands and real estate of the said Jane Parkyns, for the benefit of her and the said Sir Thomas Parkyns her intended husband, and their issue:

“But that as the said Sir Thomas Parkyns the son, and Jane Parkyns, had neither of them attained the age of twenty-one years, such mutual settlement could not be made without the aid and authority of parliament. The petitioners therefore prayed, that a bill might be brought in to enable them, the said Sir Thomas Parkyns and Jane Parkyns, the infants, with the consent of the other petitioners, their guardians and trustees, to make such settlement at their inter-marriage as aforesaid. [206] Signed by Thomas Parkyns, John Sherwin, Richard Porter, Elizabeth Parkyns, Jane Parkyns, and Samuel Sterropp.”

This petition was referred to the Lord Chief Baron Parker and Mr. Justice Abney, and, on their report, an act was passed, reciting, “that the said Jane Parkyns was seized and entitled to her and the heirs of her body, remainder to her and her heirs of, in, and to a share or shares in the New River brought from Chadwell and Amwell to London, valued and estimated to be worth £1000; and also seized or entitled to her and her heirs of, in, and to an undivided moiety of the manor of Sutton Bonnington, and of divers lands, tenements, and hereditaments situate, lying, and being in Sutton Bonnington aforesaid, which are therein mentioned, to be together of the annual rent of £120 or thereabouts, and subject to annuity of £40 payable to Stanhope Parkyns, Gentleman, for his life; and that she was also seized to her and her heirs in reversion, expectant on the death of Elizabeth Parkyns, widow, her mother, subject to a mortgage or security made to Sir Henry Harper, Baronet, for the sum of £3000, and interest of and in the manor of Great Leake otherwise East Leake, and divers lands, tenements, and hereditaments, situate, lying, and being in Great Leake otherwise East Leake, and Thorpe-in-the-Clotts, in the county of Nottingham, of the yearly value of £338 or thereabouts:” and it was thereby enacted, that it should be lawful for Sir Thomas Parkyns, with consent of his guardians, to settle £400 a-year jointure on Jane, out of the [207] estates devised to him by the will of Sir Thomas his father, to raise portions not exceeding £500 each, for younger sons or daughters of the marriage, and in case he, and his intended wife, should survive Elizabeth her mother, to add £100 a-year out of the devised estates to Jane's jointure. And that it should be lawful for Jane Parkyns, and the persons seized in trust for her and her heirs, with consent of Elizabeth her mother, John Sherwin, etc. to convey and settle all her estates to, and upon, such person or persons, and in such manner as might be agreed upon by her mother, Elizabeth Parkyns, John Sherwin, etc.: and the said Sir Thomas and Jane Parkyns; and that the mutual settlements should be as effectual as if the parties had been of full age, etc.

On the one hand, it was contended that it was enough to say that the defendant was entitled under this act. On the other hand, it was contended that the act only gave her, Jane Parkyns, such power as she would have had if adult; and that it was not intended to give her a greater power than she had before, but merely to remove the disability of infancy. And there was this saving clause:—“Saving to the king, his heirs and successors, and to all and every person and persons, both politic and corporate, his, her, and their heirs, successors, executors, administrators, and assigns, (other than the said Sir Thomas Parkyns, his heirs and assigns, and the trustees, of said term of ninety-nine years, limited of said premises as aforesaid, their respective executors, administrators, and assigns, and all other persons claiming under the said term of ninety-nine years, limited of said premises as aforesaid, their respective [208] and limitations of the said will, and other than the said Jane Parkyns, and the heirs of her body, and her right heirs, and all and every other person and persons seized in trust for her and her heirs), all such estate, right, title, interest, claim, and demands, of, in, to, or out of the premises, made subject to the powers given, vested, created, and established by that act, as they or any of them respectively had before the passing that act, or could or might have had or enjoyed, in case the same had not been made.” And it was contended at the bar that the Appellant was excluded

from this saving, as being the heir of her body. On this I observe that he was heir of her body, and heir general; but it is not so clear that he was excluded as her eldest son; and he claimed as a purchaser, as her eldest son, under the will of his grandfather. For instance, if Jane had done any act incurring a forfeiture in his life-time, he could maintain a suit for the property as claiming under the will of his grandfather; and not claiming as heir of her body or heir general, which he could not do, on the maxim that *nemo est heres viventis*.

No bill was brought till 1800. If they were right in their construction of the act, that it did nothing more than remove the disability of infancy, these provisions can have no more effect than they would have had if made by the parties when adult. But it is still necessary to look at the act in this view. You cannot consider the guardians as making any fraudulent representations, and against their knowledge, unless it is proved, to induce the legislature to pass this act. Jane had an estate for life under [209] the will; but the application to parliament does not prove that the guardians of Sir T. Parkyns knew Jane's title. That, however, will be better considered when we come to speak of the transaction by which he got the assignment of the mortgages, and had the entire estate in fee in himself at law, leaving no claim against him but in equity, an incapacity which is sought to be removed. Here I observe that the consideration of marriage is not like the consideration in other contracts. In a contract between A. and B. if A. does not make it good on the one hand, B. is not bound on the other. But not so in the case of marriage: for if the mutual issue are purchasers, though it is not made good by one of the parties, the issue have a right to say, you shall each of you do what you can do, and we must not be disappointed. The case must be considered with reference to that. Then a settlement was made in 1747, which, it was contended, was not conformable to the act. Before I leave this part of the case, I call your attention to the circumstance that this will of Thomas, not Sir Thomas, was found in the possession of Sir Thomas Parkyns. But it cannot be represented that this was a concealment, as the will must have been proved in the Ecclesiastical Court, and a deed was executed in 1736, in which Elizabeth represents herself as devisee and executrix under that will.

It has been contended, that the answer of the defendant admitted that the will was duly executed, which leads at present only to this observation, that the Court must take care that the admission is very clear, before the defendant can be concluded by it. [210] But perhaps that is not material in some views of the case.

In this examination I have two objects in view: 1st. To satisfy both parties, if possible, and with the more anxiety, as this is a judgment of my own. 2d. That when disputes arise between persons so nearly connected, these may be set at rest; or if not, that they may know that as much industry as possible has been bestowed upon the subject: and God knows it is difficult to satisfy both parties.

I now proceed to the deed of 1736, made the year subsequent to the will of Thomas, and of old Sir Thomas, who died at a later period; and that is made between Elizabeth, the widow of Thomas Parkyns, and Sir Thomas Parkyns. This deed recites her character of executrix under the will of Thomas, and speaks of the residue of the money arising from the sale of the estates which the will had directed to be sold by the executrix, and which could not have been sold by her without the intervention of somebody else, unless the will had been duly attested. She releases certain premises in Leake, as executrix and devisee, in both characters; and covenants for her daughter Jane, etc. etc. And this deserves attention for another reason, that one of the witnesses to the deed is Sterropp, who was a trustee in the will of old Sir Thomas, and probably, therefore, knew the state of the titles to the estates of both parties. How far this may go to fix notice upon Sir Thomas, the son, will be a question, and a very material one. But it would be dangerous to say, that merely because a man signed a deed, he therefore knew all its contents. That would be [211] rather dangerous with reference to the doctrine of notice.

Then the mortgage is transferred, as I before observed, to Eardley Wilmot, and from him it is transferred to Sir Thomas Palmer: and there is a proviso that the equity of redemption should be reserved to Elizabeth in fee. This is a great inaccuracy; but in equity she could take it only for the benefit of the person who was really entitled. Then the mortgage is transferred from Sir Thomas Palmer to Richard Farrer. That name suggests another observation. In case Jane died without issue, the estate under the will would belong to Harriett, the wife of Richard Farrer. She then was as near

a relation as any that existed, and the wife of a professional gentleman: and, on the death of Jane without issue, she would be entitled: and yet he stands by, and does not oppose the act of 1746: a very extraordinary thing, if Jane had only a life estate, and, on her death without issue, his wife would be entitled, that he should stand by, as if Jane had been entitled in fee. Then in 1780 the mortgage is transferred from the heir at law and surviving executor of Richard Farrer, to the Rev. Richard Farrer: and in 1792 it is transferred from the Rev. Richard Farrer to John Wright, who declares that his name was used only as trustee for Sir Thomas Parkyns, who insists that he has a fee simple in the equity of redemption, with the mortgage attendant upon it, and that the estate is his own entirely. But Lord Raneliffe, on the other hand, says, that the estate is given to him by the will of Thomas Parkyns, and is not affected by all these [212] transactions. When Lord Raneliffe came of age in 1776, he was induced to join in a settlement of these and other estates, from which settlement he derived some advantages. It is now admitted on all hands, that this is a case, not of fraud, but innocent ignorance: and the bill prays that the settlement made in 1776 may be set aside. It will be difficult to undo that settlement. But in point of fact, in 1776, Lord Raneliffe was ignorant of the title: and till the will was discovered in 1799, Sir T. Parkyns was also ignorant of it. Under these circumstances the bill was filed in 1800, twenty-four years after Lord Raneliffe came of age: and the question is, whether Wright is to be considered as a trustee for Sir Thomas Parkyns, or for Lord Raneliffe as eldest son, and heir of Jane. And that depends on two questions: 1st. Whether Lord R. has a clear title, founded on the will of 1735? and if he has, then, 2d. What is the equitable effect of all the subsequent transactions, and of length of time, as connected with these transactions?

Lord Eldon (C.). I now proceed to state, how this bill is framed. After stating the articles and settlement of 1707 and 1716, on the marriage of Sampson Parkyns and Alice Middlemore, and the articles and settlement of 1731 and 1732, on the marriage of Thomas, the son of Sampson Parkyns, and Elizabeth Woodroffe, the bill goes on to state the will of this Thomas Parkyns. By this will, dated 9th May, 1735, Thomas Parkyns directed that his estate of Buckminster and Sawston, in Leicestershire, should be sold for payment of his [213] debts by his executrix, and devised all his other estates to his wife Elizabeth for life, remainder to Francis Lewis, in trust for his daughter Jane for life, remainder in trust for the first and other sons of Jane, and their heirs, etc. etc.: and that after payment of his debts, etc. his personal estate should be placed out in the name of Lewis on good security, the interest to be paid to the testator's wife Elizabeth for her life, and afterwards lands to be purchased and settled, as he had settled his other real estates on his daughter and sister, and their heirs male and female: and failing such issue, to his own right heirs. And he appointed his wife Elizabeth sole executrix of his will. The bill represented this will as duly proved by the executrix, and stated that the late Lord Raneliffe, the son of Jane, had not discovered it till a short time before filing the bill: and that by this will he was entitled to the manor, mansion-house, and to the estates in Great Leake and Thorpe, etc.: and also to the New River Share mentioned in the will, and so he at that time believed. But it appeared that there had been no misrepresentation as to that: and then he states that he had been imposed upon, and kept in ignorance of his rights.

I mention these matters for the sake of this observation, that this case is not now founded on actual fraud or disguised concealment: and it is always a satisfaction when it appears that there is no ground for imputations of that description: and that, if there is a miscarriage, it is owing to complete ignorance on all sides. But it is a quite different consideration whether, when there is innocent [214] ignorance on one side, the other party, equally innocent, may not take advantage of that ignorance: that is for consideration.

The bill then, after stating the settlement of the Ruddington estates in 1727, the will of Sir Thomas Parkyns, the act of parliament, and subsequent settlement made on the marriage of Sir Thomas the son and Jane Parkyns, takes notice of the proceedings in Chancery till the rents and profits of the Ruddington estates were separated from the others, which led to the remark that the rents and profits had been directed to accumulate after payment of £200 per annum to each of the sons. But if the Ruddington estate belonged to Sir T. P. the son in tail, and he was not put to his election, it was contended, and that circumstance must be considered and disposed of, that Sir T. P. ought to have received the whole of the rents and profits of that estate, without,

contributing anything to the maintenance. And the bill charged that, if the Ruddington estate was his, there had been inaccurate treatment in the Court of Chancery of these rents and profits. Then the bill charges that Sir Thomas kept back the will, and that he, and all those concerned for him, knew the contents thereof, etc. I take notice of these charges merely to state again that there is now, whatever might have been the view first suggested, no ground for the imputation of actual fraud; and that the whole amounts only to ignorance. And, indeed, on looking at the whole of the circumstances, I cannot find, except perhaps from conjecture, upon which I dare not act, the slightest reason to conclude that any one acting for [215] Sir T. P. knew of this will, except, perhaps, Sterropp, who was a trustee under the will of old Sir T. P. and a witness to the deed of 1736, for I take them to be the same person. But independent of that, there is no agent, solicitor, or other person concerned for Sir T. P. who could be taken to have known of the will. But it is very difficult to say that those concerned for Jane, Elizabeth acting as her guardian, and Thomas Woodroffe being the solicitor for the act of parliament on behalf of Jane, and Elizabeth being a party to the deed of 1736, should not have known of the will, and that Jane was not tenant in fee, unless they knew also, for some reason or other which we cannot now discover, that the will did not operate upon the real estates in East Leake and Thorpe. It is inconceivable that Thomas Woodroffe, who with respect to Elizabeth was so near a relation as to be her brother, should not have known of the will; and if he did, he either misrepresented the state of the title to parliament, or knew that, for some reason or other, it did not operate so as to prevent Jane from having the fee. I remark that, because a great deal has been said about notice of the will; and when we come to consider that point, we shall have to attend to the effect of notice, and who they were who had notice, and for whom they were acting.

The fraud was denied by Sir T. P.; and it was difficult to believe that he, then only eighteen years of age, could have known any thing of this will; and he says he never did know of it till 1799, when two copies of it were found, one among the title deeds [216] of one denomination, another among title deeds of another denomination.

The bill also states the mortgages, and the transference of them, till they come to Wright, declaring himself a trustee for Sir T. P. Wright is not a party to this suit: and I remark that, as this bill is not a bill for the redemption of a mortgaged estate, a circumstance very material with reference to a late decision in one of the most important cases that ever came before the Court of Chancery.

The bill takes no notice of the species of equity which those claiming under Sir T. P. would have, though they should not be entitled to hold the estate. For, when the marriage with Jane took place, if she was not entitled in fee to the estate of Thorpe, she was entitled to £4000 portion out of it; with this question hanging about it, whether her life estate was not a *pro tanto* advancement. It is true that this, along with another estate, was subject to a mortgage for £3000. But she was entitled to say this: the mortgagee has two funds, and my portion is charged on one of them; and if that one is not sufficient to pay both of us, then I am entitled in equity to compel the mortgagee to resort to the other fund, so that the payment of both may be worked out. Then the Great Leake estate also was clearly subject to this £3000 mortgage, and this charge of £4000: and if she had the estate in fee, under the will of her father, T. Parkyns, or if that will did not pass the estates, I can understand how it was that the portion was not raised, because it merged in the fee. But if she was only tenant for life, it seems most extra-[217]-ordinary, that when the guardians of Sir T. P. were making this settlement, they should not take notice that she was entitled to this £4000, and more especially as the jointure which he was empowered to make when adult was to be regulated by the portion or estate brought to him by his wife, and which is that which he applies under the act,—so that this is to be considered that if Jane had the fee, there was no occasion to raise the portion; if only tenant for life, she was entitled to this £4000 portion out of the estate, and he might have given the same jointure £400 and have been in a better situation. The value was not misrepresented, for they do not speak of the value, but of the actual rent. It is said that now the estate is worth £700 a year. But it was then stated, that the rent was £338; and in the answer of Sir T. P. it was stated, so little was then the appearance of increase, that the actual rent was £314. And when one looks at that as the rent of an estate subject to a mortgage for £3000 and to a portion of £4000, it is impossible to say that Sir T. could have been much the better for getting the estate, and certainly there was

very little temptation for fraud. But whether there was ignorance, and what were the consequences, is another question.

Why, then, if the bill fails on the ground of fraud, and of notice at the time of the marriage, then you have to consider the case with reference to the inferences in fact, and in law and equity. 1st, As to the inference in fact, whether the will of Thomas is the foundation of the title to the Leake and Thorpe estates? 2d, In law and equity, whether it can be so taken by a jury if the question were to [218] be tried at law; and if deeds were executed contrary to that supposition, and the possession went a different way, whether you are authorized at this day to say that it did pass the estate? And then if it did pass it, you have to consider whether it may not be said by those who claim under Sir T. P. that the portion and mortgage moneys are to be accounted for; and so both the mortgage money and the portion, with the interest from the time when they become due, to be paid in a due mode of taking the account as between the estate and the charges upon it. But this bill is not framed upon any such equity, nor has it proper parties upon this view of the case, nor is it a bill to redeem a mortgage. But suppose it be so framed, you have to consider what ought to be the effect of the assignments of the mortgage, first to Holden, etc. and afterwards to Wright, he declaring himself a trustee for the late Sir Thomas Parkyns; and then what is the effect of Sir T. Parkyns having the equitable estate, and getting in the legal estate, with more or less of notice that the equity of redemption was in another. And then you must have considered of what it was that he had notice, supposing him to have carefully looked at all the deeds. That is very material with reference to the question of the length of time. Then suppose it cannot be proved that he had notice at the time of the marriage, and that he and all concerned for him conceived that he had the equitable estate in fee, what is the effect of his getting in the legal estate, Wright declaring himself a trustee for him, regard being had to the fact, that neither he himself, nor his solicitors, agents, nor any concerned [219] for him, had notice that the fee, if it should happen so to turn out, was not in Jane; and that such notice as he could have had of the will of Thomas was notice to be derived from the reading of certain deeds, and regard being also had to what he has admitted in his answer?

Then the deed of settlement of 1776 was stated in the pleadings, and you will have to consider the effect of that deed, by which a valuable interest was given to Lord Raneliffe: and though that settlement does not notice the will, as it could not, since it appears that all parties were quite ignorant of it, that supposes that a family arrangement as to the estates was made: and then you are to consider whether it would be fair at this day, when the deed gave that valuable interest to Lord Raneliffe, if the question should not be considered as having been settled with reference to that arrangement. In 1776 Lord Raneliffe came of age, and he does not file his bill till 1800, and he seeks to set aside in part the settlement of 1776. How that can be set aside as to one part, and not as to the rest, is not mentioned. But there is no ground upon which that can be disturbed; and, on the other hand, it cannot be said that there is any thing in it that bars relief, if due upon other grounds. The bill was then altogether founded on fraud: but the Court might judge upon that state of the pleadings, what was the effect of innocent ignorance; and if so to be considered with respect to the Leake and Thorpe estates, you are to say what is the true doctrine of equity in that view of the case, regard being had to the circumstance that Jane ought to have had the [220] real estate in fee, or a personal estate of £4000; and that the claim is made against one honestly purchasing the equitable fee, and honestly taking in the legal estate, if the fact should so turn out,—and having no notice, if such should be the fact, of the adverse claim, except in as far as notice may be presumed from the fact that he does take in that estate, and execute that deed: and that also connected with the fact, that the bill was not filed till 1800. And then you will consider whether you can now inquire into the transactions of 1746, at the hazard of disturbing titles of such ancient standing, and which the parties themselves at this day do not clearly understand.

Thus then the case is to be considered with a view to the nature of the bill in some measure; and I am anxious that this should not escape notice, lest any doctrine now to be stated should be thought to bear either one way or the other upon certain cases in the Court of Chancery, particularly on one case which has excited a great deal of attention, and as to which there prevailed a great difference of opinion. I wish to guard against the notion, that the doctrine in this case trenches one way or the other on the doctrine

understood to be established on that case; and I am anxious it should be known, that the question here turns on the particular facts of the case connected with the nature of the bill.

(Mar. 4, 1818.) Lord Eldon (C.). I now proceed to consider the case with respect to the doctrines in law and equity on which it depends; and your Lordships will permit me again to mention that the bill was filed in [221] 1880, claiming certain estates as belonging to Lord Ranccliffe, he being the son of the late Lord Ranccliffe, who was the eldest son of Jane by the late Sir T. Parkyns. And the first question on the claim so put was whether the estates passed under the will of Thomas Parkyns, the father of Jane. And it is not immaterial to inquire what would be the effect if the premises were comprised in that will. I have now an accurate copy of the will under which it was contended that the property in Leake and Thorpe passed: and when I call your attention to that, I do it for the purpose of observing that when it is contended that Sir Thomas Parkyns when he married Jane was a purchaser for valuable consideration without notice, it is one thing to say that he had notice of a prior title to these estates, and another thing to say that he had notice of a will with general words which might have effect without including that species of property which formed the subject of controversy.

The will directed the estates in Buckminster and Sawston to be sold by the executrix. The testator lived but a very short time after having made his will; and yet, from documents lately discovered, it appears probable, that he had sold, or contracted to sell, these estates in his life-time; and I request your attention to the circumstance, that instruments were brought forward in the course of the proceedings, and properly brought forward, which were not noticed in the first stages of the cause, and could not be then brought forward, because they had been only subsequently discovered, and were not known at first. The will directs the Buckminster and [222] Sawston estates to be sold; and after giving one estate to Daniel Woodroffe, who was the brother of Thomas, who was solicitor on behalf of Jane for the act of 1746-7, and brother of her mother, the testator says: "I give and devise," not estates by particular denominations, but "all my other" "real estates, not herein-before mentioned," to Elizabeth his wife for life, remainder to Francis Lewis, who is also mentioned in the will of Sir T. Parkyns, and appears to have been his friend, in trust, as follows. Suppose then those concerned for Sir T. Parkyns had notice of this will, it was notice only that it passed all the other real estates of Thomas; but it could not be considered as giving notice of what were the estates which he had to pass. For instance, if it had not been necessary to sell the whole of the Buckminster and Sawston estates to pay the debts, or if it had happened that there were no debts to be paid, might not these estates, or the surplus, be quite sufficient to satisfy the words, "all my other real estate whatsoever?"

With respect to Elizabeth, I again say, that she must have had notice of the will. The deed of 1736 takes notice of the will, and also of her character as devisee: and there are passages which make it very difficult to believe that she had not notice of all his property.

I observe, on looking at my notes, that it was felt, that it might be found difficult to support the limitations to the issue male of Jane, so as to keep the estate in the male line, as these limitations were to the first and other sons of Jane, and their heirs. Suppose she had a son, and he died without a son, [223] but leaving a daughter, there may be a doubt whether the daughter would not take in preference to those in remainder? And considering the length of time between 1735 and 1800, that would be a question of some importance, if the title could be discussed at law, which it could not, as it was covered by a mortgage; and there would be still a difficulty as to what equity ought to do to open the way to that discussion, for that is the utmost it could do.

I therefore beg leave here to say that, if at the time the act was passed, notice of this will had been given to Sir T. Parkyns, or to his agents, so as to bind him to the effect of notice, the amount of it would be this, that he would have had notice that Thomas Parkyns made a will, by which he gave to Jane for life, not the estates in Great Leake, *eo nomine*, but in this manner, "all my other real estates," the will not explaining what real estates he had to pass under these words; and I do not apprehend that notice of a will is to be considered as notice, not only of the general words passing "all my other real estate," but of each particular interest, and that you are to inquire all over the world to ascertain what were the particular interests which he had to pass.

But the question is, whether he had notice at the time of the marriage. And I

cannot find any ground to conclude that Sir T. Parkyns, or any one concerned for him, can be said to have notice even of the will, except Samuel Sterropp, and he could only have had notice of the will, such as it is. And then you are called upon to say, that Sir T. P. who was a purchaser for valuable consideration, for the [224] most meritorious consideration, had notice at that time, not only of the will, but of all the interests which Thomas Parkyns had to pass under it, because one of those concerned for him had notice of a will, executed ten years before, which does not mention the particular property, but a will passing generally "all my real estate." There was an old determination that a witness to a will or deed must be taken to have cognizance of all its contents. But that doctrine has not of late been acceded to; and it would be most mischievous, if one who has been a witness to a deed or will, and afterwards happens to be concerned in a transaction relative to other property, should be supposed to have notice of the contents of the will or deed to which he was a witness, so as to fix notice of them upon his principal on that accidental ground.

But the case here would be still stronger, looking at the circumstances as they stood at the time of the marriage. For though I believe that at the bottom there was no intentional fraud or concealment on either side, yet if you were to ask who had or had not notice, there could be no pretence for saying that Sir T. Parkyns had notice personally, and it might be that none of these concerned and dealing for him had notice: but if the fact be, that the will is to have the effect contended for, it is impossible to say that Elizabeth, who was acting on behalf of Jane, did not know of the will, and that the effect of it was to give Jane only an estate for life; and she, Elizabeth, was tenant for life antecedent to the will, and is expressly stated so to be in the act of parliament. She who proved the will, and who executed the deed of 1736, in which the will is [225] noticed, if the daughter's interest was limited to an estate for life, she must have known it at the time of the transactions in 1746-7; and during the ten years which elapsed from the death of Thomas till the passing of the act of parliament, she had abundant opportunity carefully to consider and ruminate upon the effect of the will. Then what notice had others concerned for Jane? Francis Lewis was a trustee under the will of Thomas. He was no party to the subsequent mortgage transactions; and that gives rise to another observation. The mortgage being charged on the Leake and Thorpe estate, if it passed under the will, how was it that Lewis was not a party to these instruments? And then, as the deed of compromise of 1736 was executed the year after the death of the testator Thomas, if there had been any controversy between Jane and Sir Thomas Parkyns, about the East Leake estate, it must have been mentioned in that deed. But the deed mentions only the capital message. Another observation arises from the situation and interest of Harriet Farrer. She was the wife of a professional gentleman; and from the highest to the lowest of us, I hope I may be permitted to say it without offence, we are not apt to give up that to which we are justly entitled. She was entitled under the settlement of Thomas to a provision of £1500, which, however, was not to be paid unless there were assets to pay the mortgage. But then under the will, if Jane should die without issue, Harriet would be entitled to the estate in remainder. Now regard being had to how many Farrers are parties to the subsequent mortgages, how do you account for an act of parliament passed without any opposition from them which proceeded on the ground that they had no interest, but that Jane had the fee expectant on the death of her mother, shutting out altogether Harriet and all her issue, unless one of two or three suppositions be true; either that, under these general words in the will "all my other real estate," the Leake and Thorpe estate did not pass, because he had it not to pass; or, if he had it, that he altered the limitations by some instrument executed in the intermediate time between the making of his will and his death, as he did with respect to the Buckminster and Sawston estates; or then that, if it did pass, yet considering the value of the Leake and Thorpe estate, that it was subject to a mortgage of £2900, the interest not being properly convertible into principal unless Lewis had been a party, and that Jane might say, this estate may be liable to pay about £7000, I being entitled to a portion of £4000, and in order that the Thorpe estate may pay my portion, equity will throw the mortgage on the East Leake estate, it was not worth while to interfere? Besides, Elizabeth, in consideration of the covenant by Thomas to settle this portion, had consented to bar her dower and postpone her jointure. She was a covenantee; and under these covenants he was personally engaged, and the equity of redemption was general assets to satisfy the portion, under

the covenants and by force of the will, as part of the debts. So that it comes to this, either that the information to parliament was true, and that this estate was not in the will, which mentioned no specific denomination ; or that if it was comprised in [227] the will, something was done between the execution of the will and the testator's death, altering the limitations : or that, if there was no such thing, still the demand was such as was not worth contending about. The internal evidence goes further : supposing Elizabeth bargaining for Jane, if you impute to her that she was wicked enough, from affection for Jane, to conceal that she was only tenant for life, how do you account for the other fact, her concealing that she was entitled to £4000 portion ? If Jane was tenant in fee either because the estate did not pass under the will, or by an arrangement after the will was made, one can see a rational ground for saying nothing about the £4000 because it merged in the title to the estate, and it was unnecessary to mention it. Another circumstance is strong evidence. Under the will of old Sir Thomas, the sons were tenants for life with power of jointuring, regard being had to the amount of the fortune brought by the wife ; and the material object was her jointure, which was fixed at £400 ; and as she brought £4000 fortune, she was entitled to that, whether the estate was hers or not. And that again brings forward the observation that it was not worth while to contend against the act.

I am not treating the subject as if we were trying the question at law whether the estate passed under the will. You must look at both wills to see who are concerned. Francis Lewis is mentioned in both, as a trustee in the one, as a friend in the other, and a gentleman who was one of those whom Sir Thomas mentions as one of his standing counsel. And when you consider the short period that inter-[228]-vened between the deaths of Thomas and Sir Thomas, and consider who they were who were then alive, it is utterly impossible that the friends and advisers of the respective parties could have represented as they did, unless Jane actually had the estate in fee, or an interest equal to it. You have besides the authority of Chief Baron Parker, and Justice Abney, who considered this petition ; and we are not to presume that it was examined in a slovenly manner. So then you see who must have been in this plot if there was one. Chief Baron Parker might possibly have been deceived, but Justice Abney could not have been imposed upon. Daniel Woodroffe, who was the brother of Thomas Woodroffe, the person who was solicitor and man of business for the Ranccliffe branch of the Parkyns' family, was a devisee under the will ; and is it possible they should never have heard of the will of Thomas Parkyns ?

Then when you look at the assignments of the mortgages to a certain class of men whom you cannot suppose to have advanced their money *de tempore in tempus* without inquiring into the title, the circumstance proves that they must have been aware of the will of Thomas. And a person who has notice of an instrument has notice of every thing which the instrument leads him to know. But suppose the instrument mentions only "all my real estate" generally, without specifying this particular estate, though it might have been included ;—and I had been told that the notion that it was included had never been acted on, but the contrary down to the present time, day by day, to [229] negative every inference that it was included,—who can say that I would be affected with notice that it was included, as we understand notice in equity ? And when in 1799 two copies of the will were found, as I have mentioned ; if I am mistaken, it is not for want of having taken pains ; but if they had been sent to law, it would be a miscarriage if it had been found at law that the will did pass the estate. But it does appear to me that very wild notions have gone abroad as to equity and law ; and it may not be improper now to drop a hint of that kind.

But then it is said that Sir Thomas Parkyns has admitted that this will was duly executed, and that it did pass the estate. I have read the pleadings, and I cannot bring myself to the conclusion that that is the fair effect of the answer. I do not ask him whether the attestation is such as to pass real estate. He might admit as a fact whether the will is perfect. I take the result of the answer, however, to be this, that from certain transactions which had taken place the will appeared to have been proved after the death of Thomas ; and that it was mentioned in these mortgage deeds, to which there is no evidence that he had access, and to which he could not have access unless the mortgagees chose, and so it seemed and appeared to have been proved, and executed so as to pass lands, but that he was ignorant of it. But when a man admits in that way, he is only stating what he was advised was the legal effect of the will, even if the

admission were without qualification; and then if one were to say that he believed that the will passed this estate, another [230] would say, examine first, as these are only general words; and he only passed what he could pass; and whether he did or did not pass this estate cannot be known from this will, but only from inquiry as to what interests he had before the will; and that is to be considered with reference to his title before the will, and the enjoyment subsequent to it.

Then it is said that he should have pleaded that he was a purchaser for valuable consideration without notice. Certainly there is a great difference in point of prudence between pleading this, and running the risk of what may appear at the hearing. If a man buys an estate, and a bill is filed, and a title shown to relief, he may plead that he is a purchaser for valuable consideration without notice; and he must support his plea by denying all the circumstances from which notice may be implied; and if, after all that can be said to charge him with notice, he is hardly enough to swear that he had no notice, and to deny all the circumstances; and he does plead, and refuses to try the question in any other way, then it must rest very much with his own conscience. But if he forbears to plead, and, if it turns out in the progress of the suit that he was a purchaser for val. con. without notice, it is too much to deprive him of the effect of that, merely because he does not stop the suit at first, if it be so in fact.

Now I come to the assignment of 1792; and here I must observe, that the bill has not been framed with an accurate attention to the nature of the case. The nature of the claim is either to redeem the mortgage, or that equity would put it out [231] of the way so as to allow the right to be tried at law. Then the bill ought to have been a bill to redeem, or simply to put the mortgage out of the way so as to permit the matter to be tried at law. But then it must have gone on to have offered payment of the mortgage money, suppose it to be £2900 and an account; and then they would have been entitled to charge the £4000 portion, subject to the question, whether the life estate given to Jane might not be considered as an advancement *pro tanto*. The bill should have come offering to do what was equitable, and tendering all the accounts that were necessary to settle the rights of the parties. But in 1792 the mortgaged estates were in Wright, and he executes a declaration of trust for the Defendant. I do not mention the cases of buying in prior incumbrances, to protect the estate against intermediate incumbrances, as they have no direct bearing, though they have some bearing, on this case. But there are cases where subsequent mortgagees have been permitted to purchase prior incumbrances in order to protect their mortgages, and to shut out intermediate incumbrancers, a *tabula in naufragio*, as it has been called. But I do not consider this case as of that nature, as if the estate passed under the will of Thomas; for then the great question might have arisen as to an equitable owner who has, and an equitable owner who has not the legal estate, contending which of them had the right of redemption, regard being had to all the circumstances, and so on. But the difference is, that the question is not here [232] with a volunteer as it was in another case, but with a purchaser for the most meritorious consideration, and who was in possession of the estate which he claimed as his, as being a purchaser for valuable consideration.

Then, looking at the settlement of 1776, and at the names of those who were parties to it; and, considering that a very considerable interest *in presenti* was given to Lord Raneliffe, which he could not otherwise have had in his father's life-time; and that Sir Thomas Parkyns honestly believed he had purchased; and that this is a matter of doubt where the scales strongly incline in favour of the supposition that the East Leake estates did not pass; and then considering the enormous lapse of time, and that a scrutiny from day to day is still discovering new deeds; and considering the relative values of the estates and the charges upon them in 1746, and at the present time, I think this is a case where the Plaintiff could not have any relief at law if the question were to be tried there; and upon that is founded my judgment that this bill cannot be sustained.

As to costs I never thought about them in this case, as all the parties were acting very honestly and ignorantly; and still doubting in some measure in such a case, where it is impossible, from the materials before us, to be positively certain that we are in the right. But all that can be expected of a court of justice, in a case where additional documents are drawn out in this manner, during the whole progress of the suit, is to fight with the [233] difficulty as it best can; and then if that difficulty cannot be overcome, the fault does not rest with the court.

Here then I close, and I have only further to say with respect to this case, that I have given it the utmost attention and consideration in my power, and done every thing that depended on me to make sure of my coming to a sound and accurate conclusion.

Decree AFFIRMED.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

GOVERNOR AND CO. OF THE BANK OF IRELAND, and Others,—*Appellants* ;
BERESFORD, and Others,—*Respondents* [March 13, 1818].

[*Mews' Dig.* ii. 1599, 1609 ; xi. 1248. As to discharge of surety, commented on in *Archer v. Hall*, 1828, 4 Bing. 464, at p. 468. As to position of holder of accommodation bill, see Bills of Exchange Act, 1882, s. 28 (2).]

[Commissioners under an act of parliament, for giving money by way of loan to merchants, etc. make an advance for A. who, along with B. as his surety, becomes bound to repay within a limited time. A. obtains from the Commissioners several extensions of the time of payment without the privity or knowledge of B. his surety, and at length becomes bankrupt without having paid. Bill to restrain proceedings at law against the surety ; the obligation being discharged upon the indulgence granted without his privity or knowledge. Decreed accordingly, and the decree affirmed in Dom. Proc.]

[234] By an act of the Irish parliament of 33 Geo. 3, commissioners were named, who were empowered to advance certain sums to merchants, traders, and manufacturers, upon securities, the sums to be advanced by the Bank of Ireland, and to be made good by parliament. Thomas Blair, an iron manufacturer in Dublin, applied, about the 30th January, 1800, to the commissioners for a loan, offering John Claudius Beresford, Archibald Redford, and Richard Sayers, all of Dublin, as his co-securities. It was determined to advance to Blair a sum of £10,000 ; and a bill of exchange, a security not authorized by the act, dated 7th Feb. 1800, to that amount, was drawn by Blair on Beresford, and accepted by him to the order of Redford, and indorsed by him and Sayers, payable on the 1st of November following. A bond, with warrant of attorney, was also executed by Blair and his sureties.

Blair afterwards obtained several extensions of time, for the payment of the above sum, and at length became bankrupt, without having paid. Judgments had been entered upon the bond and warrant of attorney, and the governor and company of the Bank were about to levy the £10,000 from the sureties, when they filed their bill in the Exchequer Court against the Governor and Co. of the Bank, the secretary to the commissioners (in whose name the commissioners were, under the act, to sue and be sued) and the Attorney General, stating that the extensions of credit were given without their privity and concurrence, and that, they being [235] merely sureties, were by such indulgence discharged ; and praying for a perpetual injunction to restrain proceedings at law against them on the ground of this obligation. The Defendants answered, that the sureties had notice of the indulgence, and that, even if they had not, the extensions were not of a nature to discharge them. An issue was directed to try whether the Plaintiffs had notice, but the Defendants declined the trial, not being able to prove notice.

The Court of Exchequer, in 1814, decreed according to the prayer of the bill. And from this decree the Defendants appealed.

At the hearing in the House of Lords, in March, 1818, the cases of *Walwyn v. St. Quintin*, 1 Bos. Pul. 652 ; *Nesbitt v. Smith*, 2 Bro. Ch. Ca. 179 ; *Rees v. Berrington*, 2 Ves. 540 ; and *Boulbee v. Stubbs*, 18 Ves. 20 : were cited ; and the case of *Fentum v. Pocock*, 5 Taunt. 192, decided on the principle that, neither time given by the holder to the drawer to pay, nor knowledge of the holder when he took the bill that the acceptance was merely for the accommodation of the drawer, discharged the acceptor,

and that nothing could discharge him but payment or a release, was particularly relied on by the Solicitor General on behalf of the Appellants.

Lord Eldon (C.). The proceedings in this case are proceedings on a bond and warrant of attorney to confess judgment, executed by Blair and the Respondents, under the circumstances mentioned in the pleadings. But the bond and bill of exchange, [236] mentioned in the cases, are not produced in this House, nor copies of them; and yet it is absolutely necessary that we should have them or copies of them; 1st, because it is always dangerous to decide without seeing the instruments on which the cases depend; and 2dly, because there is hardly any case from Ireland, in which it is not necessary to call for this supplemental information.

The case is the more remarkable here, and it is the more necessary that we should see these instruments, as there appears no authority in the act of parliament for taking a bill of exchange; and when it is made a question, and the subject of argument, whether the bill of exchange was not the principal security, and the bond the collateral security, it becomes still the more reasonable and proper that we should see them; for though the bond is a security of a higher nature, yet if in its recital it refers to the bill of exchange as the principal security, although the one is a specialty, and the other only a simple contract, the specialty may, perhaps, be only the collateral security.

And then you will have to consider the effect of the commissioners taking a bill of exchange as a security when the act says that they shall take only securities under seal; and it cannot without a great deal of reservation be argued with success that they shall have the benefit of such a security under the act, when the act authorizes none such to be taken.

Then in this bill of exchange J. C. Beresford is the acceptor, and if the bond is a collateral security, then you will have to consider what is the effect of the circumstance that, though Beresford is [237] the acceptor, still the consideration was given to Blair, and that with the knowledge of the commissioners. First, then, it will be to be considered in what situation Blair and Beresford stand with respect to the commissioners, and each other; and secondly, in what situation those who have indorsed this bill stand to justify this decree.

The Solicitor General says, that the Court of Common Pleas have determined (*Fenton v. Pocock*, 5 Taunt. 192) that although one receives a bill of exchange with the knowledge that it is an accommodation bill, etc. yet the acceptor is bound to pay, and this decision took place when Sir James Mansfield was Chief Justice, and the present Chief Justice (Sir Vicary Gibbs) was one of the puisne Judges. If that went on this principle, that with a view to the benefit of commercial intercourse you would not inquire into the knowledge of parties: but that all should be taken according to the natural effect of the bill, as appearing on the face of it, I think that a most wholesome principle. And it will not be surprising that I, who have so often contended that you ought always to look only at the natural effect of a bill of exchange, and never to hold that the acceptor was not first liable, should approve of that principle. And yet we have been so often misled in Chancery as to what had been considered as the law on that point by the Court of K. B. as to have held perhaps a dozen times, that the consequence was contrary to what has been determined by the Court of Common Pleas, supposing the principle to be that which I have mentioned.

Then it is also necessary that we should see this bond, not only to be certain as to the obligations of [238] the parties with reference to the law, as between principal and surety generally, but as arising out of this Irish act of parliament. In the common case there can be no doubt with respect to a bill of exchange, but that the demand ought first to be made against the acceptor, and he not paying, and notice being given to the drawer, he then became liable. And with respect to principal and surety in a bond where the creditor enters into an agreement or binding contract with the principal debtor, to give him further time without the concurrence of the surety, the surety is discharged; as the creditor by his new contract destroys the benefit which the surety had under the former contract, as he puts it out of his own power to make good his engagement to enforce immediate payment from the principal, when the surety would have a right to require him to do so. But special circumstances may vary even that, as in the case (*Boulton v. Stubbins*) in 18 Ves. 20, which I ought not to rely upon as an authority, being a decision of my own, but which was sanctioned by a decision of Lord Thurlow. It was said there, that unless the alteration of the time and mode of payment

extended to the surety, so as to prevent his enforcing immediate payment, the contract could mean nothing. But the parties must be allowed to judge of that; and there may be many cases in which individuals may think, that having obtained delay as against the creditor, they may leave the matter open as to the surety, trusting to his feelings that he will not distress them.

This case is to be viewed with reference to all these principles. It is also to be considered with [239] reference to this act of parliament. If the act gives the Crown process to the surety in the event of their being called upon to pay, and if they were not placed in that respect in a worse situation, that is one view of the case: but if there are clauses in the act requiring the commissioners to sue without delay; and the commissioners being so required to sue without delay, have put that out of their own power, then it will be to be considered whether all are to be taken as being parties to this act of parliament; and whether the commissioners, being under an obligation by the act to sue without delay, could take the benefit even of passiveness as against the surety.

But I give no final opinion upon these points till we have authentic copies of these instruments, that we may take care to be accurately informed of the nature of the instruments to which we are called upon to give legal effect.

Decree afterwards affirmed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GRANT,—*Appellant*; CAMPBELL, and Others,—*Respondents*
[May 1, 1818].

[A. gives a cautionary obligation to B. and engages to transfer and assign to him certain property in security, to en-[240]-able B. to raise money, under an agreement, by which certain contemporaneous conditions were to be performed by B. and then gives B. a letter and orders for the property, in which the conditions were not mentioned. C. advances money for B., obtains an assignation of the letter and orders, and brings an action of adjudication in implement of his obligation against A., alleging that the money had been advanced on the faith of the letter and orders, and not on that of the agreement, of which B. had not performed his part. So found by the Court below, and decree for C. But the judgment reversed by the House of Lords, on the ground that C. before he advanced, or became bound to advance money for B. had such notice of the existence of some agreement relative to the obligation by A. as imposed upon him the duty of inquiry as to its terms, also on the ground that the letter by itself was an obligation without consideration, and that the agreement must be let in to give it validity, etc.]

This was an action, brought by the Respondents, Messrs. Campbell and Stuart, for themselves, and as trustees for certain other persons, against the Appellant, to enforce performance of a cautionary obligation; and the import of the summons, which was termed a summons of adjudication in implement in security, was, that the Appellant had, by certain holograph missive letters of the 8th and 13th March 1811, bound himself to become cautioner to the friends of Mr. James Walker, in the pleadings mentioned, to the extent of £8000, for such sums as his friends might advance for him; and, having given to Walker orders upon his forester at Rothiemurchus, and his agent at Garmouth, to deliver him timber to the amount of £8000, had also bound himself to execute to Walker an assignation of his lease of the forest of Rothiemurchus to the ex-[241]-tent of £8000, in as far as the sum was not covered by the orders: that on the faith of these securities the Pursuers granted bills, and interposed their credit for certain sums in Walker's favour, he undertaking to assign to them, or a trustee for them, the

foresaid security on the wood and forest of Rothiemurchus: that Walker, on the 21st of August 1811, assigned the security to trustees for behoof of the Pursuers, with power to demand from the Appellant a direct assignation of his lease of the forest of Rothiemurchus to the extent of £7000 subscribed by them for Walker's behoof, or such part thereof as had been advanced or paid to Walker by them: and the summons concluded for delivery of the wood and assignment of the lease to the extent of £7000.

The defence on the merits was, that the Pursuers had become bound for money for Walker, not on the faith of these letters, but on the faith of an agreement entered into on the 11th March 1811, by and between the Appellant and Walker, with reference to which the letter of the 13th March, and the orders on the agent and forester, had been given to Walker, and that by this agreement the obligation on the part of the Appellant was made to depend on the performance of certain conditions by Walker, which Walker had not performed.

Defences in point of form, that the adjudication in implement was irregular without a previous constitution of the debt: that the adjudication in security was a different action, and that an adjudication in implement in security had never before been heard of; and also that this was an accumulation [242] of actions, were urged in the Court of Session and House of Lords. In the Court below these objections did not prevail, and in the House of Lords it was not found necessary to give any opinion upon them.

With respect to the merits, it appeared that the letter of the 8th March, which confined the obligation to £5000 or £6000, was not shown at all. On the 11th of March, after previous communications, in which Walker had the assistance of Mr. Jameson, his law agent, heads of agreement, between Walker and the Appellant, were determined on, and reduced to writing. By this agreement the Appellant engaged to transfer timber, and assign his lease to Walker in security for £8000, of which £3000 was to be advanced to the Appellant; and Walker engaged to advance the £3000 to the Appellant, to give the Appellant a back security over his West India property, and to relieve the Appellant of certain securities, in which he was bound along with or for Walker: and it was provided, that in case Walker could not supply the £3000, and relieve the Appellant of the securities, the agreement was to be at an end. The agreement contained the following stipulation: "It is understood, that if the said sum of £8000 can be raised for the said full period, the said transfer and assignation shall be held by Mr. Walker, in security only, for the said period of five years; but if the said sum cannot be raised for so long a period, then one-fourth in value of the said timber (or of the proceeds, if converted), but no more, shall be at the absolute disposal of Mr. Walker, at the end of twelve [243] months, from the time when Mr. Grant receives his proposed proportion of the money, if necessary, but no sooner; and the remainder of the said £8000, in virtue of the said timber (or of the proceeds, if converted), in moieties at the end of eighteen and twenty-four months from the same time, if necessary, but not sooner; it being understood, that in case of such partial or total advance by Mr. Grant, the security of Mr. Walker's friends shall still, for the said space of five years, be forthcoming when he requires it, if he can thereby operate his relief, by procuring a loan or loans anew for the remainder of that period: and the foresaid transfer and assignation shall continue to be held by Mr. Walker in security only of the whole, or such part of the said sum of £8000 as may, in all, so continue in loan to the end of the said period of five years." This agreement, although the heads were thus prepared on the 11th March, was not formally executed till the 29th March 1811.

On the 16th March, 1811, the Pursuers and those for whom they appeared as trustees, Mr. Jameson, Walker's law agent, being one, engaged to become bound for money advanced to Walker, by a writing in the following terms, subscribed by each of the parties, and stating the sums for which each was to become bound: "Whereas Mr. James Walker having been induced to go into considerable advances on goods and security of a permanent nature, and we being of opinion that he will be ultimately enabled to pay off every claim against him, and desirous of assisting him in the mean time, do hereby agree to [244] become bound to any lender of money, to the extent of our subscriptions hereto, to be repaid one-fourth part in one year, and the balance in eighteen months, and two years from the date of advance: And we further agree, in case our assistance shall be further requisite, to continue the same until the lapse of five years from this date; he always assigning to us, or a trustee for our behoof, the goods and security he now holds for his own advance." This writing was subscribed

by each of the parties, specifying the sum for which each was to become bound; and an explanatory note was added, stating that the total aid was not to exceed £8000, to which amount Walker was to produce security, etc.

Walker procured the signature of the subscribers to several bills, the first of them in point of time dated the 22d April, 1811; and on receiving the bills, he delivered to each of the Respondents a letter mentioning the agreement of the 11th of March generally, and engaging to transfer the timber and assign the lease to them, or a trustee for them, for their security.

In August, 1812, Walker became bankrupt, and the Appellant refused to execute the transfer and assignation, as Walker had performed none of the conditions incumbent on him by the agreement. One of the Respondents was appointed agent in the sequestration against Walker, and thus obtained access to his books and papers; and it was then only for the first time, as the Appellant alleged, that the Respondents saw the letters and orders, although that was denied by the Respondents. The Pursuers [245] then procured from Walker an assignation of the letters of guarantee and orders of delivery, in which Walker stated that they had bound themselves upon the faith of these letters and orders, and thereupon brought their action.

The Lord Ordinary, on the 22d June, 1812, pronounced an interlocutor, finding that the Pursuers were no parties to the agreement directly, and could not in sound reasoning, be held to be constructively such; and that the subscription of the Pursuers and their subsequent advances, must be held as proceeding on the letters of the 8th and 13th March, 1811, and that they had no concern with the private agreement; and decerned and declared in terms of the libel.

The Pursuers gave in two minutes restricting the decree;—1st. As to the sum for which Mr. Cunningham, one of the subscribers, had become responsible, he having advanced nothing. 2d. As to Mr. Jameson's debt, the Respondents alleging that they had discovered circumstances which might occasion some debate as to his claim. 3d. As to the amount of a dividend from Walker's property.

Upon reclamation by the Appellant, the Court found that under the restrictions, the Pursuers were entitled to a decree of adjudication in security of the sums of money which might have been advanced by them, and decerned accordingly, reserving all objections *contra executionem*, until the precise amount of the said advances should be ascertained, and for that purpose remitted to the Lord Ordinary. From these interlocutors the Appellant appealed.

[246] The Lord Chancellor in the course of the argument above, observed that in England before the Pursuers could have proceeded on these letters, they must have gone to the stamp office to get them stamped, and have paid a large penalty.

(May 1, 1818.) Lord Eldon (C.). In this case it is not my intention to say any thing as to the nature of the adjudication, whether in implement, or in security, or as to the accumulation of actions, because it appears to me that the case may be decided without touching upon these points.

In looking at the summons, it seems clear that the Respondents must recover on the guarantee of these letters, of the 8th and 13th March, or that they cannot recover at all; and the question is whether the Respondents advanced their money on the faith of these letters. The summons is in this form: "that the Appellant on the 8th of March, 1811, addressed to Mr. Walker a holograph missive letter of the following tenor:

"*Edinburgh, Mar. 8, 1818.*

"MY DEAR SIR,—Understanding that your friends are willing to come forward
"with certain securities or advances which you at present have occasion for, if they
"have sufficient indemnity; I hereby become bound to become your cautioner to them
"to the extent of £5000 or £6000 if you require it, and to assign to you in an
"effectual manner, in corroboration of such cautionary engagement, timber in the
"North cut down, and ready for market, to the above ex-[247]-tent, exclusive of what
"you have in your own hands, hereby undertaking that I have so cut down, and ready
"for market, a larger quantity than the above value.

"I am, my dear Sir, Most sincerely yours,

(Signed)

"J. P. GRANT."

This letter was addressed to Walker, and it is obvious, from the contents of it, that

he was to be at liberty to show it to any person who might be willing to advance him money on that security. And if there had been any improvidence in not calling it out of his hands, when the agreement of the 11th of March was entered into; I say the 11th, although it was not executed till the 29th; the consequences must have been endured, because principle is not to be sacrificed to prevent the effects of such improvidence. The case states that this letter was not presented to the Respondents, because the Appellant became desirous to obtain a larger sum than it warranted Mr. Walker to raise. The summons proceeds: "That the whole of the sum mentioned in the "above missive being intended for the said James Walker's accommodation, in retiring "those bills on which Mr. Grant and he stood as joint obligants, but which were the "proper debts of the said James Walker; the sum was afterwards, with the view of "accommodating Mr. Grant, extended to £8000, of which the sum of £3000 was to be "given directly to Mr. Grant." It appears to me to be of no importance for whose accommodation it was intended. "That accordingly [248] on the 13th day of March "foresaid, the said John Peter Grant, Esq. alongst with an order on his forester for "wood to the value of £8000, delivered another holograph missive letter to the said "James Walker, of the following tenor:

"Edinburgh, Mar. 13, 1811.

"DEAR SIR, —Having of this date given you orders on my forester and agent at "Garmouth, to deliver you timber to the amount of £8000. I hereby bind myself to "execute in your favour an assignation to my lease of the forest of Rothiemurchus, to "the extent of the said £8000, in so far as the same is not covered by the above orders.

"I am, dear Sir, Your most obedient humble servant,

(Signed)

"J. P. GRANT."

(Addressed)

"To James Walker, Esq. Leith."

"That on the faith of these sureties several of Mr. Walker's friends did grant bills, "and give their credit for the following sums, viz. Robert Jamieson, Esq. writer to the "signet, £1000; Dr. Thomas Davidson, of Muirhouse, £1000; Robert Boog, Esq. of "Dundas Street, £1000; William Cunningham, of Fredrick Street, £1000; John "Pitcairn, of Pitcairn, £1000; Thomas Wood, Esq. £500; the said John Campbell, "£500; and the said James Stuart, £1000; it being a condition annexed to their "engagements, that he the said James Walker should assign to them, or a trustee for "their behoof, the foresaid security upon the wood and forest of Rothiemurchus." By [249] what facts they intended to prove that they did proceed on the faith of these securities, or the time when they granted any bills, is not stated.

In this summons there is not a word about the instrument of the 16th March, to which the names of the Respondents are subscribed; and it is not immaterial that in the suit the name of the first subscriber Jamieson is dropped, and that the name of Cunningham is also dropped; and I presume, the John Campbell and James Stuart, whose names are subscribed, are the same to whom the assignation of the letters was made by Walker. "That the said subscribers having thus given Mr. Walker bills for "the sum subscribed by them, he raised money and applied the same, in terms of the "agreement between Mr. Grant and him, having paid Mr. Grant £3000 in cash out of "the first end of it. That in order to effectuate their security, the said subscribers "named the said John Campbell and James Stuart trustees for them; and the said "James Walker, by his assignation in favour of the Pursuers, of date the 21st day of "August, 1812, and which is registered in the books of council and session, on the "30th day of September thereafter, on the foregoing narrative, and further narrating "that the said obligatory missives were granted by the said John Peter Grant, Esq. "in order to enable him, the said James Walker, to raise a sum of money not exceeding "£8000 sterling, on the security therein mentioned, and which money was to be "applied for their mutual behoof; and that his name having been used in these letters, "merely for behoof of his friends, [250] till they should name trustees to hold the right "for themselves, it was just and reasonable that he should fulfil the obligation upon "him to assign to them the foresaid security, and they having appointed the said John "Campbell and James Stuart as trustees, therefore he thereby assigned, conveyed, and "made over to and in favour of the said John Campbell and James Stuart, in trust for "behoof of themselves, and the said Robert Jamieson, Thomas Davidson, Robert Boog, "William Cunningham, John Pitcairn, and Thomas Wood, right, title, and interest

“ which he had or could have in and to the said obligation on John Peter Grant, Esq. “ to deliver the wood, and assign the forest of Rothiemurchus, in consequence of the “ above recited letters by the said John Peter Grant, Esq., to him, and in and to the “ timber which might be lying at that time at Garmouth, in terms thereof, with full “ power to the said John Campbell and James Stuart, as trustees for themselves and “ the gentlemen above-named, if necessary, to apply to and demand from the said John “ Peter Grant, Esq. a direct assignation to themselves to his lease of the wood and “ forest of Rothiemurchus, to the extent of the said sum of £7000 sterling, or such “ part thereof as has been advanced and paid to him, the said James Walker, by them.” Then it states that the Appellant refused to implement the obligation, and concluded that he should be decreed to implement, etc. Without stating all the findings in the Lord Ordinary’s interlocutor, I call your Lordships’ attention only to the concluding findings in these words; “ Finds [251] that the subscriptions of the Pursuers, and their “ subsequent advances, must be legally held as proceeding on the letters of the 8th and “ 13th March, 1811, and no others. Finds that the Pursuers have no concern with the “ private agreement and arrangement made between the Defender and James Walker, “ of whatever date it may be: therefore adjudges, decerns, and declares, in terms of “ the conclusions of the libel.”

On the 25th February, and 3d March, 1814, the Respondents gave in two minutes, restricting the decree; the latter of some importance, on account of the light which it throws on the real nature of the transaction. The first related to a sum for which Mr. Cunningham had subscribed, but which was not advanced. The second restriction, which reduced the sum to between £5000 and £6000 was that of Mr. Jamieson’s debt, and the reason alleged was, that circumstances had been discovered which might occasion some doubt as to his claim, though he had actually advanced the money. It is always with great diffidence that I speak of the forms of proceedings in Scotland; but to be sure if it had been a proceeding in this country, it would have been very extraordinary that Jamieson’s name could be dropped. But so it is represented. What the doubts were is not explained. But it is impossible to look at these transactions without seeing that Jamieson must have known all that was intended between Walker and the Appellant, whether the others knew it or not.

I do not state the subsequent interlocutors any further than to mention that judgment was given, [252] that the Respondents were entitled to a decree of adjudication in security, upon which so much has been said at the bar.

Now as to these letters, if the principles of the law of Scotland as to the matter of guarantee do not differ, as I conceive they do not, from those of our law, if one puts into the hands of another a letter by which he engages to pledge himself for the payment of whatever sums may be advanced on the faith of that letter, if money is so advanced, he must abide by the consequences. But in our law, that guarantee may be withdrawn before it is acted upon. Now that letter of the 8th March, 1811, was not shown at all; and the letter of the 13th March, 1811, was for a different sum. And he who drew the engagement of the 16th March, seems to have had some notion of the agreement of the 11th March, for so it is dated in the paper itself, although not executed till the 29th. Jamieson, beyond all doubt, knew it; and it is difficult to suppose that when he subscribed that engagement, he did not communicate what he knew, as to the real nature of the transactions, to the rest who subscribed along with him.

The engagement is in these terms: “ Whereas Mr. J. W. having been induced to “ go into considerable advances on goods, and security of a permanent nature,” etc. I request your Lordships’ attention to the words “ to be repaid one fourth in one year, and the balance in eighteen months, and two years, from the date of advance,” and to the words, “ he always assigning to us, etc. the goods and security he now holds for his “ own advance,” which I interpret to mean—whatever securities he [253] holds for his own advances to Mr. Grant, he is to give us the benefit of them. The total aid was not to exceed £8000, to which amount J. W. was to produce security, and then there is a memorandum among themselves.

Now although the agreement was not executed till the 29th March, it is clear that it was in contemplation on the 11th, before this engagement of the 16th March was drawn. And when you look at it, it is an engagement on the part of the Appellant to transfer the timber and assign the lease, subject to a previous assignation, Walker

engaging on his part to give the Appellant a back security over his West India property, and to perform some other conditions, in which, if he failed, the agreement was expressly stated to be at an end. This was communicated to them by Walker before they had granted bills or advanced any money: and is distinct notice given to them in this sense that, although the agreement was not executed, yet that it was agreed that there should be such articles, which imposed upon them the duty of inquiry, when they would have found that the indemnity was not so pure and unincumbered as they might on the 16th have imagined.

I am therefore of opinion, subject to the correction of the House, that looking at the effect of the whole transaction, they could have only the same relief that Walker would be entitled to. Whether Walker can successfully make any claim, I do not say. Their summons does not proceed upon that ground, but on the ground of these letters: and they cannot be permitted to allege now that they shall have the same benefit in this case that Walker might have [254] had. The claim of the Respondents, therefore, cannot in this case be supported.

Lord Redesdale. I concur in the opinion that the claim cannot be supported in this action. The summons demands the delivery of the timber, and an assignment of the lease as a further security. The ground on which this claim is made, is these letters of the 8th and 13th March, 1811. The first question then arises upon this letter of the 8th March. They say, they advanced their money on the faith of this and the subsequent letter. But they admit that this letter was never shown. What, however, is this letter? It amounts only to an engagement to become security for him upon certain terms, and they were never called upon to advance their money according to the terms of that letter. And in whatever way the Appellant might have been liable under that letter, as the terms of it were never acted upon, it is out of the question. It is admitted that it was never shown, and that is manifest from the terms of the instrument of the 16th March, which do not bear the slightest reference to this letter of the 8th March; and it was not then in contemplation. What is next? The orders of the 13th March, to deliver timber for Walker's behoof to the amount of £8000, and the letter of that date to Walker. That letter is an engagement to execute in Walker's favour an assignation of the lease of the forest of Rothiemurchus, to the extent of the said £8000 "in so far as the same is not covered by the above orders;" so that, if the timber to the amount should be delivered, there was to be [255] no assignation of the lease. But what is that letter standing by itself? An engagement without consideration. It must be connected with something else: and what is that? The contract of the 11th March, 1811, is necessarily let in, and there is nothing else to give the undertaking of the 13th March any validity. I conceive, therefore, that the letters of the 13th March, standing alone, cannot be founded upon; and the letter of the 8th March is, as already stated, out of the question.

To supply the defect, they say that the whole sum mentioned in the first letter being for Walker's accommodation, the sum was afterwards extended to £8000 with a view to accommodate Mr. Grant. Where did they find that? Only in the agreement of the 11th March; and it is manifest that whoever framed the summons had that in view, otherwise this would not have been said. Then the summons states that on the faith of these sureties they granted bills and gave their credit. Now what is the fact? On the 16th March they signed the subscription paper, in the contemplation and on condition of his assigning to them the securities which he held for the advances which he had made. It is impossible that the ground here laid could be that on which they agreed to advance their money. They agreed to advance it only on the securities which Walker could make available. The engagement of the 13th March is merely to assign the lease to the extent of the £8000 in as far as the sum was not covered by the orders for the delivery of the timber. But here they demand, first, the delivery of the timber to the amount of the £7000; and, secondly, the assignment [256] of the lease to the extent of that sum; which goes beyond the terms of the letters. But that engagement could not by itself be the foundation of an action without something else. Then they undertook to advance their money on the engagement stated in the instrument of the 16th March, and that was nothing except the securities which Walker could have enforced. They advanced nothing at that time: but they afterwards granted bills when they had distinct notice of the existence of the contract of the 11th March: and it is clear that Jamieson was informed of the nature of that contract. It does not appear that the

others knew the precise terms of it; but they were sufficiently informed of it to know, that it was by that only that the Appellant was bound: so that they could not, with effect, demand the assignation of the lease, or the delivery of the timber, without referring to that instrument of the 11th of March, and complying with all the terms of it.

It is clear then that they did not advance their money on the faith of the letter of the 8th March; and the letter of the 13th, by itself, contained nothing of which they could take advantage; and by the instrument of the 16th March, they had the benefit only of such security as Walker could have enforced. I do, therefore, conceive that they cannot claim to have the timber delivered, or the lease assigned to them, as they had no title, except as assignees of Walker, since they did not advance their money on any security that he could not have enforced: and the instrument of the 16th speaks only of securities held by him for his own advances. [257] Upon the whole then, I am of opinion that this judgment ought to be reversed; and that the Appellant ought to be assoilzied, also from the costs of the action below. He cannot have his costs here.

Judgment of the Court below REVERSED: and the Appellant assoilzied accordingly.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WOOLLEY, and Another,—*Appellants*; MAIDMENT, —*Respondent* [March 13, May 27, 1818].

[3 Scots R. R. 407.]

[Action for aliment by a son against his mother. The mother had been a ward of Chancery, and having, when fifteen years of age, married Maidment, the Respondent's father, a settlement of her property real and personal was then made, under the direction of the court, by which the interest of the personal estate was made payable to her for life, and the principal to her children, in equal shares at her death; but their interests to be vested, as to sons, at the age of twenty-one, and, as to daughters, at the age of eighteen, or on their marriage. As to the freehold, copyhold, and leasehold estates, they were to be sold, and the money to be invested in purchase of freehold and copyhold estates, of which the mother was made tenant for life, with remainder to her first and other sons in tail, etc. The pursuer was the first son. The father died. The mother advanced £100 as a fee, to a clerk to the signet, into whose office the son entered with a view to the profession of an advocate, the mother then residing in Scotland. The mother married again, and refusing to allow her son a certain annual sum for his maintenance, he brought the action for aliment, being then past the age of twenty-one, and the claim to [258] aliment sustained, *super jure nature*, in the court below. But the judgment reversed in the House of Lords.]

[The Lord Chancellor being of opinion that the interests of the respective parties were settled by the English settlement which could not be undone, and being of opinion that as the son had a vested interest in the property with which he might deal in the market, he had sufficient aliment without aid from his mother.]

Jane Woolley, the Appellant, being in 1791 entitled to considerable real and personal property, under the marriage settlement and will of her grandfather Robert Barnvelt, merchant in London, and being then only 15 years of age, and a ward of Chancery, was in that year married to Mr. Maidment, the Respondent's father; and on that occasion, under the directions of the Court of Chancery, marriage articles were executed

between the Respondent's father and the Appellant. They commence with a recital that his mother, the Appellant, was entitled to a third share of certain heritable estates that had been settled on her and her two brothers, by her grandfather, in the year 1767; and also that her grandfather by his will of 1785, had vested certain other heritable estates, and certain sums of money for behoof of the Appellant's mother; and after that person's death, for behoof of the Appellant and her other children, when they should attain the age of twenty-one, till which time it was to be accumulated by trustees; and then it is declared that in contemplation of the marriage, the parties "covenanted, provided, and agreed to assign, transfer and set over, settle and [259] assure, or cause to be assigned, transferred and set over, settled and assured, all the part, share and interest of the said Jane Anne Woolley, whether present or future, vested or contingent, of and in the before-mentioned sums of £4403 16s. 4d. 3 per cent. Reduced Bank Annuities; £3000 4 per cent. Bank Annuities; and £8000 3 per cent. Consolidated Bank Annuities, and all the past share and interest present and to come, which the said James Maidment and Jane Anne Woolley, his intended wife, or the said James Maidment in her right, will immediately, upon the solemnization of the said intended marriage become entitled to, and in and to the produce and accumulations thereof, unto Jacob Caseneuve Troy of Chatham, in the county of Kent, banker; Thomas Lomas of same place, gentleman;" (both since deceased,) "Richard Burton, of Craven-street in the Strand, in the county of Middlesex, Esquire; and Richard Withy the younger, of the same place, Esquire; their executors, administrators, and assigns, upon the trusts, and to and for the intents and purposes herein after-mentioned, expressed and declared of and concerning the same." The deed next proceeds to provide, that the moneys and estate shall be kept under trust, till Mrs. Maidment shall have attained the age of majority, when she and her husband became bound to those trustees, "by such good and sufficient fines, recoveries, conveyances, assignments, and assurances in the law, as they the trustees, their heirs, executors, administrators and assigns, or any of them, their, or any of [260] their counsel learned in the law, shall advise or approve of, upon the trusts, and to and for the ends, intents, and purposes, and under and subject to the powers, provisions, declarations, and agreements herein after-mentioned, expressed and declared, or directed of and concerning the same." The purposes of the trust are then declared to be, in the first place, to vest the whole property that may belong to the wife, either presently or eventually, in government stock, or securities, in the county of Middlesex, in the name of the trustees, who are authorised to pay the interest and other annual proceeds "into the proper hands of the said Jane Anne Woolley only, and not into the hands of any other person or persons, to whom, or in whose favour she may assign, alien, charge, or encumber the same, to the intent that the same may be for the sole and separate use of the said Jane Anne Woolley, and may not be subject to the debts, control, disposition or engagements of the said James Maidment, her said intended husband, and for which the receipt of the said Jane Anne Woolley, and her receipt only, under her own proper hand-writing, shall be from time to time a sufficient discharge to the person or persons paying the same, for so much thereof for which such receipts shall be given."

Next follow the instructions of the parties, as to the application of the principal sums, after the death of the life-entrix, in these terms: "and from and after the decease of the said Jane Anne Woolley, in trust for all and every the child and children of the said intended marriage, subject to the proviso herein [261]-after last mentioned and contained, equally, share and share alike, the shares of sons to be interests vested in them at their respective ages of twenty one years, and of daughters at their respective ages of eighteen years, or days of marriage, which shall first happen, and to be paid, assigned and transferred, at such respective days or times, if the same shall happen after the death of the said Jane Anne Woolley, but if before, then immediately after her death; provided always, that if any such children shall die before his or their portion shall become vested as aforesaid, then and in such case, the part or share, parts or shares of her, him, or them so dying, shall go to the survivor or survivors, and others of them equally between or among them (if more than one), share and share alike: and the same shall become vested interests (if more than one), share and share alike, and be paid and payable at the respective days and times, and shall go in the same manner as is thereby provided and declared, touching his, her, or their original portion or portions, and such condition or benefit or survivorship of accruer

“ shall extend as well to the surviving or accruing, as to the original shares. That as to the right and interest of the said Jane Anne Woolley of and in the said freehold, copyhold, and leasehold estates, they shall hold them in trust, to sell and dispose of the same, either entirely or in parcels, to any person or persons who shall be willing to become the purchaser or purchasers thereof, for the best price or prices that can or may be reasonably had or gotten for the same; and to lay out [262] and invest the money arising from such sale, in the purchase of such freehold or copyhold messuages, lands or tenements of inheritance, to be situated in some part of England, as the said James Maidment and Jane Anne Woolley, during their joint lives, and the survivor of them, shall by note or writing under their or his or her hands or hand, testified by two credible witnesses, direct and appoint, and to settle, convey, and assure the messuages, lands, and hereditaments so to be purchased, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the powers, provisions, declarations, and agreements hereinafter mentioned, expressed, and declared, of and concerning the same; that is to say, to the use of the said James Maidment and his assigns, for and during the term of his natural life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the said Jane Anne Woolley, during the term of her natural life; WITH REMAINDER to the use of the first son of the body of the said James Maidment, or the body of the said Jane Anne Woolley, lawfully to be begotten, and the heirs of the body of such first son.” And it is further “ agreed and declared, that in the mean time, until the said freehold, leasehold, and copyhold estates shall be sold and disposed of, in pursuance of the trust herein-before contained, the rents and profits of the same freehold, copyhold, and leasehold estates shall be received by the same persons as would be entitled to the rents and profits of the freehold and copyhold estates [263] herein-before directed to be purchased, in case the same was actually purchased and settled pursuant to the trust herein-before contained; and it is hereby also declared and agreed, that in the mean time, from and after such sale or sales of the said freehold, copyhold, and leasehold estates, hereby directed to be made as aforesaid, and until the money to be produced from such sale or sales shall be laid out and invested in such purchase or purchases as herein-before directed, the same shall be laid out and invested in or upon government, or real securities, at interest in the said county of Middlesex, in the names of the said Jacob Caseneuve Troy, Thomas Lomas, Richard Burton, and Robert Withey, and the interest to be produced therefrom, to be paid and applied to the same persons, and in the same proportion and manner as the rents and profits of the freehold and copyhold estates, so to be purchased as aforesaid, would be payable or applicable to, in case the same were actually purchased and settled pursuant to the trust herein-before contained.” It is therefore declared, “ that it shall and may be lawful to and for the said trustees, for the time being, by the direction of the said Jane Anne Woolley in her life-time, signed by writing under her hand, attested by two credible witnesses, and for them after her decease, if they shall think fit to sell and dispose of, and apply a reasonable part of the moneys, stocks, funds, and securities hereby provided for the portion or portions of any such child or children, being a son or sons, not exceeding the sum of two hundred pounds sterling, [264] for placing out such son or sons, in any profession, business, employment, or for his or their portions, which shall not have become vested or payable.”

The marriage contemplated in these articles was solemnized: and Mr. Maidment, the Respondent's father, in obedience to an order from the Court of Chancery, executed an endorsement on them, by which, on the 22d July, 1793, “ he assigned, transferred, and set over to the before-named Jacob Caseneuve Troy, Thomas Lomas, Richard Burton, and Robert Withey, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, all the right, share, and interest, which I, the said James Maidment, have, in the several respective funds, whether vested or contingent, and mentioned in the within indenture, to, for, and upon the several respective trusts, intents, and purposes in the said indenture particularly mentioned, expressed, and contained.”

James Maidment, the father, had no property when he married, and the family was maintained out of the mother's property the subject of the above settlement, by which her interest in the property was made only a life interest, when she would, otherwise, have had the whole, which by the settlement or articles was given, upon her decease, to

her children. James Maidment, the Respondent, was the eldest son of the marriage. The father died in 1804, and in 1814 the mother, residing in Scotland, married Captain Landers. A short time before this the Respondent went into the office of a clerk to the signet, to acquire a knowledge of the [265] practical part of business, with a view to the profession of an advocate: and his mother advanced £100 to the signet clerk on that occasion. The son asserted that the mother had advised this step, which she denied. After her marriage with Captain Landers, he applied to her for a fixed settlement, or an undertaking to pay him, out of her life interest, a certain annual sum for his maintenance and education. The mother professed that she had maintained him in her house, and made him occasional advances, which she was willing to continue to the extent of her ability, but refused to comply with the above request. The son, in 1815, being then of the age of majority, brought an action in the Court of Session against his mother for aliment, stating in his summons two distinct grounds: 1st, that aliment is due from a mother to her child *super jure naturæ*; 2dly, that as life-rentrix of the property, she was bound to aliment the fiar. A third ground, suggested from the Bench, was afterwards insisted upon, that the mother, by engaging her son in a profession, by which he could not support himself, came under a *quasi* obligation to aliment and support him. The summons concluded, "That the said Mrs. Jane Anne Woolley, alias Maidment, alias Landers, his mother, and Captain Thomas Landers, her present husband, for his interest, ought and should be decreed and ordained by the decree of the Lords of our Council and Session, to make payment to the Pursuer of the sum of £200 sterling, annually; or of such other sum, less or more as our said Lords shall think a reasonable allowance for his maintenance [266] and education, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the term of Whitsuntide next for the half-year preceeding, and termly thereafter during the natural life of the said Mrs. Jane Anne Woolley, alias Maidment, alias Landers, with £20 sterling of liquidate penalty for each term's failure in the payment of the said aliment, and interest thereof, from and after the respective terms of payment, during the not payment of the same.

"This action having come to be debated before the Lords of the first division, and their Lordships having advised the libel, and heard the counsel for the parties, they decern at the Pursuer's instance against the Defender, his mother and her present husband for his interest, for the payment within ten days from this date, of the sum of £50 sterling, in name of interim aliment, as also for the dues of extract if payment shall not be made within the period abovementioned, and allow the said interim decree to be extracted, without abiding the order of the minute-book. And further, the Lords appoint the parties to prepare, print, and box memorials, on the whole cause, on or before the first box day in the ensuing vacation, under an amand of £10 each: and appoint the parties mutually to subjoin to their memorials condescendences of the funds and effects in the hands of the Defenders."

The Appellant put in a petition against this judgment. She there contended, that the Respondent was not only major, educated to a genteel [267] profession, and in the receipt of more than comparatively fell to the share of the Appellant and her family, but that he was also invested in the fee of that whole property, out of which the Appellant, his mother, drew only an interim aliment. As fiar of the property, and being of full age, he was vested with a fund of credit, which he might burden or impignorate, as he thought fit.

But their Lordships "refused the prayer of the petition, and adhered to their former interlocutor complained against."

Of same date (26 May, 1815) their Lordships pronounced judgment upon the mutual memorials and condescendences by which judgment they sustained "the Respondent's claim and process of aliment *super jure naturæ* against the Appellant, his mother, and her husband for his interest; but before modifying the annual amount thereof, they appointed Respondent to print, lodge, and box within ten days from this date, an additional and more articulate condescendence of the funds and income in the possession of the Appellant."

From these interlocutors, the Appellant appealed: and the reasons of appeal in the printed case were these:

I. Because the action is incompetent, aliment being only due to children from

parents who are minors, impotent, or unable to work for themselves, whereas the Respondent is major, educated to a profession, and is thereby able to earn a living.

II. Because no action for aliment is competent at the instance of a child against a parent, but where such child is in want, deprived of the necessaries of [268] life, and where the parent is, on the other hand, able to relieve him; but the Respondent is fiar of a landed estate, which he may dispose of or mortgage to those who shall supply him with what is necessary, but which supply the Appellant, from the smallness of her income, cannot advance to the Respondent, nor is she obliged to do so.

III. Because no aliment is due by parents but when they are able to give it. Whereas, the Appellant is not enabled so to do, in as much as by her marriage to Captain Landers her property was transferred to him, who *super jure naturæ* is not bound to aliment the children of a former husband.

IV. Because the annuity out of which any aliment shall be taken is settled upon the Appellant by the marriage articles which invests the fee in the Respondent, whereas any aliment to be taken from that annuity would be a direct violation of the provisions in those settlements, the superceding of which would necessarily vest the whole property in the Appellant, and make it disposable by her at pleasure.

In the printed case for the Respondent, the three points already mentioned were insisted upon; and the principles contended for were supported as follows:

That the Respondent, in the preceding observations, has not mistaken the principles of Scotch law applicable to such cases as the present, will be manifest upon the slightest attention to the following cases, which are selected amongst many that might be referred to. In the case of Straitons against [269] Laird of Laurieston, reported by Morison, p. 418, under the head, "Aliment *ex debito naturali*," majority was not held to be the term at which aliment must cease. The children there had provisions, payable at their age of fifteen, or at their marriage with consent. "And the Lords found that the clause, "as it is here conceived, obliging the father himself in his own life, was suspensive as "to the payment of the stock, till it appear how the children would marry; but that "the brother" (who as heir came in place of his father in *quantum lucratus*;) "was "obliged to aliment them, *medio tempore*, from their age of fifteen, from which the "annual rent of their sums was modified." The case of Dalzell against Dalzell is thus reported (Mor. p. 450): "In a question between these parties, it had been determined "that the Defender, who had succeeded to his father in an opulent family estate, was "obliged to maintain the Pursuer, his niece, by an elder brother deceased. The next "question was, how long this aliment should continue; the Defender contending that "it ought to cease as soon as the Pursuer was able to earn her living by her own "industry. The Lords, however, found, that in the circumstances of this case, the "Pursuer was entitled to £30 per annum during her life, or till her marriage." To the report of this case, the following note is added: "The circumstance which chiefly in- "duced the Court in this case to appoint the aliment to continue after majority, was, "that the Pursuer was the grand-child of the representative of a family of such dignity, "that although she was the issue [270] of a clandestine marriage with an obscure "woman, yet it was inconsistent with the honour of the family to permit her to be in "a situation in which she might be under the necessity of engaging in some mean "employment for her subsistence. This was consistent with former decisions where "such a circumstance had occurred. See No. 48, etc. These cases were quoted in the "argument." In Campbell against his father, decided February, 1741, "the Lords "found that even foresfamiliation did not exclude aliment *super jure naturæ*." The report of Chiesly against Edgar of Wadderlie, July 5, 1676, Mor. p. 417, is as follows: "Edgar of Wadderlie being charged upon an indenture betwixt him and Samuel Chiesly, "Chirurgion, for payment of the sum therein contained, for his brother's prentice fee, "and entertained during his prenticeship; and having suspended the said bond, and "intended a reduction thereof upon minority and lesion; the Lords found that the "second brother having no other means nor provision, his eldest brother, who was heir "to his father, and had the estate, ought to entertain him and put him to a calling; "and did not sustain the reasons of lesion." The Respondent may also refer to the case of Ramsay against Rigg (June 4, 1687, Morison, p. 391). In this case, the claim of aliment rested partly on the act 1491; but that circumstance is obviously of no importance, because that statute only makes certain persons liable who were not so before, but does not affect any defence against aliment founded on the circumstances of the

claimant. It is obviously therefore a [271] good precedent in this instance. It is thus reported : "Simeon Ramsay pursues his mother for an aliment out of her jointure, because "he was a minor (though the President said it imported not whether he was major or "minor, if he could not live *alimide*, and was bred not by his parents to a trade which "could make him subsist), and she life-rented all, and was married again. Alleged, "He was bound apprentice to a skipper, and was eighteen years of age, and had run "away, and she had only 600 merks by year. The Lords modified to him £100 Scots "yearly."

From the cases which have now been mentioned, the Respondent apprehends it must be apparent, that, in awarding aliment, the Scotch law does not adopt any fixed or invariable rule, but adapts its decisions to the circumstances of each case; and the Respondent is confident that the Appellants will be unable to bring forward a single precedent in which the Court conceived themselves to be fettered by a strict rule, and were not guided by the specialties of the question. This being the fact, he has no great apprehension respecting the result of this appeal, as he trusts it is impossible to deny that the Court of Session have rightly considered the circumstances of the parties, and duly applied the law. It happens, however, curiously enough, that the very question now under review was decided in the case of Ayton against Colville, July 25, 1705, which was stronger than the present in this respect, that the party found liable to aliment was not his mother but his step-mother, who life-rented his father's estate, and that [272] the Pursuer was not about to be, but actually was, an advocate; which last circumstance was pleaded as a defence, but it was repelled in consideration of the answer: "The name of employment will not afford a man bread, and *officium nemini* " *debet esse damnosum*. Neither is the race always to the swift, nor the battle to the "strong; for many advocates have risen to great eminency who, at the beginning, have "had little or no business." It is proper to attend also to the extent of aliment decreed. "The Lords," the report bears, "modified the fourth part of the lady's life-rent for the "Pursuer's aliment; and decreed her to make payment to him accordingly, albeit he "was quarrelling her life-rent in a reduction; seeing if he prevailed therein, the aliment "would cease."

Hitherto the Respondent has confined himself to the mere law of the case, and argued on the supposition that the Appellant had done nothing to create or strengthen her obligation. But, 2dly, It is obvious that in this case *res non sunt integre*. The Appellant, as already stated, has all along directed the Respondent to the profession of the law, and never, till the unfortunate event which necessitated this action, denied him the means of finishing his education, and obtaining every requisite accomplishment. If there be any fault in his having attached himself to such a profession, the blame rests with the Appellant entirely. It is owing to her at least as much as to the Respondent, that he is not in a situation to maintain himself without assistance. Her selection, therefore, of this profession, would [273] fix and extend her liability were it limited at common law, and completely exclude *personali exceptione* the defence she has attempted to maintain.

It is again objected, that the action was not competent before the Court of Session, and that Chancery was the proper forum for the determination of the question.

It is answered, this objection is in perfect consistency with the rest of the Appellant's conduct; but it is apprehended that an action of aliment is, from its nature, so urgent, as to be entitled to a decision in any court to which it can be legally carried with most ease and expedition. Now, it is not denied in this instance, that both parties were completely within the jurisdiction of the Court of Session; indeed, the Appellant, Mrs. Landers, had been domiciled, and had spent her ample income in Scotland for several years before. In these circumstances, to send the Respondent to Chancery is an utter evasion, and implies, besides the monstrous inconsistency of making a person who is at this moment comparatively indigent, seek expensively in another country that redress which he might obtain more cheaply, and with as much justice, at home. It is obviously a matter of no consequence whence the Appellant derives her income,—from what country or from what source: the great and leading point is, that she has a large income, and is the Respondent's mother,—bound by nature, as well as by her own conduct towards him, to support him in a manner becoming his station. Whence the income is derived is a mere matter of history, and can have no influence upon obliga-

tions, which [274] do not depend upon the nature or origin of the Appellant's revenue, but upon the fact that such revenue exists. Suppose the funds were situated in the colonies, or in a foreign country, would the plea be for one moment listened to, that the Respondent must stop the business of his education, and ruin his prospects in life, by seeking abroad the assistance which he may procure at hand, and which, even should he find it, may be obtained too late? It is apparent too, that in the country where the parties reside, their wants must be best known, and the redress most accurately measured. It need only be added, that as the whole property in Chancery is life-rented by the Appellant, no remedy could be given there different from that sought here,—an allotment to the Respondent of a certain part of his mother's income; so that as the Appellant did at the time reside and spend her fortune in Scotland, it is again submitted that the Court of Session, in the present circumstances, is not only competent to the decision of this point, but is, in fact, the only Court before whom it could with any propriety have been brought.

Lord Eldon (C.). It is quite clear that by the settlement the issue could touch nothing till her death, except the £200 which she had power, with consent of the trustees, to raise for them. This was the case of a settlement made by the Court of Chancery in England upon a ward of that Court on her marriage at fifteen years of age; and the Court, settling a bargain, as it were, between her and the issue, gives her a life interest in the personal pro-[275]-perty, and the whole to the children of the marriage on her death; and a life estate in the real property, with remainder to her first son in tail. Then the important question which the House may be called upon to determine is this, whether when such a bargain has been made by the Court of Chancery with all the caution that belongs to a settlement made under such circumstances, she, to whom the whole might have been given, and who got only a life interest, is to be obliged, merely because she removed to Scotland, out of that life interest to aliment not only the eldest son but the whole of her children; for the principle of the *jus nature* goes to that extent, or it is nothing. So that it comes to this, whether the settlement of the real and personal property made for her and her children by the Court of Chancery is to be so far altered as that the issue shall still have the whole of the benefit provided for them, but that her life interest is to be cut down. It is difficult to assent to that proposition, and the difficulty was felt by the Judges. One Judge says that he could not touch the settlement; but the Court considered it as a clear case on the Scotch *jus nature*. And it comes round to this, that the House may be called upon to determine the great question whether a settlement made by the Court of Chancery under such circumstances may be undone in this way, and to what extent. And if it is to be disturbed for the children, why not for the mother? It is not likely this should be decided before the recess, and it would be very desirable if it could be settled in the mean time.

[276] I see the common lawyers have taught the Scotch lawyers to talk about the delays of the Court of Chancery. As to that I say only "*sat cito, si sat bene.*"

(May 27, 1819.) Lord Eldon (C.). When we consider the nature of this case, the opinions of the Judges of the Court of Session are certainly rather a surprise on an English lawyer. But we ought to recollect, and if we do not admonish ourselves, others will give us the admonition, that we ought not to consider Scotch cases under the influence of English impressions. (Lord Redesdale. This is an English case.) The Noble Lord says that this is an English case; and when we look at the notes which we have of the observations and comments of the Judges, if we ought, in the administration of Scotch law, to recollect that we are English Judges, I venture very respectfully to hint to them that, when they are dealing with questions of English law, they should recollect that they are Scotch Judges. This is an English case; and it appears very strange on English principles, that when the children are by a marriage settlement made purchasers of the principal of the subject, and the parent of the interest of it for life, they should be entitled not only to their own share, but that *jure nature* they should be entitled to a part of the parent's share.

This settlement was made and the marriage solemnized in 1791. Maidment was in debt, and died in 1804, and he and his creditors being out of the question, she was entitled for her life according to the marriage articles. The Respondent stated in his [277] case that his mother had always supplied him liberally till her marriage with Captain Landers, and that then her liberality had been discontinued. Then this action

was brought, and the result was, on the ground there stated, a judgment that she was obliged to aliment him : the parties respectively having the interests mentioned in this marriage settlement. By the first interlocutor the Court decreed for £50 to the Pursuer in the name of interim aliment, and ordered memorials and condescendences. The appellant petitioned against this interlocutor, but the Court adhered, and sustained the claim of aliment, *super jure naturæ*, but before modifying the amount ordered a more particular condescendence of the funds in the mother's power. When this was before the Judges below there was a difference of opinion, and instead of proceeding further below, the Appellants appealed, as parties are entitled to do from interlocutory judgments where there is a difference.

The case is to be considered, not merely with reference to the point of the *jus naturæ*, and the means of the parent to aliment, and other circumstances, but with reference to the doctrine of Scotch law, when applied to the effect of an English settlement. I do not state any of the adjudged cases as to liferenters and fiars, as this case cannot be considered in that view. The real question is whether, after a contract had been made, by which the children were to have the principal of her fortune, and she was to have her own maintenance for life out of the funds, she was obliged to aliment the Respondent out of her share. The obligation between parent and [278] child in Scotland is different from ours. Here it is almost gone at the age of majority, whatever it may be in a moral view. But according to the Scotch law, although a provision is made for the children : if not payable at the time of majority, they are entitled to aliment even after their majority, and regard is paid to their having no means, and to their ability to support themselves in the circumstances in which they have been educated : and some cases go even the length of reference to the dignity of the family, which we could not reach at all. And the case of *Ayton v. Colville* justifies what the judges say as to advocates. The fact that the Pursuer was an advocate was there stated as a defence, but the defence was repelled for the reasons there stated.

Now in this case it does appear to me impossible that on the ground either of the *jure naturæ*, or the office of advocate, this judgment can be sustained. Here is the case of one who need not wait the delays of the Court of Chancery. He has an immediate vested interest in a large share of the property, and may deal with it in the market, in which his interest would be better than that of his mother ; and he is first tenant in tail in remainder of the lands to be purchased ; and he had therefore sufficient aliment. It does appear to me, therefore, in considering these circumstances, that this is not a case where aliment ought to be allowed according to the law of Scotland.

I propose therefore that the judgment be reversed with something of this nature, that the Lords having regard to the marriage settlement, and the provisions of it, therefore reverse the judgment.

[279] Mr. Warren.—Would your Lordships give costs to the Appellants?

Lord Chancellor.—I am apprehensive we cannot give costs, where three Judges out of four are with the Respondents.

Judgment accordingly reversed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WADDELL, and Another. — *Appellants* ; WADDELL, — *Respondent*

[Mar. 9, 1818].

[3 Scots R. R. 416.]

[A. by disposition and settlement, gives his moveable property, except the debts due to him, to B. the object of his particular favour ; and the residue of the debts due to him, after payment of the debts due from him, to B. in life-rent and to C. in fee : and gives the life rent in his lands to B. and the fee to C. :

declaring that B. by acceptance of the deed, should be bound to pay the whole of his debts ; manifestly conceiving that his moveable property would be much more than sufficient for payment of his debts, and intending that B. should have the life-rent in the lands free. The moveable property turns out not to be sufficient to pay the debts, and action brought by the life-rentrix against the fiar for relief and sale of so much of the lands as would pay the balance, etc. and relief decreed below. But the judgment reversed in Dom. Proc., the disposer, although he intended that B. should have the life-rent free, having expressly subjected B. alone to the payment of his debts, for which she became liable to the amount at least of the benefit which she derived from the deed.]

This action was brought by Jean Waddell, sister of the late William Waddell, of Easter Moffatt, [280] against the Appellants, his nephews ; and the object was to fix upon the Appellants a liability for certain debts of the deceased, which, they contended, rested exclusively on the Pursuer. The question depended on the effect of a disposition and settlement, executed by the late William Waddell, under which the parties on both sides derived valuable interests. By that disposition the disposer gave to his sister Jean, the Pursuer, all his lands and heritages in life-rent ; also all debts and sums of money heritable, and moveable, that should be due to him at his death, and all corns, cattle, etc. and in general, all his moveable subject. And particularly, and without prejudice to the said generality, he gave under the burdens, etc. under-written, to Jean Waddell, in life-rent, and to the Appellants in fee, all and whole the respective lands and others, etc.—“ But declaring always that the said Jean Waddell shall be bound and “ obliged, as by acceptance hereof she binds and obliges herself, to pay all my just and “ lawful debts, with my funeral charges and expences, and any gifts or legacies I may “ think proper to leave by a writing under my hand.” And then he appointed Jean Waddell to make payment to his sister Christian Waddell, of a yearly annuity of £20 ; and gave £1000 to his niece Margaret Waddell, and £100 to Agnes Gardner, and £700 to another niece named Margaret Waddell, which sums were to be paid by the Appellants, or those who might succeed to the fee of the lands. And then he assigned and made over to the Appellant George Waddell, in fee, all debts and sums of money that should be due to him at the time of his death, and empowered Jean Wad-[281]-dell to sell whatever part of his moveable property above assigned to her in life-rent, and to George Waddell in fee, she might think proper, and to lend out the money on heritable bonds, payable to herself in life-rent, and to the said George Waddell in fee.

Mr. Waddell died in 1806, three years after the execution of the deed. He had, in his life-time, made considerable advances for the making and repairing the Bathgate and Airdrie road, between Edinburgh and Glasgow ; and had also come under obligations to a considerable amount to lenders of money for the purposes of that road, the expected tolls of which were then imagined to be ample security. The interest of the money advanced by him was regularly paid to the time of his death. Soon after his death it was found that the tolls were totally insufficient to defray the yearly burdens, and hence the trustees not only withheld, in future, any interest from their own body, but made large requisitions on each other for sums to pay up the principal of money borrowed. From this and other causes, the moveable funds, and debts due to Mr. Waddell, fell greatly short of the claims and demands against him : and the Respondent had no means to pay the amount of the deficit without encroaching on the annual income which she drew from the lands. The fiars having refused to agree to a sale of so much of the lands as would pay this balance, or advance the money to pay it, the Respondent brought this action against them for relief. The summons narrated the different clauses of the settlement executed by her deceased brother, and proceeded thus :—[282] “ That “ the said William Waddell having died as aforesaid, on the said first day of June, 1806, “ it has turned out that the personal debts due by him in consequence of cautionary and “ other obligations, executed prior to his death, greatly exceed the whole moveable funds “ and effects assigned to the Pursuer : ” And it concluded—“ that the Defenders should “ be decerned, and ordained by decret foresaid, to free and relieve the Pursuer of the “ principal sums of these debts, the Pursuer being always bound to pay the legal interest “ from the period of Mr. Waddell's till her own decease, or to pay £5000, less or more, “ to enable her to get relief for herself.”

This action came first to be tried before Lord Balmuto, Ordinary. Upon hearing counsel on the grounds of the action and defences, his Lordship appointed them to give in memorials to himself; upon advising which, his Lordship pronounced the following judgment:—"Having considered the mutual memorials for the parties, and whole process, finds that the deceased William Waddell, of Easter Moffatt, for the love, favour, and affection which he bore to Jean Waddell, his sister, by a deed of settlement disposed and assigned to and in favour of the said Jean Waddell, in life-rent, and George and William Waddell, his nephews, in fee, his personal and heritable estate: but declaring that the said Jean Waddell, by acceptation thereof, 'is bound and obliged 'to pay all my just and lawful debts, funeral expences, and any gifts or legacies I may think proper to leave by a writing under my hand: 'That this declaration is coupled with [283] this other clause, 'in order the more easily to carry my intentions with regard to my moveable property into execution, I hereby empower the said Jean Waddell to sell and dispose of whatever part of my moveable property above assigned to her in life-rent, and the said George Waddell, in fee, she may think proper, and convert the same into cash; and after payment of my debts, sick-bed and funeral expences, to lend out the remainder of the money on heritable bonds, taken payable to herself in life-rent, and the said George Waddell, in fee: 'which unequivocally indicates the opinion and belief of the Testator that his personal estate was more than sufficient to pay his funeral expences and all debts that were due by him: That in no view could it be the intention of the late Mr. Waddell to burden his sister with his debts, in the event of their exceeding his moveable estate, and deprive her of the favourable situation in which he had placed her, by giving her the life-rent of his whole property: Finds it is not denied that the personal funds have fallen greatly short of the debts of the late Mr. Waddell, and therefore that the Pursuer is entitled to be relieved by the Defenders, fiars of the heritable estates, in proportion to the value of these estates, in so far as the principal sums due by the late Mr. Waddell exceed his personal funds and effects; the Pursuer being always liable for the interest of such sums, from the death of the late Mr. Waddell, until the Defenders shall enter into possession, and draw the rents of the heritable property; but, before further answer, appoints the Pursuer to give in a [284] specific condescendence of the debts due to the deceased Mr. Waddell, and of all other moveables belonging to him, which she has or might have intromitted with, and of the amount of the debts due by him which she has paid or are still resting, distinguishing the interest from the principal; and when the said condescendence is lodged, allows the Defenders to see and answer the same."—Thereafter the Appellants having given in a short representation, the Lord Ordinary thought it best, in order to save time and expense to the parties, to desire informations to be printed, that the case might be determined at once by the whole court. Upon advising these informations, the Judges of the first division of the Court of Session pronounced this interlocutor: "Upon the report of Lord Balmuto, and having advised the informations for the parties, the Lords find and declare in terms of the Lord Ordinary's interlocutor of date 11th December, 1813; and remit to the Lord Ordinary to proceed accordingly; but find the Defenders not liable in the expenses of process." To this judgment the Lords adhered, by refusing a petition for the Appellants, who thereupon appealed.

The grounds on which the Respondent founded her claim to relief in this case, were stated by the Respondent to be these—1st, That at the period of Mr. Waddell's death there was a very large deficit in his moveable funds; and 2dly, that the Intention of the granter was clearly expressed in this deed itself, merely to impose the debts on the Respondent, not *qua* life-rentrix, but *qua* executrix, and assignee of his moveable funds; and in fact, that the [285] technical import of the clause founded on by the Appellants went no further. The first of these positions the Respondent admitted that she was bound to prove; the latter was a question of construction for the Court. As to the first point the Respondent made out a statement from which it appeared that there was a very considerable deficit, and this she had offered to prove in the Court of Session. As to the point of construction, the Respondents contended that the inquiry here, as in all cases of construction of settlements, should be—1st, What was the true and actual intent of the defunct? 2dly, Has the Court of Session as a court of equity, power to give effect to the intention of the granter in the manner claimed by the Respondent according to the established rules of law applicable to the case.

I. In reference to the first of these points, it has been shown that the deed of

settlement of Mr. Waddell, in so far as the Respondent was interested, consists of two parts: it conveyed, 1st, a life-rent of Mr. Waddell's heritage; and, 2dly, an assignation of his moveables, which were to be applied in the first instance in payment of all the just and lawful debts of the granter. Now, at first sight, the declaration in the deed of settlement, that the Respondent "shall be bound and obliged, as by acceptation" "hereof she binds and obliges herself, to pay all my just and lawful debts," taken as a single and insulated clause, appears to be unqualified. But fortunately, without going beyond the deed itself, there is the most complete evidence that this obligation was merely meant to attach to the assignation of moveables, which occurs in a preceding part of the deed. [286] It was intended solely as a burden on that part of the conveyance; for towards the end of the deed of settlement, the testator, after assigning over to the Appellant George Waddell, in fee, all debts and sums of money, both heritable and moveable, that should be owing to him at the time of his death, proceeds thus: "and in order the more easily to carry my intents with regard to my moveable" "property into execution, I hereby empower the said Jean Waddell to sell and dispose" "of whatever part of my moveable property above assigned to her in life-rent, and the" "said George Waddell in fee, she may think proper, and convert the same into cash;" "and after paying off my debts, sick-bed and funeral expenses, to lend out the" "remainder of the money on heritable bonds, taken payable to herself in life-rent," "secluding the *jus mariti* of any husband she may marry, and to the said George" "Waddell in fee." Here, then, is the clearest evidence of the ground upon which alone the defunct took the Respondent bound to pay his debts. He appointed the debts to be paid out of the moveables. He declared so expressly in the deed. If that fund fails therefore, the means are taken away in respect of which alone, the testator laid the burden of debts on the Respondent. And here it is humbly submitted as a general rule of law and of construction, that every presumption must lie against the allegation that a granter intended to impose a heavy burden of debts upon a mere life-rent. The debts of a man are in general due to the creditors instantly upon his death; but a mere life-renter has neither money nor credit to raise a fund for the [287] payment of large debts. Every man must be presumed to know that a life-renter has none. And therefore, though a burden upon a life-renter is possible, and must receive effect when a testator intends it, yet a court is entitled to examine the evidence rigidly, and to look narrowly to every part of a deed of settlement, to ascertain the full extent of the burden that the defunct really intended the life-renter to bear. In this particular case Mr. Waddell knew well that his sister had not a shilling in the world but what she could obtain from him. It is granted that a man may impose his whole debts on a life-renter on the supposition that they are insignificant; and though they unexpectedly prove so heavy, a court cannot give the life-renter relief. That is freely conceded. But the present case is entirely different, when the life-renter is also made executor, and the debts are imposed, not in respect of the life-rent,—but in respect of the executry funds. The fact that the Respondent was to enjoy her life-rent free, seems as distinctly announced as any one provision of the deed. For the defunct, in another clause towards the conclusion of the deed (quoted in the Respondent's narrative), when excluding the *jus mariti* of any husband that the Respondent might marry, expressly declares his meaning in bestowing the life-rent on the Respondent. He says it is given "in respect that the lands and others above-mentioned are conveyed to the" "said Jean Waddell in life-rent, merely for the regard and affection I have and bear" "to her;" therefore it is provided and declared that the *jus mariti* of any husband that she [288] may marry is excluded. The above clause, in the Respondent's humble apprehension, deserves to be particularly marked. The testator does not say, as his nephews now attempt to plead, that the life-rent was conveyed to the Respondent in any view "for the payment of his debts." This is not even stated as one of the objects of this part of the conveyance. But a different reason for the conveyance is assigned altogether; and the Respondent's life-rent is in particular stated to be given to her solely for the love and favour that the granter bore to her. Thus, if the Respondent has been successful in showing that the obligation on her to pay the debts, was merely imposed on her in respect of the assignation to the moveables, there are a multitude of authorities to show that the Respondent cannot be liable beyond the value of these moveables. This has been long fixed. (Kilk. June 6, 1745; Mercer *v.* Scotland.) Accordingly, upon a very deliberate argument before the whole court, in order to settle

this point, in the case of Smith against Marshall, it was found by the court, that a clause declaring that a son should be personally liable for the disposer's debts, imported no more than that he should be liable for the disposer's debts, *in valore* of the heritage and moveables intromitted with by him. And the same decision has since been repeated again and again, in cases too numerous to be specified. The Appellants cannot controvert this doctrine; but they allege that there was more here than a mere conveyance of moveables; they plead that there is a gift of a valuable life-rent, and they contend that the life-rent as well as the moveables must be exhausted before the Respondent can obtain any relief in this case. This renders it necessary to enter into some explanation of the law of Scotland, applicable to the obligation in question. When a party by a Scotch settlement gives a general disposition, or executes a conveyance of part of his estate by a *mortis causi* deed in favour of another, and declares that the donee "shall be bound and obliged to pay all his just and lawful debts," it is a question of circumstances, to be collected from the scope and tenor of the whole deed, whether the testator meant these debts ultimately to be borne by the donee? In many cases this may be his meaning, but in other cases it would be unjust thus to interpret such a clause, which is often inserted for the following reason. By the law of Scotland the whole heirs of a deceased person, both in his real and personal estates, are liable to creditors for his debts; and this on account of what is called their representation of the defunct. Hence they may in general be all sued by any of the creditors of the defunct; but when a particular party holding a certain fund, such as an executor or assignee to moveables, is burdened with the payment of debts, that shows the party primarily liable, and renders it incumbent on the creditors to sue the party so pointed out in the first instance, till the funds in his hands be exhausted; but it does not necessarily follow that the debts are ultimately to be borne by the donee, or that his relief from the other heirs is to be excluded. That is to be collected from the whole clauses of any particular deed, or from the whole settlements of the testator taken together. This doctrine is illustrated by a variety of cases which have occurred in Scotland. In particular there are two cases in Lord Kilkerran's Reports (Kilk. No. 3, p. 230) to the following effect: David Russel, surgeon in Kennoway, entailed his estate upon Thomas Dall, son to Mr. William Dall, minister of the Gospel at Barry, and Rachel Russel, his eldest sister, by a deed containing this clause: "I hereby expressly burden this right of disposal, not only with the payment of my funeral charges, but also with the payment of my three sisters-german their portions yet resting by me to them; and with the payment of all the just and lawful debts that shall be resting by me at the time of my death, to whatsoever person or persons, by bond, bill, contract, decree, or any other manner of way; and likewise with the payment of the life-rent provisions provided to Rachel Thomson my mother, and to Rachel Wilson my wife," with prohibition to sell or contract debts, except that it was in the power of the heirs of tailzie to sell as much as would satisfy the burdens above mentioned.

William Dall and Rachel Russel his wife, upon David Russel's death, were confirmed executors *qua* nearest of kin to him; and being pursued by the other two sisters and their husbands to account for the executy, in which, if unencumbered, these sisters had an equal interest, the Defenders made this defence, that there were more moveable debts than exhausted it. To which it was replied, that the defunct had laid the burden of his debts upon his land estate, which of course must be liable. But the Lord Ordinary, 22d December, 1744, "in respect it was not denied by the Pursuers that the moveable debts due by the defunct did exceed the moveable estate belonging to him, repelled the claim made by the Pursuers for the said moveable estate." And the Lords refused a reclaiming bill, and adhered. Upon this case Lord Kilkerran remarks, that "the circumstances of the estate were a strong indication that it could not be the intention of the granter to burden the tailzied estate with the debts. But, laying aside these circumstances, it was the general opinion that the rule is, that a clause in the disposition of a land estate, burdening the donee with payment of the granter's debts, does not exclude the donee from relief of the moveable debts from the executy." This decision establishes the principle, that the court, in every case in which a donee is burdened with debts, is entitled and bound to look beyond the isolated words of the clause, to the intention of the granter, and to give the donee relief accordingly. The burden is imposed upon a particular party, in the first instance, for the purpose of a more speedy and convenient settlement with the creditors at large;

but in no case is it held that this burden excludes the relief competent to the disponent from the other heirs of a defunct, if a deficiency unexpectedly occurs in the fund provided for the payment of the debts. This doctrine is clearly laid down by Lord Kilkerran in the case which immediately follows the one last quoted (Kilk. No. 4. p. 231). His Lordship reports the case of Margaret, etc. Campbells against Dugald Campbell, which was shortly this: "A father, in a disposition of his personal estate, "burdened the disponent with payment of all [292] his debts heritable and moveable." He executed afterwards an entail of his lands and estate, in which he burdened the institute and substitute with payment of all his debts heritable and moveable, empowering the heirs of entail to sell as much of the lands as would pay the debts. Though this deed was subsequent in date to the assignation of moveables, the Court found that the disponent of the lands was not bound ultimately to sustain the debts, but that these fell to be borne by the successor, who was by law liable for such debts, viz. by the assignee of the moveables. Lord Kilkerran, after detailing the history and decision of the preceding case, explains very clearly the law applicable to such questions. "In no "case," says his Lordship, "are men so apt to be of different opinions as in those that "are called *questiones voluntatis*, nor in the nature of things can they be brought within "one rule. Meantime, as this particular *questio voluntatis*, whether one heir or another "is intended to be ultimately liable in the debts, has generally its rise only from the "conception of the burdening clause, so much may be thought to be established by the "decision in this case, and that of Russel and Dall, that no clause, however anxiously "burdening the heir or disponent, is to be construed to exclude from the relief competent "to him by the operation of the law, unless either the clause be such as makes the debts "real burdens, or that by apt words such relief is excluded. This judgment was, upon "an appeal, affirmed." The Respondent might quote a variety of other decisions to the same effect. For instance, [293] "An heir was found entitled to a relief of an annuity "and a legacy from the executor, although the estate had been disposed under the "burden of debts and legacies." But she will not load this with a further enumeration of precedents. She will therefore conclude with the following (Fac. Coll., June 20, 1572), which is extremely parallel in its most material circumstances with the present case. David Annandale, merchant in Edinburgh, settled the life-rent of a house on Christian Keay, his wife, in the event of her surviving him, and also executed in her favour a disposition of his moveables, expressly burdened with payment of all his debts. Keay intromitted universally with his moveables, and paid his debts so far as these would go; but the debts exceeded the funds. Keay, the widow, was afterwards married to Peter Brown, and they paid to Priscilla Handieside the sum of £50 sterling, which the deceased David Annandale owed her by bond. Instead of taking the receipt for that sum, they made Handieside grant an assignation of it to a trustee for their use. In consequence of this assignation, the trustee adjudged the fee of the house above-mentioned, which had now devolved on William Annandale, heir at law. After the death of Keay, William Annandale, brother and heir of David Annandale, raised a reduction of the assignation, and of the adjudication which followed upon it; and the similarity, in several points of that case, to the present, deserves to be noted. There was, in Annandale's case, both a conveyance of a life-rent and an assignation of moveables to the same party, burdened with debts. The moveables proved insufficient; and in that case the Court found that [294] the debts were no burden on the life-rent, but that the life-renter was entitled to relief from the heir's estate. The Pursuer, in the case of Annandale, pleaded, that as, Keay by her acceptance of the disposition made in her favour by her husband, Annandale, became burdened with the payment of all his debts, she and Brown, her second husband, must be understood to have paid Handieside's debt in compliance with this obligation; and that the debt, being thus extinguished, could not afterwards be revived in the person of Brown (who derived right from Keay) so as to affect the heritage of Annandale. Answered for the Defender Brown: although the action had been brought against Keay herself, she would not have been burdened, in consequence of the disposition by her first husband, beyond the amount of the subjects with which she intromitted, as was found in the case of Thomson *v.* Creditors of Thin, 28th December 1675, observed by Stair. The Lords repelled the reasons of reduction, and found that the Defender was entitled to take an assignation to the bond in his own or in a trustee's name, so as to affect the fee belonging to the heir. The application of these precedents to the present case requires no commentary. They

all demonstrate, 1st, the purposes for which such clauses as that founded on by the Appellants are generally inserted in Scotch settlements;—and 2dly, that provisions thus expressed do not necessarily import a final burden on the donee without relief, but must be interpreted in connexion with the other provisions in a party's settlements, to ascertain the real intention of the granter, by which alone the rights [295] and obligations of all his heirs are ultimately regulated. These views of the law will, it is humbly supposed, establish without difficulty the soundness of the judgments under review. There is, no doubt, one clause in the settlement of the late Mr. Waddell, which, if taken apart and perused singly, might be held to impose a burden on the Respondent; but when the whole deed is examined, it is found, that it consists of several distinct conveyances; and the testator unequivocally inserted a declaration in the very same deed which is now the subject of construction, as to the fund to which he meant the burden to apply, and of course out of which alone the debts were to be paid: When that fund therefore turns out deficient, it is in vain to construe with literal strictness the words of one isolated clause in the deed against the sense of the whole provisions of it taken together. Had the Respondent merely been an assignee of moveables, or an executor, it could not be pleaded by the Appellants that she was personally liable for the debts beyond the value of these moveables, even if the clause had been expressed in the very terms of the present; but they cannot get more advantage in the present case, unless they could make out that the granter of the deed really intended the debts to be paid out of the annual income derived by the Respondent from the property, as well as out of the moveable property assigned to the Respondent. But it is humbly submitted, that the whole structure of the deed, and in fact that express clauses in it (unnecessary to be repeated) decisively obviate any such plea. But if the Respondent has not been [296] mistaken in the views which she has submitted as to the nature of the settlement in this case, and as to the true meaning of the granter, it is humbly presumed, that the Court below were well justified, on the grounds and authorities in law before stated, in giving effect to that intention, as they did in the interlocutors appealed from.

With respect to the fact of a deficit, and argument, that the abridgment of the Respondent's life-rent interest was directly contrary to the intention of the disposer, the Appellants answered—

The Appellants conceive it perfectly unnecessary to examine the accuracy of the contrast, as represented by the Respondent, between Mr. Waddell's funds, as estimated by himself, at the date of the disposition, and their real disposeable amount at his death, as the whole argument founded upon it seems to them utterly inapplicable to the present question. The question is, whether or not the obligation to pay the testator's whole debts is imposed upon the Respondent by his settlement; and it is clear, that the decision of that question could not be in the slightest degree affected by the establishment of the Respondent's proposition, that the testator considered the moveables, without the life-rent of the heritage, sufficient to discharge that obligation. Does it not happen every day, that a bequest is abridged, or perhaps rendered entirely unavailing by the alteration of the testator's affairs taking place between the date of the bequest and his death, and was it ever held that a court in construing the contending claims of legatees, in such cases, is entitled to disregard the intention really expressed by the [297] testator, and to give effect to the intentions which it is supposed he would have expressed if he had foreseen the situation of his affairs at the period of his death? yet it is only on this supposition that the argument of the Respondent can bear on the subject of dispute. Although Mr. Waddell did place at the disposal of the Respondent a fund, which he supposed more than equal to the payment of the debts and the protection of the life-rent, yet, if his supposition turned out at his death to be incorrect, and if the acceptance of the deed, and consequently of any part of its benefits, binds the Respondent to pay the debts; every thing which she takes by the deed must be subject to that obligation, and a court cannot "protect" the life-rent without substituting for the settlement made by Mr. Waddell a new settlement, upon presumptions of his intention, suited to the situation in which he left his affairs. It is hardly necessary to state, that such an interference is contrary to every legal principle, and that the only sound presumption to be drawn from a testator allowing his will to remain unaltered in the change of his affairs, is, that he saw and approved of the effect which that change had on his testamentary arrangements.

The Appellants are just as much entitled to the benefit of these presumed intentions as the Respondent. The Respondent maintains, and the Lord Ordinary seems to hold, that because the clause directing the disposal of the moveables, after payment of the debts, shows his conviction of the sufficiency of the moveables for that purpose, it is to be inferred, that it was his intention to confer the [298] unimpaired enjoyment of the life-rent of the heritage on the Respondent. But it appears to the Appellants, that the clause in question only provides for contingency, without arguing any conviction, on the part of the testator, that the contingency was to be realized. And even allowing it that effect, why is that conviction to operate in favour of the life-renter, rather than the fiars? If the testator's belief of the sufficiency of the moveable funds is proof of his intention, that the life-renter should have the life-rent free, is it not equally decisive of his view of securing to the fiars the full enjoyment of the fee? Is it not just as likely that if he had been aware of the deficiency of the moveables, he would have curtailed the life-rent, for the advantage of the fiars, as that he would have burdened the fiars for the benefit of the life-renter? This argument then, even if admissible, would be perfectly inconclusive. It leaves the question just where it was. That question must be determined not by the extraneous circumstances of the difference between the real and estimated amount of the testator's moveable succession, but solely and exclusively by the terms of the deed itself, which burdens the "acceptation" of the deed, and, consequently, the "acceptation" of the life-rent of the heritage, as well as the moveables, of every thing, in short, which the deed confers, with the payment of the whole of the testator's debts. The obligation is, in fact, an obligation laid personally on the Respondent, if she shall take benefit by the deed at all: and if the objection is expressed with sufficient precision, it is in vain to argue that the life-rent, one of the subjects con-[299]-veyed, is protected from the obligation, because the testator may be presumed to have supposed that the moveables, the other subject placed at the Respondent's disposal, was adequate to its performance.

In answer to the argument, that the obligation to pay the debts was meant to attach solely to the assignation of the moveables, the Appellants referred to the clause, by which it was declared, that by acceptation hereof (of the deed), the Respondent became bound to pay the debts, and to the whole of the disposition. And as to the adjudged cases quoted to show that the obligation to pay debts did not always preclude the claim of relief, the Appellants answered—Here there is no attempt to stretch the liability of the Respondent beyond that limit, because the benefits conferred on the Respondent, by the deed in question, including the life-rent, are confessedly far more than equivalent to the debts which she is bound to pay. It is necessary for her to make out, therefore, that even although the subjects conveyed are sufficient to pay the debt, the obligation to pay does not bar her claim of relief; and in support of this position, she refers to certain decisions, in particular to the cases of *Russell v. Russell*, and *Campbell v. Campbell*, *Kilkerran*, p. 230, 231. In the first case it was found, that where an entail had burdened the lands entailed, with the payment of his debts, his moveable effects, which were not disposed of, remained properly liable, and that the disponee had a claim of relief against the executor.

In the case of *Campbell v. Campbell*, a person first executed a settlement of his moveable property under the burden of the payment of his debts, and [300] afterwards executed an entail of his lands under the same burden. Here the obligation to pay the debts was imposed both on heir and executor, but it was found to operate exclusively against the executor, in the question which occurred, regarding their respective responsibility. The point fixed by these decisions may be expressed in the words of Lord Kilkerran's Report of the first case, "That a clause in the disposition of a land estate, burdening the disponee with the payment of the granter's debts, does not exclude the disponee from relief of the moveable debts from the executry"—and the ground of the rule is expressed in the argument of one of the parties in *Campbell v. Campbell*, reported by the same Judge, "Where a person settles his estate, not by way of succession, but by disposition, *inter vivos*, reserving a life-rent and power over the estate to himself, the disponee takes not as heir, and especially if he be not *alioqui successurus*, the creditors cannot recover their payment but by the circuit of a reduction upon the act of parliament 1621; and therefore it is the universal practice, where one settles his estate upon a series of heirs, to burden the disponee and the heirs succeeding to him, with the payment of the debts; and the

"intention of such burdening clause is understood only in favour of the creditors, to give them the like access against the disponent, as if he had taken the estate by service; but by no means to deprive him of the like relief that would have been competent from the moveable estate, had he taken the estate by service."

It must be perfectly evident that the principle of [301] these judgments is quite inapplicable to the question under discussion. They no doubt show, that where a person, in a disposition of a particular land estate, inserts the obligation to pay his debts, that obligation does not bar the disponent's relief from the executor, because the obligation is understood in law to be merely inserted for the benefit of creditors, and not as defining the respective responsibility of disponent and executor. Here, however, there is no question between disponent and executor, but between disponents, under one general settlement of the disponent's whole property, by which he divides that property into certain shares, and imposes upon each sharer certain specified burdens, as the conditions upon which these various persons are to take benefit by the deed. Upon the two Appellants he lays the obligation of paying particular legacies, and upon the Respondent that of paying his whole debts; obligations which each are, by the "acceptation" of the deed taken, bound to perform. In such a case it seems utterly absurd to infer, from the relief competent between disponent and executor, that a similar relief is available to the Respondent against her co-disponents. That inference is excluded by the circumstance of the obligation forming part of a general settlement where the disponent had particularly in view the benefits which he was conferring, and the burdens which he was imposing on each of the various disponents. The obligation to pay the debts in this case could not have been inserted merely for the benefit of creditors. Being imposed exclusively upon the Respondent, the life-rentrix, while the fiars, the persons whom of course, in con-[302]-templating the rights of creditors it was most natural to subject, are left entirely free: it is obvious that the obligation was imposed for the sole purpose of defining the particular burden which the testator declared she should bear in consideration of the benefit conferred by the deed. Indeed it seems impossible to frame any more unequivocal partition of the separate burdens to which each disponent under a deed is to be subjected, than the form adopted here by the disponent. No doubt, if the subjects bestowed on the Respondent had been insufficient to discharge the obligation imposed upon her, relief from the Appellants would have followed as a matter of course; but while a life-rent of the value of £800 or £900 a year, remains untouched, she must remain the proper debtor, without relief, in that obligation which forms the express condition of her acceptance of the deed.

Another decision referred to with much confidence on the part of the Respondent is still less applicable to the point now in dispute. "David Annandale, merchant in Edinburgh, settled the life-rent of a house upon Christian Keay, his wife, in the event of her surviving him, and also executed in her favour a disposition of his moveables, expressly burdened with payment of all his debts. After his death, Keay intromitted universally with his moveables, yet so that after payment of the privileged debts due by the deceased, her super intromissions appeared not to have exceeded £2 sterling." Keay married a second time, and she and her husband paid a debt of the deceased, to the amount of £50, but took an assignation of it to a [303] trustee for their own use, on which the trustee adjudged the house. After the death of Keay, the heir of David Annandale brought a reduction of the assignation, and the adjudication against Brown the second husband, on the ground that Keay, by her acceptance of the disposition of the moveables, was burdened with all the debts, and therefore that she and her husband must be understood to have paid the debt under that obligation. In this action the defender was assolizied. The decision is quoted on the part of the Respondent, as showing that where a person held a life-rent of a certain heritable subject, and a disposition of moveables burthened expressly with the disponent's debts, she was not precluded from her relief against the fee of the heritage, in so far as the moveables were insufficient for their liquidation. But the resemblance of that case to the present is completely removed, by considering its circumstances. There it appears from the report, that the life-rent of the house was not burdened with the debts at all; nay, it seems clear from the expressions used in the narrative, that the disposition of the moveables was a totally separate deed. The situation of Keay, therefore, was that of a person having the unburdened life-rent of a house, and a disposition of moveables, subjected to the payment of the

disponer's debts. There could be little doubt therefore, that upon the ordinary principle of law, she, upon paying a debt beyond the amount of the moveables, had a claim of relief against the heritage, though life-rented by herself. That decision would be perfectly applicable here, if the Respondent's conveyance of the lands of Easter Moffat, and [304] others, were unburthened with any obligation to pay the disponer's debts; and if that obligation were only imposed in a conveyance of moveables, which turned out inadequate to the performance. But here the situation of the Respondent is widely different. The obligation is attached to her right of life-rent, as well as every thing else which she takes by the deed. Indeed the obligation is immediately subjoined to the conveyance of the life-rent of the lands; and, therefore, upon the ordinary rules of construction, is more exclusively incumbent upon her in the character of life-renter than any other. The value of the life-rent is beyond all denial, of incomparably greater amount than the balance of debt said to be still due; nay, the sums which she has already drawn from it since Mr. Waddell's death are sufficient to discharge the double of that balance; and in these circumstances, the Appellants humbly submit that her claim of relief cannot be sustained against them upon whom no such burthen is thrown by the deed, without frustrating the obvious and clearly expressed intentions of the testator.

(Mar. 9, 1818.) Lord Eldon (C.). In this case the question arises upon the effect of a deed of settlement, in which there are several clauses material to be attended to with reference to the case of Keay. Mr. Waddell made this settlement under an apprehension that if he gave the Respondent, his sister, all his moveables absolutely; and gave her the debts due to himself, at the time of his decease, to be converted into cash, and applied in payment of the debts due from himself, she would derive a benefit from that arrange-[305]ment; and he calculated that, after payment of his debts out of that fund, there would be a residue to be settled in the manner mentioned in the deed. That he had so calculated the extent of his fortune cannot be doubted. But there are thousands of cases where, when one happens so to miscalculate, the actual arrangement is such as he did not know would be the effect of the will. If he had had nothing but lands, and had given them to A. B. for life, remainder to C. D. in fee, then certainly the fee would be liable for the debts, the life-renter keeping down the interest. But the question is, what is the effect of the disposition altogether.

This lady was the principal object of his affection; and the disposition commences with the following narrative: "Know all men by these presents, that I, William Waddell, Esq. of Easter Moffat, heritable proprietor of the lands and others after mentioned, for the love, favour, and affection that I have and bear to Jean Waddell (my youngest sister), George Waddell, of Ballochnie, and William Waddell, his brother (my nephews), and for other good causes and considerations, me hereunto moving, have disposed, assigned, conveyed and made over, as I do by these presents, but with and under the burdens, provisions, conditions, power, and faculty under written, give, grant, assign, and dispoine from me my heirs and successors, to and in favour of the said Jean Waddell, in life-rent, all lands and heritages presently belonging or which shall belong to me at the time of my death, with the whole writs and evidents thereof, conceived in favour of me or my predeces-[306]-sors, and authors; as also all debts and sums of money, heritable and moveable, any ways addebted, resting, or that shall be owing to me at the time of my death."

And I apprehend the effect of that, coupled with a clause in the concluding part of the deed, was to give a life-rent only in these debts to Jean Waddell. And then he says; "And further, give, grant, assign, and dispoine to and in favour of the said Jean Waddell, her heirs, executors, successors, and assignees, all the corns, cattle, horse, nolt, sheep, etc. and in general, any other moveable subject pertaining or belonging to me wherever the same may be." The distinction then being that of his moveable property, all the debts and sums of money due to him were given to her in life-rent, and the rest absolutely.

Then he proceeds, "And particularly without prejudice to the said generality, I hereby, with and under the burdens, provisions, condition, power, and faculty under written, give, grant, and dispoine from me and my foresaids, to and in favour of the said Jean Waddell in life-rent, and the said George Waddell and his heirs in fee, all and whole the respective lands and others after mentioned, viz." (Then follows a full

description of the subjects destined to the Appellant, George Waddell.) "And further, "I hereby give, grant, and dispoſe from me and my foreſaids, to and in favour of the ſaid Jean Waddell, in life-rent, and the ſaid William Waddell, and his heirs in fee, "all and whole the Forty Shilling Land of Eaſter Moffat, etc." (Then follows a particular [307] deſcription of the lands diſpoſed in fee to the other Appellant, William Waddell.) And then he goes on:—

"But declaring always that the ſaid Jean Waddell ſhall be bound and obliged, as, "BY ACCEPTATION HEREOF, ſhe binds and obliges herſelf to pay all my juſt and lawful "debts, with my funeral charges and expences, and any gifts or legacies I may think "proper to leave by a writing under my hand."

Thus then the deed, after deſcribing the lands, and diſpoſing the fee to his nephews, takes up the ſubject of his debts, which he lays upon her only. Now if there had been nothing more in the deed, it would be quite impoſſible to ſay that ſhe was not liable for the whole of the debts, and that if he miſcalculated, ſhe would not be ſo far diſappointed of what he meant to give her: as there is not a word to ſhow that he had it in contemplation that the lands ſhould be liable to pay any of the debts. Then he proceeds, "And I appoint the ſaid Jean Waddell, to make payment to Chriſtian "Waddell, my ſiſter, ſpouſe of James Muir of Gilgarth, during the ſaid Chriſtian "Waddell's life, a yearly annuity of £20 ſterling per annum, and that at two terms in "the year, Whitsunday and Martinmas, by equal portions, beginning the firſt term's "payment thereof at the firſt term of Whitsunday or Martinmas after my death, and ſo "on termly thereafter during her life-time." That ſtands on the ſame ground as the bequeſt to the Reſpondent, and is open to the ſame answer. If he miſcalculated, and the life-rent failed, ſo would [308] the annuity for the ſame reaſon. And then the diſpoſition goes on—"and in the event of the ſaid Jean Waddell's predeceasing the "ſaid Chriſtian Waddell, then I hereby appoint the ſaid William Waddell, or thoſe "who may ſucceed to the fee of the lands above diſpoſed to him, to make payment to "the ſaid Chriſtian Waddell of her ſaid annuity." And then he gives conſiderable legacies, "As alſo I leave the ſum of £1000 ſterling to Margaret Waddell, my niece, "daughter of Patrick Waddell of Bogo, and £100 ſterling to Agnes Gardner, daughter "of John Gardner of Broom Park: which ſums of £1000 and £100 are hereby declared "the ſaid William Waddell, or thoſe who may ſucceed to THE FEE of the lands, and "others above diſpoſed to him, ſhall be bound and obliged, as by acceptation hereof "they bind and oblige themſelves, to make payment to the ſaid Margaret Waddell and "Agnes Gardner, at the firſt term of Whitsunday or Martinmas, after the death of the "ſaid Jean Waddell, with the legal intereſt thereof, from the term of payment during "the not payment of the ſame.

"And further, I leave the ſum of £700 ſterling to Margaret Waddell, my niece, "daughter of the deceased George Waddell, of Ballochnie: which ſum of £700 ſterling, "the ſaid George Waddell, her brother, or thoſe who may ſucceed to THE FEE of the "lands above diſpoſed to him, ſhall be bound and obliged, as, by acceptation hereof, "they bind and oblige themſelves, to make payment to the ſaid Margaret Waddell, at "the firſt term of Whitsunday or Martinmas after the death of the ſaid [309] Jean "Waddell, with the legal intereſt thereof, from the term of payment, during the not "payment of the ſame." So that he firſt makes a gift to Jean, then to William and George; and then lays the burthen of the payment of his debts on Jean alone: and then he takes up the remainder of his purpoſe, and ſubjects the fee to legacies not to be paid till the death of Jean. There is another clauſe which, it is contended, ſhows his anxiety to provide for Jean: but the answer to that is, that ſhe could not take the benefits of this diſpoſition, but ſubject to the payment of the debts. On this clauſe conſiderable ſtreſs has been laid, and it certainly ſhows that he muſt have thought that the whole of his moveable property, including the debts due to him, would be more than ſufficient to pay his debts due from him.

"And further, I hereby aſſign, and make over to the ſaid George Waddell in fee, "all debts and ſums of money heritable and moveable, any ways addebtled, reſting, or "that ſhall be owing to me at the time of my death. And in order the more eaſily to "carry my intentions with regard to my moveable property into execution, I hereby "empower the ſaid Jean Waddell, to ſell and diſpoſe of whatever part of my moveable "property, above aſſigned to her in life-rent, and the ſaid George Waddell in fee, ſhe "may think proper, and convert the ſame into caſh, and after paying off my debts, ſick

“bed, and funeral expenses, to lend out the remainder of the money on heritable bonds, “taken payable to herself in life-rent, secluding the *jus mariti* of any person she may “marry, and the [310] said George Waddell in fee.” This manifestly shows the intent that the debts should be paid out of the moveable property; and also that he thought that it would be more than sufficient for that purpose; otherwise it would have been unnecessary to have given the residue to one in life-rent, with remainder to another in fee.

But after all, where the personal property is made liable to the payment of debts, and the residue is given to one, and the lands to another, and there is no residue, the objects of testators are defeated every day. He seems to have thought that there would be enough to pay his debts. But suppose £10,000 due to him, and £5000 to pay, and that the £10,000 or £5000 of it, had been lost by insolvency or otherwise, the object of his bounty would be defeated. Then the utmost that can be said is, that he called upon her to take, but subject to a burthen, what, he conceived, would be a benefit. But he mistakes: and so mistaking and miscalculating, his object has miscarried. I therefore think that the opinion of the two Judges, against that of the three, is the better opinion; and that this judgment should be reversed, and the Defenders assoilzied, without prejudice to any claim which she may have against the Appellants, in case the interest she has under the deed should fall short of the burthens imposed upon her.

(Sir Samuel Romilly, in answer to a question from the Lord Chancellor, stated that they did not mean then to press the point of her being personally liable after her interest should be exhausted.)

[311] Judgment REVERSED, without prejudice to any claim against the Defenders, in case the interest she derived under the disposition stated should fall short of the debts paid, or to be paid, by the Pursuer.

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Webster <i>v.</i> Christie, [1813] 1 Dow P. C. 247	688
Wemyss (Earl of), Montgomery <i>v.</i> , [1813] 2 Dow P. C. 90	798
Wheeler <i>v.</i> D'Esterre, [1814] 2 Dow P. C. 359	894
White, Benson <i>v.</i> , [1816] 4 Dow P. C. 334	1184
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Whitehead <i>v.</i> Travis, [1779] 7 Bro. P. C. 49	33
Wight <i>v.</i> Dicksons, [1813] 1 Dow P. C. 141	651
Wight <i>v.</i> Ritchie, [1814] 2 Dow P. C. 377	900
Wilkie <i>v.</i> Geddes, [1815] 3 Dow P. C. 57	988
Willan <i>v.</i> Willan, [1814] 2 Dow P. C. 274	863
Williams <i>v.</i> Lane, [1726] 8 Bro. P. C. 291	591
Wilson <i>v.</i> Kirshaw, [1750] 7 Bro. P. C. 296	192
Woodford, Rendlesham <i>v.</i> , [1813] 1 Dow P. C. 2	689
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Yorkshire (West Riding of) <i>v.</i> R., [1813] 2 Dow P. C. 1	767
Young & Co. <i>v.</i> Leven, [1816] 4 Dow P. C. 138	1116
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